

2010 WL 1434893 (Ariz.App. Div. 1) (Appellate Brief)
Court of Appeals of Arizona, Division 1.

Christine GELB, a single woman, Appellant,
v.

DEPARTMENT OF FIRE, Building, and Life Safety, a political subdivision of the State of Arizona;
Sedona Casa Contenta Homeowners Association, Inc., an Arizona Non-profit corporation, Appellees.

No. 1 CA-CV 09-0744.
March 8, 2010.

Yavapai County Superior Court No. V1300CV820080197

Appellants' Opening Brief

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*1 Statement of the Case

On March 13, 2008, Appellant, Christine Gelb (“Ms. Gelb”), filed a Petition for administrative review in the Department of Fire, Building and Life Safety pursuant to [A.R.S. § 41-2198](#). After holding an evidentiary hearing on June 10, 2008, the administrative agency refused to consider all of the arguments and legal theories Appellant raised during the proceeding and dismissed her petition. [IR¹ 12; AR 29, p. 7]

Appellant timely filed her Complaint for Judicial Review in the Yavapai Superior Court and gave notice to the administrative agency. [IR 1, 8] The Superior Court determined there was “substantial evidence” to support the Administrative Agency's decision and affirmed its ruling. [IR 38, p. 1] After filing a Motion to Alter or Amend Judgment/Motion for Reconsideration, Appellant timely appealed. [IR 39, 42]

This Court has jurisdiction to review the superior court's decision pursuant to [A.R.S. §§ 12-902\(A\)\(1\)](#), [12-913](#), and [12-2101\(B\)](#).

*2 Statement of Facts

In 2004, Appellant Ms. Gelb, bought a lot in Sedona, Arizona, located in a subdivision managed by the Sedona Casa Contenta Homeowners Association, Inc. (“Casa Contenta”). [AR 7, p. 3] The community is governed by the Amended and Restated Declaration of Covenants, Conditions, and Restrictions (“CC&R's”). [AR 23] A separate forty-eight page document, entitled the Design Guidelines and Construction Regulations (“Design Guidelines”), was adopted in October 2004. [AR 21; AR 24] The Design Guidelines are incorporated in Casa Contenta's CC&R's. [AR 23, Art. IV, 2, ¶ 4]

How the community designs, landscapes, and improves common area is somewhat unique in Casa Contenta. The majority of the land in the subdivision is common area, owned by all residents. [IR 23 at p. 175] Each owner may build their residence on the “building envelope,” up to the “building line.” [IR 23 at p. 175] This means the common area literally comes to the

homeowner's property line, so that there is common area between the home site and street, on the sides, and in the rear. [IR 23 at pp. 175-176] The "property owner is responsible for paying for the landscape or their share of the common area," [IR 23 at p. 55, ll 5-9] while the homeowner's association is responsible for maintaining the common areas. [IR 23 at pp. 176-177]

***3** Before beginning construction, the property owner's architect must meet with the Design Review Committee, as suggested in the Design Guidelines. [IR 23 at pp. 178, 206-209; AR 21 at p. 3, ¶ 2] The Design Guidelines provide:

In contrast to the usual methods of residential development, in which concern for the natural environment is subordinated to the desire to develop as efficiently and economically as possible, the *Design Review Committee has chosen to approach its planning from a more sensitive viewpoint. At Casa Contenta, emphasis will be given to development that is planned to harmonize, blend and complement, rather than dominate, the natural environment.*

The philosophy of Casa Contenta is the *sensitive integration* of the lifestyle of residents *to the natural environment*. Its goal is the subtle blending of people, structures and the built environment into a *harmonious and aesthetically pleasing community with emphasis on the preservation of major portions of the natural environment* as a unifying visual effect throughout Casa Contenta.

To ensure the preservation of the *natural landscape* for the enjoyment of all residents of Casa Contenta, the concept of a maximum allowable building area, called the "Building Pad" has been developed. All improvements must be designed to be within the Building Pad, including the residence, accessory buildings, outside patios and terraces, swimming pools, if permitted by the Design Guidelines, and any other improvements or structures. Only indigenous or approved non-indigenous plants may be planted within the Building Pad unless otherwise approved by the Design Review Committee. *Outside of the Building Pad, the natural landscape must be left undisturbed.*

...

These Design Guidelines have been written to communicate this philosophy of developing with sensitivity the *preservation* and *maintenance* of the *environment*. These are qualitative standards of design, justified in part by the *climate, terrain, and the fragile *4 environment* of the Building Envelope. They provide direction in the planning, design and construction of residential structures to ensure compatibility with that environment....

Each Building Envelope within Casa Contenta is considered unique in terms of its natural opportunities and constraints. In order to take full advantage of those attributes, each area and condition may require different approaches to design and construction. It is the *intent of the development philosophy*, the residential architectural standard, and the design restrictions set forth in these Design Guidelines *to preserve, protect, and enhance the special environment of Casa Contenta.*

It is expected that the design of each Dwelling Unit in Casa Contenta *will be tailored to the unique features* of each individual Building envelope in an *effort to achieve a synthesis of nature* and Dwelling Unit.

To preserve the natural features of each Building Envelope, such as views, significant existing plant materials and washes, *each Dwelling Unit will need to be individually sited to minimize disruption of the existing environment.*

The purpose of the Design Review Committee is to evaluate each proposed design for appropriateness to its Building Envelope and compliance with the objectives of the Design Guidelines. The Committee may determine that what was found acceptable in one situation may not be acceptable in another. The goal is for the *appearance and character* of all residences and *improvements to harmonize with, and enhance, their natural and improved surrounding*, rather than to dominate and/or contrast sharply with them.

...

[AR21 at pp. 5-6]

The Casa Contenta Design Review Committee and landscaping committee approved Ms. Gelb's plan in June 2006. [IR 23 at pp. 54, 58, 78, 200, 206-207; AR *5 20(B), (C), (D), (E)] Ms. Gelb constructed a 2.1 million dollar home on the property and installed the landscaping on the common area, as the Association required. [IR 23 at pp. 55, 126, 152-153] Ms. Gelb primarily lives in the home during the winters and returns to Wisconsin during the summer. [IR 23 at pp. 148-149]

In December 2006, after the Design Review Committee had approved Ms. Gelb's landscaping, the Association's Board of Directors determined it wanted non-indigenous crushed gravel placed in front of and around Ms. Gelb's home. [IR 23 at pp. 96-97, 143] Casa Contenta waited until Ms. Gelb had left the property for the summer, and then brought a dump truck and installed red crushed gravel in front of her home in 2007 without Ms. Gelb's approval. [IR 23 at pp. 136-137, 161]

Ms. Gelb filed a Petition in March 2008, seeking relief from the Association's unauthorized installation of unnatural crushed gravel in front of her residence. [Petition, App. 1]² Ms. Gelb cited Article XII, § 3 of the CC&R's, *6 Restatement sections, equitable estoppel, and [A.R.S. §§10-3830, 10-3842](#) in her Petition. [App. 1] After Casa Contenta responded, [App. 2] the Department of Fire, Building, and Life Safety set a hearing for June 10, 2008. [AR 2]

Shortly before the hearing, Casa Contenta began mass-installing crushed granite in the common areas, so as to hide their discriminatory practice. The association installed crushed rock in front of an eight-year old home within a couple weeks before the hearing. [IR 23 at p. 187; AR 26 5(B)] A witness at the hearing testified that “28 tons [of crushed gravel] has come in . . . within the last couple of weeks. And another ten [tons]” came on June 11, 2008. [IR 23 at p. 204]

In her pre-hearing brief, Gelb raised four arguments: 1) that she “detrimentally relied on [Casa Contenta's] approval of her landscaping;” 2) that Casa Contenta had unfairly discriminated against her in violation of Article XII, § 3 of the CC&R's; 3) that Casa Contenta exceeded its authority under the Design Guidelines; and that 4) that the installation of the gravel violated the Design Guidelines. [AR 6, pp. 4-7]

At the hearing held on June 10, 2008, the administrative law judge determined that the scope of the hearing would be limited to a violation of Art. 12, *7 § 3 of the CC&R's. [IR 23 at p. 25] Despite the presentation of evidence on the issue at the hearing, the administrative agency held in his final ruling:

Petitioner also implied that Respondent exceeded its authority under the Site Development landscape maintenance provisions of the Design Guidelines when it applied the crushed rock. **However, no violation of any governing documents was alleged in the petition other than Article XII, Section 3, the anti-discrimination clause, and as such, this tribunal does not decide claims that were not alleged in the petition.**

[AR 29, p. 6 fn. 1]

Gelb submitted a Complaint to the Yavapai Superior Court seeking judicial review of the agency's ruling. Since that ruling, a Maricopa Superior Court has enjoined the Department of Fire, Building & Life Safety from taking any further action. [See case attached to IR 24] After holding oral argument, the superior court affirmed the agency's decision. Because the superior court applied the incorrect standard of review, Ms. Gelb sought appellate review with this Court.

***8 Questions Presented**

I. Whether the Administrative Agency committed legal error by refusing to address an issue it had ample opportunity to review, was tried by consent, and related to whether the homeowner's association treated Appellant unfairly.

II. Whether the Administrative Agency erred as a matter of law by refusing to consider Restatement sections 6.13 and 6.14 as the appropriate standard for determining if a homeowners' association has treated its owners unfairly.

III. Whether the trial court erred in finding the installation of unnatural crushed gravel, unevenly distributed throughout the subdivision, constitutes substantial evidence.

Summary of the Argument

Appellant Ms. Gelb had a dispute with her Homeowners' Association and sought relief in the administrative agency, the Department of Fire, Building, and Life Safety. Not only did the agency fail to provide relief, but it refused to consider her legal arguments within its statutory authority. First, the agency erroneously determined it would not consider whether Casa Contenta violated its own Design Guidelines when it installed non-indigenous gravel in the common area surrounding Ms. Gelb's home even though she timely raised the argument, the issue was tried by consent, and the Design Guidelines were an integral part of determining whether Casa Contenta had treated her unfairly. Second, the administrative agency committed legal error by refusing to consider sections 6.13 and 6.14 of the Restatement (3d) Property: Servitudes as the proper standard of ***9** review for Ms. Gelb's claims. Third, Casa Contenta treated Ms. Gelb unfairly by installing unnatural crushed gravel in front of her home when it was not evenly required throughout the neighborhood. These legal errors are an abuse of discretion, warranting reversal.

In its review of the proceedings below, the superior court erroneously found "substantial evidence" existed supporting the agency's decision. The superior court's ruling, however, failed to address Ms. Gelb's "legal error" arguments and whether the agency's decision was "contrary to law." Ms. Gelb respectfully requests this Court modify the superior court's ruling and enter judgment in favor of Ms. Gelb, finding that Casa Contenta violated its CC&R's and order Casa Contenta to comply with its CC&R's. Alternatively, because there is an injunction in place preventing the Department of Fire, Building, and Life Safety from holding hearings in a separate matter, Ms. Gelb asks this Court to reverse and remand for a hearing in superior court, where Ms. Gelb may frilly present her legal arguments.

Standard of Review

Generally, this Court "shall affirm the agency action unless after reviewing the administrative record...the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion." [A.R.S. § 12-910\(E\)](#). "When reviewing a superior court's decision as to whether an administrative action was illegal, arbitrary, capricious or an abuse of ***10** discretion, [the appellate court] determine[s] whether the records supports the court's judgment." *Cactus Wren Partners v. Ariz. Dep't of Bldg. & Fire Safety*, 177 Ariz. 559, 564, 869 P.2d 1212, 1217 (App. 1993). When the appellate court reviews the administrative agency's legal interpretations and conclusions, it is "free to draw [it]s own legal conclusions and determine whether the agency erred in its interpretation of the law." *Eshelman v. Blubaum*, 114 Ariz. 376, 378, 560 P.2d 1283, 1285 (App. 1977).

Argument

I. This Court Should Reverse Because Both the Administrative Agency and Superior Court Abused Their Discretion By Failing to Consider Appellant's Legal Arguments.

Both the administrative agency and the superior court abused their discretion by failing to consider legal arguments which were timely raised and tried by consent. A court abuses its discretion by committing an error of law. *State v. Rubiano*, 214 Ariz. 184, ¶ 5, 185, 150 P.3d 271, 272 (App. 2007) ("An abuse of discretion includes an error of law."). Here, the administrative agency committed legal error by refusing to address an issue timely raised, which it had ample opportunity to address. *Airfreight Express Ltd. v. Evergreen Air Center, Inc.*, 215 Ariz. 103, 109, 158 P.3d 232, 238 (App. 2007).

Similarly, the superior court erred by failing to consider whether the agency's refusal was arbitrary, capricious, contrary to law or an abuse of discretion. *11 [See IR 36] Rather than determine whether the agency's decision was arbitrary, the superior court simply found “substantial evidence” supported the decision. [IR 36, p. 2] Because the superior court did not apply the correct standard, this Court must review the decision to determine whether Casa Contenta violated the CC&R's.

A. The Administrative Agency Had Authority To Consider Appellant's Arguments and Committed Legal Error By Failing To Do So

In its final ruling, the agency determined it would not decide whether Casa Contenta had exceeded its authority under the Design Guidelines or violated the Design Guidelines because Ms. Gelb had failed to cite the “provision” in her Petition. [AR 29, p. 6 fn. 1; IR 23 at pp. 7, 16, 25-28] The agency committed legal error for three reasons. First, the agency has a statutory obligation to review planned community documents. Second, the Design Guidelines are incorporated in Casa Contenta's CC&R's and are an integral part of whether Casa Contenta unfairly discriminated against Ms. Gelb. Third, and most importantly, whether Casa Contenta evenly applied and how it interpreted the Design Guidelines was timely raised, tried by consent, and not waived prior to the hearing.

1. The Administrative Agency Had Statutory Authority to Determine A Violation of the Design Guidelines

The administrative agency possesses statutory authority to determine violations and ensure compliance with Casa Contenta's CC&R's. The *12 “administrative law judge *shall* adjudicate complaints regarding and ensure compliance with . . . Title 33, chapter 16 and planned community documents.” A.R.S. § 41-2198(3) (emphasis added). Moreover, the agency is statutorily obligated to conduct a “hearing concerning violations of the . . . planned community documents.” A.R.S. § 41-2198.01(B); see also A.R.S. § 41-2198.

“Community documents” are defined as “the declaration, bylaws, articles of incorporation, if any, and rules, if any.” A.R.S. § 33-1802(2). A “declaration” is defined as “any instruments, however denominated, that establish a planned community and any amendment to those instruments.” A.R.S. § 33-1802(3).

In Article IV, § 2 of the CC&R's, the “Casa Contenta Design Guidelines, [are] incorporated herein by reference.” [AR 23 at p. 20, Art. IV, § 2, ¶ 4] Similarly, the Design Guidelines provide “[t]he provisions of the Declaration of Covenants, Conditions and Restrictions for Casa Contenta (the “Declaration”), which is recorded in the Office of the Yavapai County Recorder, are incorporated herein by reference. ...” [AR 24 p. 4, Incorporations] The Design Review Committee is an integral process in ensuring each home complies with Casa Contenta's vision of its high-end community. [See AR 23 and 24 generally]

Therefore, under § 41-2198, the administrative agency had the authority to review and *ensure compliance with* the CC&R's, but more importantly, the Design *13 Guidelines. The agency's failure to hear Ms. Gelb's arguments deprived her of the ability to present her claim.

2. The Design Guidelines are an Integral Part in Determining Whether Casa Contenta applied its CC&R's discriminatorily

Ms. Gelb's primary claim in her Petition related to Casa Contenta's unequal treatment of homeowners in its decision to place non-indigenous crushed gravel in her front yard, in violation of Article XII, § 3. [Petition, App. 1; AR 23 at p. 44, Art. XII, § 3; AR 6, pp. 5-6] That provision states: “*Equal Treatment of Owners*. Except as otherwise expressly provided herein, these restrictions shall be applied to all Owners without discrimination.” [AR 23 at p. 44, Art. XII, § 3]

In order for the administrative agency to determine whether “*these restrictions*” had been applied unevenly to Ms. Gelb, [AR 24, Art. 12, § 3] it had to evaluate the “restrictions” that she alleged were discriminatorily applied. Ms. Gelb argued the restrictions

outlined in the Design Guidelines, which repeatedly emphasize leaving the “natural” terrain and harmonizing with the “natural environment,” [AR 24, p. 5, Intro to Objectives, ¶ 1] were unevenly applied throughout the neighborhood. [AR 6, pp. 9-10 (all residents not required to install same kind of crushed rock)] The Design Guidelines clearly state that “[*outside of the Building Pad, the natural landscape must be left undisturbed.*” [AR 24 p. 5, ¶ 3]

***14** Here, Casa Contenta discriminatorily disturbed the common area surrounding Ms. Gelb's home by placing non-indigenous gravel outside of her building pad. [IR 23 at pp. 231, 66-67, 100-101, 154] Additionally, Casa Contenta's distribution of the gravel was not uniformly applied throughout the neighborhood. [AR 6, pp. 5-6, 8-10; IR 23 at pp. 33-34, 165, 201-202] Some homes, like Ms. Gelb's, have a lot of gravel, while others have “less,” [IR 23 at p. 217] and Casa Contenta has placed three separate colors of rock in the common areas: gold, white, and red. [IR 23 at pp. 219-220]

Because the administrative agency refused to consider the “violation” of the Design Guidelines, it failed to adequately review Ms. Gelb's legal argument. The Design Guidelines is a forty-eight page document, incorporated, and mentioned in the CC&R's numerous times. [AR 24; AR 23 at pp. 12, 14, 16, 19, 20, 22, 23, 24, 37, 38] Whether Casa Contenta is abiding by its own standards, as exhaustively discussed in the Design Guidelines, is a necessary part of whether Casa Contenta violated the CC&R's.

3. The Administrative Agency Committed Legal Error By Failing to Address an Issue Timely Raised and Tried By Consent

Essentially, the agency erroneously determined Gelb had “waived” her claim. Ms. Gelb, however, sufficiently presented her argument and provided the administrative agency ample opportunity to address her claim. Moreover, the issue ***15** was tried by consent. The agency's failure to consider her claim was an error of law, and therefore, an abuse of discretion. See [A.R.S. § 12-910\(E\)](#); [Rubiano](#), 214 Ariz. 184, ¶ 5, 185, 150 P.3d at 272. The appellate court may make an independent determination on this issue and is not bound by the agency's conclusions on questions of law. [3613 Ltd v. Dep't of Liquor Licenses and Control](#), 194 Ariz. 178, ¶ 17, 182, 978 P.2d 1282, 1286 (App. 1999).

Under state law, a party must only “timely present [her] legal theories to the Agency so as to give the Agency an opportunity to rule properly.” [Airfreight Express Ltd.](#), 215 Ariz. at 109, 158 P.3d at 238. This is so the Agency has “the opportunity to address the issue on its merits.” *Id.* A party will not be deemed to have waived a claim unless she intentionally relinquished a known right. [Verma v. Stuhr](#), 223 Ariz. 114, ¶ 68, 221 P.3d 23, 36 (App. 2009). “Waiver of a right requires a clear showing of intent to waive that right.” [Servs. Holding Co. v. Transamerica Occidental Life Ins. Co.](#), 180 Ariz. 198, 206, 883 P.2d 435, 443 (App. 1994).

Ms. Gelb argued, introduced, and presented evidence of her argument without objection during the following:

1. In her “Memorandum of Points and Authorities” dated June 6, 2008; [AR 6, pp. 6-7]

2. In her opening statement; [IR 23 at pp. 32-33]

***16** 3. At the hearing, where both parties offered the Design Guidelines into evidence; [IR 23 at pp. 67-68, 71, 120, 70-71, 178, 181-182; AR 21; AR 24]

4. During Mr. Hadley's testimony about the Design Review Committee and approval process; [IR 23 at pp. 178, 181-182, 197, 207, 215, 217, 230-231] and

5. In her written closing argument. [AR 11 pp. 5-9]

Additionally, the administrative law judge permitted Ms. Gelb to present testimony relating to the Design Guidelines, and Casa Contenta did not object. [IR 23 at pp. 28] Specifically, the following exchange occurred:

Fritz Aspey: And, as I understand it, we're not allowed under your ruling, to go forward with the equitable estoppel argument, but we are allowed to present testimony regarding selective enforcement or disparate treatment and also whether or not the installation of the gravel violates the CC&R's.

Judge Wales: Exactly.

[IR 23 at p. 26, ll 3-11, p. 28] The administrative law judge even considered and quoted the Design Guidelines in his final ruling, [AR 29] but he failed to address whether the unequal application of unnatural gravel violated the Design Guidelines as raised in Ms. Gelb's briefings.

Based on the evidence presented at the hearing and the above arguments, Ms. Gelb cannot be said to have intentionally relinquished her right to the claim. *17 See *Verma*, 223 Ariz. 114, ¶ 68, 221 P.3d at 36. Moreover, “[w]hen evidence is presented at trial which presents a new o[r] different theory from that alleged in the pleadings, and the adverse party does not object to the introduction thereof, that issue is then tried by implied consent.” *Electrical Advertising, Inc. v. Sakato*, 94 Ariz. 68, 71, 381 P.2d 755, 756 (1963); see also Ariz. R. Civ. P. 15.

As discussed above, Ms. Gelb's primary argument of unequal treatment was directly related to the Design Guidelines. At the hearing, Casa Contenta agreed to admit the Design Guidelines and failed to object to Ms. Gelb's presentation of the evidence. Because the claim was timely presented and not intentionally waived, the administrative agency had an obligation to determine whether Casa Contenta had violated the Design Guidelines, as incorporated into its “community documents.” The agency's failure to consider her argument was legal error, requiring reversal.

B. Superior Court Failed to Address Whether Administrative Agency's Decision was Contrary to Law

The trial court applied the incorrect standard when reviewing whether the administrative agency considered Ms. Gelb's argument. As stated above, when reviewing a legal conclusion, the superior court is “free to draw [it]s own legal conclusions and determine whether the agency erred in its interpretation of the law.” *Eshelman*, 114 Ariz. at 378, 560 P.2d at 1285; see also A.R.S. § 12-910(E) *18 (“The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence ... the court concludes that the action is . . . contrary to law.”).

In its under advisement ruling, the superior court found “*there is substantial evidence* in the record to support the administrative agency's decision. Moreover, the Court finds that the Agency did not abuse its discretion in evaluating Ms. Gelb's legal arguments or considering and weigh[ing] the evidence presented at the hearing.” [IR 36, p. 2]

The superior court's conclusion, however, fails to address the essence of Gelb's claim--that the administrative agency's refusal to consider her Design Guidelines argument was contrary to the law. [IR 21 at pp. 18-22] Only one of Ms. Gelb's arguments raised in her appeal to the superior court related to a lack of substantial evidence as to the agency's findings. [IR 21 at pp. 26-29]

Ms. Gelb's first argument, and most prominent argument in her brief, was that the “agency abused its discretion by refusing to consider a timely submitted legal argument.” [IR 21 at p. 18] In this argument, Ms. Gelb asserted the agency erred as a matter of law by ignoring one of her legal claims against Casa Contenta, which was timely and adequately presented in the lower proceedings. [IR 21 at 21-22] Gelb reiterated this position during oral argument, claiming the agency's *19 decision to ignore her violation of the Design Guidelines was “contrary to law” and an “error as a matter of law.” [IR 35, TR. July 20, 2009, p. 7]

Despite the presentation of these arguments to the superior court, the court failed to rule on whether the agency's decision was contrary to law. Therefore, the superior court erred as matter of law, and this Court may substitute its judgment for the superior court. See *Sevilla v. Sweat*, 9 Ariz. App. 183, 185, 450 P.2d 424, 426 (1969); see also *Coplan v. Ariz. State Bd. of Appraisal*,

222 Ariz. 599, ¶ 9, 218 P.3d 1056, 1058 (App. 2009) (when superior court applies improper standard, appellate court proceeds with independent review of agency's action).

The superior court also erred by failing to reverse and modify the agency decision and enter Judgment in Ms. Gelb's favor based on the agency's refusal to consider her legal arguments. [See IR 41, p. 5] Under A.R.S. § 12-911(B), a technical error or an agency's failure to “observe technical rules of evidence shall not constitute grounds for reversal of the decision, unless it appears to the trial court that *the error or failure affected the rights of a party and resulted in injustice to [her]*.” A.R.S. § 12-911(B). Even in an administrative hearing, “[a] claimant is entitled to fundamental procedural protections.” *Stoffel v. Ariz. Dep't of Econ Sec.*, 162 Ariz. 449, 451, 784 P.2d 275, 277 (App. 1989). Here, the administrative agency deprived Ms. Gelb of her right to present her claims and deprived her of *20 fundamental protection, resulting in an injustice. The superior court's ruling to the contrary is erroneous.

II. The Administrative Agency Erred as a Matter of Law By Failing To Consider the Restatement Sections Cited as the Appropriate Standard of Review

The administrative agency also erred as a matter of law in failing to apply the Restatement sections cited in Ms. Gelb's Petition when evaluating whether Casa Contenta had acted reasonably. Ms. Gelb cited Restatement (3d) Property: Servitudes (2000) §§ 6.13 & 6.14 in her Petition. [App. 1] At the beginning of the hearing, the administrative law judge informed the parties he would not hear any evidence related to the Restatements. [IR 23 at pp. 8, 26-27] He seemed to believe the Restatement was out of his jurisdiction because he could “not [] look at” them. [IR 23 at pp. 3-4; AR 29 p. 2, ¶ 5]

The Restatement provisions cited by Appellant, however, *provide the correct standard of review* for determining whether a homeowner's association has acted reasonably. The Restatement sections were not alleged as a separate “violation.” Thus, the administrative agency erred by refusing to apply the Restatement standards when considering whether Casa Contenta violated the CC&R's.

Section 6.13 requires an HOA “to treat members fairly” and “to act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design-control powers.” Restatement (3d) Property: Servitudes *21 (2000) § 6.13. The word “including” indicates that “rulemaking, enforcement and design-control” are not the only “powers” the Association has a duty to act reasonably in exercising. Likewise, section 6.14 requires directors of HOAs to “act in good faith, to act in compliance with the law and the governing documents, to deal fairly with the association and its members.” Restatement (3d) Property: Servitudes (2000) §6.14.

Generally, Arizona follows the Restatement in the absence of controlling authority. *Gau v. Smitty's Super Valu, Inc.*, 183 Ariz. 107, 110, 901 P.2d 455, 458 (App. 1995). Further, Arizona has specifically adopted section 6.13 of the Restatement (3d) of Property: Servitudes. See *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007).

Ms. Gelb argued that Casa Contenta violated Article XII, § 3 of the CC&Rs. [App. 1] Article XII, § 3 states “[e]xcept as otherwise expressly provided herein, these restrictions shall be applied to all Owners without discrimination.” [AR. 23 at Art. XII, § 3] The CC&Rs give no other guidance or standard as to what constitutes “discrimination.” However, Arizona courts have determined that section 6.13 of the Restatement was “the appropriate *standard* to apply” in deciding whether an HOA's conduct was appropriate. *Tierra Ranchos*, 216 Ariz. at 201, 165 P.3d at 179 (emphasis added).

*22 In this case, Ms. Gelb attempted to argue, before the agency rejected her argument out of hand, that §§ 6.13 and 6.14 of the Restatement provided the objective *standard* the agency should use to determine if the HOA “discriminated” against her. The administrative agency refused to use this standard, believing it only had authority to “ensure compliance” with the community documents. A.R.S. § 41-2198(3). However, the Agency interpreted A.R.S. § 41-2198 in an unduly narrow fashion.

The agency *cannot* properly “ensure compliance” with the community documents without using the “appropriate standard” in making that determination. Arizona courts have stated that § 6.13 of the Restatement is that standard. *Tierra Ranchos*, 216 Ariz. at 201, 165 P.3d at 179. The agency erred by failing to consider § 6.13 in determining whether the HOA violated Article XII, § 3 of the CC&Rs. Therefore, this Court should reverse the superior court's upholding of that erroneous ruling.

III. The Superior Court Erred in Finding Substantial Evidence Supported the Administrative Agency's Decision

The superior court erred by concluding “substantial evidence” supported the administrative agency's decision when there was un rebutted evidence that Casa Contenta had arbitrarily and capriciously discriminated against Ms. Gelb. [IR 36 p. 2] The evidence at the administrative hearing established that Casa Contenta *23 had unfairly discriminated against Ms. Gelb. For example, the following testimony was presented:

1. Mr. Hadley agreed that “there's no specific language that says you shall, as a homeowner, install crushed rock.” [IR 23 at p. 217, 11. 19-21]
2. Mr. Hadley testified that the HOA began to install crushed granite as a ground cover because it was the “thing” of its first landscape installer. [IR 23 at p. 204-205]
3. Crushed red rock is “not a very natural surfacing,” and that crushed granite was “[n]ot naturally occurring, obviously...” and that crushed rock “was not indigenous to the site.” [IR 23 at pp. 66, 231]
4. Mr. Hadley testified that “[e]very lot has some [gravel]...*Some more, some less*” [IR 23 at p. 217] and that “[i]t depends on the situation.” [IR 23 at p. 202]
5. Ms. Gelb testified the gravel was scattered throughout the community inconsistently. [IR 23 at p. 165]
6. When asked where in the CC&Rs direction is given “as to where on the lot the crushed rock is to be installed, Mr. Hadley testified “[t]here isn't. It's an aesthetic decision by the Committee.” [IR 23 at pp. 220-221, *see also* pp. 201-202]
- *24 7. Mike Bower, Ms. Gelb's architect, testified he saw “several” homes that “[did] not have crushed gravel” around their common area on June 3, 2008, the week before the hearing. [IR 23 at pp. 84-85]
8. Mr. Bower testified that the common area around the home depicted in Exhibit I-3 had “a little bit of edge gravel right near the curbing of the road and then the rest of the property is dirt... in terms of ground cover.” [IR 23 at p. 88]
9. Likewise, Mr. Bower testified that the common area depicted in Exhibit I-4 shows “raw and natural earth again.” [IR 23 at p. 88]
10. According to Mr. Bower, the common area in Exhibit 5 showed “bare earthen ground without gravel.” [IR 23 at p. 89]
11. Exhibits I-6, I-7, I-8, I-9, I-10, I-11, I-12, and I-13 all depict common area surrounding various homes that is “raw open ground”, “barren ground”, “bare ground”, “natural dirt”, and “without gravel”. [IR 23 at pp. 90-93]
12. Mr. Bower also testified that “in addition to several homes not having any gravel there was some other Common Area[] that [was] strictly under the purview of the Association itself that did not receive a gravel treatment.” [IR 23 at pp. 85-86]

*25 Here, the testimonial evidence from both parties established the crushed gravel had been unevenly distributed throughout the community. [IR 23 at pp. 165, 201-202, 217] Based on the strict standards outlined in the CC&R's and the Design Guidelines, which continuously emphasize the importance of the “natural” landscape and harmonizing the homes with the environment, [IR

24 at pp. 5-6, 24] Casa Contenta discriminated against Ms. Gelb by installing crushed gravel around a majority of her residence. Casa Contenta waited until the summer when Ms. Gelb was in Wisconsin to install the crushed gravel in the “common area,” which went right up to her garden wall. [IR 23 at pp. 136-137, 161, 197] Then, in order to hide its discriminatory conduct, Casa Contenta installed 38 tons of gravel within a week before the hearing. [IR 23 at p. 204 (28 tons a week ago, plus 10 coming day after hearing)]

Although Casa Contenta believes it had the “sole discretion” to “maintain” the common areas, [AR 23, Art. V, § 1] it also has an obligation to act reasonably and comply with its own standards. [AR 23, Art. II, § 4, p. 15] Additionally, the CC&R's require the Association to limit the landscaping “to the *original landscaping* installed by [Homeowner] and/or its predecessors during original construction, and such *natural landscaping* as the Design Review Committee shall in its sole discretion determine should be maintained.” [AR 23, Art. VI, § 4, p. 28] The non-indigenous gravel, spread out unevenly throughout the *26 neighborhood, violates those standards. Therefore, the superior court erred by finding substantial evidence supported the agency's decision, and the superior court's ruling should be reversed.

Conclusion

Ms. Gelb has been denied an opportunity to challenge Casa Contenta's interpretation and application of its Design Guidelines. The administrative agency's refusal to consider her properly and timely raised arguments was contrary to its legal authority. Thus, its refusal to consider her legal arguments was an error of law. Additionally, the administrative agency erred by refusing to consider the Restatement sections as the proper standard of review. The agency's error, and the superior court's improper affirming of this error, should be reversed.

Pursuant to [A.R.S. § 12-910\(E\)](#), Ms. Gelb respectfully requests this Court modify the superior court's ruling and enter judgment in favor of Ms. Gelb, finding Casa Contenta's actions violated its CC&R's and that Casa Contenta be ordered to comply with the CC&R's. Alternatively, because there is an injunction in place preventing the Department of Fire, Building, and Life Safety from taking any further action, Ms. Gelb asks this Court to reverse and remand for a hearing in superior court, where Ms. Gelb may properly and fully present her legal arguments.

Appendix not available.

Footnotes

- 1 Hereinafter “IR” stands for the Amended Index of Record filed with this Court on December 17, 2009 and February 11, 2010. Within that record, IR 50 is the certification of the Administrative Record. Hereinafter, Appellant will refer to the record cites in the Index of Record on Review as certified by the Office of Administrative hearings as “AR ____.” [See IR 12 (struck from record) and IR 50]
- 2 When the Office of Administrative Agency certified the administrative record on review, it appears the agency failed to number and include the original Petition and Response. Both the Petition and Response were considered by the administrative law judge and should have been included as part of the agency record. This Court ordered the superior court “to obtain the administrative record for this case from the Department of Fire, Building, and Life Safety,” which should have included the Petition and Response. To the extent these documents are not included in the record, Appellant requests the agency be ordered to fully comply with this Court's order and that the record be supplemented. For this Court's ease, Appellant has attached a copy of the Petition and Response to her brief. [See Appendix 1 and 2]