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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; OFFICE OF
19 ADMINISTRATIVE HEARINGS, an
20 independent agency; WALTER A. STROMME
21 and JUDITH A. STROMME a married man,

22 Defendants.

Case No.: LC2007-000189

**RESPONSE TO DEFENDANT
STROMME'S MOTION FOR
ORDER TO SHOW CAUSE AS
TO WHY THE ASSOCIATION
SHOULD NOT BE HELD IN
CONTEMPT FOR FAILING TO
COMPLY WITH COURT
ORDERS**

(Assigned to the Hon. Margaret H.
Downie)

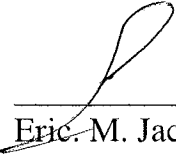
23 Plaintiff APACHE WELLS HOMEOWNERS ASSOCIATION ("Plaintiff"), by and
24 through counsel undersigned, hereby files its Response to Defendant Stromme's Motion for
25 Order to Show Cause Re: Contempt, and requests that said motion be denied for reasons set
26 forth in the accompanying Memorandum of Points and Authorities and in its separate
27 Application for Stay of the Order Re: Transfer Fees, incorporated herein by this reference.

28 Calendared By JF Date 0.18.07

SWC, SFG, MCM, JRC, Z330.4
reply 0.26.07

1 DATED this 14th day of June, 2007.

2 JACKSON WHITE, P.C.

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4 
5 Eric M. Jackson
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7 40 N. Center St., Suite 200
8 Mesa, Arizona 85201
9 Attorneys for Plaintiff

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. Mr. Stromme's Motion For Order To Show Cause Hearing Must Be Denied**
12 **As He Lacks Standing To Require An Order To Show Cause Hearing On**
13 **Behalf Of Third Parties.**

14 The "prudential requirements of the standing doctrine" are that a party can only "assert
15 his own legal rights and interest, and cannot rest his claim to relief on the legal rights or
16 interests of third parties."¹ The Arizona Supreme Court affirms, requiring that Stromme first
17 prove a "particularized injury" to himself.² In his motion, Stromme is asserting claims on
18 behalf of third parties, which he cannot do. He did not sell his home, he has not incurred a
19 \$950.00 transfer fee, and he therefore cannot demonstrate a particularized injury. There is no
20 evidence that the persons from whom the transfer fees were received have objected to and
21 they have not joined in Stromme's motion.

22 Because the Administrative Decision justifies and voids collection of the Association's
23 \$950.00 transfer fee (see II, *infra*), the Association forwards transfer fee monies now received
24

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27 ¹ Franchies Tax Bd. of California v. Alcan Aluminium Ltd., 493 U.S. 331, 336, 110 S. Ct. 661, 665 (1990), citing
28 Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 2204 (1975).

² Bennett v. Brownlow, 211 Ariz. 193, ¶17, 119 P.3d 460 (2005).

1 to a separate trust account pending this appeal. These funds will be reimbursed should the
2 Court deem the increased transfer fee void.

3 **II. The Administrative Decision's Findings Of Facts And Conclusions Of Law**
4 **Justify The Association's Collection Of A \$950.00 Transfer Fee.**

5 This appeal is necessarily brought because the Administrative Decision expressly
6 contradicts itself. On the one hand, the Administrative Decision states the \$950.00 transfer
7 fee is "arbitrary and capricious" and "shall be \$300.00."³ On the other hand, the Agency
8 concluded as a matter of law that the Restatement (Third) of Property: Servitudes §3.5
9 controls and the \$950.00 transfer fee is valid "if there is some rational justification for such
10 increase."⁴ Under the Restatement §3.5 cited to by the Administrative Decision, "some
11 rational justification" exists when "the amount of the fee is **set by the governing board** of
12 the association and the funds are used for **operating expenses** of the association."⁵
13
14
15

16 The Agency concluded that the \$950.00 transfer fee had "some justification" as the
17 transfer fee funded operating expenses.⁶ In fact, the Agency concluded as a matter of law that
18 the expenses covered by the \$950.00 transfer fee were "needed" operating expenses, "e.g.,
19 security costs, repairs needed for existing buildings in the strip mall, and the need for a
20 reserve."⁷ Under the controlling law, the analysis should have stopped there.
21

22 ...

23 ...
24

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26 ³ Administrative Law Judge Decision, Order.

27 ⁴ Administrative Law Judge Decision, Conclusions of Law, ¶31. See also ¶30 at footnote 2.

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

⁶ Administrative Law Judge Decision, Findings of Fact, ¶15; Conclusions of Law, ¶32.

⁷ *Id.*

1 **III. The Association Suffers Substantial Financial Hardship Without The**
2 **\$950.00 Transfer Fee.**

3 Without a \$950.00 transfer fee, the Association is left with disastrous results.
4 Apache Wells has twenty-year-old buildings requiring extensive renovation and repair.⁸
5 It also requires increased security because of the substantial jump in burglaries within
6 the community.⁹ The prior budget failed to account for these new and pressing needs.¹⁰
7 The shortfall in the budget immediately to cover these operating expenses had to be
8 addressed.¹¹ In summary, the monies raised by the increase in transfer fees funded over
9 \$90,000 in required operating expenses over the last several years. Without an income
10 supplemented by transfer fees the previously unforeseen expenses of the association
11 cannot be met. *See also* Application to Stay Execution of Order Re: Transfer Fees filed
12 herewith. Its only other option to cover the shortfall in the budget is to increase the
13 personal burdens of each member by increasing the general assessments. The
14 Association rightfully relying on the Restatement declined this alternative.
15
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17

18 **IV. This Court's Minute Entry Does Not Order The Association Stop Charging**
19 **A \$950.00 Transfer Fee.**

20 Stromme mistakenly asserts that Apache Wells should be held in contempt
21 because it continues to collect a \$950.00 transfer fee in violation of this Court's Minute
22 Entry dated April 30, 2007. This Court declined to consider Apache Wells Application
23 for Stay of Administrative Order partly because it did not articulate the factors for the
24
25

26 _____
27 ⁸ *Id.*; Transcription of Hearing, 93:22-25; 94:12-21.

28 ⁹ Transcription of Hearing, 94:1-6.

¹⁰ Transcription of Hearing, 93:21-25.

¹¹ *Id.*

1 stay pursuant to Mehta v. Jones, 211 Ariz. 505, 123 P. 3d 1142 (App. 2005). Further,
2 the original application did not address the transfer fees. Rather, it only requested the
3 payment of the filing fee of \$550.00 to Stromme be stayed. Apache Wells determined it
4 was not cost effective to pursue the Motion to Stay on that issue and instead elected to
5 pay Stromme the \$550.00, which it did.
6

7 **IV. The Application To Stay Filed Herewith Sets Forth Good Cause To Stay the**
8 **Administrative Agency Decision Pending Appeal.**


9 Continued collection of the \$950.00 is viewed by the Association as justified
10 pending appeal. More importantly, it is crucial to covering the shortfall in the operating
11 expenses recognized by the Administrative Decision as “needed” without increasing the
12 individual burdens of the members of the Association through an increased general or
13 even a special assessment.
14

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16 **V. Conclusion**

17 For the reasons set forth hereinabove, Apache Wells is not in contempt of any
18 order and Stromme lacks standing to assert contempt. Stromme’s Motion for Order to
19 Show Cause as to Why the Association Should Not Be Held in Contempt should,
20 therefore, be denied.
21

22 DATED this 14th day of June, 2007.

23
24 JACKSON WHITE, P.C.

25
26 
27 Eric M. Jackson
28 40 N. Center St., Suite 200
Mesa, AZ 85201
Attorneys for Plaintiff

1
2 ORIGINAL hand delivered this 11th day of
3 June, 2007, to:

4 The Clerk of the Court

5 COPIES of the foregoing hand
6 delivered this same day to:

7 The Honorable Margaret H. Downie
8 201 W. Jefferson, Room 4A
9 Phoenix, AZ 85003-2243

10 COPIES of the forgoing mailed
11 this same day to:

12 Department of Fire, Building, and Life Safety
13 11110 W. Washington, #100
14 Phoenix, AZ 85007

15 Melanie C. McKeddie, Esq.
16 Cheifetz Iannitelli Marcolini, P.C.
17 1850 N. Central Avenue, 19th Floor
18 Phoenix, AZ 85004
19 *Attorneys for Defendants Stromme*

20 By: 