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

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

13 Plaintiff,

14 v.

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

20 Defendants.

No. LC 2007-000189

**REPLY IN SUPPORT OF MOTION
FOR ORDER TO SHOW CAUSE AS
TO WHY THE ASSOCIATION
SHOULD NOT BE HELD IN
CONTEMPT FOR FAILING TO
COMPLY WITH COURT ORDERS**

21 The Association's Response to Stromme's Motion does nothing to negate the fact
22 that the Association is and has willingly been violating two Court Orders. Indeed, while
23 the Association makes another attempt to obtain a stay of the Administrative Law Judge's
24 Order (the "Order"), the impropriety of which will be addressed in a separate Response,
25 the Association does not dispute the fact that it has continued to charge a \$950.00 transfer
26 fee, despite being ordered by the Administrative Law Judge to charge only \$300.00, and
despite being denied a stay by this Court. The Association has failed to establish any
reason why it should not be held in contempt.

The Association for the first time raises standing as an apparent defense to the
underlying action in its Response to Stromme's Motion. Stromme challenged the propriety
of the transfer fee at the administrative level, yet the Association did not raise standing as

1 an issue at that time. The facts giving rise to Stromme's standing at the administrative
2 level have not changed and are in fact identical to the facts giving rise to Stromme's
3 standing to challenge the Association's violation of the Order. Stromme is the other party
4 to the Order. The fact that the Association did not raise standing as an issue at the
5 administrative level precludes the Association from raising the issue now on appeal. See,
6 e.g., Johnson Intern., Inc. v. City of Phoenix, 192 Ariz. 466, 471, 967 P.2d 607, 612
7 (App. 1998) (refusing to address issue of standing on appeal because it was not raised in
8 the lower court); Premier Financial Services v. Citibank (Arizona), 185 Ariz. 80, 86-87,
9 912 P.2d 1309, 1315-16 (App. 1995) (holding the Court of Appeals "cannot consider
10 issues and theories that were not presented to the court below").

11 Notwithstanding the fact that the Association cannot raise the issue of standing
12 herein, Stromme has standing to challenge the Association's violation of the Order and
13 subsequent Minute Entry of this Court. The Declaration for the Apache Wells community
14 expressly provides all members with standing to challenge actions of the Association. To
15 be certain, in Section 6, the Declaration provides that when any violation of the
16 Declaration occurs, "any owner of any lot, block or parcel in the described property or any
17 unit or subdivision thereof may bring action at law or in equity, either for injunction,
18 action for damages or such other remedy as may be available." As a member of the
19 Association, Stromme has standing to challenge violations of the Declaration by the
20 Association. As Stromme argued at the administrative level, the Association's transfer fee
increase is a violation of the Declaration.

21 The Association next argues it is free to violate the Order by challenging its merits.
22 While the Association is certainly free to challenge the validity of the Order on appeal,
23 such a challenge has no bearing on whether the Association has violated the Order, which
24 has not been stayed by this Court. In any event, Stromme will establish in his Responsive
25 Brief that the Association's the Administrative Law Judge's Order should be affirmed, as
26 the Association cannot meet its burden in establishing that the decision was arbitrary,

1 capricious, and an abuse of discretion. The decision of the Administrative Law Judge is
2 consistent with applicable law. While the Association is correct that Section 3.5 of the
3 Restatement (Third) of Property – Servitudes (the “Restatement”) allows for transfer fees,
4 the Association fails to acknowledge that such transfer fees are invalid under Section 6.5 of
5 the Restatement unless they are expressly authorized by the Declaration or actually relate
6 to the cost of transfer. In this case, the Declaration for the Apache Wells community does
7 not authorize transfer fees. Accordingly, any fees imposed must relate only to the actual
8 costs of the transfer. The Association’s own admissions establish that the transfer fee
9 increase at issue is not related in any way to the actual costs of the transfer and
10 accordingly, the Order should be affirmed by this Court.

11 Rather than adhere to the Declaration, the Association is in effect instituting a
12 special assessment upon its members through the transfer fee. The Declaration requires
13 that special assessments must be approved by a majority of the owners in Apache Wells,
14 yet the Association is collecting the transfer fee without having first obtained the requisite
15 approval through a proper vote. The Association’s attempt to bypass the Declaration by
16 calling its assessment a “transfer fee” should not be permitted. The Association cannot
17 continue to unnecessarily tax its members to support its overzealous spending.¹

18 The Association argues it would suffer “substantial financial hardship” without the
19 transfer fee. The Association makes this argument, yet its former President, Brian Johnson,
20 testified at a deposition in a related case on June 20, 2007 that the Association was extremely
21 well funded. Mr. Johnson, who was the Association’s President at the time of the
22 administrative hearing, testified at the administrative hearing, and is currently acting as a legal
23 representative for the Association such that he is familiar with the Association’s current
24 financial condition. Mr. Johnson testified that the Association is so well off financially that it

25 ¹ The Association’s spending is the subject of a related lawsuit, Maricopa County Superior Court
26 Case Number CV2007-005085, wherein numerous Association members, including Stromme, challenge the
Association’s imposition of a \$6,020.00 special assessment.

1 is making double payments on the loan it obtained for its recent building purchase. The
2 payments, according to Mr. Johnson, are approximately \$10,000.00 per month. If the
3 Association would suffer hardship without a \$650.00 fee it imposes upon new members, how
4 and why is it making double payments on a loan? To put it simply, there is no evidence to
5 support any claim of hardship by the Association. Moreover, it begs the question to ask how
6 the Association reconciles the fact that it is not actually utilizing the transfer fees it is
7 collecting with its claim that it would suffer a hardship without such fees. The Association's
8 own admissions establish that it is collecting the fees, but placing them in an escrow account
9 pending resolution of this appeal. What hardship could the Association possibly suffer by not
10 collecting the fees at all? It is not currently utilizing any transfer fees and as such, adhering to
11 the Court's Order by only collecting the \$300.00 transfer fee will not cause any hardship.

12 The Association has submitted a second Application for Stay, which Stromme will
13 respond to in a separate pleading. It should be noted, however, that the Association's current
14 Application does not negate the fact that the Association has been collecting the transfer fee in
15 violation of the Order. The Association has not obtained a stay in this matter, and its second
16 Application for a stay should not allow the Association to justify its violation of the Order after
17 the fact. The Association is incorrect in arguing the April 30, 2007 Minute Entry has no
18 bearing on this issue. As the Minute Entry established, the Association did not obtain a stay of
19 the Order. The Association nevertheless persisted in collecting the transfer fee, in violation of
20 that Order. In addition, as described above, the Association has in no way met its burden in
21 establishing good cause as required by A.R.S. § 12-911.

22 The Association has not disputed the facts giving rise to its Contempt - a valid Order
23 exists and it has violated that Order. Because the facts of the Association's Contempt are not
24 in dispute, Stromme believes an evidentiary hearing is no longer necessary. Stromme
25 therefore respectfully requests that the Court issue an Order finding the Association in
26 Contempt, as follows:

1 A. A finding that the Association is in contempt of Court for failure to
2 comply with the Order and Minute Entry.

3 B. An Order requiring the Association to reveal all instances since
4 February 12, 2007 wherein it has collected a transfer fee in excess of
5 \$300.00.

6 C. An Order sanctioning the Association in an amount per day determined
7 by the Court until all funds collected in violation of the February 12, 2007
8 Order and Minute Entry are refunded and the Association acknowledges no
9 future violations of the February 12, 2007 Order and Minute Entry will
10 occur, and specifically that it will not collect a transfer fee above \$300.00
11 unless and until it is successful in its appeal of the February 12, 2007 Order.

12 D. An Order awarding Stromme his attorneys' fees and costs incurred in
13 his efforts to seek compliance by the Association with the Order and Minute
14 Entry.

15
16 DATED this 20th day of June, 2007.

17 CHEIFETZ IANNITELLI MARCOLINI, P.C.

18 By 

19 Steven W. Cheifetz

20 Melanie C. McKeddie

21 Attorneys for Walter A. Stromme

22 ORIGINAL of the foregoing filed
23 this 20th day of June, 2007 with:

24 Clerk
25 MARICOPA COUNTY SUPERIOR COURT
26 201 West Jefferson
Phoenix, Arizona 85003-2243

26 COPY of the foregoing hand-delivered

1 this 26th day of June, 2007 to:

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

6 COPIES of the foregoing mailed
7 this 26th day of June, 2007 to:

8 DEPARTMENT OF FIRE, BUILDING & LIFE SAFETY
9 11110 West Washington, #100
10 Phoenix, Arizona 85007

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13 40 North Center, Suite 200
14 Mesa, Arizona 85201
15 Attorneys for Respondent/Appellant/Plaintiff

16 By 

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