

1 Steven W. Cheifetz (011824)
Melanie C. McKeddie (022942)
2 **CHEIFETZ IANNITELLI MARCOLINI, P.C.**
1850 North Central Avenue, 19th Floor
3 Phoenix, Arizona 85004
(602) 952-6000

4 Attorneys for Petitioner/Appellee Walter Stromme

5 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
6 **IN AND FOR THE COUNTY OF MARICOPA**
7

8 APACHE WELLS HOMEOWNERS
ASSOCIATION, INC., an Arizona non-profit
9 corporation,

10 Plaintiff,

v.

11 DEPARTMENT OF FIRE, BUILDING AND
12 LIFE SAFETY; OFFICE OF
ADMINISTRATIVE HEARINGS, an
13 independent agency; WALTER A. STROMME,
a married man,

14 Defendants.
15

No. LC2007-000189

**RESPONSE TO APPLICATION FOR
STAY OF ADMINISTRATIVE ORDER
RE: TRANSFER FEE INCREASE**

16 The Association's second Application for Stay, like the first, fails to articulate
17 sufficient cause to stop enforcement of the Administrative Law Judge's Order (the
18 "Order"). As the Association has been actively violating the Order since its issuance,
19 resulting in Stromme filing a Motion requesting the Association be held in Contempt, the
20 Association's current Application purports to provide justification for the Association's
21 conduct after the fact. Notwithstanding, the Association has failed to meet its burden in
22 establishing any of the criteria set forth in P&P Mehta LLC v. Jones, 211 Ariz. 505, 510,
23 123 P.3d 1142, 1147 (App. 2005), which expressly holds that a stay will not be granted
24 unless both a colorable claim of error and hardship is shown.
25
26

1 **The Association Failed to Establish a Colorable Claim of Error**

2 Concerning the first criteria set forth in P&P Mehta, a colorable claim of error is
3 established when the applicant demonstrates a “seemingly valid, genuine, or plausible
4 claim under the circumstances of the case.” Id. Here, the Association contends that the
5 Administrative Law Judge erred in finding that the Association determined the amount of
6 the transfer fee increase in an arbitrary and capricious manner. However, the
7 Administrative Law Judge’s decision is consistent with applicable law and quite frankly,
8 the Association’s purported standards relating to transfer fees do not apply in this case.

9 The Association erroneously argues Section 3.5 of the Restatement (Third) of
10 Property – Servitudes (the “Restatement”) allows for transfer fees in *any* amount so long
11 as the Board of Directors selects the amount and utilizes such fees for operating expenses.
12 The Association’s interpretation of the Restatement ignores essential language, such as the
13 fact that “the power of a common interest community to impose such fees [transfer fees] is
14 governed by the rule stated in § 6.5.” RESTATEMENT (THIRD) PROPERTY – SERVITUDES, §
15 3.5, cmt. c. Notably, the standard the Association insists applies is set forth in an
16 illustration in the Restatement, which illustration begins with language the Association has
17 completely ignored, “the declaration for a condominium development requires payment of
18 a transfer fee.” Id. at Illustration 5. As noted by the Administrative Law Judge in his
19 decision, the Declaration for Apache Wells *does not provide the Association with*
20 *authority to impose a transfer fee.* Accordingly, the analysis does not stop with the fact
21 that the Board set the fee and supposedly uses it for operating expenses, as the Association
22 suggests. The Administrative Law Judge was correct to continue his analysis to find that
23 the Association imposed the transfer fee increase in an arbitrary and capricious manner.

24 The Association points to other cases, as well as other communities in Arizona,
25 where transfer fees are imposed. However, as the Administrative Law Judge noted, the
26 Association fails to address the governing documents applicable in those other instances.
The very cases the Association cites in its Application hinge on the fact that the fees at

1 issue are expressly authorized by the governing documents in each case. For instance, in
2 de Mello v. 79th Street Tenants Corp., 136 Misc.2d 73 (N.Y. City Civ. Ct. 1987), the
3 Court upheld the transfer fee at issue *because* the fee was expressly authorized by the
4 governing documents. Similarly, in Mayerson v. 3701 Tenants Corp., 123 Misc.2d
5 235 (N.Y. Sup. 1984), and Jamil v. Southridge Co-op. Section No. 4 Inc., 102 Misc.2d
6 404, 405 (N.Y. Sup. 1979), the Courts upheld the transfer fees at issue *because* they were
7 expressly authorized by the governing documents.

8 Moreover, the cases cited by the Association concern cooperatives and not
9 homeowners associations, are governed by New York law (which expressly addresses the
10 fees at issue), and are not even persuasive authority in this Court.¹ For those cases,
11 beyond the governing documents, New York statutory law has expressly provided
12 authority to impose transfer fees associated with the stock sale involved in a cooperative
13 transfer. See McKinney's Business Corporation Law § 501. In other words, the
14 Association's cited cases have no applicability whatsoever to Apache Wells, other than the
15 fact that they demonstrates a Board of Directors must be authorized by applicable
16 governing documents, even in a cooperative apartment building, to impose transfer fees. It
17 makes sense then, that the Association ignores the cases cited in the Restatement at Section
18 6.5, which hold transfer fees are invalid when not authorized by the governing documents
19 and not related to the actual costs of transfer. See, e.g., Fe Bland v. Two Trees Mgmt.
20 Co., 66 N.Y.2d 556, 498 N.Y.S.2d 336, 489 N.E.2d 223 (1985).

21 The governing documents for the Apache Wells community are a contract between
22 the members of the Association and the Association. Arizona Biltmore Estates v. Tezak,
23 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1994), citing Divizio v. Kewin
24

25 ¹ Two of the cases cited by the Association are from the New York City Civil Court and New York
26 Supreme Court, which are New York's *trial* courts. The other case is from lower level appellate court,
which is only authoritative for the Second Department in New York, which is by no means the entire state.

1 Enterprises, Inc., 136 Ariz. 476, 481, 666 P.2d 1085, 1090 (App. 1983). See also
2 Scholten v. Blackhawk Partners, 184 Ariz. 326, 328, 909 P.2d 393, 395 (App. 1995). As
3 such, it is the governing documents that control the manner in which the Association can
4 raise funds, along with applicable statute. As the Association acknowledges, the governing
5 documents for Apache Wells provide two means by which the Association can raise funds.
6 First, it has the option of increasing the general assessment, which the Association has
7 done repeatedly for the past several years. Recognizing the potential for abuse in
8 assessment increases, the Arizona legislature placed limits upon a homeowners
9 association's ability to increase its general assessments. Pursuant to A.R.S. § 33-1803,
10 homeowners association are not permitted to raise the general assessment by more than
11 twenty percent per year without approval of the majority of the homeowners. Further, the
12 Bylaws of Apache Wells restrict the Association more by requiring a majority vote for
13 increases greater than ten percent. The Association has raised the general assessment by
14 ten percent repeatedly for the past several years, and as such, its argument that it will be
15 forced to raise the general assessment without the excess transfer fee is wholly without
16 merit. The Association has already instituted the increase, which again begs the question
17 as to why the Association still "needs" the excess transfer fee funds.

18 The second option for the Association to raise funds is by way of a special
19 assessment, which also requires approval of the majority of homeowners. The Association
20 just recently passed² such a special assessment, in the amount of \$6,020.00 per lot. Again,
21 if the Association is in such dire need of funds from the excess transfer fees, why would it
22 not utilize the \$8.5 million obtained from the special assessment to cover the alleged
23 expenses it claims are needed? Rather than utilize the \$8.5 million for the "necessary"
24

25 ² Stromme disputes the Association's claim that it validly passed the special assessment described
26 herein. For purposes of this pleading, however, Stromme will not address the validity of the special
assessment.

1 expenses described by the Association, such as security to prevent burglaries, the
2 Association intends to utilize the funds for a new community center, restaurant, bar and
3 golf pro shop. To put it simply, the Association's arguments of hardship, which are
4 addressed in detail below, cannot stand in light of its contradictory actions. More
5 importantly, the transfer fee increase is nothing more than a special assessment anyway.
6 The only difference lies in the fact that the Association attempted to bypass the requirement
7 that it obtain homeowner approval prior to imposition of the assessment.

8 The Arizona legislature has spoken as to transfer fees that may be imposed by a
9 homeowners association. In A.R.S. § 33-1806(C), the legislature allows for a
10 homeowners association to charge members "a reasonable fee to compensate the
11 association for the costs incurred" in preparing documents associated with a transfer. This
12 statute is consistent with the Restatement, which allows for a homeowners association to
13 charge for the actual costs associated with the transfer regardless of governing documents.
14 It is also consistent with the Restatement's holding, as well as the holdings of other cases
15 interpreting this issue, that no additional transfer fees may be imposed without authority
16 from the governing documents. The Apache Wells governing documents provide two
17 ways by which the Association can raise funds, both of which the Association has
18 exhausted. Here, the Association attempts to create a third way to raise funds, which it
19 simply lacks authority to do.

20 There is no question that the Administrative Law Judge's decision concerned lack of
21 authority in the governing documents and the fact that the Association's transfer fee does
22 not relate to the actual costs of transfer. More importantly, there is no question that
23 applicable law does not allow for the Association's transfer fee increase in this case. As
24 such, the Association has failed to establish a valid, plausible, or genuine claim by arguing
25 it is free to set transfer fees in any amount it wishes so long as it uses such fees for
26 operating expenses. According to the Association's arguments, it could impose a transfer

1 fee equivalent to 100% of the purchase price so long as the Association uses said fees for
2 operating expenses. Clearly, such a result is inconsistent with applicable law and rests on
3 arbitrary and capricious whims of the Association's Board of Directors. The Association's
4 transfer fee increase is nothing more than an effort to bypass the governing documents for
5 the Apache Wells community, which contrary to the cases relied upon by the Association,
6 do not allow for transfer fees and instead require a majority of the homeowners to approve
7 such an assessment.

8 The Association Failed to Establish the Requisite Harm

9 The Association's arguments relating to harm are inconsistent, at best. The
10 Association claims "disastrous" results will ensue if the stay is not granted, yet the
11 Association then states it is not utilizing any of the excess transfer fees it is collecting in
12 violation of the Order. What disastrous results could possibly ensue when the Association
13 is not even utilizing the funds it is collecting? Clearly, the Association has been operating
14 without the transfer fee increase since February 2007 without such "disastrous" results.
15 Further, if such "disastrous" results are impending, why did the Association wait until now
16 to request a stay? Surely it could have requested a stay when it filed its first Application
17 over two months ago.

18 As further evidence of the inconsistency of the Association's claims, the
19 Association's former President, Brian Johnson, recently testified at a deposition in a related
20 matter regarding the financial condition of the Association. Mr. Johnson is currently the
21 Association's legal representative and is presumptively informed of the Association's
22 financial condition. See Deposition Brian Johnson, attached hereto as **Exhibit A**, at 127:8-
23 17. According to Mr. Johnson, the Association is in such excellent financial condition that
24 it is able to make nearly double payments on the loan it obtained for the building purchase
25 that was also at issue at the administrative level. **Exhibit A**, at 118:6-18. As established
26 in the lower court, the building purchase cost the Association in excess of \$700,000.00, the

1 down payment for which it apparently had in its operating account. The payments on the
2 loan for the building, according to Mr. Johnson, are approximately \$5,000.00 per month,
3 which the Association has been nearly doubling. **Exhibit A**, at 118:6-18. If the
4 Association is in such dire financial straits, as it argues in its Application, how and why is
5 it doubling a \$5,000.00 loan payment when it is not required to do so? Further, where
6 does the extra payment amount come from? If the Association is in such need of funds for
7 expenses such as security, perhaps it should stop making unnecessary loan payments and
8 start utilizing its funds for that purpose. Perhaps it may also be prudent for the Association
9 to refrain from making \$700,000.00 purchases. In any event, there is no question that the
10 Association's claim of hardship is invalid in light of the facts of this case.

11 As described above, the Association has been undertaking significant effort to raise
12 funds in the Apache Wells community. The transfer fee increase is unequivocally part of
13 that effort, as acknowledged by the Association. Notwithstanding the fact that the transfer
14 fee increase is an impermissible and unauthorized way for the Association to raise funds,
15 there is simply no basis for the Association to claim any sort of hardship without the
16 transfer fee increase as it has done in its Application. Stromme reiterates that the
17 Association is spending money on numerous items that are luxuries and not necessities,
18 such as a \$700,000.00 building, early payment of a loan, a restaurant, a bar, and a golf
19 pro shop. The Association's concern for "civil liability" is certainly well-founded in light
20 of the fact that it is choosing to spend its funds on these items instead of building
21 maintenance and security, as outlined in its Application. By no stretch of the imagination
22 can the Association justify a claim of hardship in light of its actions that completely
23 contradict such a claim.

24 **The Association's Violation of the Order Should not be Tolerated**

25 As set forth in Stromme's Motion for Contempt relating to the Association's
26 persistence in violating the Order, and as admitted freely by the Association in its

1 Application, the Association has continued to collect the excess transfer fee since the Order
2 was issued in February 2007. The fact that the Association is placing the excess funds in
3 an escrow account does not negate its violations of the Order. If the Association's
4 Application is granted now, such that its conduct of violating the Order is permitted, the
5 effect will be that the Association is able to bypass lawfully entered Court Orders when it
6 so chooses. If the Association desired a stay of the Order, it should have applied for the
7 same immediately upon filing this appeal³ and should have refrained from collecting fees in
8 violation of the Order unless and until its Application was granted. Rather than adhering
9 to this procedure, which is required by law, the Association waited until months after it
10 filed its appeal to request a stay, and knowingly violated the Order in the interim. Such
11 conduct should not be tolerated and therefore, the Association's Application should be
12 denied for that reason alone.

13 **Conclusion**

14 The Association has failed to establish the requisite good cause for granting a stay of
15 the Order. More specifically, the Association has not established a colorable claim of
16 error, and has not established any hardship in the absence of a stay. Further, the
17 Association failed to adhere to applicable law in requesting a stay, in that it knowingly
18 violated the Order at issue for several months prior to making its request. Stromme
19 respectfully requests the Association's Application be denied in its entirety.

20 DATED this 29th day of June, 2007.

21 CHEIFETZ IANNITELLI MARCOLINI, P.C.

22 By 

23 Steven W. Cheifetz
24 Melanie C. McKeddie
25 Attorneys for Petitioner/Appellee

26 ³ Notably, the Association waited several months to request a stay of the transfer fee Order. If the Association would truly suffer hardship by adhering to the Order, why did it delay in seeking a stay?

1 ORIGINAL of the foregoing filed
this 29th day of June, 2007 with:

2 Clerk
3 MARICOPA COUNTY SUPERIOR COURT
4 201 West Jefferson
Phoenix, Arizona 85003-2243

5 COPY of the foregoing hand-delivered
this 29th day of June, 2007 to:

6 The Honorable Margaret H. Downie
7 MARICOPA COUNTY SUPERIOR COURT
8 201 West Jefferson, Room 4A
Phoenix, Arizona 85003-2243

9 COPIES of the foregoing mailed
this 29th day of June, 2007 to:

10 DEPARTMENT OF FIRE, BUILDING & LIFE SAFETY
11 11110 West Washington, #100
12 Phoenix, Arizona 85007

13 Eric M. Jackson, Esq.
14 JACKSON WHITE, P.C.
15 40 North Center, Suite 200
Mesa, Arizona 85201
Attorneys for Respondent/Appellant/Plaintiff

16 By 

17
18 N:\CLIENTS\Save Apache Wells\Administrative Decision Appeal 2330-4\Response App Stay 6 26 07.doc

19
20
21
22
23
24
25
26

Exhibit **A**

In The Matter of:

DOSHIER, ET AL. VS. APACHE WELLS HOMEOWNERS, ET AL.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

BRIAN JOHNSON

JUNE 20, 2007

***JD REPORTING, INC.
CERTIFIED REPORTERS***

389 East Palm Lane
Phoenix, Arizona 85004
Phone: (602) 254-1345
Fax: (602) 254-2548
E-Mail address: JDREPORT@AOL.COM

Word index included with this condensed transcript

DEPOSITION OF BRIAN JOHNSON, 6/20/07

117

1 purchase is being paid or was being paid by the
 2 transfer fees.
 3 MR. LINDER: You can answer the
 4 question. My objection stands in terms of the fact
 5 that it's not relevant to this lawsuit. But go ahead.
 6 If you know the answer to the question, answer it,
 7 Brian.
 8 THE WITNESS: No, they are not.
 9 BY MR. CHEIFETZ:
 10 Q. So there was never any thought by the
 11 Board that we can fund the cancer building by
 12 collecting these transfer fees?
 13 A. No. I heard that in deposition, and
 14 it's absolutely false. When the transfer fee issue
 15 came up, the bank building wasn't even on the radar.
 16 I think Ernie Shoults testified that we put it in
 17 place to pay for that building. Absolutely false. In
 18 fact, just to go on with that, all of the reasons for
 19 the transfer fee were laid out at the time it was
 20 given. And it was basically, we had a shortfall in
 21 the -- and we were essentially down to a zero reserve
 22 fund basis. We had an overrun on the library building
 23 of about \$100,000. And we had -- nighttime security
 24 was a big issue, came up after the budget was
 25 formulated, and it looked like it was going to be

JD REPORTING, INC. (602) 254-1345

DEPOSITION OF BRIAN JOHNSON, 6/20/07

119

1 approved of?
 2 A. Absolutely not.
 3 Q. Wasn't there some sort of suggestion by
 4 you that basically only the nominated committee would
 5 have the right to select people to run for the Board
 6 and that the others would have to obtain signatures?
 7 A. That's in the bylaws, yes.
 8 Q. So the bylaws say they have to get
 9 signatures before they can run?
 10 A. That's right.
 11 Q. But people that the nominating committee
 12 picks, they don't have to get signatures?
 13 A. That's right.
 14 Q. How come other people disagreed and said
 15 it's not specified? Isn't that what the --
 16 A. It doesn't matter what other people
 17 disagreed with. I checked it out with the attorney
 18 and got backing that it's correct.
 19 Q. Wouldn't that make it more likely that
 20 only those nominated by the Board would be -- would
 21 have the chance to run?
 22 A. If that were true, we'd have three
 23 people running, wouldn't we? We had six and seven
 24 candidates.

Q. Isn't it true that your proposal was
JD REPORTING, INC. (602) 254-1345

DEPOSITION OF BRIAN JOHNSON, 6/20/07

118

1 possibly 30, \$40,000 a year that we hadn't budgeted.
 2 So the transfer fee was a way to take care of these
 3 things and run the business.
 4 Q. What are the monthly payments on the
 5 cancer building?
 6 A. They are -- we're paying \$9,000. The
 7 required payment per the agreement is about 5,000 -- I
 8 forget the exact amount. I can get it for you. 5,245
 9 or something. I asked our treasurer at the time, Tony
 10 Pasula, if -- we wanted to pay it off faster to cut
 11 down the interest. I said could we pay 11-, \$12,000 a
 12 year. And he said, Yes, we can, that shouldn't put a
 13 strain on. And the Board discussed it, and we figured
 14 out that \$9,000 amortized the building in seven years
 15 flat. And that's without any kind of an adjustment in
 16 the rate. And we went ahead and said, Okay, we're
 17 going to go with \$9,000, amortize it in seven years
 18 and pay it off.

(Discussion off the record.)

(WHEREUPON, a luncheon recess was taken

from 11:42 a.m. to 12:34 p.m.)

BY MR. CHEIFETZ:

23 Q. Mr. Johnson, did you seek to limit those
 24 that could run for the Board of Directors of the
 25 association to only those that the Board of Directors

JD REPORTING, INC. (602) 254-1345

DEPOSITION OF BRIAN JOHNSON, 6/20/07

120

1 defeated?
 2 A. No.
 3 Q. So your proposal passed and they
 4 required 35 signatures for other people to run?
 5 A. Yes. Certainly.
 6 Q. Was that the way it was in the past?
 7 A. Always. May not have been adhered to,
 8 but the bylaws have always been that way. It's
 9 just -- you know, it seems to be fairly
 10 straightforward. You have a nominating committee to
 11 nominate. You don't have a nominating committee to
 12 receive names of everyone who wants to come forward
 13 and run. That's what I clarified.
 14 Q. But the concern is, if the nominating
 15 committee is controlled by the Board, then you're most
 16 likely to perpetuate those candidates that the Board
 17 favors. And some people think it's good to have a
 18 change.
 19 MR. LINDER: I don't think that's a
 20 question yet, so don't answer it.
 21 THE WITNESS: No, I didn't hear a
 22 question.
 23 MR. LINDER: All right.
 24 BY MR. CHEIFETZ:
 25 Q. Is all the business of the association

JD REPORTING, INC. (602) 254-1345

DEPOSITION OF BRIAN JOHNSON, 6/20/07

125

1 to cut with the country club over the future community
 2 center?
 3 **A. No. I don't think there were minutes.**
 4 **The community long-range planning committee didn't**
 5 **take minutes as such. They are a committee. They are**
 6 **not a board. And so they operate in that fashion.**
 7 **Q.** Well, who negotiated the agreement with
 8 the country club over who would pay what burden for
 9 the community center?
 10 **A. Well, you saw the agreement in**
 11 **principle, and it's signed by both Boards, so both**
 12 **Boards are in full compliance with it.**
 13 **Q.** And who negotiated that agreement?
 14 **A. The long-range planning committee.**
 15 **Q.** So the Board of Directors didn't
 16 negotiate it? It was done by the long-range planning
 17 committee?
 18 **A. Right.**
 19 **Q.** And then do they just present it to the
 20 Board?
 21 **A. Yes.**
 22 **Q.** And was there a discussion at a meeting
 23 about whether to agree to enter into that agreement
 24 or --
 25 **A. Yes, there was.**
 JD REPORTING, INC. (602) 254-1345

DEPOSITION OF BRIAN JOHNSON, 6/20/07

127

1 **Q.** Are you currently making decisions
 2 regarding the case?
 3 **A. Well, you'd have to define "decisions,"**
 4 **I guess.**
 5 **Q.** You don't know what a decision is?
 6 **A. I'd have to have you define it before I**
 7 **could say whether I'm making them.**
 8 **Q.** It's a choice. Are you making choices
 9 for the homeowner's association?
 10 **A. Yes.**
 11 **Q.** And you're saying you're authorized to
 12 do so because you're appointed by who? The president?
 13 **A. Marv Stoll.**
 14 **Q.** So Marv Stoll, did he appoint you as
 15 this liaison with the counsel at a public meeting, or
 16 was it done separately?
 17 **A. Separately.**
 18 **Q.** So basically your testimony is that Marv
 19 Stoll has the authority to simply appoint you to make
 20 choices for the association without a public meeting,
 21 without a vote of the Board of Directors?
 22 **MR. LINDER: Form and foundation.**
 23 **THE WITNESS: Yes.**
 24 **BY MR. CHEIFETZ:**
 25 **Q.** Is that typically how the business of
 JD REPORTING, INC. (602) 254-1345

DEPOSITION OF BRIAN JOHNSON, 6/20/07

126

1 **Q.** And -- so prior to the vote on that
 2 agreement, there was a discussion as to whether that
 3 agreement made sense?
 4 **A. There was.**
 5 **Q.** How long was that discussion?
 6 **A. I wasn't at the meeting. I wasn't on**
 7 **the Board then.**
 8 **Q.** Do you still have any keys to the
 9 homeowner association?
 10 **A. No.**
 11 **Q.** Do you know why you're the one that's
 12 communicating with the association attorney rather
 13 than a member of the Board of Directors?
 14 **A. Past experience, I suppose.**
 15 **Q.** But isn't it true that you don't have
 16 any current role with the association?
 17 **A. Only as designated.**
 18 **Q.** So are you saying it's appropriate for
 19 the Board of Directors to simply appoint people to
 20 carry out the association's business?
 21 **A. Yes.**
 22 **Q.** And so the fact that you're not elected
 23 is irrelevant to whether you can carry on association
 24 business?
 25 **A. No.**
 JD REPORTING, INC. (602) 254-1345

DEPOSITION OF BRIAN JOHNSON, 6/20/07

128

1 the association is done? Just the president appoints
 2 somebody, and they carry out the association business?
 3 **A. Depends on the nature of the business.**
 4 **Q.** But when it comes to the dispute over
 5 the community center, that's the way it is done?
 6 **A. Well, in a limited sense, yes. I don't**
 7 **make -- I don't make substantive decisions. I**
 8 **communicate with Marv Stoll, and I communicate with**
 9 **the attorneys. It's just not practical for Marv Stoll**
 10 **to be in communication with them because of the**
 11 **distance.**
 12 **Q.** But why not have an elected official
 13 carry out that duty, somebody that was elected for
 14 that very purpose?
 15 **MR. LINDER: Form and foundation.**
 16 **THE WITNESS: You know, if you were the**
 17 **president and you wanted to do it that way, I guess**
 18 **you would do it that way. And there's nothing wrong**
 19 **with Marv Stoll appointing someone that he feels is**
 20 **capable to do it.**
 21 **BY MR. CHEIFETZ:**
 22 **Q.** You're saying it's up to the whim of the
 23 president how the association business is going to be
 24 done?
 25 **A. I didn't say that.**
 JD REPORTING, INC. (602) 254-1345

DEPOSITION OF BRIAN JOHNSON, 6/20/07

181

1 three years there's been six members are country club
2 and three members not. Prior to that it's, throughout
3 history of the thing going back, it's been four and
4 five.

5 (Exhibit No. 14 was marked for
6 identification.)

7 BY MR. CHEIFETZ:

8 Q. Is Exhibit 14 the Revised Declaration of
9 Covenants, Conditions and Restrictions?

10 A. Yes.

11 Q. And the upper left top of page 10,
12 doesn't it provide that no For Sale signs or any other
13 type of sign or advertisements shall be displayed in
14 said subdivision except as designated by company?

15 A. Yes, it does.

16 Q. And when they say the "company," they
17 mean the association?

18 A. Yes.

19 Q. And isn't it true that those homeowners
20 that were displaying signs that said Save Apache
21 Wells, Vote Yes, that they were violating the CC&Rs?

22 MR. LINDER: Form and foundation.

23 THE WITNESS: I wouldn't read that into
24 that because otherwise, you'd have to read into it
25 that the For Sale signs might also be in violation.

JD REPORTING, INC. (602) 254-1345

DEPOSITION OF BRIAN JOHNSON, 6/20/07

183

1 subversive and misleading, Mr. Stoll, he's mistaken?

2 A. No, I didn't say that.

3 Q. Is your understanding that a member of
4 SAW wanted to buy the bank building?

5 A. Yes.

6 Q. Who was that member?

7 A. Bob Domit.

8 Q. And how do you know that to be true?

9 A. He stated it himself in the office in
10 the presence of Terry and Enga both.

11 Q. Who's Terry?

12 A. The secretary in the office.

13 Q. And so did that cause the association
14 concern?

15 A. It simply validated what we already
16 suspected. Because he had stood up at a meeting, a
17 homeowner meeting and demanded to know what we were
18 bidding on the building. And I responded that we were
19 in the process of negotiations and we weren't
20 revealing numbers. It's a real estate deal. And he
21 said, I demand to know, and I know that you've made
22 two bids over there. And I repeated the answer that
23 we are not going to divulge numbers at this time
24 because we're in the process of negotiating a
25 purchase. And subsequent to that, he went in the

JD REPORTING, INC. (602) 254-1345

DEPOSITION OF BRIAN JOHNSON, 6/20/07

182

1 BY MR. CHEIFETZ:

2 Q. So you're saying it's okay for the For
3 Sale signs? They are not in violation of the CC&Rs?

4 A. I'm saying that D says, No For Sale
5 signs are permitted except as designated by the
6 company. It also says, No other type of signs except
7 as designated by the company. And I don't know what's
8 designated by the company. I know there are For Sale
9 signs, so they obviously are permitted. Now, I assume
10 that there are exceptions for other signs as well.

11 Political signs.

12 Q. So basically you're saying the
13 association had the right to prevent -- to preclude
14 the signs, but they made a choice to allow them?

15 MR. LINDER: Form and foundation.

16 THE WITNESS: No, I didn't say that. I
17 said I don't know for sure if they would have been
18 precluded. And I think political signs are permitted.

19 BY MR. CHEIFETZ:

20 Q. Even misleading ones?

21 MR. LINDER: Form and foundation.

22 THE WITNESS: That's strictly

23 subjective.

24 BY MR. CHEIFETZ:

25 Q. So if the president said the signs were

JD REPORTING, INC. (602) 254-1345

DEPOSITION OF BRIAN JOHNSON, 6/20/07

184

1 office and says, I know damn well that offers were
2 made, and I know what they were, and I want to buy the
3 building myself, I've been over there talking to them
4 about buying the building myself. So Enga and Terry
5 can easily confirm that.

6 MR. CHEIFETZ: I've got nothing further.

7 MR. LINDER: I don't either. We'll read
8 and sign.

9 (WHEREUPON, this deposition concluded at
10 2:22 p.m.)

18
19
20
21
22
23
24
25
BRIAN JOHNSON

JD REPORTING, INC. (602) 254-1345