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MARCOLINI, P.C.

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

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

15 Plaintiff,

16 v.

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

21 Defendants.

Case No.: LC2007-000189

PLAINTIFF'S OPENING BRIEF

(Assigned to the Hon. Margaret
Downie)

(Oral Argument Requested)

22 Plaintiff APACHE WELLS HOMEOWNERS ASSOCIATION ("Plaintiff"), by and
23 through counsel undersigned, hereby files its Opening Brief and requests that this Court
24 conclude as a matter of law that the increase in transfer fees from \$300.00 to \$950.00 is proper
25 for reasons set forth in the accompanying Memorandum of Points and Authorities.
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M. W. ...
D. ...
M. E.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. Introduction**

3 This Appeal is about whether the Department of Fire, Building, and Life Safety (the
4 “Department”) abused its discretion and acted arbitrarily and capriciously by disregarding
5 controlling statutes, law, and provisions of governing documents to hold that Apache Well’s
6 decision to increase its transfer fee was improper.
7

8 **II. Summary of the Case**

9 On November 17, 2006, Defendant Walter A. Stromme (“Stromme”) filed a Petition
10 with the Department alleging violations of the governing documents.¹ Specifically, Stromme
11 alleged that the board’s increase in a “transfer fee” from \$300.00 to \$950.00 without a vote
12 by the homeowners violated Article X, Section 2(d)(1) of the Bylaws.²
13

14 On January 22, 2007, the Office of Administrative Hearings conducted the hearing.
15 During the hearing, Apache Wells testified that in or about April 2005 it discovered it had a
16 “shortfall in [the] budget on certain items” previously unforeseen.³ Those “certain items”
17 included: increased security during summer months when many of the units were vacant⁴
18 costing approximately “20, 30, 40” thousand dollars;⁵ “4,000 to \$3,000” in “repairs needed”⁶
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23 ¹ Index of Record on Review (“IRR”) ¶47 Administrative Law Judge Decision, Findings of Fact,
24 ¶2.

25 ² IRR ¶47 Administrative Law Judge Decision, Findings of Fact. ¶4(b)

26 ³ Transcription of Hearing, 93:21-25, attached to Notice of Filing Transcript dated April 19,
2007; IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶29.

27 ⁴Transcription of Hearing, 94:1-11, attached to Notice of Filing Transcript dated April 19, 2007

28 ⁵ Transcription of Hearing, 98: 24-25, attached to Notice of Filing Transcript dated April 19,
2007

⁶ IRR ¶47 Administrative Law Judge Decision, Findings of Fact, ¶15(b).

1 for deteriorating buildings “that nobody had budgeted for;”⁷ and the need for a “\$100,000
2 reserve” to fund a recently acquired library.⁸ In its “FINDINGS OF FACTS,” the
3 Department accepted Apache Wells’ testimony and held:

4
5 the transfer fee was instituted to raise additional funds for the Apache
6 Wells because 1) The budget did not account for repairs needed to the
7 buildings located in the strip mall that are owned by Apache Wells; 2)
8 The recent construction of a library building which the Board felt
9 required a reserve of at least \$100,000.00 for further work; and 3)
10 Security during the summertime and from 11:00 p.m. to 5:00 a.m.⁹

11 In addition to its testimony regarding increased expenses, and to establish that the Board’s
12 decision to increase the transfer fee was valid, Apache Wells asserted Arizona’s business
13 judgment rule presumption that its directors were “presumed” to have acted properly in
14 increasing the transfer fee from \$300.00 to \$950.00.¹⁰

15 Stromme also testified. During his testimony, Stromme confirmed he was not
16 challenging the imposition of the transfer fee, only the increase of the fee from \$300.00 to
17 \$950.00 without membership vote. His sole basis for disputing the increased transfer fee
18 rested on Article X, Section 2(d)(1) of the Bylaws entitled “Special Assessments.”¹¹ He did
19 not present any evidence whatsoever to rebut the business judgment rule presumption.
20

21
22 ⁷ Transcription of Hearing, 94:18-21, attached to Notice of Filing Transcript dated April 19, 2007

23 ⁸ Transcription of Hearing, 98:17-21, attached to Notice of Filing Transcript dated April 19, 2007

24 ⁹ IRR ¶47 Administrative Law Judge Decision, Findings of Fact, ¶15(b).

25 ¹⁰ IRR ¶47 Administrative Law Judge Decision, Findings of Fact, ¶12; IRR ¶21 Hearing
26 Memorandum, page 3, lines 13-28, and page 4, lines 1-8; A.R.S. §10-830(D); United Dairymen of
27 Arizona v. Schugg, 212 Ariz. 133, ¶31, 128 P.3d 756, ¶31 (App. 2006). See also IRR ¶23 Supplemental
28 Hearing Memorandum 6:3-18 citing Restatement §3.5, Comment c, Illustration ¶5 (emphasis added);
Article V, Section 1(A) of the Bylaws; A.R.S. §10-801(B) (“all corporate powers shall be exercised by
its...board of directors”); A.R.S. §10-830(A) (homeowners association business is what the “director,”
not the member, deems to be in the best interest of the Association); A.R.S. §10-2011 (Association
affairs shall be managed by the board of directors).

¹¹ IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶28.

1 After reviewing the testimony and legal arguments, the Department concluded as a
2 matter of law that the Arizona Supreme Court “adopted the approach of Restatement (Third)
3 of Property Servitudes §3.5(c)”¹² which deems transfer fees valid “so long as there is some
4 rational justification for the imposition of such fees.”¹³ Consequently, the Department
5 concluded as a matter of law that Apache Wells’ increased transfer fee “would be appropriate
6 if there was some rational justification for such increase.”¹⁴
7

8
9 Considering the testimony, the Department concluded “justification for an increase of
10 the fees, e.g., security costs, repairs needed for existing buildings in the strip mall, and the
11 need for a reserve” existed.¹⁵ This conclusion was based on Apache Wells providing “general
12 information of some of the [operating] expenses that would be defrayed by the collection of
13 the increased transfer fee.”¹⁶
14

15 Despite its rulings that the Restatement §3.5 governs validity of transfer fees, the
16 Department then ruled that the increase in transfer fees was “arbitrarily and capriciously
17 selected” because it was “not reasonably related to specific expenses that are anticipated”¹⁷
18 contrary to the numerous “specific expenses” testified to by Apache Wells, even though the
19 amount of the increase was pleaded by Stromme. The Department did not deem the transfer
20 fee invalid because the increase required membership vote pursuant to Article X, Section
21 2(d)(1) of the Bylaws. Instead, it disregarded the statutory presumption concerning board
22
23
24

25 ¹² IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶30, footnote 2.

26 ¹³ Restatement §3.5, Comment c.

27 ¹⁴ IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶31.

28 ¹⁵ IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶32.

¹⁶ Id.

¹⁷ IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶34.

1 decisions and voided it based on a “reasonably related to specific expenses” standard never
2 addressed by the parties and contrary to the Restatement §3.5, Comment c.

3 **III. Standard of Review**

4
5 When an administrative decision is appealed to the superior court, the superior court
6 decides “whether the administrative action was illegal, arbitrary, capricious, or involved an
7 abuse of discretion.”¹⁸ Decisions failing to “articulate a rational connection between the facts
8 found and the choice made”¹⁹ and decisions not supported by “substantial evidence” are “set
9 aside as being arbitrary and capricious.”²⁰ Abuses of discretion occur when decisions are
10 made that are “unsupported by facts or sound legal policy.”²¹ It also occurs when decisions
11 “misapply law or legal principle.”²² In other words, abuse of discretion occurs if—
12

13
14 the reasons given by the court for its actions are clearly untenable,
15 legally incorrect, or amount to denial of justice. Similarly, a
16 discretionary act which reaches an end or purpose not justified by,
and clearly against, reason and evidence “is an abuse.”²³

17 The reviewing court’s finding of any one of the above factors justifies vacating the
18 administrative decision and supplementing the decision with “its own rulings on questions of
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20
21 ¹⁸ Smith v. Arizona Long Term Care System, 207 Ariz. 217, ¶14, 84 P. 3d 482, ¶14 (App. 2004),
22 citing Ethridge v. Ariz. St. Bd. of Nursing, 165 Ariz. 97, 100, 796 P.2d 899, 902 (App.1989) and
Berenter v. Gallinger, 173 Ariz. 75, 77, 839 P.2d 1120, 1122 (App.1992).

23 ¹⁹ DeCarlo v. MCSA, Inc., 163 Ariz. 23, 785 P. 2d 592 (App. 1988); see also City of Phoenix v.
24 Geyler, 1044 Ariz. 323, 328-29, 697 P. 2d 1073, 1078-79 (1985) (In exercising its discretion, the agency
is “not authorized to act arbitrarily or inequitably, nor to make decisions unsupported by facts or sound
legal policy”).

25 ²⁰ Id.

26 ²¹ City of Phoenix, 1044 Ariz. 323 at 328-29 citing Bowman v. Hall, 83 Ariz. 56, 316 P.2d 484
(1957).

27 ²² City of Phoenix, 1044 Ariz. 323 at 328-29 citing Johnson v. Howard, 45 Wash.2d 433, 436,
275 P.2d 736, 739 (1954).

28 ²³ City of Phoenix, 1044 Ariz. at 329.

1 law,”²⁴ which is requested in this case for reasons set forth below.

2 **IV. Argument**

3 **A. The Department abused its discretion in ruling the transfer fee was**
4 **arbitrary and capricious because the transfer fee is clearly justified under controlling**
5 **law.**

7 The Restatement §3.5, Comment c, recognized by the Administrative Decision as
8 controlling, deems transfer fees valid so long as there is “some rational justification” for their
9 imposition.²⁵ The Restatement is replete with examples of when “some rational justification”
10 exists; one clear example being when “the amount of the fee is **set by the governing board**
11 **of the association and the funds are used for operating expenses** of the association.”²⁶
12 Because the Department concluded that Apache Wells \$950.00 transfer fee had “some
13 justification” as the transfer fee funded operating expenses,²⁷ the \$950.00 transfer fees should
14 have been upheld by the Department pursuant to the Restatement. However, they were not.
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18 It appears the Department ruled against the transfer fees because it felt that Apache
19 Wells “has not provided...how the Board determined the amount of the increase.”²⁸ To the
20 contrary, Stoll provided ample testimony why the transfer fee was increased. For example,
21 Stoll testified that Apache Wells, as an older association, has twenty-year-old buildings
22
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24

25 ²⁴ *Smith v. Arizona Long Term Care System*, 207 Ariz. 217, 84 P. 3d 482, (App. 2004);
26 *Bucciarelli v. Ariz. Dep't of Transp.*, 166 Ariz. 67, 68, 800 P.2d 54, 55 (App.1990).

27 ²⁵ IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶¶30 footnote 2, 31 and 32.

28 ²⁶ Restatement §3.5, Comment c, Illustrations ¶5 (emphasis added).

²⁷ IRR ¶47 Administrative Law Judge Decision, Findings of Fact, ¶15, Conclusions of Law, ¶32.

²⁸ IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶33.

1 requiring extensive renovation and repair.²⁹ He also testified that the need for increased
2 security arose because of the substantial jump in burglaries within the elderly community
3 during summer months when homes are vacant.³⁰ Each of these expenses was quantified³¹
4 and accepted by the Department in its Findings of Facts and Conclusions of Law.³² As part
5 of its due diligence, Apache Wells extensively researched how to account for the shortfall in
6 its budget without burdening its members with an increase in assessments.³³ It determined
7 that an increase in transfer fees was appropriate.
8
9

10 The Department seems confused by the use of the word “transfer”, as relating to
11 conveyance fees. It is not. Rather, it is a reasonable contribution by new purchasers in the
12 amenities they will enjoy that have been paid for by prior owners and which need to be
13 maintained.³⁴ The Department does not rule that transfer fees are unjustified. Rather, it is the
14 amount of the increase it finds unjustified.
15

16 The \$600.00 increase falls squarely within the amounts justified by the Restatement
17 §3.5 to cover operating expenses, which justifies transfer fees from \$2000 to tens of
18 thousands of dollars. For example, it cites to de Mello v. 79th St. Tenants Corp., 136 Misc. 2d
19 73, 517 N.Y.S. 2d 892 (1987) (holding that vendor of cooperative apartment is liable for
20
21

22
23 ²⁹ Transcription of Hearing, 93:22-25; 94:12-21, attached to Notice of Filing Transcript dated
24 April 19, 2007.

³⁰ Transcription of Hearing, 94:1-6, attached to Notice of Filing Transcript dated April 19, 2007.

³¹ See footnotes 4, 5, 6, 7, and 8, supra.

25 ³² IRR ¶47 Administrative Law Judge Decision, Findings of Fact, ¶15(b), Conclusions of Law,
26 ¶32.

³³ IRR ¶47 Administrative Law Judge Decision, Findings of Fact, ¶16.

27 ³⁴ Transcript of Hearing, 95:13-25; 96:1-9; attached to Notice of Filing Transcript dated April 19,
28 2007.

1 transfer fee equal to 10% of net profit of the sale of units);³⁵ Mayerson v. 3701 Tenants Corp.,
2 123 Misc. 2d 235, 473 N.Y.S. 2d 123 (1984) (“transfer fees or ‘flip taxes’ imposed by
3 cooperative in the amount of 7.5% on transfer of proprietary shares to raise revenues for the
4 cooperative and to promote stability in ownership are legal”); and Jamil v. Southridge
5 Cooperative Sec. No 4 Inc., 102 Misc. 2d 404, 425 N.Y.S. 2d 905 (1979), aff’d, 77 A.D. 2d
6 822, 429 N.Y.S. 2d 340, cert. denied, 450 U.S. 919 (1981) (\$2000 transfer fee for waiver of
7 corporation’s right of first refusal).³⁶

8
9
10 In reaching its conclusion, the Department seeks to substitute its opinion of what
11 amount of increase is justified for that of the Board of Directors of the Association, which is
12 vested with that responsibility.³⁷ That position is on dangerous ground and contrary to law.

13
14 **B. The Department abused its discretion and acted arbitrarily and**
15 **capriciously in imposing a “reasonably related” standard to conclude the transfer fee**
16 **was improper; said standard being contrary to controlling law.**

17
18 As stated above, the Restatement §3.5 deems transfer fees used to fund **general**
19 operating expenses valid.³⁸ The Department concluded the restatement standard was met
20 because the transfer fees were used for general operating expenses.³⁹ The analysis should
21

22
23 _____
24 ³⁵ Restatement §3.5, Reporters Note, Transfer Fees, page 471 and 472.

25 ³⁶ Id.

26 ³⁷ IRR ¶23 Supplemental Hearing Memorandum 6:3-18 citing Restatement §3.5, Comment c,
27 Illustration ¶5 (emphasis added); Article V, Section 1(A) of the Bylaws; A.R.S. §10-801(B) (“all
28 corporate powers shall be exercised by its...board of directors”); A.R.S. §10-830(A) (homeowners
association business is what the “director,” not the member, deems to be in the best interest of the
Association); A.R.S. §10-2011 (Association affairs shall be managed by the board of directors).

³⁸ Restatement §3.5, Comment c, Illustrations ¶5.

³⁹ IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶32.

1 have stopped there, but it did not. Without legal precedent, the Department deemed the
2 transfer fee “arbitrary and capricious” because it was not “reasonably related to specific
3 expenses that are anticipated.”⁴⁰ The Department has created a new unprecedented standard
4 and places itself in a position to review the decision of every board every time an increase in
5 transfer fees is passed.
6

7 The controlling “some rational justification” standard requires only that transfer fees
8 be used for **general**⁴¹ operating expenses, not **specific** operating expenses. Even if the
9 Restatement standard required transfer fee funds be reasonably related to specific operating
10 expenses, which it does not, Apache Wells satisfied that burden. The Department concluded
11 specific operating expenses were funded by the \$950.00 transfer fee, i.e. “needed repairs to
12 existing buildings in the strip mall,” “security costs,” and “need for reserve.”⁴² And, the
13 characterization of those unforeseen expenses by the Department as “needed”⁴³ satisfies the
14 “reasonably related” requirement.
15
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18 Transfer fees of \$1000 or more occur throughout the state as a reasonable alternative
19 to increasing general assessments or imposing special assessments. In fact, the Department
20 concluded that the Association’s extensive investigation revealed that many associations have
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24 ⁴⁰ IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶34 (“The evidentiary
25 record reflects that the determination as to the amount of the increase of the transfer fee was arbitrarily
26 and capriciously selected and not reasonably related to specific expenses that are anticipated.”)

27 ⁴¹ Restatement §3.5, Comment c, Illustrations ¶5.

28 ⁴² IRR ¶47 Administrative Law Judge Decision, Findings of Facts, ¶15, Conclusions of Law,
¶32.

⁴³ Id.

1 transfer fees, several of which are much higher than \$950.00.⁴⁴

2 **C. The Department abused its discretion and acted arbitrarily and**
3 **capriciously in ruling the \$950.00 transfer fee was improper based on reasons not**
4 **presented by Stromme and for reasons exceeding its jurisdiction.**
5

6 The Department is of limited jurisdiction. It can only hear matters granted it by A.R.S.
7 §41-2198. A.R.S. §41-2198 grants the Department jurisdiction to adjudicate complaints
8 regarding and ensuring compliance only with the planned community documents. Any
9 rulings not based on the community documents or applicable statutes exceed the jurisdiction
10 of the Department. On this point, the Department agreed.⁴⁵ Once jurisdiction is established,
11 the administrative agency must then only adjudicate the merits of the parties' claims.⁴⁶
12

13 Stromme claimed the increased transfer fee was invalid because it was not passed by
14 the membership pursuant to "Special Assessment" language of Article X, Section 2(d)(1) of
15 the Bylaws. Apache Wells argued Article X, Section 2(d)(1) was irrelevant because
16 controlled "special assessments," are not transfer fees, and because the amount of transfer
17 fees is set by the board pursuant to Article V, Section 1(A) of the Bylaws, the Restatement,
18 and applicable statutes A.R.S. §§10-801(B), 10-830(A), and 10-2011.⁴⁷
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22

23 ⁴⁴ IRR ¶47 Administrative Law Judge Decision, Findings of Facts, ¶16;

24 ⁴⁵ See IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶1 (concluding as a
25 matter of law that "the Office of Administrative Hearings has jurisdiction to hear disputes between an
26 owner and planned community...**to determine if there are violations of the planned community
documents or the statutes that regulate planned communities**" (emphasis added)).

27 ⁴⁶ See generally Cranmer v. State, 204 Ariz. 299, ¶7, 63 P. 3d 1036, ¶7 (App. 2003) (the court
28 must first determine if there is jurisdiction, then the court must only adjudicate the merits of the parties'
claims).

⁴⁷ IRR ¶23 Supplemental Hearing Memorandum 6: 3-16.

1 In adjudicating Stromme’s claim, the Department correctly held the Restatement
2 governed transfer fees, not Article X, Section 2(d)(1) of the Bylaws, and recognized Apache
3 Wells’ assertion that “the Board has discretion to set the transfer fees,”⁴⁸ but became
4 confused in its analysis.
5

6 Had the Department properly applied Article V, Section 1(A) of the Bylaws, Arizona
7 Revised Statute, and the Restatement §3.5 it would have ruled the transfer fees are valid
8 because “the amount of the fee is set by the governing board of the association.”⁴⁹ The
9 Department never once referenced the transfer fee invalid because it violated Article X,
10 Section 2(d)(1) of the Bylaws. Instead, it struck the amount of the increase because it was not
11 “reasonably related” to “specific expenses.”⁵⁰ What amount of increase would have been
12 justified, if any? The Department overstepped its jurisdiction in deciding the transfer fee
13 issue because its decision was not based on the governing documents or applicable statutes;
14 and further, it certainly did not adjudicate only the merits of the parties’ claims.
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18 **D. The Department erred in ruling the increased transfer fee was “arbitrary**
19 **and capricious.”**

20 Associations may exercise broad powers if they are not “arbitrary and capricious.”⁵¹
21
22

23 ⁴⁸ IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶32.

24 ⁴⁹ IRR ¶23 Supplemental Hearing Memorandum 6:3-18 citing Restatement §3.5, Comment c,
25 Illustration ¶5 (emphasis added); Article V, Section 1(A) of the Bylaws; A.R.S. §10-801(B) (“all
26 corporate powers shall be exercised by its...board of directors”); A.R.S. §10-830(A) (homeowners
27 association business is what the “director,” not the member, deems to be in the best interest of the
28 Association); A.R.S. §10-2011 (Association affairs shall be managed by the board of directors).

⁵⁰ IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶¶33 and 34.

⁵¹ Villas at Hidden Lakes Condominium Ass’n v. Geupel Const. Co., Inc. 174 Ariz. 72, 80, 842
P. 2d 117, 125 (App. 1992)

1 “Arbitrary and capricious” in the context of homeowners associations is defined as “bearing
2 no reasonable relationship to the fundamental condominium [planned community] concept.”⁵²
3 Increasing the Apache Wells transfer fee in response to a shortfall in the budget caused by a
4 corresponding increase in operating expenses is a fundamental planned community concept
5 for reasons set forth hereinabove. Transfer fees are a remedy to this problem because they
6 provide necessary funds for operating expenses without the added burden to the members of
7 increasing general assessments and they cause contribution from new members for facilities
8 in existence which were paid for by their predecessors.
9
10

11 **E. The Department acted arbitrarily and capriciously by holding the**
12 **increased transfer fee was improper without articulating why.**
13

14 In DeCarlo v. MCSA, Inc., 163 Ariz. 23, 785 P. 2d 592 (App. 1988), the Court
15 analyzed the “arbitrary and capricious” standard as it applies to the Department. It held:

16 Under the ‘arbitrary and capricious’ standard the scope of review is a
17 narrow one. A reviewing court must ‘consider whether the decision was
18 based on a consideration of the relevant factors and whether there has
19 been a clear error of judgment... **The agency must articulate a**
20 **‘rational connection between the facts found and the choice made.’**⁵³

21 The Department concludes the Restatement governs transfer fees and confirms the standard
22 set forth therein was satisfied.⁵⁴ Yet, the Department never articulated why it ruled contrary
23

24 ⁵² Id., citing Chateau Village North Condominium v. Jordan, 643 P. 2d 791, 792 (Colo. App.
25 1982); Worthinglen Condominium Owners’ Ass’n v. Brown, 57 Ohio App. 3d 73, 76, 566 N.E. 2d 1275,
26 1277 (1989).

27 ⁵³ DeCarlo, 163 Ariz. at 26 (emphasis added).

28 ⁵⁴ IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶¶31 and 32 (“the
Administrative Law Judge concludes that an increase in such fees would be appropriate if there is some
rational justification for such increase. In the instant matter, Apache Wells provides some justification

1 to the Restatement and why it based its decision on reasons outside the claims presented by
2 the parties. The only justification set forth by the Department was that the board did not set
3 forth specific expenses justifying the increase,⁵⁵ but that position is clearly contrary to the
4 evidence⁵⁶ and the Department's own Findings of Facts⁵⁷ and has no legal precedence.
5

6 **F. The consequences of the Department's ruling will cause substantial**
7 **hardship to the Association and its members.**

8
9 The monies raised by the increase in transfer fees funded over \$90,000 in operating
10 expenses over the last several years. Without an income supplemented by transfer fees, the
11 previously unforeseen, but now required expenses of the association may not be met without
12 increasing assessments. The only other alternative is to cut expenditures. Without repairs,
13 unmaintained buildings will continue to deteriorate; without security, crime within the
14 Association will continue to increase. As a result, Apache Wells will lose its luster and
15 property values will surely decrease. Buildings within Apache Wells may even be
16 condemned and members will lose much of their property values. This alternative was
17 quickly rejected by Apache Wells, which has a duty to maintain the common area. It is for
18 these very reasons that the Restatement deems transfer fees valid under the circumstances
19 presented in this case.
20
21
22

23 **G. The Department abused its discretion and act arbitrarily and capriciously**
24
25

26 for an increase of the fees, e.g., security costs, repairs needed for existing buildings in the strip mall, and
27 the need for a reserve [i.e. operating expenses].")

28 ⁵⁵ IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶34.

⁵⁶ See footnotes 3, 4, 5, 6, 7, 8, 9, and 10 supra.

⁵⁷

1 by disregarding Arizona statute and case precedent granting deference to the board's
2 decision to increase the transfer fee from \$300.00 to \$950.00.

3 Directors are "presumed in all cases" to have acted in accordance with the statutory
4 requirements.⁵⁸ Arizona courts interpret this to mean that:

5
6 the business judgment rule presumes that "in making a business
7 decision the directors of a corporation acted on an informed basis, in
8 good faith and in the honest belief that the action taken was in the
best interest of the company."⁵⁹

9 The burden is on the party challenging a director's action to establish by clear and convincing
10 evidence facts rebutting the presumption.⁶⁰

11
12 Apache Wells asserted this statutory presumption.⁶¹ However, Stromme did not present
13 clear and convincing evidence, let alone any facts, sufficient to overcome this presumption. The
14 Department certainly did not cite to any facts in its Findings of Facts and Conclusions of Law.
15 The Department abused its discretion by erroneously disregarding the statutory presumption.

17 V. Conclusion

18 For the above reasons, the Administrative Decision is arbitrary and capricious and
19 constitutes an abuse of discretion. If upheld, the decision would be to the detriment of
20 Apache Wells and its members.

21
22 WHEREFORE, Apache Wells respectfully requests this Court vacate the
23 Administrative Agency's decision pertaining to Issue 2 and deem the increase in the transfer
24

25
26 ⁵⁸ IRR ¶21 Hearing Memorandum, page 3, lines 13-28, and page 4, lines 1-8; A.R.S. §10-
830(D); United Dairymen of Arizona v. Schugg, 212 Ariz. 133, ¶31, 128 P.3d 756, ¶31 (App. 2006).

27 ⁵⁹ United Dairymen of Arizona v. Schugg, 212 Ariz. at ¶31.

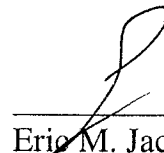
28 ⁶⁰ A.R.S. §10-830(D).

⁶¹ IRR ¶21 Hearing Memorandum, 3: 13-28, and 4: 1-8.

1 fee to \$950.00 to be valid as a matter of law.

2 DATED this 15th day of June, 2007.

3 JACKSON WHITE, P.C.

4 

5 _____
6 Eric M. Jackson
7 40 N. Center St., Suite 200
8 Mesa, AZ 85201
9 *Attorneys for Apache Wells*

10 ORIGINAL hand delivered this 15 day of
11 June, 2007, to:

12 The Clerk of the Court

13 COPIES of the foregoing hand
14 delivered this same day to:

15 The Honorable Margaret H. Downie
16 201 W. Jefferson, Room 4A
17 Phoenix, AZ 85003-2243

18 COPIES of the forgoing mailed
19 this same day to:

20 Department of Fire, Building, and Life Safety
21 11110 W. Washington, #100
22 Phoenix, AZ 85007

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