

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2007-000189-001 DT

11/02/2007

HON. MARGARET H. DOWNIE

CLERK OF THE COURT
S. Bindenagel
Deputy

APACHE WELLS HOMEOWNERS
ASSOCIATION INC

ERIC M JACKSON

v.

ARIZONA STATE DEPARTMENT OF FIRE
BUILDING AND LIFE SAFETY (001)
WALTER A STROMME (001)
OFFICE OF ADMINISTRATIVE HEARINGS
(001)

MICHELLE L WOOD
MELANIE C MCKEDDIE
CHRISTINA A PARRY

OFFICE OF ADMINISTRATIVE
HEARINGS

RULING

The court has considered the record on appeal, as well as the briefing by the parties and the arguments of counsel. The Superior Court has jurisdiction over this matter pursuant to the Administrative Review Act, A.R.S. §§ 12-901, *et seq.* A.R.S. § 12-910(E) defines the scope of this court's review:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

Defendant Walter A. Stromme ("defendant" or "Stromme") owns property that is governed by the Apache Wells Homeowners Association, Inc. ("plaintiff" or "Apache Wells"). Apache Wells is a planned mobile home community that, for certain purposes, falls within the

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purview of the Arizona Department of Fire, Building and Life Safety (“Department”).¹ In November of 2006, Stromme filed a petition with the Department in which he lodged three complaints against Apache Wells. The only claim that remains at issue is in these proceedings relates to Apache Wells’ decision to raise the “transfer fee”² from \$300 to \$950 without a vote of the homeowners. Stromme alleged that such action violated Apache Wells’ bylaws – specifically, Article X, Section 2(D)(1), which provides:

Special assessments shall be approved by a two-thirds (2/3) vote of the Board at a duly called meeting at which a quorum is present, and by the majority vote of residential unit owners at a special election called and publicized for the specific purpose.

Apache Wells admitted that its Board of Directors (“Board”) raised the transfer fee from \$300 to \$950 at a meeting on April 20, 2005 without a vote of the membership. It denied, however, that the above-quoted provision of the bylaws applied to transfer fees and affirmatively alleged that the fees were “authorized pursuant to *Powell v. Washburn*, 211 Ariz. 553, 555 ¶1, 125 P.3d 373, 375 ¶1 (2006), and the Restatement (Third) of Property: Servitudes (“Restatement”) §3.5.”

An evidentiary hearing was held on January 22, 2007 before Administrative Law Judge (ALJ) Lewis D. Kowal. Three witnesses testified: (1) Stromme; (2) Brian Johnson;³ and (3); and Marvin Stoll.⁴ At the conclusion of the hearing, the ALJ took the matter under advisement. In a written decision dated February 12, 2007, ALJ Kowal found 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.” ALJ’s Conclusion of Law no. 34. He thus concluded that the increased transfer fee was unauthorized and must be rescinded. Apache Wells thereafter filed a timely complaint for judicial review with this court.

It is important to clarify what is and is not at issue in these proceedings. As Stromme made clear below, he is *not* challenging Apache Wells’ ability to impose a transfer fee. He is contending that the Board’s decision to increase the existing transfer fee was inappropriate because it violated Article X, Section 2(D)(1) of the bylaws. Stromme has not alleged that Apache Wells violated any statutes by increasing the transfer fee.

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

² A “transfer fee” is assessed against *buyers* of property in the Apache Wells community. It is not designed to recoup the costs associated with the transfer of ownership. Rather, it is based on the notion that existing homeowners have paid to establish and maintain community amenities and that new homeowners should contribute toward those past expenditures because they will enjoy the fruits of past owners’ financial efforts.

³ Johnson served on the Board from January 2004 through January 9, 2007 and was Apache Wells’ president from January 2006 through January 9, 2007.

⁴ At the time of his testimony, Stoll was the president of Apache Wells.

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Stromme bore the burden of proving his claim by a preponderance of the evidence. He did not do so. He did not establish that the transfer fee is a special assessment within the meaning of the bylaws. In fact, the evidence was to the contrary.⁵ Once Stromme failed to prove his stated claim, the analysis should have ceased.

Administrative agencies have no common law or inherent powers. *Ayala v. Hill*, 136 Ariz. 88, 664 P.2d 238 (App. 1983). Their powers and duties are limited to those specifically granted by statute. *Id.* See also *Schwartz v. Superior Court*, 186 Ariz. 617, 925 P.2d 1068 (App. 1996); *Caldwell v. Ariz. State Board of Dental Examiners*, 137 Ariz. 396, 670 P.2d 1220 (App. 1983). The ALJ correctly stated his authority: “to determine if there are violations of the planned community documents or the statutes that regulate the planned communities.” *ALJ’s Conclusion of Law* no. 1. See also A.R.S. §§ 42-2198,⁶ 41-2198.01(B).⁷ However, the parties and the ALJ proceeded to consider and litigate far more than community documents and statutes governing planned communities. They delved into a rather in-depth analysis of the common law and provisions of the Reinstatement. While such arguments and analyses might be appropriate in a court of general jurisdiction, they exceeded the scope of the agency’s relatively-narrow authority in the case at bar. *Cf. Cactus Wren Partners v. Arizona Dept of Building and Fire Safety*, 177 Ariz. 559, 869 P.2d 1212 (App. 1993). Even if the parties agreed to litigate such matters, they could not confer subject matter jurisdiction on the Department and the ALJ. *Guminski v. Arizona State Veterinary Examining Board*, 201 Ariz. 180, 33 P.3d 514 (App. 2001) (subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel).

⁵ Under the bylaws, a special assessment is enforceable by a lien on the property and, like a general assessment, must be based on “the Association’s cost in obtaining and maintaining common areas, property, facilities and service devoted to the common usage and enjoyment of the membership at large.” See Article X, Section 2. Moreover, as discussed *supra*, the transfer fee is not assessed against current property owners, but against buyers of property within the community.

⁶ A.R.S. § 41-2198 states:

Pursuant to chapter 6, article 10 of this title, an administrative law judge shall adjudicate complaints regarding and ensure compliance with:

The Arizona mobile home parks residential landlord and tenant act.

Title 33, chapter 9 and condominium documents.

Title 33, chapter 16 and planned community documents.

⁷ A.R.S. § 41-2198.01(B) provides that the Department may conduct a hearing concerning violations “of condominium documents or planned community documents or violations of the statutes that regulate condominiums or planned communities.”

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Conclusion

This would be a different case if Stromme were challenging Apache Wells' power to impose a transfer fee in the first instance. The available remedies would also differ if Stromme's claims were being litigated in a civil action. In this administrative proceeding, though, only two sources of authority were relevant: the planned community documents and Arizona statutes that regulate planned communities. Stromme did not prove that the Board violated either in approving the transfer fee increase.

IT IS ORDERED reversing the final decision of the Arizona Department of Fire, Building and Life Safety. Plaintiff's requested relief is granted.

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