

2010 WL 4086149 (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.

September 10, 2010.

Yavapai County Superior Court Case No. CV820080197

Appellee's Supplemental Brief on Constitutional Questions

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***1 QUESTIONS PRESENTED**

1. May the court consider the constitutionality of Laws 2006, Ch. 324, § 6 in this appeal even though appellee failed to file a cross-appeal from the order entered by the superior court denying appellee's motion to dismiss in which it asserted the administrative hearing process was unconstitutional?
2. Are Laws 2006, Ch. 324, § 6, which amended [A.R.S. § 41-2198 et seq.](#) and [A.R.S. § 33-1242](#) and [§ 33-1803](#), in violation of the Arizona Constitution's separation of powers clause and therefore unconstitutional?

LEGAL ARGUMENT

***I. The Court of Appeals may hear the Constitutional Question
despite the absence of a cross-appeal by Appellee on the issue.***

[Rule 13\(b\)\(3\), A.R.C.A.P.](#), provides as follows:

The brief of the appellee may, without need for a cross-appeal, include in the statement of issues presented for review and in the argument any issue properly presented in the superior court. The appellate court may affirm the judgment based on any such grounds. The 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.

The Appellee's brief included a detailed recitation of the constitutional issues in the Statement of the Case. Additionally, the first legal argument section of the Appellee's brief is devoted entirely to the argument that the Superior Court had no authority to hear Appellant's administrative appeal. The argument asserts that because of the constitutional infirmity of the statute and the prior issued declaratory judgment and injunction issued by the *2 Superior Court in Maricopa County, Appellant's case should be dismissed or was at least moot and the administrative appeal should result in the denial of any relief to Appellant.

Although no distinct section of Appellee's brief was designated as the statement of issues presented for review, the Appellee's brief makes quite clear that it was seeking to have the constitutional argument heard by the Court of Appeals. This issue was raised in the Superior Court and fully briefed by way of Appellee's motion to dismiss. As a result, the Appellee did not need to file a cross-appeal in order to keep this question alive for the Court of Appeals to determine.

Additionally, case law indicates that questions of constitutionality may be raised at any time. See *In re MH 2007-001275*, 219 Ariz. 216, 219, ¶ 11, 196 P.3d 819, 822 (App. 2008). See also *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987) (Arizona Supreme Court declined to consider constitutional questions first raised after oral argument on petition for review, although recognizing that it had the discretion to consider constitutional issues raised for the first time on appeal).

Appellee is not requesting any greater relief from the Court of Appeals than the ruling already issued by the Superior Court. Appellee is merely raising an alternative basis to uphold the lower court's ruling. A finding on the constitutionality question in favor of Appellee essentially leads to the *3 same practical result in this case - affirming the lower court's ruling. Using the constitutional argument as a basis for affirming the Superior Court's ruling also does not in any way lessen the rights of the Appellant.

II. Laws 2006, Ch. 324, § 6 violates the separation of powers clause in the Arizona Constitution and is unconstitutional.

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 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).

*4 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 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 *5 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 the purpose of the department to establish a procedure to protect the consumer of such products and services.

***6** [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 divest the judiciary of authority to hear cases. It can ***7** 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 a new administrative agency or empowers an existing one 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, Laws 2006, Ch. 324, § 6 violates the separation of powers clause in the Arizona Constitution and is unconstitutional.

CONCLUSION

For the reasons stated above, the Appellee requests that the Court of Appeals consider the constitutional arguments presented and find that Laws ***8** 2006, Ch. 324, § 6 violates the separation of powers clause in the Arizona Constitution and affirm the Superior Court's decision on this basis.

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