

2010 WL 4086148 (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.

September 10, 2010.

Yavapai County Superior Court No. V1300CV820080197

**Appellants Supplemental Brief**

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**\*ii TABLE OF CONTENTS**

|                                                                                                                                                                  |    |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| I. <i>ARCAP 13(b)(3) Prevents Appellee From Raising this Issue Without Filing a Cross-Appeal</i> .....                                                           | 1  |
| II. <i>A.R.S. § 41-2198 is a Constitutional Delegation of Authority to An Administrative Agency and Does Not Violate the Separation of Powers Doctrine</i> ..... | 5  |
| III. <b>Conclusion</b> .....                                                                                                                                     | 10 |

**\*iii TABLE OF AUTHORITIES**

**Cases**

|                                                                                                                                            |                |
|--------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| <i>Adage Towing &amp; Recovery, Inc. v. City of Tucson</i> , 187 Ariz. 396, 930 P.2d 473 (App. 1996) .....                                 | 2, 3           |
| <i>Aztar Corp. v. U.S. Fire Insurance. Company.</i> , 223 Ariz. 463, 224 P.3d 960 (App. 2010) .....                                        | 4              |
| <i>Batty v. Ariz. State Dental Bd</i> , 57 Ariz. 239, 246, 112 P.2d 870, 873 (1941) .....                                                  | 6, 7           |
| <i>Cactus Wren Partners v. Ariz. Dep't of Building and Fire Safety</i> , 177 Ariz. 559, 563, 869 P.2d 1212, 1216 (App. 1993) .....         | 7, 8           |
| <i>Eastin v. Broomfield</i> , 116 Ariz. 576, 580, 570 P.2d 744, 748 (1977) ...                                                             | 5              |
| <i>Engel v. Landman</i> , 221 Ariz. 504, ¶ 17, 212 P.3d 842, 848 (App. 2004) .....                                                         | 2, 3           |
| <i>Facilitec, Inc. v. Hibbs</i> , 206 Ariz. 486, 80 P.3d 765 (2003) .....                                                                  | 9, 10          |
| <i>J. W. Hancock Enterprises, Inc. v. Arizona State Registrar of Contractors</i> , 142 Ariz. 400, 405, 690 P.2d 119, 124 (App. 1984) ..... | 5, 6, 8, 9, 10 |
| <i>State v. Jenson</i> , 193 Ariz. 105, 109, 970 P.2d 937, 941 (App. 1998) ...                                                             | 4              |
| <i>State v. Marana Plantations, Inc.</i> , 75 Ariz. 111, 252 P.2d 87 (1953) ...                                                            | 9              |
| <i>State ex. rel Schneider v. Bennett</i> , 219 Kan. 285, 290-92, 547 P.2d 786, 792-92 (Kan. 1976) .....                                   | 6              |
| <i>State v. Shrum</i> , 220 Ariz. 115, 120, 203 P.3d 117, 1180 (2009) .....                                                                | 4              |
| <b>*iv</b> <i>Sunpower of Arizona v. Ariz. State Registrar of Contractors</i> , 166 Ariz. 437, 442, 803 P.2d 430, 435 (App. 1990) .....    | 9              |
| <i>Udall v. Severn</i> , 52 Ariz. 65, 79 P.2d 347 (1938) .....                                                                             | 8, 9           |
| <b>Constitution, Statutes, and Rules</b>                                                                                                   |                |
| Arizona Constitution article 3 .....                                                                                                       | 5              |

|                                                     |         |
|-----------------------------------------------------|---------|
| Arizona Constitution article 6, § 1 .....           | 6       |
| A.R.S. § 12-1841(B) .....                           | 1, 3    |
| A.R.S. § 33-1201 <i>et. seq</i> .....               | 9       |
| A.R.S. § 33-1801 <i>et. seq</i> .....               | 9       |
| A.R.S. § 41-1092 .....                              | 7       |
| A.R.S. § 41-2198 .....                              | 5, 7, 9 |
| A.R.S. § 41-2198.01 .....                           | 1, 6    |
| Arizona Session Law Chapter 324, § 6 .....          | 7       |
| Arizona Rules of Civil Appellate Procedure 13 ..... | 1, 2, 4 |

**\*1 I. ARCAP 13(b)(3) Prevents Appellee From Raising this Issue Without Filing a Cross-Appeal.**

Appellee's failure to file a cross-appeal precludes it from receiving declaratory relief from this Court that the administrative process is unconstitutional, particularly when neither the administrative agency nor the superior court considered the issue. Notably, in its Answer in superior court, [IR 6] Appellee failed to plead a counter-claim alleging [A.R.S. § 41-2198.01, et. seq.](#) was unconstitutional or notice the proper authorities under [A.R.S. § 12-1841\(B\)](#).

Rather, Appellee filed a motion to dismiss, relying on a non-precedential superior court opinion, asking the superior court to dismiss Appellant's Complaint because "the underlying administrative hearing process has been deemed unconstitutional." [IR 24 p. 1] Appellee's motion was absent any substantive argument regarding the unconstitutionality of [A.R.S. § 41-2198.01](#). [IR 24] Finding it was not bound by another superior court's decision, the superior court denied the motion to dismiss without considering the constitutional issue. [IR 31] Now, for the first time in this proceeding, Appellee seeks to have this Court determine the administrative review process is "void and of no effect." [Answering Brief, p. 7] This declaration is unpermitted by [Arizona Rules of Civil Appellate Procedure \(ARCAP\) 13\(b\)\(3\)](#) on this appeal.

[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 \*2 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\(b\)\(3\)](#). 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).

Here, Casa Contenta is seeking to enlarge its own rights and lessen Appellant's rights by removing Appellant's opportunity for a remanded hearing or review. If Appellant is successful on appeal, this Court may order the superior court to enter judgment in her favor based on her legal arguments. Alternatively, this court may remand the case to the administrative agency for further proceedings or remand to the superior court for review of the administrative record. If this Court concludes the administrative process is "void," Appellant is left without a remedy. This deprivation of Appellant's remedies is a clear expansion of Appellee's rights in this case. Pursuant to [ARCAP 13\(b\)\(3\)](#), this Court may not expand Appellee's rights or lessen Appellant's rights without a cross-appeal, which Appellee failed to file.

In [Adage Towing & Recovery, Inc. v. City of Tucson](#), 187 Ariz. 396, 930 P.2d 473 (App. 1996), a towing company sought declaratory relief that a sign created a binding implied contract and consensual lien. *Id.* at 397-98, \*3 930 P.2d at 474-75. The superior court denied the towing company relief. *Id.* at 398, 930 P.2d at 475. On appeal, the City of Tucson--the Appellee--challenged the superior court's finding that the posting of the sign created a binding contract as a cross-issue in its Answering Brief. *Id.* at 399, 930 P.2d at 476. The Arizona Court of Appeals refused to consider the issue because it would have lessened appellant's rights, which cannot occur without the filing of a cross-appeal. *Id.* Similarly, where an appellee sought to enlarge her rights by increasing child support and receiving an award of attorney's fees, the appellate court would not consider those issues because appellee failed to file a cross-appeal. [Engel](#), 221 Ariz. 504, ¶ 17, 212 P.3d at 848.

In this case, Appellee is similarly attempting to enlarge its rights by invalidating a statutory scheme by raising the issue in its Answering Brief without filing a cross-appeal. In the lower court proceedings, Appellee failed to file a "Notice of Claim of Unconstitutionality," or provide the proper entities with notice that it intended to have a state statute declared unconstitutional.

See [A.R.S. § 12-1841](#). Procedurally, it is inequitable to permit Appellee to challenge the constitutionality of a statute and fully brief the constitutional issue for the first time in its Answering Brief. [See IR 24 (which does not brief the constitutional issue, but only seeks dismissal based on the Maricopa Superior Court's ruling)]. Additionally, superior court decisions are not binding on appellate courts. See \*4 [State v. Shrum](#), 220 Ariz. 115, 120, 203 P.3d 117, 1180 (2009); [State v. Jensen](#), 193 Ariz. 105, 109, 970 P.2d 937, 941 (App. 1998).

Contrary to [Azta Corp. v. U.S. Fire Ins. Co.](#), 223 Ariz. 463, 224 P.3d 960 (App. 2010), where the appellate court considered a “cross-issue” even when a cross-appeal had not been filed, the parties in this case did not fully brief or argue the constitutionality of [A.R.S. § 41-2198.01](#) in the superior court proceedings. In fact, the issue was never raised at the administrative level. In [Azta Corp.](#), the appellee raised a cross-issue, which was raised in its cross-motion for summary judgment but the superior court never reached the issue because it granted relief on other grounds. *Id.* at ¶ 42, n. 8, 224 P.3d at 973. That was not the case here. In superior court, appellee asked the court to dismiss because the statute had already been found unconstitutional. [IR 24] Appellee did not counter-claim [IR 6] or seek to have the superior court declare the administrative process unconstitutional in its motion to dismiss. [IR 24] Thus, Appellee's current request for relief in this Court is an expansion of its rights requiring a cross-appeal and should not be considered a mere “cross-issue.” Therefore, Ms. Gelb respectfully requests this Court find it lacks jurisdiction to consider the constitutional argument under [ARCAP 13\(b\)\(3\)](#)

**\*5 II. [A.R.S. § 41-2198](#) is a Constitutional Delegation of Authority to An Administrative Agency and Does Not Violate the Separation of Powers Doctrine.**

Appellee contends the administrative process of permitting the Department of Fire, Building, and Life Safety (“DFBLS”) to hear community association disputes is an “impermissible delegation of judicial authority to the executive branch.” [Answering Brief, p. 8] Generally, there is a strong presumption in favor of constitutionality of any legislative enactment, and the asserting party bears the burden of overcoming the presumption. [Eastin v. Broomfield](#), 116 Ariz. 576, 580, 570 P.2d 744, 748 (1977). Here, Appellant has not met that burden because the DFBLS performs a constitutional quasi-judicial function, not solely reserved for the judicial branch.

The separation of powers clause provides:

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.”

[Ariz. Const. art. 3](#). However, the separation of powers doctrine “does not forbid all blending of powers, but only is intended to keep one branch of government from exercising the whole power of another branch.” [J. W. Hancock Enterprises, Inc. v. \\*6 Ariz. State Registrar of Contractors](#), 142 Ariz. 400, 405, 690 P.2d 119, 124 (App. 1984).

Here, the legislature expanded the DFBHS's authority to hear and adjudicate disputes between homeowners and community associations. [A.R.S. § 41-2198.01\(B\)](#). In determining whether this statute violates the separation of powers doctrine, this court must consider the “specific facts and circumstances presented.” [J.W. Hancock Enterprises, Inc.](#), 142 Ariz. at 405, 690 P.2d at 124, citing [State ex. rel Schneider v. Bennett](#), 219 Kan. 285, 290-92, 547 P.2d 786, 792-92 (Kan. 1976). Before finding a violation “there must be a significant interference by one department with the operations of another department.” *Id.* No such significant interference exists here.

The following non-exclusive factors are relevant to the analysis:

1. Essential nature of the power being exercised;
2. Degree of control by the legislative department;

3. Nature of the objective;

4. Practical result of the blending of powers.

First, Appellant maintains the nature of the power being exercised by the DFBLS is judicial in nature, but not an improper delegation of authority. The ability to hear and determine facts and apply law is not an exclusive judiciary function. See *Batty v. Ariz. State Dental Bd*, 57 Ariz. 239, 246, 112 P.2d 870, 873 (1941) (judicial power, as defined by article 6, § 1 of the Arizona Constitution \*7 “does not include the power to hear and determine facts and apply the law thereto which has been conferred on administrative or executive officers acting in the proper exercise of the duties imposed upon them by law”). Rather, an administrative agency performs a “quasi-judicial” function. See *id.*, 57 Ariz. at 246, 112 P.2d at 873 (When “the power to hear and determine whether a certain state of facts which requires the application of a law exists is committed to an administrative or executive officer, although the particular power may be identical with one which is also exercised by a court, it is, strictly speaking, not ‘judicial’ but ‘[q]uasi-judicial’ power.”) Thus, the DFBLS may exercise judicial functions, as long as it is not an improper usurpation of authority. See *Cactus Wren Partners v. Ariz. Dep’t of Building and Fire Safety*, 177 Ariz. 559, 563, 869 P.2d 1212, 1216 (App. 1993).

Second, in regards to the degree of control by the legislature, when the legislature enacted A.R.S. § 41-2198, it required the Department to comply with A.R.S. § 41-1092, which outlines the office of administrative hearings, and it renamed the statute “Administrative adjudication of complaints.” A.R.S. § 41-2198; see also Ariz. Session Law ch. 324, § 6. This procedural protection ensures a critical judicial “check” of administrative power. See *Cactus Wren Partners*, 177 Ariz. at 563, 869 P.2d at 1216.

As for the third factor--the nature of the objective--it would appear the legislature intended to create a more cost-effective way to challenge, dispute, and \*8 resolve conflicts between homeowners and planned community associations. Appellee claims this objective is inappropriate because the Department's authority must be auxiliary to and dependent upon the proper exercise of legitimate regulatory power. [Answering Brief, p. 8] See *Cactus Wren*, 177 Ariz. at 562, 869 P.2d at 1215, citing *J.W. Hancock Enterprises, Inc.*, 142 Ariz. 400, 690 P.2d 119.

In support of this argument, Appellee quotes *Cactus Wren*, which, in dicta, appeared to add another factor in the separation of powers analysis. *Cactus Wren* relied on *Udall v. Severn*, 52 Ariz. 65, 79 P.2d 347 (1938), which supports the DFBLS's ability to act in a quasi-judicial function by hearing private party disputes. In *Udall*, the purpose of the separation of powers doctrine is clarified, when it states:

Where the Constitution expressly, or by implication, confers a certain power on one of the great departments of the government, that power may not be delegated to another department, but where the power so conferred is being exercised by the proper department and it is necessary, in order to carry out such a constitutional power, that some acts be performed which in their nature are more properly to be classified as falling under the jurisdiction of another department, such latter acts, *being merely auxiliary to and dependent upon the proper carrying out of the legitimate power of the department, are not a violation of the constitutional inhibition.*

*Id.* at 77, 79 P.2d at 352 (emphasis added). Here, the DFBLS's review of private party disputes between homeowners and associations is a lesser, auxiliary carrying out of a judicial function. Ultimately, the judicial branch retains the ability to \*9 review all decisions from the administrative agency. The only “power” of the DFBLS is to hear disputes based on planned community documents and condominium documents. See A.R.S. § 41-2198; see also 33-1201 *et. seq.*, 33-1801, *et. seq.*, Because the scope of the DFBLS hearings are limited, the DFBLS is not exerting an overt or overpowering usurpation of power or encroaching upon the judicial branch's authority. See *Sunpower of Arizona v. Ariz. State Registrar of Contractors*, 166 Ariz. 437, 442, 803 P.2d 430, 435 (App. 1990) (statute provided checks and protections necessary to prevent unconstitutional grant of authority).

Finally, as for the fourth factor laid out in *J. W. Hancock Enterprises*, there is a mingling of roles between the judicial branch and executive branch in this case. However as discussed above, the Department's power is not unfettered or unchecked. By permitting an administrative law judge to “adjudicate complaints and ensure compliance” with planned community and condominium documents, the legislature limited the executive branch's “encroachment” on the judicial authority. [A.R.S. § 41-2198](#); *cf State v. Marana Plantations, Inc.*, 75 Ariz. 111, 252 P.2d 87 (1953) (legislative grant to board ability formulating general policies violated separation of powers). Similar quasi-judicial functions have been found not to violate the separation of powers. *See J. W. Hancock Enterprises*, 142 Ariz. at 406, 690 P.2d. at 125 (Registrar of Contractors); *Facilitec, Inc. v. Hibbs*, 206 Ariz. 486, 80 P.3d 765 (2003) (Arizona Department of Administration could \*10 delegate authority to deputy). Therefore, according to the test laid out in *J.W. Enterprises*, and the cases interpreting the separation of powers doctrine, the delegation of authority to DFBLS is not a violation of [Article III of the Arizona Constitution](#).

### III. Conclusion

Appellant respectfully requests this Court refuse to consider Appellee's constitutional argument due to its failure to file a cross-appeal. The separation of powers issue was not fully briefed in the lower court, nor did the superior court review the merits of the claim. On appeal, Appellee attempts to invalidate the administrative process from which Appellant appeals. Appellee's argument expands its own rights and deprives Appellant of a remedy, which is specifically prohibited by [ARCAP 13\(b\)\(3\)](#).

Additionally, the legislature's delegation of administrative review to the Department of Fire, Building, and Life Safety does not violate the separation of powers because an agency may perform a quasi-judicial function as long as the proper “checks” are in place and the judicial branch is not deprived of its ultimate authority. Appellant respectfully requests this Court grant her relief based on the arguments presented in her Opening and Reply Briefs.