

2010 WL 2356161 (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.

May 14, 2010.

Yavapai County Superior Court No. V1300CV820080197

Appellants' Reply Brief

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***1 Argument**

I. This Court Lacks Jurisdiction To Consider Appellee's Constitutional Argument and Should Refuse to Consider the Merits of the Claim.

Appellee, Sedona Casa Contenta Homeowner's Association, Inc., (“Casa Contenta”), is improperly raising its unconstitutional argument at this stage in the proceeding for two reasons. First, Appellee has failed to file a cross-appeal from the superior court's judgment. Second, Appellee waived this argument by failing to claim the statutory scheme was unconstitutional in the lower court proceeding.

Appellant, Ms. Gelb, respectfully requests this Court find it lacks jurisdiction to consider the constitutional argument. In the event this Court considers it, Ms. Gelb requests she be allowed to file a supplemental brief to properly address the merits of the claim pursuant to [Rule 13\(e\), Arizona Rules of Civil Appellate Procedure \(ARCAP\)](#).

A. Appellee's Failure to File a Cross-Appeal is Fatal to This Court's Ability to Consider the Claim Because Appellee Seeks to Enlarge its Substantive Rights.

[Rule 13\(b\)\(3\), ARCAP](#), permits an appellee to “include in the statement of issues presented for review and in the argument any issue properly presented in the superior court.” However, “[t]he appellate court may direct that the judgment be modified *to enlarge the rights of the appellee* or to lessen the rights of the appellant ***only if the appellee has cross-appealed seeking such relief.***” [ARCAP 13\(b\)\(3\)](#). *2 Where the Appellant seeks to enlarge its rights, the appellate court lacks jurisdiction to consider the arguments without a cross-appeal. See [Engel v. Landman](#), 221 Ariz. 504, ¶ 17, 212 P.3d 842, 848 (App. 2004).

For the first time in this proceeding, Appellee filed a “Notice of Claim of Unconstitutionality” with this Court and seeks to have this Court “find that the Administrative Hearing Act is unconstitutional as a violation of the separation of powers clause of the Arizona Constitution.” [Answering Brief, p. 17] Appellee, however, failed to file a cross-appeal in this case. [See IR 42-46] In its Answering Brief, Appellee cited no authority for its assertion that this Court may determine the issue without a cross-appeal. [Answering Brief, p. 2] To the contrary, the ARCAP rules and case law prohibit this Court from determining an argument that would expand Appellee's rights. See [Engel](#), 221 Ariz. 504, ¶ 17, 212 P.3d at 848.

Appellee's request for relief essentially seeks a declaratory judgment finding the administrative process wholly unconstitutional. [See Answering Brief, p. 17] Such a finding would expand Appellee's rights and lessen Appellant's rights by holding the entire process unconstitutional. This enlargement of Appellee's rights is not permitted by [Rule 13, ARCAP](#), and this Court should not consider its argument.

****3 B. Appellee Has Waived Its Constitutional Argument.***

Additionally, Appellee has waived this argument by not raising the merits of its constitutional claim in the lower court proceeding. When Appellee first raised this “argument” in the superior court, it did not seek a finding that the administrative process was unconstitutional. Rather, Appellee asked that the superior court “*dismiss this administrative review appeal* for the reason that the underlying administrative hearing process ***has been deemed unconstitutional.***” [IR 24, p. 1] The Appellee attempted to cite the superior court decision as precedential authority for why the superior court action should be dismissed. [IR 24, pp. 1-2] The superior court denied its request. [IR 27; IR 28]

Appellee mistakenly continues to rely on the Maricopa Superior Court decision which found the administrative review process unconstitutional. [IR 24, p. 2] As with the superior court, this appellate court is not bound by trial court decisions. See [State v. Jensen](#), 193 Ariz. 104, ¶ 25, 970 P.2d 937, 941 (App. 1998); [In re Molz](#), 127 Cal. App. 4th 836, 845 26 Cal. Rptr. 3d 131, 137 (Cal. App. 2005).

Moreover, Appellee's Motion to Dismiss failed to address the merits of whether [A.R.S. § 41-2198.01](#) violated the separation of powers. [IR 24] In fact, neither party addressed whether the administrative process violated the Arizona Constitution. [See generally IR 24; IR 27] Appellee waited until the filing of its *4 Answering Brief on appeal before asking for a “finding” that the Administrative Hearing Act is unconstitutional.

Appellee's current argument on appeal is different from the argument raised in its motion to dismiss. In superior court, Appellee sought a dismissal based on another trial court's decision. On appeal, Appellee seeks declaratory relief. Appellee never questioned the constitutionality at the administrative level. Thus, its request for a declaratory finding of unconstitutionality has been waived. See *Mohave Elec. Co-op, Inc. v. Byers*, 189 Ariz. 292, 301, 942 P.2d 451, 460 (App. 1997).

***C. If This Court Considers the Constitutionality of Appellee's
Argument. Appellant Requests the Ability to File a Supplemental Brief.***

In the event this Court decides to address whether [A.R.S. § 41-2198.01 et. seq.](#) is unconstitutional, Appellant requests the ability to file supplemental briefing. Under ARCAP, Appellant would be entitled to combine its Reply with its Answer to Appellee's cross-appeal and to additional time for drafting the Reply. See [ARCAP 13\(e\)](#), [14\(c\)](#), and [15\(e\)](#).

Additionally, [A.R.S. § 12-1841\(A\)](#) requires a party to serve a copy of the pleading, motion or document containing the allegation at the same time the other parties in the action are served and shall be entitled to be heard.” [A.R.S. § 12-1841\(A\)](#). For the first time in this proceeding, Appellee notified the proper parties *5 under [§ 12-1841\(A\)](#). If the state parties take advantage of their opportunity to be heard, Appellant will be deprived of the ability to address the constitutional argument on the merits or respond to any Amicus Curiae briefs. It would be unfair to declare the statute unconstitutional at this phase of the proceeding, particularly when this is the first time Appellee notified the state pursuant to [A.R.S. § 12-1841](#) or addressed the merits of the argument. Below, Appellee simply asked for a dismissal.

Therefore, Appellant requests this Court determine it lacks jurisdiction to consider the claim. Alternatively, if this Court reviews the merits of Appellee's argument, Appellant requests the opportunity to file supplemental briefing on the issue.

II. Administrative Agency Had Authority to Address the Issues Presented

In its Answering Brief, Appellee claims the administrative agency had no “common law or inherent powers” to consider Ms. Gelb's claims. [Answering Brief, p. 12] Specifically, Appellee contends the agency lacked the ability to hear “violations” based on the common law of the Restatement of Servitudes. [Answering Brief, p. 13] Appellee's brief fails, however, to address Ms. Gelb's argument.

Ms. Gelb did not cite the Restatement in her Petition for the purposes of proving a “violation” of the Restatement had occurred. Rather, Ms. Gelb cited the *6 Restatement provisions in support of her argument that Casa Contenta had discriminated against her by failing to evenly apply the community documents, which included the Design Guidelines by reference. In her Opening Brief, and in the superior court, Ms. Gelb reiterated that the Restatement of Servitudes provided the *proper standard of review* for evaluating whether a homeowner's association acted reasonably. [Opening Brief, p. 20; IR 21 pp. 23-26] See Restatement (3d) Property: Servitudes (2000) §§ 6.13, 6.14; see also *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 201, 165 R3d 173, 179 (App. 2007) (Restatement provides “the appropriate standard to apply”).

Whether Casa Contenta treated Ms. Gelb fairly, acted reasonably, and complied with the community documents was the basis of her petition. By finding that it could not “hear” the Restatement, the administrative agency did not simply “limit the scope” of the hearing by refusing to hear a “claim.” Rather, the agency refused to utilize the appropriate standard of review, as defined by Arizona law, which would determine whether Casa Contenta had fairly and reasonably complied with its community documents.

The agency's refusal to at least read and consider sections 6.13 and 6.14 as appropriate standards was an error of law and should have been reversed by the superior court.

****7 III. The Agency's Failure to Consider Appellant's Legal Arguments Was Error As A Matter of Law***

Appellee misconstrues Appellant's arguments related to the alleged "violation" of the Design Guidelines and completely fails to address how relevant the Design Guidelines were to whether Casa Contenta had unfairly discriminated against Ms. Gelb by not complying with its own standards. Both the administrative agency and the superior court erred by refusing to consider whether Casa Contenta had complied with the Design Guidelines when determining whether the association had treated Ms. Gelb unfairly.

As explained in her Opening Brief, the Design Guidelines were an integral part of Casa Contenta's CC&R's. In fact, it is undisputed the Design Guidelines were incorporated by reference into the CC&RS, which were Casa Contenta's planned community documents. [AR 23 at p. 20, Art. IV, § 2, ¶ 4] Under A.R.S. § 41.2198.01, the administrative agency possessed jurisdiction to consider whether the association had complied with its community documents.

Ms. Gelb asserted that Casa Contenta's uneven application of "restrictions" stemmed from the Design Guidelines. Casa Contenta's Design Guidelines repeatedly emphasize the importance of preserving the natural environment and harmonizing the development with the natural surroundings. [AR 24, p. 5, Intro to Objectives, ¶ 1; AR 24 p. 5, ¶ 3] Thus, whether the "gravel" was a natural part of *8 the landscape was pertinent to whether Casa Contenta had treated Ms. Gelb unfairly by waiting until she had left for the summer to install non-indigenous gravel directly adjacent to her home. The agency's failure to address this argument deprived Ms. Gelb of the ability to adequately present her claim.

In its Answering Brief, Appellee maintains Casa Contenta did not violate its CC&R's because "[n]othing in the Design Guidelines prohibits crushed rock" and the association has "sole discretion" to landscape the common areas." [Answering Brief p. 16] Casa Contenta's argument, however, highlights the importance of considering the Design Guidelines, which outline the "spirit" and "purpose" of the community. [See AR 21 pp. 5-6] The Design Guidelines repeatedly emphasize the importance of preserving the natural environment and the association's desire to be "unique" and sensitive to the surrounding area. [AR 21 p. 5, ¶ 1; see also pp. 5-6]

Thus, without a specific "prohibition" against crushed gravel, it was imperative for the administrative agency to consider the stated purpose of the community--as outlined by the Design Guidelines--when it considered whether Casa Contenta had treated Ms. Gelb unfairly. By failing to consider the Design Guideline "violation," the agency erred because it did not determine whether Casa Contenta had complied with its own standards--something A.R.S. § 41-2198.01 expressly permits it to do.

*9 Finally, the issue of whether Casa Contenta had fully complied with its own Design Guidelines, as incorporated in the community documents, was tried by consent. Appellee would not have been prejudiced because as it admits, the Design Guidelines were admitted into evidence without objection at the hearing. Additionally, both Casa Contenta and the administrative judge had ample time to address the merits of the claim. The evidence was presented, discussed, and evaluated at the hearing. Moreover, the parties filed written Closing Arguments, [AR 10; AR 11] giving Casa Contenta plenty of notice to address Ms. Gelb's argument. The administrative agency's absolute refusal to consider the Design Guidelines was an error of law.

IV. The Superior Court Erred by Finding Substantial Evidence Existed Supporting the Agency's Decision

Testimony at the hearing established that crushed granite was not a natural surface in Sedona and that it was non-ingenuous to the area. [IR 23 at pp. 66, 231] Several witnesses also testified that the gravel was spread unevenly and sporadically throughout the neighborhood. [IR 23 at pp. 84-85, 88, 220-221, 201- 202]

Casa Contenta is a unique neighborhood where the “common area” is adjacent to the owner's building pads. In Ms. Gelb's case, the gravel was installed up to the wall of her home. [IR 23 at pp. 136-137, 161, 197] As a homeowner, she *10 was required by the CC&R's to install the original landscaping. [AR 23, Art. VI, § 4, p. 28] Contrary to her installation, Casa Contenta re-did the landscaping by installing unnatural crushed gravel in and around her home. Casa Contenta did not take this action with all of the homes in the neighborhoods. [IR 23 at pp. 202, 217] By failing to be consistent with its distribution of the gravel and comply with the overall purpose of the Design Guidelines, Casa Contenta unfairly discriminated against Ms. Gelb. The superior court's finding to the contrary was error and should be reversed.

CONCLUSION

Ms. Gelb respectfully requests this Court modify the superior court's ruling or order the superior court to enter judgment in favor of Ms. Gelb, finding Casa Contenta violated its CC&R's and ordering it to comply with the CC&R's, including the Design Guidelines. Alternatively, due to the injunction in place preventing the Department of Fire, Building, and Life Safety from taking further action, Ms. Gelb requests this Court reverse and remand the action to the superior court for a hearing and other proceedings not inconsistent with this Court's decision.

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