

2010 WL 2173440 (Ariz.App. Div. 1) (Appellate Brief)

Court of Appeals of Arizona, Division 1.

Christine GELB, a single woman, Plaintiff/Appellant,

v.

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

No. 1 CA-CV 09-0744.

April 26, 2010.

Yavapai County Superior Court, Case No. CV820080197

Appellees Answering Brief

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*1 STATEMENT OF THE CASE

This case originated as a petition filed by Appellant Christine Gelb (Appellant) with the Department of Fire, Building and Life Safety (DFBLS) pursuant to [A.R.S. § 41-2198.01 et seq.](#) as amended by Laws 2006, Ch. 324 §6 (Administrative Hearing Act). The DFBLS, which had no statutory authority to regulate community associations, sent the petition and Appellee's Sedona Casa Contenta Homeowners Association (Association or Appellee) response to the Office of Administrative Hearings (OAH) so that it could schedule an administrative hearing before one of OAH's administrative law judges to resolve this dispute between two private parties. No state agency took any action of any kind other than the DFBLS's perfunctory transfer of the "pleadings" to the OAH.

The administrative hearing was conducted on June 10, 2008, and a final ruling was issued on June 30, 2008. Pursuant to [A.R.S. § 12-901 et seq.](#), the Appellant filed a complaint for judicial review of the administrative decision on August 8, 2008.

Concurrently, another association challenged the constitutionality of the Administrative Hearing Act in Maricopa County case LC2008-000740 (Phoenix Townhouse Homeowners Association v. Arizona Office of Administrative Hearings, et. al.). On February 26, 2009, the Superior Court in Maricopa County declared that The Administrative Hearing Act violated the separation of powers *2 clause of the Arizona Constitution. The Court issued an order enjoining the DFBLS and OAH from taking any further action in any pending administrative cases and from accepting any new petitions related to disputes between homeowners and their community associations. [IR 24, Exhibit A]. Neither the Arizona Attorney General nor any other party served, including the President of the Senate and Speaker of the House, challenged that court ruling. The DFBLS and OAH complied with the order and ceased all actions related to previously filed complaints and stopped taking any further cases.

As a result of the declaratory and injunctiverelief issued by the Superior Court in Maricopa County, the Appellee moved to dismiss the present case with the Superior Court in Yavapai County. [IR 24]. Judge Bluff denied that motion without explanation on May 5, 2009. [IR 31]. While Appellant did not file a cross-appeal on this issue, it should be procedurally dispositive of this case as the underlying administrative decision at issue is the result of an unconstitutional hearing process that is void. Similarly, any ruling on the merits of this appeal would perpetuate this unconstitutional process, and would also be void. The Appellee

is serving this brief on the Arizona Attorney General, the President of the Senate, and the Speaker of the House, in accordance with [A.R.S. § 12-1841\(A\)](#), to provide them with the opportunity to intervene once again on this issue if they so choose.

***3 STATEMENT OF FACTS**

In the simplest terms, this case involves a dispute between a homeowner and her homeowners' association over the landscaping improvements on real property owned by the Association. The Association owns all of the real property surrounding the homeowner's house, which is constructed on a building envelope. The Association owns the "yard" surrounding the building envelope. The Association placed crushed rock on the ground in front of Appellant's home where it had been disturbed during construction. Similar rock has been placed in front of houses and along streets throughout the community.

The Association's CC&Rs at Article II, Section 1 provide:

The Association, through its Board, officers and committees, shall take the appropriate action to ***manage, maintain, repair, replace and improve the Common Areas and Transitional Areas***, together with all Improvements located thereon (except as otherwise provided herein), to perform related activities, and to perform all other functions and duties assigned to the Association by this Declaration, by the Articles or Bylaws, or properly delegated to it by its Members.[AR 23, p. 14]

The CC&Rs at Article V, Section 1 provide:

The Association, or its duly delegated representative shall... ***maintain and otherwise manage all Common Areas and Transitional Areas...and do all such other and further acts which the Board deems necessary to maintain and preserve the Common Areas and Transitional Areas***, and the beauty thereof, in accordance with the general purposes specified in this Declaration...***The Board shall be the sole judge*** as to the appropriate landscape maintenance of all Common Areas... [AR 23, p. 25]

***4** As these CC&R provisions show, the Association is required to maintain, manage and preserve both the common area and the transitional areas around Appellant's home. The Association installed and paid for the crushed red rock in the common and transitional areas around the Appellant's home. [IR 23, p. 161, ln. 7-10]. The Association has installed crushed rock in varying quantities around many other homes in the community. The Appellant's own testimony at the administrative hearing was that there were maybe five or six homes that did not have rock installed around them. [IR 23,p. 165, ln.20-22]. On the other hand, an Association witness testified that there was rock installed to some degree around each lot in the community. [IR 23, p. 205, ln, 5-9]. There are about 100 homes in the community. [AR 25]. Crushed rock has been part of the common area landscaping since the community began development. [IR 23, p. 204, ln. 7-25].

The Association only approved Appellant's *preliminary* landscaping plans. The Association's Design Guidelines and Construction Regulations make it very clear that final approval of landscaping and irrigation occurs only after completion of the installation and the Association may, "if appropriate, give final approval at that time." [AR 24, p. 8]. The Association inspected Appellant's landscaping after they were notified of the completion as required by the Design Guidelines, but they were not satisfied. [IR 23, p. 209, ln. 1-13]. Among the ***5** problems with the installed landscaping was that the ground still showed tire ruts from the disturbance during construction and "looked raw." *Id.* The Association never provided the Appellant with final approval of the landscaping. [IR 23, p. 210, ln. 17-20]. The Association discussed with the Appellant various modifications to the landscaping to address the Association's concerns about the perceived shortcomings of the installed landscaping. [IR 23, p. 210, ln.4-11]. The Appellant never agreed to any of the alternative proposals, and the Association eventually installed crushed rock on the common area that it owns around Appellant's home. [IR 23, p. 137, ln. 58].

***6 LEGAL ARGUMENTS**

I. THE TRIAL COURT DID NOT HAVE AUTHORITY TO REVIEW AN ADMINISTRATIVE RULING WHEN THAT ADMINISTRATIVE PROCESS HAD BEEN DECLARED UNCONSTITUTIONAL

A. Standard of Review

When reviewing a superior court's decision pursuant to [A.R.S. §12-913](#), the Court reaches the underlying question of whether the administrative action was illegal, arbitrary, capricious or an abuse of discretion. *Siler v. Arizona Dept. of Real Estate*, 193 Ariz. 374, 378, 972 P.2d 1010, 1014 (App. 1998). Issues involving constitutional interpretations, claims or challenges are questions of law subject to *de novo* review. *Graville v. Dodge*, 195 Ariz. 119, 123, ¶ 17, 985 P.2d 214, 216 (App. 1999).

B. Analysis

The underlying administrative hearing process has been declared unconstitutional and the OAH and DFBLs have been enjoined from taking any further action on complaints involving condominium or planned communities. [IR 24, Exhibit A]. Despite this jurisdictional obstacle, the reviewing Superior Court judge in Yavapai County denied Appellee's motion to dismiss based on these grounds. [IR 31]. The Appellee has preserved its right to this defense, and *7 the Court of Appeals has jurisdiction to hear this question of law.¹ The legal arguments presented to the Superior Court in Maricopa County are restated here in support of Appellee's assertion that the instant case is moot and the underlying administrative ruling is void and of no effect.

The separation of powers between the judicial, executive and legislative branches is a fundamental principle of both our federal and state governments. In Arizona, the separation of powers principle is found in [Article III of the Arizona Constitution](#): The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

However, this separation of powers is not absolute. The powers of different branches may be “blended” under certain limited circumstances. In order for the legislature to “blend” the judicial function into an administrative agency of the executive branch, the authority of the agency to adjudicate claims between private *8 parties must be “auxiliary to and dependent upon the proper exercise of legitimate regulatory power.” *J.W. Hancock Enterprises, Inc. v. Arizona State Registrar of Contractors*, 142 Ariz. 400, 405, 690 P.2d 119, 124 (App. 1984).

In approaching the review of this Constitutional challenge, it is worth recalling the Arizona Supreme Court's commentary on the judiciary's special role in separation of powers cases:

Constitutional mandates are not lightly to be disregarded by any of the departments of the government, and particularly not by that one [the judiciary] which has always been considered in our system as peculiarly the guardian of the Constitution.

Udall v. Severn, 52 Ariz. 65, 71, 79 P.2d 347, 349 (1938)

The administrative adjudication of community association cases by the DFBLs is an impermissible delegation of judicial authority to the executive branch. An “administrative agency may resolve disputes between private parties **if this authority is auxiliary to and dependent upon the proper exercise of legitimate regulatory power.**” *Cactus Wren Partners v. Arizona Dep't of Building and Fire Safety*, 177 Ariz. 559, 564, 869 P.2d 1212, 1217 (App. 1993), citing *J.W. Hancock Enterprises, Inc. v. Arizona State Registrar of Contractors*, 142 Ariz. 400, 405, 690 P.2d 119, 124 (App. 1984) (emphasis supplied); See also *Severn*, *supra*, at 77, 79 P.2d at 352.

The DFBLS has absolutely no regulatory authority over community *9 associations. The *Cactus Wren* case involved a constitutional challenge to the DFBLS's authority to adjudicate disputes between private parties, which is similar to the case at hand. However, *Cactus Wren* involved a dispute between a mobile home park owner and tenants of the park regarding administrative fees and trash charges the owner assessed to the tenants. In *Cactus Wren*, the DFBLS, after an evidentiary hearing, ordered the owner to reimburse certain charges and fees to the tenants. The owner of the park appealed to the Superior Court claiming that the DFBLS could not order restitutionary damages. The owner also claimed that the DFBLS did not regulate mobile home parks because it neither licensed them nor otherwise regulated them.*Id.* at 561.

The legislature's creation of the administrative hearing process for community associations does not pass the threshold test established by the Court in *Severn* and restated in *Cactus Wren*. No regulatory scheme exists for community associations and therefore the DFBLS has no legitimate regulatory authority upon which to claim a right to conduct adjudications between private parties. The DFBLS was established to:

further the public interest of safety and welfare by maintaining and enforcing standards of quality and safety for manufactured homes, mobile homes and factory-built buildings and by reducing hazards to life and property through the maintenance and enforcement of the state fire code by providing fire training, fire investigations and public life safety education as provided for in this chapter. It is also *10 the purpose of the department to establish a procedure to protect the consumer of such products and services.

[A.R.S. § 41-2141\(A\)](#). There is absolutely nothing in the DFBLS's organic statute that deals with regulation of condominium or planned community associations. The legislature has never established a regulatory framework for community associations within the DFBLS or any other executive agency. There simply is no administrative agency that regulates community associations.

In *Cactus Wren*, the constitutional challenge failed because the DFBLS had legitimate regulatory authority over mobile home parks as evidenced by its mandate in [A.R.S. § 41-2141\(A\)](#). This mandate is the prerequisite authority upon which the DFBLS's administrative adjudication is auxiliary and dependent. Because the DFBLS has no mandate to regulate community associations, it has no constitutional authority to conduct adjudications between private parties in the community association context.

The prerequisite administrative regulatory authority cannot be met by the mere existence of a statute in an area of concern. For instance, the legislature cannot create executive branch adjudications for criminal violations merely because the legislature “regulates” crime by the creation of the criminal code. If “legitimate regulatory authority” meant the legislature's “regulation” of an area of law, then there would be no limit whatsoever on the legislature's authority to *11 divest the judiciary of authority to hear cases. It can only be that the “legitimate regulatory authority” referenced in *Cactus Wren* (and its predecessor cases) refers to the legislature's creation of an administrative agency to regulate specialized areas of law.

The DFBLS has constitutional authority to adjudicate complaints between private parties in the mobile home park context because the DFBLS was created to regulate this area of the law and not simply because the Mobile Home Park Landlord-Tenant Act was codified by the legislature in [A.R.S. §33-1401 et seq.](#) Similarly, the existence of the planned community and condominium statutes is not the “legitimate regulatory authority” anticipated and required by the courts. Unless and until the legislature creates an administrative agency that is empowered to regulate community associations, there will be no legitimate regulatory authority upon which to append the power to conduct administrative adjudications between private parties.

For these reasons, the administrative ruling being reviewed in this case is void and of no force or effect. It is the fruit of an unconstitutional process that has been declared unconstitutional by a competent court of record, and neither the executive nor legislative branches elected to challenge that decision. It is the law in Arizona, and the lower court judge in this case should have dismissed this matter for lack of jurisdiction or on ground that it has become moot.

*12 In any event, this Court should deny Appellant's appeal as it is clearly moot at this point. Any relief granted to the Appellant would subject the Association again to an unconstitutional process that could only produce a void result.

II. THE TRIAL COURT PROPERLY FOUND THAT THE OAH HAD AUTHORITY TO LIMIT THE SCOPE OF THE ISSUES PRESENTED AT THE ADMINISTRATIVE HEARING

A. Standard of Review

The Court of Appeals has the authority to review *de novo* whether an administrative agency has acted within its statutory jurisdiction. *Beazer Homes Arizona, Inc. v. Goldwater*, 196 Ariz. 98, 993 P.2d 1062 (App. 1999)

B. Analysis

In the event that the Court finds that it can reach the merits of this appeal, Appellant is nonetheless not entitled to any relief. Administrative agencies have no common law or inherent powers. *Ayala v. Hill*, 136 Ariz. 88, 664 P.2d 238 (App. 1983). Their powers and duties are limited to those specifically granted by statute. *Id.* The OAH's authority pursuant to its governing statute is only to determine whether there have been violations of the planned community documents or the planned community act. *A.R.S. § 41-2198.01(B)*. Considering common law causes of action or legal theories or violations of any other statutory provision outside of the planned community act is beyond the clearly designated *13 authority of the administrative tribunal.

The Appellant's administrative complaint alleged that the Association violated of Article XII, Section 3 of the Association's CC&Rs, Sections 6.13 and 6.14 of the Restatement of Servitudes, and *A.R.S. §§ 10-3830* and 3842. [See Appellant's Opening Brief, Appendix 1], The statute that allowed the filing of such an administrative complaint gave the DFBSL jurisdiction to hear cases "concerning violations of condominium documents or planned community documents or violations of the statutes that regulate condominiums or planned communities." *A.R.S. § 41-2198.01(B)*. The statutory right to a hearing is clearly limited. It did not include the right to make claims for violations of the Arizona Non-profit Corporation Act in Title 10 of the Arizona Revised Statutes or common law claims based upon the Restatement of Servitudes. As a result, the administrative law judge was correct to limit the scope of the hearing to the one cognizable claim made by the Appellant - that the Association had violated Article XII, Section 3 of the CC&Rs, which prohibited the Association from discriminating against the Appellant by applying the terms of the CC&Rs in a different manner. Further, the Superior Court was correct to affirm the administrative judge's decision in limiting the scope of the hearing.

The Appellant suggests that the additional claims were tried by consent. *14 This is patently false. The Appellee's response to the complaint filed with the DFBSL specifically objected to the claims made pursuant to the Restatement of Servitudes and the Non-profit Corporation Act. [Appellant's Opening Brief, Appendix 2, p. 2, ¶¶6 and 7]. Appellee never consented to the OAH hearing and deciding these claims. The administrative law judge made it clear at the outset of the hearing that he would not consider those claims. [IR 23, p.8, ln. 1220].

The Appellee admits that the Design Guidelines were admitted into evidence and that it did not object to the admission of them into evidence. This fact does not mean that other legal claims were tried by consent. The Design Guidelines are relevant to the consideration of whether Appellant was treated in a discriminatory manner. However, Appellant failed to allege that the Association violated any provision of the Design Guidelines in her complaint. The complaint merely states that the Association has "not required or placed gravel on all common areas in the subdivision." [Appellant's Opening Brief, Appendix 1]. There was no allegation in the complaint that the use of crushed rock was itself a violation of the Design Guidelines. Since there is no discovery or disclosure in the context of an administrative hearing, it would be prejudicial to compel the Association to have tried an issue of which it had no notice.

***15 III. THE TRIAL COURT DID NOT ERR IN FINDING
SUBSTANTIAL EVIDENCE TO SUPPORT THE ALJ'S DECISION**

A. Standard of Review

In reviewing factual determinations by an administrative agency, the court of appeals does not reweigh evidence or substitute its judgment for that of the agency. Instead, the Court of Appeals determines whether substantial evidence exists in the record to support the agency's factual findings. *Culpepper v. State*, 187 Ariz. 431, 437-38, 930 P.2d 508, 514-15 (App. 1996).

B. Analysis

The Appellant failed to present convincing evidence either in the opening brief, in the Superior Court, or in the administrative hearing that she was the only homeowner that had crushed rock placed on the common area around her home. The Association installed crushed rock in varying quantities around many other homes in the community throughout the years of its existence. Crushed rock has been part of the common area landscaping since the community began development. [IR 23, p. 204, ln. 7-25]. Appellant presented no evidence to rebut this fact. Also, the Appellant's own testimony at the administrative hearing was that there were only perhaps five or six homes in the entire community that did not have rock installed around them. [IR 23, p. 165, ln.20-22]. Another witness testified that there was rock installed to some degree around each lot in the *16 community. [IR 23, p. 205, ln. 5-9].

There simply is no factual basis for Appellant's position that she has been treated in a discriminatory manner by having crushed rock placed in the common area around her home. The rock was paid for by the Association and installed on the Association's common area. Similar rock exists throughout the community and has existed long before Appellant built her home there. As a result, there is substantial evidence upon which the administrative law judge and the Superior Court could rely in reaching their decisions that the Association did not violate Article XII, Section 3 of the CC&Rs.

To the extent that Appellant may be allowed to argue that the Association violated its own Design Guidelines by installing crushed rock on the common areas, there is no merit to this argument either. The Association's board of directors has the sole discretion to determine the appropriate landscape maintenance of the common areas. [AR 23, p. 25]. Nothing in the Design Guidelines prohibits crushed rock. [AR 24]. The Appellant quotes the introductory paragraphs of the Design Guidelines at length in her opening brief, but she cites to nothing that discusses whether or not crushed rock is allowed or prohibited. [Opening Brief, p. 3-4]. The Appellant relies on vague references to preserving the "natural" environment. While that point is in fact made in various ways in the prefatory comments to the Association's Design Guidelines, it relates *17 to a housing development of large and expensive homes in the red rock and high desert country in Sedona. The homes themselves are violations of the Design Guidelines under the Appellant's interpretation.

There is simply no evidence to support Appellant's claim that the Association violated its own CC&Rs and Design Guidelines by installing crushed rock on its property.

CONCLUSION

For the reasons stated above, the Appellee requests that the Court of Appeals find that the Administrative Hearing Act is unconstitutional as a violation of the separation of powers clause of the Arizona Constitution; confirm the order of the Superior Court in Maricopa County declaring *A.R.S. § 41-2198.01 et seq.* as amended by the Administrative Hearing Act to be unconstitutional as applied to community associations and enjoining the DFBLS and OAH from further action in such cases; and dismiss Appellant's case as a result of the unconstitutional basis of the decision that she is appealing. Alternatively, the Appellee requests that the Court of Appeals find that the Superior Court did not act arbitrarily or capriciously or abuse its discretion and that there was substantial evidence upon which the Superior Court and the OAH based their decisions.

Footnotes

- 1 Appellant argued below that the Association waived the argument by failing to raise it at the OAH level. This is contrary to the plain language of [A.R.S. §12-902\(B\)](#) and interpreting caselaw. See *DeGroot v. Ariz. Racing Comm'n*, 141 Ariz. 331, 340, 686 P.2d 1301, 1310 (App. 1984) (citations omitted). See also *Ariz. Dep't of Econ. Sec. v. Redlon*, 215 Ariz. 13, 16, ¶6, 156 P.3d 430, 433 (App. 2007).

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