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MARCOLINI, P.C.

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

11
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

**REPLY TO DEFENDANT
STROMME'S RESPONSE TO
APPLICATION FOR STAY OF
ADMINISTRATIVE ORDER RE:
TRANSFER FEE INCREASE**

(Oral Argument Requested)

(Assigned to the Hon. Margaret H.
Downie)

23 Plaintiff APACHE WELLS HOMEOWNERS ASSOCIATION ("Apache Wells"), by
24 and through counsel undersigned, hereby files its Reply to Defendant Stromme's ("Stromme")
25 Response to Application for Stay of Administrative Order Re: Transfer Fee Increase. Apache
26 Wells incorporates its Opening Brief in reply hereto as well as all other pleadings on record with
27 this court.
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1 Stromme argues the stay cannot be granted because 1) the administrative order does not
2 demonstrate a colorable claim of error, and 2) the Apache Wells governing documents and
3 Arizona law do not authorize imposition of transfer fees. Stromme's arguments are patently
4 flawed because: 1) colorable claims of error do exist, 2) the governing documents and Arizona
5 law do authorize transfer fees, 3) Stromme's Response contains arguments inapplicable in this
6 matter pursuant to the express rulings of the Administrative Decision, 4) Stromme's Response
7 presents arguments that cannot be raised for the first time on appeal, and 5) the record reveals
8 that hardship will result if a stay is not granted. Stromme also fails to establish standing,
9 meaning his response is without merit.

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12 **I. The Agency erred by not properly applying the Restatement.**

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14 It is undisputed that Restatement §3.5 applies. Reiterating Restatement §3.5, comment c;
15 "Fees to cover the administrative costs entailed by a transfer of ownership, or occupancy, and
16 education of new members are justified."¹ Applying the Restatement standard, "the
17 Administrative Law Judge conclude[d] that an increase in such fees would be appropriate if
18 there is some rational justification for such increase."² It then held "Apache Wells provide[d]
19 some justification."³ The administrative decision then applied a legally unprecedented standard
20 and exceeded its jurisdiction by holding the increased fee was "arbitrary and capricious" for
21 improper reasons set forth in Apache Wells's Opening Brief incorporated herein by this
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25 ¹The Restatement (Third) of Property: Servitudes §3.5, Comment c.

26 ²Index of Record on Review ("IRR") ¶47 Administrative Law Judge Decision,
27 Conclusions of Law, ¶31.

28 ³IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶32.

1 reference.

2 **II. Stromme cannot present arguments outside the scope of the administrative decision**
3 **to request sanctions and the Agency erred in not applying the business judgment**
4 **rule.**

5 Stromme's argument that the increased transfer fee is improper because the governing
6 documents do not provide for them and because it violates A.R.S. §33-1806(C) is clearly
7 untenable because the Administrative Law Judge concluded that "**Apache Wells provide[d]**
8 **legal authority for the imposition of such fees.**"⁴ In fact, whether transfer fees are authorized
9 by the governing documents is irrelevant in this matter because "The Administrative Law Judge
10 is not addressing whether the imposition of transfer fees is appropriate because that is not the
11 issue before the Administrative Law Judge and **even Mr. Stromme acknowledged that he was**
12 **not seeking to have such fees invalidated.**"⁵ Stromme's legal issues and arguments raised for
13 the first time cannot be considered by this court on appeal.⁶ Stromme did not appeal the
14 decision of the Administrative Law Judge. In fact, he is opposing the Association's appeal.
15 Moreover, A.R.S. §33-1806(C) is inapplicable here, not only because it is only now raised for
16 the first time on appeal, but because it regards imposition of fees on the members, not transfer
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21 ⁴IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶30 (emphasis
22 added).

23 ⁵IRR ¶47 IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶30
24 (emphasis added); see also IRR ¶47 Administrative Law Judge Decision, Conclusions of Law,
25 ¶28 (Mr. Stromme "is not challenging the imposition of a transfer fee but the increase of the fee
26 from \$300.00 to \$950.00.")

27 ⁶McDowell Mountain Ranch Land Coalition v. Vizcaino, 190 Ariz. 1, 5, 945 P. 2d 312,
28 316 (1997); Hawkins v. Allstate Ins. Co., 152 Ariz. 490, 503, 733 P. 2d 1073, 1086 (1987)
(issues not raised until appeal are not considered); Napier v. Bertram, 191 Ariz. 238, 239, ¶6m
954 P. 2d 1389, 1390 (1998) (court cannot consider new factual theories raised for first time on
appeal); Westin Tucson Hotel v. State, Dep't of Revenue, 188 Ariz. 360, 364, 936 P. 2d 183,
187 (App. 1997) (claim raised for the first time on appeal is waived).

1 fees paid by new buyers to compensate for amenities that have been paid for by the seller but
2 will be enjoyed by the buyer.

3 Importantly, this case is not about whether the transfer fee itself is authorized, but only
4 whether the board's decision to increase the transfer fee was justified. Apache Wells provided
5 controlling Arizona law that the board's decision to increase the transfer fee was justified. For
6 example, Apache Wells asserted that directors are "presumed in all cases" to have acted in
7 accordance with the statutory requirements under Arizona law.⁷ Arizona courts interpret this to
8 mean that:
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11 the business judgment rule presumes that "in making a business
12 decision the directors of a corporation acted on an informed basis, in
13 good faith and in the honest belief that the action taken was in the
14 best interest of the company."⁸

15 The burden is on the party challenging a director's action to establish by clear and convincing
16 evidence facts rebutting the presumption.⁹ Apache Wells asserted this statutory presumption.¹⁰
17 However, Stromme did not present clear and convincing evidence, let alone any facts, sufficient
18 to overcome this presumption. Colorable error exists because the Agency disregarded the
19 statutory presumption and ruled the board's decision to increase the transfer fee was improper
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25 ⁷ IRR ¶21 Hearing Memorandum, page 3, lines 13-28, and page 4, lines 1-8; citing to
26 A.R.S. §10-830(D) and United Dairymen of Arizona v. Schugg, 212 Ariz. 133, ¶31, 128 P.3d
756, ¶31 (App. 2006).

27 ⁸ United Dairymen of Arizona v. Schugg, 212 Ariz. at ¶31.

28 ⁹ A.R.S. §10-830(D).

¹⁰ IRR ¶21 Hearing Memorandum, 3: 13-28, and 4: 1-8.

1 without Stromme first overcoming the presumption with “clear and convincing” evidence. The
2 Administrative Agency actually found the increase had “some justification!”¹¹

3 **III. The governing documents do authorize imposition of transfer fees.**

4 Even assuming that this case considered the question of whether imposition of transfer
5 fees is authorized by the governing documents, which it does not, the question is answered with
6 a resounding yes. 3(H) of the Apache Wells Revised Declaration of Conditions, Covenants, and
7 Restrictions (“Declaration”) provides that “The Company shall maintain and care for such
8 Community Areas.”¹² 3(O) of the Declaration provides that “All lots and parcels including
9 landscaping and improvements thereon shall be maintained and kept clean at all times in a
10 manner so as to meet the approval of the Company **in its sole discretion.**”¹³ Article II, Section
11 1 of the Bylaws requires that “The specific purposes of the Association shall be: ...To improve
12 the social, ecological and property values of Apache Wells community: and “To assess members
13 when necessary to carry out the foregoing purposes, including, but not limited to the acquisition
14 of property and improvements to existing property.”¹⁴ Determining how to assess (i.e. charge)
15 the members to fund the general reserve for maintenance is left in the “sole discretion” of the
16 board pursuant to the governing documents. All of the cases relied upon by the restatement and
17 cited to by counsels held that transfer fees were proper because the governing documents,
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24 ¹¹ IRR ¶47 Administrative Law Judge Decision, Conclusions of Law, ¶32.

25 ¹² IRR ¶21 Hearing Memorandum, Declaration §3(H) attached thereto as Exhibit A.

26 ¹³ IRR ¶21 Hearing Memorandum, Declaration §3(O) attached thereto as Exhibit A.

27 ¹⁴ IRR ¶21 Hearing Memorandum, Article II, Section 1 of the Bylaws, attached thereto as
28 Exhibit A. For purposes of this section of the Bylaws, the word “assess” is not limited to
general and special assessments, but charging the members for Company business.

1 including bylaws, articles and the declaration (i.e. CC&Rs) authorized them. Thus, the cases
2 support this matter as Apache Wells' CC&Rs and bylaws authorize imposition of transfer fees.

3 **IV. Apache Wells suffers hardship without the transfer fees.**

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5 Stromme asserts irrelevant facts not part of the record and for the first time on
6 appeal to raise questions regarding the association's hardship. For example, Stromme argues
7 hardship will not be suffered because the assessment is raised every year, because it is
8 doubling a \$5,000.00 loan payment, and because the expenses are for "luxuries not
9 necessities." See page 7, lines 1-23 of Stromme's Response. The court cannot consider these
10 new facts.¹⁵ Rather, the court must only consider the Administrative Law Judge's
11 conclusions that the transfer fee was increased due to "**needed repairs** to existing buildings
12 in the strip mall," "security costs," and "need for reserve."¹⁶ Taking only the Agency's
13 conclusions into consideration, the inability to increase transfer fees would result in a
14 "shortfall in [the] budget on certain items" previously unforeseen.¹⁷ This "shortfall" in
15 Apache Wells' budget is prima facie evidence of hardship required for the Stay pursuant to
16 Mehta v. Jones, 211 Ariz. 505, 23 P. 3d 1142 (App. 2005).

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23 ¹⁵ McDowell Mountain Ranch Land Coalition v. Vizcaino, 190 Ariz. 1, 5, 945 P. 2d 312, 316
24 (1997); Hawkins v. Allstate Ins. Co., 152 Ariz. 490, 503, 733 P. 2d 1073, 1086 (1987) (issues not raised
25 until appeal are not considered); Napier v. Bertram, 191 Ariz. 238, 239, ¶6m 954 P. 2d 1389, 1390
26 (1998) (court cannot consider new factual theories raised for first time on appeal); Westin Tucson Hotel
27 v. State, Dep't of Revenue, 188 Ariz. 360, 364, 936 P. 2d 183, 187 (App. 1997) (claim raised for the
28 first time on appeal is waived).

¹⁶ IRR ¶47 Administrative Law Judge Decision, Findings of Facts, ¶15, Conclusions of Law, ¶32
(emphasis added).

¹⁷ 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.

1 **V. Stromme, only now in the appeal, specifically raises issues on behalf of third**
2 **persons.**

3 Arizona courts have long held that “Any person interested in the subject-matter of the suit
4 who has a personal interest in the judgment is a ‘real party in interest’ and unless joined in the
5 action **he cannot be bound by the judgment.**”¹⁸ Ariz. R. Civ. Proc. 17(a) bolsters this rule.
6 No member besides Stromme is named as a party in this lawsuit and Stromme’s request for
7 contempt can only be determined by considering persons not bound to the administrative
8 decision. Thus, the issue of standing to assert claims on behalf of third-persons only now arises,
9 which Apache Wells properly disputes pursuant to cited case law. Stromme has provided no
10 evidence or legal precedent to rebut this black letter law and therefore cannot overcome the
11 “prudential” requirement to establish standing.
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15 **VI. Conclusion**

16 For the above reasons, a colorable claim of error exists and for reasons in Apache Wells
17 Application, a balancing of harm favors granting stay. Stromme lacks standing to assert claims
18 on behalf of anyone but himself, and Stromme’s improper arguments raised for the first time in
19 appeal cannot be considered. Therefore, Apache Wells respectfully requests this Court grant its
20 Application for Stay pending determination of appeal.
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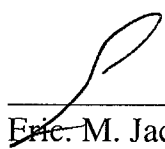
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28 ¹⁸ Mosher v. Hiner, 62 Ariz. 110, 112, 154 P. 2d 372 (1944).

1 DATED this 16th day of July, 2007.

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10 ORIGINAL hand delivered this 16th day of
11 July, 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
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18 COPIES of the forgoing mailed
19 this same day to:

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