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Pro Per

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

R. L. WHITMER,

Petitioner.

v.

HILTON CASITAS HOMEOWNERS ASSOCIATION, also known as HILTON CASITAS COUNCIL OF HOMEOWNERS, also known as COUNCIL OF CO-OWNERS, also known as HILTON CASITAS COUNCIL OF CO-OWNERS; and MICHAEL BENGSON, President of the named Respondent;

Respondents.

CV2016-055080

PETITIONER'S MOTION TO VACATE JUDGMENT AND GRANT A NEW TRIAL

(Assigned to the Hon. Aimee L. Anderson)

Petitioner requests that the Court vacate its judgment and grant a new trial pursuant to ARCP Rule 59(a)(1)(H), as the judgment is a misapplication of law and not supported by the evidence.

Because there is no statutory jurisdiction for an executive branch administrative law tribunal to have "contempt of court proceedings" powers, the Court erred in dismissing the Petitioner's petition for lack of jurisdiction when Article 6 Section 14.1 of the Arizona Constitution expressly states that "[t]he superior court shall have original jurisdiction of ... proceedings in which exclusive jurisdiction is not vested by law in another court."

The Court's award of attorney fees and costs is a misapplication of law as this action does not arise from contract as required by ARS §12-341, nor are the

prerequisites under ARS §12-349 present for ARS §12-349, ARS §12-349 and ARCP Rule 11 to apply.

MEMORANDUM OF POINTS AND AUTHORITIES

Legislative Intent and Jurisdiction

In 2006, the Arizona Legislature passed House Bill 2824 **(Ex. 1)** which amended A.R.S. § 41-2198 et seq. and A.R.S. §33-1201 et seq. permitting an owner or a condominium owners association to file a petition with the Department of Fire, Building and Life (the "Department") for a hearing concerning violations of planned community documents or violations of statutes that regulate condominiums, and that such petitions will be heard before the Office of Administrative Hearings ("OAH") as an equivalent alternative to filing an action with the superior court. A.R.S. § 41-2198.02.B provided that "[t]he order issued by the administrative law judge is enforceable through contempt of court proceedings."

In 2007, OAH submitted its annual report **(Ex. 2)** to the Governor, Arizona Senate President, and Speaker of the House of Representatives citing their new responsibilities from House Bill 2824 as their number one priority in their "Continued Development of the Office" section. They also reported that 97 petitions were file with OAH through the Department of which two were appealed to the Superior Court, and included their "checklist to guide both homeowner and association." In their checklist they acknowledged that their limited jurisdiction does not extend to contempt of court proceedings:

> "If the petition item has been decided by a court or previously has been addressed in a hearing before the OAH, it cannot be revisited. OAH has no authority for contempt proceedings or enforcement of prior decisions. However, failure by a party to comply with a decision issued by the OAH may result in the other party seeking enforcement of the Administrative Law Judge's decision through a contempt of court proceeding in Superior Court." (Emphasis added) **(Ex. 2,** P. 28**)**

In 2011, the Arizona Legislature passed Senate Bill 1148 **(Ex. 3)** in reaction to *Gelb v. Department of Fire, Building and Life Safety*, 225 Ariz. 515, 518 (Ct. App. 2010). In *Gelb* the court of appeals found that "the Administrative Process ... violates the separation of powers set forth in the separation of powers provision set forth in Article 3 of the Arizona Constitution. In passing Senate Bill 1148 in 2011, the Arizona Legislature left no doubt that the administrative law process is only a limited alternative to the Superior Court in their legislative findings and intent as follows:

> 3. The legislature further determines and finds that while direct licensure and regulation of condominiums and planned communities may not be necessary at this time, the legislature has repeatedly found over the years that owners in condominiums and planned communities are frequently subjected to inconsistent, unreasonable and often unlawful enforcement and application of the declarations, rules and bylaws that govern their communities, their managers and their boards of directors, and owners are often unable to afford the cost of formally litigating their disputes in the superior court. (**Ex. 3**, P3:L26-33)
>
> 4. The legislature further finds that the continuing use of the existing hearing officer function in the department of fire, building and life safety will provide for an efficient use of already-established common interest community expertise at this agency, will provide an important consumer protection for owners in condominiums and planned communities and will efficiently and effectively provide for resolution of these common interest community disputes without the expense, formality and difficulty of requiring a trial in the superior court in every instance, and will do so without the cost and bureaucratic complexity of creating an entirely new administrative body to perform these important functions, while still maintaining the ability and right to recourse in the superior court, and without threat to the core functions of the judiciary. (Emphasis added) (**Ex. 3**, P3:L35-45)

In 2016, the Arizona Legislature by passing Senate Bill 1530 substituted the Arizona Department of Real Estate in A.R.S. Title 32, Chapter 20 for the Department of Fire, Building, and Life Safety and left OAH in place as the venue for administrative law proceedings.

The legislature's intent and the statutory language is clear — an administrative law judge's jurisdiction is limited to "order any party to abide by the statute, condominium documents, community documents or contract provision at issue", and does not include "contempt of court proceedings" jurisdiction.

The powers of an administrative law judge are defined by ARS §32-2199.02.A:

> A. The administrative law judge may order any party to abide by the statute, condominium documents, community documents or contract provision at issue and may levy a civil penalty on the basis of each violation. All monies collected pursuant to this article shall be deposited in the condominium and planned community hearing office fund established by section 32-2199.05 to be used to offset the cost of administering the administrative law judge function. If the petitioner prevails, the administrative law judge shall order the respondent to pay to the petitioner the filing fee required by section 32-2199.01.

An order of an administrative law judge is enforceable through contempt of court proceedings ARS §32-2199.02.B:

> B. The order issued by the administrative law judge is binding on the parties unless a rehearing is granted pursuant to section 32-2199.04 based on a petition setting forth the reasons for the request for rehearing, in which case the order issued at the conclusion of the rehearing is binding on the parties. <u>The order issued by the administrative law judge is enforceable through contempt of court proceedings</u> and is subject to judicial review as prescribed by section 41-1092.08. (Emphasis added)

Arizona Constitution Art 6 §1: "The judicial power shall be vested in an integrated judicial department consisting of a supreme court, such intermediate appellate courts as may be provided by law, a superior court, such courts inferior to the superior court as may be provided by law, and justice courts."

"Contempt of court" is a judicial power to which the Legislature has not empowered or vested any contempt jurisdiction with administrative law judges.

Article 6 Section 14.1 of the Arizona Constitution expressly states that "[t]he superior court shall have original jurisdiction of ... proceedings in which exclusive jurisdiction is not vested by law in another court."

The award of attorney fees and costs per ARS §12-341.01 requires that an action is brought out of contract, and ARS §12-349 requires one of the following four prerequisites;

> "1. Brings or defends a claim without substantial justification.
> 2. Brings or defends a claim solely or primarily for delay or harassment.
> 3. Unreasonably expands or delays the proceeding.
> 4. Engages in abuse of discovery."

ARS §12-350 and Rule 11 are dependent on the prerequisites of ARS §12-349. Because the prerequisites of ARS §12-349 are not present in this case and sanctions under Rule 11 are obviously not justified, therefore the award of attorney fees and costs should be vacated.

Argument

The Superior Court Has Exclusive Jurisdiction

Per ARS §32-2199.02.B an "order issued by the administrative law judge is enforceable through contempt of court proceedings", and only the courts of the Judicial Branch have contempt powers and only the Superior Court has been given statutory powers regarding "contempt of court proceedings".

The Legislature did not give OAH contempt powers and, as part of the Executive Branch, it does not have any of the judicial powers that are reserved to the courts. This fact Mr. Greg Hanchett Esq., the Acting Director of the Arizona Office of Administrative Hearings, adamantly confirmed:

> [T]here is nothing in OAH's enabling statutes (ARS § 41-1092 et. seq.), that would enable OAH to enforce its own decisions through contempt proceedings that it would hold. Administrative tribunals have only those powers specifically prescribed by statute or rule. (Emphasis added) **(Ex. 4)**

This Court's judgment was based upon the Defendants' bogus assertion "pursuant to R2-19-102(c), that an Administrative Law Judge may issue a contempt order over contempt proceedings of the Administrative Orders, using the Arizona Rules of Civil Procedure and related local rules." (Res. to motion for recon. P. 3:L. 6-10).

"It is fundamental in administrative law that an administrative agency or commission must exercise its rule-making authority within the grant of legislative power as expressed in the enabling statutes. Any excursion by an administrative body beyond the legislative guidelines is treated as an usurpation of constitutional powers vested only in the major branch of government." *General Electric Company v. Burton*, 372 F.2d 108 (6th Cir.); *Busey v. Deshler Hotel Co.*, 130 F.2d 187, 142 A.L.R. 563 (6th Cir.); 2 Am.Jur.2d, Administrative Law, § 211.

The jurisdiction of OAH, an executive branch quasi-judicial department, cannot be expanded by rules of "procedure" to include "contempt of court proceedings" or any other judicial proceedings.

Administrative Rules of procedures are intended for the administration of proceedings and cannot create the jurisdiction to hear proceedings.

If administrative law judges, as part of the executive branch, were to interpret and use Administrative Rule R-2-19-102.C to expand their jurisdiction,

they would clearly be usurping the constitutional powers vested in the Legislature and Judiciary by Article 3 of the Arizona Constitution. Obliviously, Administrative Rules of Procedure (R-2-19-102.C), which were promulgated by the executive branch, cannot be used to expand OAH's limited jurisdiction.

Article 6 Section 14.1 of the Arizona Constitution expressly states that "[t]he superior court shall have original jurisdiction of ... proceedings in which exclusive jurisdiction is not vested by law in another court," and because "contempt" can be adjudged as criminal and may result in incarceration, it is obvious that the Legislature intended that the Superior Court enforce administrative law orders by using its exclusive jurisdiction over "contempt of court proceedings" as a core function of the "judiciary."

The Award of Attorney Fees and Costs Should Be Vacated

As to the Court's award of attorney fees and costs, this case concerns the enforcement of statute and does not arise out of contract, and in accordance with *Brown v. Terravita Cmty. Ass'n, Inc.*[1] (No. 1 CA-CV 14-0455, Ariz. Ct. App. Memorandum Decision Jul. 30, 2015) the Respondents are not entitled to an award under ARS §12-341.01.

Here, as in *Brown*, there is no support or evidence proving any of the four prerequisites in ARS §12-349. Without any of the four prerequisites in ARS §12-349, an award of attorney fees and costs based on ARS §12-350 and Rule 11 is unsupportable as an application of law. A sanctionable award is obviously not justified in this case.

Petitioner brought this action in good faith and followed the instructions given by the Arizona Office of Administrative Hearings ("OAH") to the public, and reported to the Governor and the Legislature in 2007. The same instructions that are still on the OAH website (http://www.azoah.com/Vol42.html, **Ex. 5**) as of date of this filing, still instruct the public:

[1] In accordance with A.R.S. Sup.Ct. Rule 111(c), a copy of the memorandum decision is provided herewith for the Court's consideration as per Rule 111(c)(1)(A) and (C). **(Ex. 6)**

> "However, failure by a party to comply with a decision issued by the OAH may result in the other party seeking enforcement of the Administrative Law Judge's decision through a contempt of court proceeding in Superior Court." **(Ex. 5, P.2)**

These are the same instructions that the Petitioner used in filing his administrative law order in September 2014 which resulted in the Administrative Law Decision 14F-H1415004-BFS and is the basis for this enforcement action.

Petitioner being aware that Article 6 Section 14.1 of the Arizona Constitution gives the Superior Court original jurisdiction of "proceedings in which exclusive jurisdiction is not vested by law in another court," and that there is no Arizona statute that gives jurisdiction to an administrative law judge to conduct contempt proceedings, the Petitioner followed the OAH instructions in good faith and filed this action with this Court.

Conclusion

The Legislature clearly intends through the plain language of ARS §32-2199.02.B that an "order issued by the administrative law judge is enforceable through contempt of court proceedings", and because there is no statute that explicitly provides administrative law judges with "contempt of court" jurisdiction, the Petitioner rightfully filed the complaint with the Superior Court who pursuant to Article 6 Section14.1 of the Arizona Constitution has exclusive jurisdiction in this matter.

The Court erred in not following Article 6 Section14.1 of the Arizona Constitution, and further erred by rendering an erroneous judgment that administrative law judges have jurisdiction over "contempt of court proceedings", while no such jurisdiction has been granted by statute.

The Superior Court Rules do not limit its jurisdiction to Superior Court injunctions, and "injunction" in the Court's Rules does not exclude an order of an administrative law judge, nor is it defined in any other restrictive way. The

Superior Court obviously has jurisdiction and is the proper venue for the petitioner's complaint under the Arizona Constitution, and the Arizona Rules of Civil Procedure cannot limit the application of the provisions of the Constitution that would in any way alter the Constitution's implementation.

In addition, that the Court erred in awarding attorney fees and costs under ARS §12-350 and Rule 11 is without evidence of any of the prerequisites ARS §12-349 present.

Accordingly, the Petitioner respectfully requests that the Court vacate its judgment and grant a new trial.

If this Court rules that Article 6 Section14.1 of the Arizona Constitution does not grant jurisdiction to the Superior Court, and decides *not* to vacate its judgment and order a new trial, it should clearly state its rationale in a detailed minute entry so that said order may be reviewed by the Court of Appeals.

Additionally, in finding that Article 6 Section14.1 of the Arizona Constitution does not apply, the Court will have effectively rendered ARS §32-2199 et seq. meaningless without any means of enforcement, thus eliminating the legislative intent of "resolution of these common interest community disputes without the expense, formality and difficulty of requiring a trial in the superior court." As a public service, if the Court denies this Rule 59 motion, it should notice the Legislature, the Arizona Department of Real Estate, and OAH that orders from administrative law judges have effectively been ruled unenforceable.

Dated this 22nd day of May, 2017.

R. L. Whitmer

ORIGINAL filed this
22nd day of May, 2017, with the Court;

and a COPY mailed this same date to:

Augustus Shaw, and Nicole Payne
Shaw & Lines Law Firm
4523 E. Broadway Rd.
Phoenix, AZ 85040

Courtesy copies to:

The Honorable Steve Yarbrough
Arizona State Senate President
1700 W. Washington Street
Phoenix, AZ 85007;

The Honorable Javan Mesnard
Speaker of the Arizona House of Representatives
1700 W. Washington Street
Phoenix, AZ 85007;

Ms. Judy Lowe, Director/Commissioner
Arizona Department of Real Estate
2910 N. 44th Street
Phoenix, AZ 85018; and

Mr. Greg Hanchett, Acting Director
Arizona Office of Administrative Hearings
1700W. Washington Street
Phoenix, AZ 85007

Exhibit 1

Conference Engrossed

State of Arizona
House of Representatives
Forty-seventh Legislature
Second Regular Session
2006

CHAPTER 324

HOUSE BILL 2824

AN ACT

AMENDING SECTION 10-11602, ARIZONA REVISED STATUTES; AMENDING SECTION 33-1242, ARIZONA REVISED STATUTES, AS AMENDED BY LAWS 2006, CHAPTER 71, SECTION 1; AMENDING SECTION 33-1803, ARIZONA REVISED STATUTES, AS AMENDED BY LAWS 2006, CHAPTER 71, SECTION 5; AMENDING SECTION 33-1805, ARIZONA REVISED STATUTES, AS AMENDED BY LAWS 2006, CHAPTER 71, SECTION 7; CHANGING THE DESIGNATION OF TITLE 41, CHAPTER 16, ARTICLE 5, ARIZONA REVISED STATUTES, TO "ADMINISTRATIVE HEARINGS"; AMENDING SECTION 41-2198, 41-2198.01, 41-2198.02, 41-2198.03 AND 41-2198.04, ARIZONA REVISED STATUTES; AMENDING TITLE 41, CHAPTER 16, ARTICLE 5, ARIZONA REVISED STATUTES, BY ADDING SECTION 41-2198.05; RELATING TO HOMEOWNERS' ASSOCIATIONS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 10-11602, Arizona Revised Statutes, is amended to read:

10-11602. Inspection of records by members; applicability

A. Subject to subsections E and F of this section, any member who has been a member of record at least six months immediately preceding its demand is entitled to inspect and copy any of the records of the corporation described in section 10-11601, subsection E during regular business hours at the corporation's principal office, if the member gives the corporation written notice of its demand as provided in section 10-3141 at least five business days before the date on which the member wishes to inspect and copy.

B. Subject to subsections E and F of this section, a member who has been a member of record at least six months immediately preceding its demand is entitled to inspect and copy any of the following records of the corporation during regular business hours at a reasonable location specified by the corporation, if the member meets the requirements of subsection C of this section and gives the corporation written notice of its demand as provided in section 10-3141 at least five business days before the date on which the member wishes to inspect and copy the following:

1. Excerpts from any records required to be maintained under section 10-11601, subsection A, to the extent not subject to inspection under subsection A of this section.

2. Accounting records of the corporation.

3. Subject to section 10-11605, the membership list described in section 10-11601, subsection C.

4. The corporation's most recent financial statements showing in reasonable detail its assets and liabilities and the results of its operations.

C. A member may inspect and copy the records identified in subsection B of this section only if the following conditions are met:

1. The member's demand is made in good faith and for a proper purpose.

2. The member describes with reasonable particularity the member's purpose and the records the member desires to inspect.

3. The records are directly connected with the member's purpose.

D. This section does not affect either:

1. The right of a member to inspect records under section 10-3720 or, if the member is in litigation with the corporation, to the same extent as any other litigant.

2. The power of a court, independently of chapters 24 through 40 of this title, to compel the production of corporate records for examination on proof by a member of proper purpose.

E. The articles of incorporation or bylaws of a corporation organized primarily for religious purposes may limit or abolish the right of a member under this section to inspect and copy any corporate record.

F. Unless the board of directors has provided express permission to the member, a member of a corporation that is a rural electric cooperative is not entitled to inspect or copy any records, documents or other materials that are maintained by or in the possession of the corporation and that relate to any of the following:

1. Personnel matters or a person's medical records.

2. Communications between an attorney for the corporation and the corporation.

3. Pending or contemplated litigation.

4. Pending or contemplated matters relating to enforcement of the corporation's documents or rules.

G. ~~Sections 33-1258 and 33-1805, relating to association financial and other records,~~ THIS SECTION DOES NOT apply to any corporation that is a condominium as defined in section 33-1202 or a planned community as defined in section 33-1802.

H. This section does not apply to timeshare plans or associations that are subject to title 33, chapter 20.

Sec. 2. Section 33-1242, Arizona Revised Statutes, as amended by Laws 2006, chapter 71, section 1, is amended to read:

33-1242. Powers of unit owners' association; notice to unit owner of violation

A. Subject to the provisions of the declaration, the association may:

1. Adopt and amend bylaws and rules.

2. Adopt and amend budgets for revenues, expenditures and reserves and collect assessments for common expenses from unit owners.

3. Hire and discharge managing agents and other employees, agents and independent contractors.

4. Institute, defend or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium.

5. Make contracts and incur liabilities.

6. Regulate the use, maintenance, repair, replacement and modification of common elements.

7. Cause additional improvements to be made as a part of the common elements.

8. Acquire, hold, encumber and convey in its own name any right, title or interest to real or personal property, except that common elements may be conveyed or subjected to a security interest only pursuant to section 33-1252.

9. Grant easements, leases, licenses and concessions through or over the common elements.

10. Impose and receive any payments, fees or charges for the use, rental or operation of the common elements other than limited common elements described in section 33-1212, paragraphs 2 and 4 and for services provided to unit owners.

11. Impose charges for late payment of assessments and, after notice and an opportunity to be heard, impose reasonable monetary penalties upon unit owners for violations of the declaration, bylaws and rules of the association.

12. Impose reasonable charges for the preparation and recordation of amendments to the declaration or statements of unpaid assessments.

13. Provide for the indemnification of its officers and executive board of directors and maintain directors' and officers' liability insurance.

14. Assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration expressly provides.

15. Be a member of a master association or other entity owning, maintaining or governing in any respect any portion of the common elements or other property benefitting or related to the condominium or the unit owners in any respect.

16. Exercise any other powers conferred by the declaration or bylaws.

17. Exercise all other powers that may be exercised in this state by legal entities of the same type as the association.

18. Exercise any other powers necessary and proper for the governance and operation of the association.

B. ~~Before taking action to enforce the provisions of the condominium documents regarding the condition of the unit owner's property, the association shall provide the unit owner with written notice of the violation of the condominium documents and a description of the process the unit owner must follow to contest the notice.~~ A unit owner who receives a written notice that the condition of the property owned by the unit owner is in violation of a requirement of the condominium documents without regard to whether a monetary penalty is imposed by the notice may provide the association with a written response by sending the response by certified mail within ten business days after the date of the notice. The response shall be sent to the address contained IN THE NOTICE OR in the recorded notice prescribed by section 33-1256, subsection J.

C. Within ten business days after receipt of the certified mail containing the response from the unit owner, the association shall respond to the unit owner with a written explanation regarding the notice. ~~The written explanation from the association~~ THAT shall provide at least the following information UNLESS PREVIOUSLY PROVIDED IN THE NOTICE OF VIOLATION:

1. The provision of the condominium documents that has allegedly been violated.

2. The date of the violation or the date the violation was observed.

3. The first and last name of the person or persons who observed the violation.

4. THE PROCESS THE UNIT OWNER MUST FOLLOW TO CONTEST THE NOTICE.

~~C.~~ D. UNLESS THE INFORMATION REQUIRED IN SUBSECTION C, PARAGRAPH 4 OF THIS SECTION IS PROVIDED IN THE NOTICE OF VIOLATION, the association shall not proceed with any action to enforce the condominium documents, including the collection of attorney fees, before or during the time prescribed by subsection ~~B~~ C of this section regarding the exchange of information between the association and the unit owner. AT ANY TIME BEFORE OR AFTER COMPLETION OF THE EXCHANGE OF INFORMATION PURSUANT TO THIS SECTION, THE UNIT OWNER MAY PETITION FOR A HEARING PURSUANT TO SECTION 41-2198.01 IF THE DISPUTE IS WITHIN THE JURISDICTION OF THE DEPARTMENT OF FIRE, BUILDING AND LIFE SAFETY AS PRESCRIBED IN SECTION 41-2198.01, SUBSECTION B.

Sec. 3. Section 33-1803, Arizona Revised Statutes, as amended by Laws 2006, chapter 71, section 5, is amended to read:

33-1803. Penalties; notice to member of violation

A. Unless limitations in the community documents would result in a lower limit for the assessment, the association shall not impose a regular assessment that is more than twenty per cent greater than the immediately preceding fiscal year's assessment without the approval of the majority of the members of the association. Unless reserved to the members of the association, the board of directors may impose reasonable charges for the late payment of assessments. A payment by a member is deemed late if it is unpaid fifteen or more days after its due date, unless the community documents provide for a longer period. Charges for the late payment of assessments are limited to the greater of fifteen dollars or ten per cent of the amount of the unpaid assessment. Any monies paid by the member for an unpaid assessment shall be applied first to the principal amount unpaid and then to the interest accrued.

B. After notice and an opportunity to be heard, the board of directors may impose reasonable monetary penalties on members for violations of the declaration, bylaws and rules of the association. Notwithstanding any provision in the community documents, the board of directors shall not impose a charge for a late payment of a penalty that exceeds the greater of fifteen dollars or ten per cent of the amount of the unpaid penalty. A payment is deemed late if it is unpaid fifteen or more days after its due date, unless the declaration, bylaws or rules of the association provide for a longer period. Any monies paid by a member for an unpaid penalty shall be applied first to the principal amount unpaid and then to the interest accrued. Notice pursuant to this subsection shall include information pertaining to the manner in which the penalty shall be enforced.

C. ~~Before taking action to enforce the provisions of the community documents regarding the condition of the member's property, the association shall provide the member with written notice of the violation of the community documents and a description of the process the member must follow to contest the notice.~~ A member who receives a written notice that the condition of the property owned by the member is in violation of the community documents without regard to whether a monetary penalty is imposed by the notice may provide the association with a written response by sending the response by certified mail within ten business days after the date of the notice. The response shall be sent to the address contained IN THE NOTICE OR in the recorded notice prescribed by section 33-1807, subsection J.

D. Within ten business days after receipt of the certified mail containing the response from the member, the association shall respond to the member with a written explanation regarding the notice. ~~The written explanation from the association~~ THAT shall provide at least the following information UNLESS PREVIOUSLY PROVIDED IN THE NOTICE OF VIOLATION:

1. The provision of the community documents that has allegedly been violated.
2. The date of the violation or the date the violation was observed.
3. The first and last name of the person or persons who observed the violation.
4. THE PROCESS THE MEMBER MUST FOLLOW TO CONTEST THE NOTICE.

~~D.~~ E. UNLESS THE INFORMATION REQUIRED IN SUBSECTION D, PARAGRAPH 4 OF THIS SECTION IS PROVIDED IN THE NOTICE OF VIOLATION, the association shall not proceed with any action to enforce the community documents, including the collection of attorney fees, before or during the time prescribed by subsection ~~C~~ D of this section regarding the exchange of information between the association and the member. AT ANY TIME BEFORE OR AFTER COMPLETION OF THE EXCHANGE OF INFORMATION PURSUANT TO THIS SECTION, THE MEMBER MAY PETITION FOR A HEARING PURSUANT TO SECTION 41-2198.01 IF THE DISPUTE IS WITHIN THE JURISDICTION OF THE DEPARTMENT OF FIRE, BUILDING AND LIFE SAFETY AS PRESCRIBED IN SECTION 41-2198.01, SUBSECTION B.

Sec. 4. Section 33-1805, Arizona Revised Statutes, as amended by Laws 2006, chapter 71, section 7, is amended to read:

33-1805. Association financial and other records

A. Except as provided in subsection B of this section, all financial and other records of the association shall be made reasonably available for examination by any member or any person designated by the member in writing as the member's representative. The association shall not charge a member or any person designated by the member in writing for making material available for review. The association shall have ten business days to fulfill a request for examination. On request for purchase of copies of records by any member or any person designated by the member in writing as the member's representative, the

association shall have ten business days to provide copies of the requested records. An association may charge a fee for making copies of not more than fifteen cents per page.

B. Books and records kept by or on behalf of the association and the board may be withheld from disclosure to the extent that the portion withheld relates to any of the following:

1. Privileged communication between an attorney for the association and the association.

2. Pending litigation.

3. Meeting minutes or other records of a session of a board meeting that is not required to be open to all members pursuant to section 33-1804.

4. Personal, health or financial records of an individual member of the association, an individual employee of the association or an individual employee of a contractor for the association, including records of the association directly related to the personal, health or financial information ABOUT AN INDIVIDUAL MEMBER OF THE ASSOCIATION, AN INDIVIDUAL EMPLOYEE OF THE ASSOCIATION OR AN INDIVIDUAL EMPLOYEE OF A CONTRACTOR FOR THE ASSOCIATION.

5. Records relating to the job performance of, compensation of, health records of or specific complaints against an individual employee of the association or an individual employee of a contractor of the association who works under the direction of the association.

C. The association shall not be required to disclose financial and other records of the association if disclosure would violate any state or federal law.

Sec. 5. Heading change

The article heading of title 41, chapter 16, article 5, Arizona Revised Statutes, is changed from "MOBILE HOME PARKS HEARING OFFICER FUNCTION" to "ADMINISTRATIVE HEARINGS".

Sec. 6. Section 41-2198, Arizona Revised Statutes, is amended to read:

41-2198. Administrative adjudication of complaints

PURSUANT TO CHAPTER 6, ARTICLE 10 OF THIS TITLE, an administrative law judge shall adjudicate complaints regarding and ensure compliance with:

1. The Arizona mobile home parks residential landlord and tenant act ~~pursuant to title 41, chapter 6, article 10~~.

2. TITLE 33, CHAPTER 9 AND CONDOMINIUM DOCUMENTS.

3. TITLE 33, CHAPTER 16 AND PLANNED COMMUNITY DOCUMENTS.

Sec. 7. Section 41-2198.01, Arizona Revised Statutes, is amended to read:

41-2198.01. Hearing; rights and procedures

A. A person who is subject to title 33, chapter 11 or a party to a rental agreement entered into pursuant to title 33, chapter 11 may petition the department for a hearing concerning violations of the Arizona mobile home parks residential landlord and tenant act by filing a petition with the department and paying a ~~fifty-dollar~~ NONREFUNDABLE filing fee IN AN AMOUNT TO BE ESTABLISHED BY THE DIRECTOR. All monies collected shall be deposited in the state general fund and are not refundable.

B. FOR A DISPUTE BETWEEN AN OWNER AND A CONDOMINIUM ASSOCIATION OR PLANNED COMMUNITY ASSOCIATION THAT IS REGULATED PURSUANT TO TITLE 33, CHAPTER 9 OR 16, THE OWNER OR ASSOCIATION MAY PETITION THE DEPARTMENT FOR A HEARING CONCERNING VIOLATIONS OF CONDOMINIUM DOCUMENTS OR PLANNED COMMUNITY DOCUMENTS OR VIOLATIONS OF THE STATUTES THAT REGULATE CONDOMINIUMS OR PLANNED COMMUNITIES. THE PETITIONER SHALL FILE A PETITION WITH THE DEPARTMENT AND PAY A NONREFUNDABLE FILING FEE IN AN AMOUNT TO BE ESTABLISHED BY THE DIRECTOR. THE FILING FEE SHALL BE DEPOSITED IN THE CONDOMINIUM AND PLANNED COMMUNITY HEARING OFFICE FUND ESTABLISHED BY SECTION 41-2198.05. THE DEPARTMENT DOES NOT HAVE JURISDICTION TO HEAR:

1. ANY DISPUTE AMONG OR BETWEEN OWNERS TO WHICH THE ASSOCIATION IS NOT A PARTY.

2. ANY DISPUTE BETWEEN AN OWNER AND ANY PERSON, FIRM, PARTNERSHIP, CORPORATION, ASSOCIATION OR OTHER ORGANIZATION THAT IS ENGAGED IN THE BUSINESS OF DESIGNING, CONSTRUCTING OR SELLING A CONDOMINIUM AS DEFINED IN SECTION 33-1202 OR ANY PROPERTY OR IMPROVEMENTS WITHIN A PLANNED COMMUNITY AS DEFINED IN SECTION 33-1802, INCLUDING ANY PERSON, FIRM, PARTNERSHIP, CORPORATION, ASSOCIATION OR OTHER ORGANIZATION LICENSED PURSUANT TO TITLE 32, CHAPTER 20, ARISING OUT OF OR RELATED TO THE DESIGN, CONSTRUCTION, CONDITION OR

SALE OF THE CONDOMINIUM OR ANY PROPERTY OR IMPROVEMENTS WITHIN A PLANNED COMMUNITY.

~~B.~~ C. The petition shall be in writing on a form approved by the department, shall list the complaints and shall be signed by or on behalf of the persons filing and include their addresses, stating that a hearing is desired, and shall be filed with the department.

~~C.~~ D. On receipt of the petition and the filing fee the department shall mail by certified mail a copy of the petition along with notice to the named respondent that a response is required within ~~ten~~ TWENTY days of mailing of the petition showing cause, if any, why the petition should be dismissed.

~~D.~~ E. After receiving the response, the director or ~~his~~ THE DIRECTOR'S designee shall promptly review the petition for hearing and, if justified, refer the petition to the office of administrative ~~appeals~~ HEARINGS. The director may dismiss a petition for hearing if it appears to ~~his~~ THE DIRECTOR'S satisfaction that the disputed issue or issues have been resolved by the parties.

~~E.~~ F. Failure of the respondent to answer is deemed an admission of the allegations made in the petition, and the ~~administrative law judge may proceed with a default hearing~~ DIRECTOR SHALL ISSUE A DEFAULT DECISION.

~~F.~~ G. Informal disposition may be made of any contested case.

~~G.~~ H. Either party or ~~his~~ THE PARTY'S authorized agent may inspect any file of the department that pertains to the hearing, if such authorization is filed in writing with the department.

~~H.~~ I. At a hearing conducted pursuant to this section, a corporation may be represented by a corporate officer, ~~or~~ employee OR CONTRACTOR OF THE CORPORATION who is not a member of the state bar if:

1. The corporation has specifically authorized the officer ~~or~~, employee OR CONTRACTOR OF THE CORPORATION to represent it.

2. The representation is not the officer's ~~or~~, employee's OR CONTRACTOR OF THE CORPORATION'S primary duty to the corporation but is secondary or incidental to the officer's or employee's duties relating to the management or operation of the corporation.

Sec. 8. Section 41-2198.02, Arizona Revised Statutes, is amended to read:

41-2198.02. Orders; penalties; disposition

A. The administrative law judge may order any party to abide by the statute, CONDOMINIUM DOCUMENTS, COMMUNITY DOCUMENTS or contract provision at issue and may levy a civil penalty on the basis of each violation. FOR PURPOSES OF ACTIONS BROUGHT UNDER THE ARIZONA MOBILE HOME PARKS RESIDENTIAL LANDLORD AND TENANT ACT, THE CIVIL PENALTY SHALL NOT EXCEED FIVE HUNDRED DOLLARS. All monies collected pursuant to this article shall be deposited in the state general fund to be used to offset the cost of administering the administrative law judge function, EXCEPT THAT MONIES COLLECTED FROM DISPUTES INVOLVING CONDOMINIUMS OR PLANNED COMMUNITIES AS PRESCRIBED IN SECTION 41-2198.01, SUBSECTION B SHALL BE DEPOSITED IN THE CONDOMINIUM AND PLANNED COMMUNITY HEARING OFFICE FUND ESTABLISHED BY SECTION 41-2198.05. If the petitioner prevails, the administrative law judge shall order the respondent to pay to the petitioner the filing fee required by section 41-2198.01.

B. The order issued by the administrative law judge is binding on the parties unless a rehearing is granted pursuant to section 41-2198.04 based on a petition setting forth the reasons for the request for rehearing, in which case the order issued at the conclusion of the rehearing is binding on the parties. NOTWITHSTANDING SECTIONS 41-1092.08, SUBSECTION B AND 41-1092.09, AN ORDER ISSUED BY THE ADMINISTRATIVE LAW JUDGE IN AN ACTION REGARDING A CONDOMINIUM OR PLANNED COMMUNITY IS THE FINAL ADMINISTRATIVE DECISION AND IS NOT SUBJECT TO A REQUEST FOR REHEARING. The order issued by the administrative law judge is enforceable through contempt of court proceedings.

Sec. 9. Section 41-2198.03, Arizona Revised Statutes, is amended to read:

41-2198.03. Scope of hearing

A. The administrative law judge may hear and adjudicate all matters relating to the Arizona mobile home parks residential landlord and tenant act and rules adopted pursuant to this article, except that the administrative law judge shall not hear matters pertaining to rental increases pursuant to section 33-1413, subsection G or I. ~~and does not have the authority to impose civil penalties.~~

B. This section shall not be construed to limit the jurisdiction of the courts of this state to hear and decide matters pursuant to the Arizona mobile home parks residential landlord and tenant act, THE

STATUTES OR CONDOMINIUM DOCUMENTS THAT REGULATE CONDOMINIUMS OR THE STATUTES OR COMMUNITY DOCUMENTS THAT REGULATE PLANNED COMMUNITIES.

Sec. 10. Section 41-2198.04, Arizona Revised Statutes, is amended to read:

41-2198.04. Rehearing; appeal

A. EXCEPT FOR AN ACTION RELATING TO CONDOMINIUM DOCUMENTS OR PLANNED COMMUNITY DOCUMENTS OR THE STATUTES REGULATING CONDOMINIUMS OR PLANNED COMMUNITIES, a person aggrieved by a decision of the administrative law judge may apply for a rehearing by filing with the director a petition in writing pursuant to section 41-1092.09. Within ten days after filing such petition, the director shall serve notice of the request on the other party by mailing a copy of the petition in the manner prescribed in section 41-2198.01 for notice of hearing.

B. The filing of a petition for rehearing temporarily suspends the operation of the administrative law judge's action. If the petition is granted, the administrative law judge's action is suspended pending the decision on the rehearing.

C. In the order granting or denying a rehearing, the director shall include a statement of the particular grounds and reasons for the director's action on the petition and shall promptly mail a copy of the order to the parties who have appeared in support of or in opposition to the petition for rehearing.

D. In a rehearing conducted pursuant to this section, a corporation may be represented by a corporate officer or employee who is not a member of the state bar if:

1. The corporation has specifically authorized such officer or employee to represent it.

2. Such representation is not the officer's or employee's primary duty to the corporation but is secondary or incidental to such officer's or employee's duties relating to the management or operation of the corporation.

Sec. 11. Title 41, chapter 16, article 5, Arizona Revised Statutes, is amended by adding section 41-2198.05, to read:

41-2198.05. Condominium and planned community hearing office fund

A. THE CONDOMINIUM AND PLANNED COMMUNITY HEARING OFFICE FUND IS ESTABLISHED IN THE DEPARTMENT TO BE ADMINISTERED BY THE DIRECTOR. MONIES IN THE FUND ARE CONTINUOUSLY APPROPRIATED. ON NOTICE FROM THE DIRECTOR, THE STATE TREASURER SHALL INVEST AND DIVEST MONIES IN THE FUND AS PROVIDED BY SECTION 35-313, AND MONIES EARNED FROM INVESTMENT SHALL BE CREDITED TO THE FUND.

B. MONIES IN THE CONDOMINIUM AND PLANNED COMMUNITY HEARING OFFICE FUND SHALL BE USED TO REIMBURSE THE ACTUAL COSTS OF THE OFFICE OF ADMINISTRATIVE HEARINGS IN CONDUCTING HEARINGS PURSUANT TO SECTION 41-2198.01, SUBSECTION B, MONIES REMAINING IN THE FUND MAY BE USED BY THE DEPARTMENT TO OFFSET THE COSTS OF ADMINISTERING CASES FILED PURSUANT TO SECTION 41-2198.01, SUBSECTION B.

Sec. 12. Joint legislative budget committee review; condominium and planned community fees

On or before December 1, 2007, the joint legislative budget committee shall review and make recommendations to the legislature regarding the filing fees charged to parties filing for an administrative hearing pursuant to section 41-2198.01, subsection B, Arizona Revised Statutes, as amended by this act, regarding condominiums and planned communities. The joint legislative budget committee shall recommend a level of filing fee appropriate to ensure the hearing officer program is fiscally sound and self-supporting.

APPROVED BY THE GOVERNOR JUNE 15, 2006.

FILED IN THE OFFICE OF THE SECRETARY OF STATE JUNE 15, 2006.

Exhibit 2

The Office of Administrative Hearings

The Twelfth Annual Report

to

Governor Janet Napolitano

Senator Timothy S. Bee, President of the Senate

Representative James P. Weiers, Speaker of the House

Pursuant to A.R.S. § 41-1092.01(C)(5)
and
A.R.S. § 41-1092.01(C)(9)

Cliff J. Vanell, Director
November 1, 2007

Contents

I. Introduction and Overview

The Office of Administrative Hearings (OAH) was created pursuant to Laws 1995, Chapter 251, adding Arizona Revised Statutes § 41-1092 *et seq.*, and commenced operation on January 1, 1996. Administrative hearings previously provided by regulatory agencies (except those specifically exempted) were transferred to the OAH for independent proceedings. There are two OAH locations, Phoenix and Tucson, with 31 full-time positions, including the Director, the Office Manager, 19 Administrative Law Judges, and 10 support staff. In addition to conducting hearings in Phoenix and Tucson, the OAH videoconferences Registrar of Contractors hearings in Flagstaff, Kingman, Lake Havasu City, Prescott, Show Low, Sierra Vista, and Yuma. Our statutory mandate is to "ensure that the public receives fair and independent administrative hearings."

Responsibility:

The OAH understands its responsibility to create a system that is efficient and cost effective. The OAH statistics in FY 2007 indicate agency acceptance of Administrative Law Judge Decisions without modification was 91.03%. Agency acceptance of Findings of Fact and Conclusions of Law without modification was 94.7%. Rehearings (1.48%) and Appeals (2.65%) were rare. Evaluations by participants continue to indicate that Administrative Law Judges and the OAH were rated excellent or good in 96% of all responses.

Integrity:

The OAH takes its statutory mandate to provide fair, impartial and independent hearings seriously. Although part of the executive branch, together with its client agencies, the OAH maintains a conscious detachment from political issues and the missions of those agencies. Procedures, rulings, and case assignments are at all times kept free of outside pressures to ensure that the parties can be assured that hearings are impartial and independent.

Commitment:

The OAH views commitment as a willingness to advance its mission, including improving the quality of decision-writing. While the Administrative Law Judges must render decisions according to the evidence before them and using their independent judgment, the OAH now requires that Administrative Law Judges review all decisions that have been modified or rejected by an agency in order to encourage them to identify any possible miscitations or other areas where quality can be improved. This commitment is in furtherance of the duty of the OAH to provide continuing education to its Administrative Law Judges.

Efficiency:

Through careful case management, the OAH enjoys no backlog. The completion rate for cases in FY 2007 was 97.77%.

II. Continued Development of the Office

1. Planned Community and Condominium Association Hearings

HB 2824 created hearings before the OAH for disputes involving planned community and condominium associations and their members. Pursuant to A.R.S. § 41-2198.01(B), the disputes extend to violations of condominium documents and planned community documents or violations of the A.R.S. Title 33, Chapters 9 and 16. The funding for these cases is exclusively based on the setting of an appropriate filing fee by the Department of Fire, Building and Life Safety (DFBLS), which intakes petitions and is responsible for reimbursing the actual costs of hearings before the OAH. A successful petitioner is reimbursed the filing fee by the losing respondent. A.R.S. § 41-2198.02(A). The decisions of the OAH are final and there is no right of rehearing. A.R.S. § 41-2198.02(B). The courts retain jurisdiction over similar actions. A.R.S. § 41-2198.03(B).

2. Pioneering of All-Electronic Hearing Docket

The OAH implemented a totally paperless case file in a large water case involving multiple interested persons and which had great statewide and interstate interest. All filings were required to be electronic and all orders were issued via posting to a webpage. Posting of filings and orders to the webpage was notice to all parties. The webpage may be found at http://www.azoah.com/Water.htm

3. Public Presentations

Administrative Law Judges have presented on the subject of the OAH adjudicative process in various venues, including Phoenix College and private groups. Such public presentations cultivate public awareness of OAH's mission and increase understanding of the administrative process.

4. Articles Published

In FY 2007, the OAH published three articles on its website as part of a series of informational articles to educate the public and parties about the hearing process and how to better present their cases. The articles are included as an Appendix and may be found at OAH's website at www.azoah.com/OAHArticles.htm, along with all previous articles previously published in the OAH Newsletter.

5. Professional Development

Administrative Law Judges continue to receive professional education in the subject matter of agencies as well as skills development.

Administrative Law Judge Marianne Bayardi was appointed to the Phoenix Municipal Court in January 2007.

III. Summary of Agency Use of OAH Services

1. Case Management

a. Breakdown of Cases Filed by Agency (FY 2007):

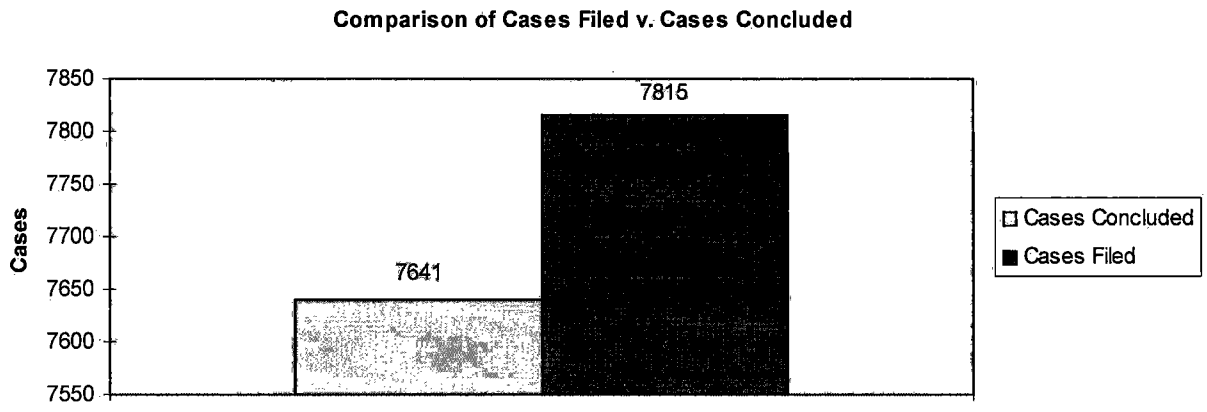
7,815 cases were filed with the OAH in FY 2007. The distribution among the agencies, boards, commissions, or political subdivisions (Agencies) are as follows (in descending order by number of cases filed):

Arizona Health Care Cost Containment System	3,653
Registrar of Contractors	2,285
Department of Weights and Measures	337
Department of Health Services	331
Department of Economic Security - CPS	133
Department of Environmental Quality	127
State Board of Nursing	106
Department of Fire, Building, and Life Safety	97
Arizona Department of Financial Institutions	90
Department of Real Estate	84
Department of Administration - Capitol Police Parking	75
Liquor Licenses and Control	69
Department of Insurance	65
Department of Education - Special Ed	61
Department of Revenue	46
DFBLS - Planned Community/Condominium	35
Department of Public Safety - Student Transportation	21
Arizona State Retirement System	16
Department of Gaming	15
Medical Radiologic Technology Board of Examiners	15
Arizona Medical Board	13
Peace Officers Standards and Training	13
Secretary of State	13
Department of Racing	10
State Land Department	10
State Board of Accountancy	9
Board of Appraisal	8
Structural Pest Control Commission	8
Office of the Attorney General	7
State Board for Charter Schools	7
Pharmacy Board	6
Department of Commerce	5
Arizona Lottery	5
Board of Dental Examiners	5
Department of Water Resources	5
Board of Chiropractic Examiners	4
Board of Nursing Care Institution Administrators Examiners	4
Board of Technical Registration	4
Department of Agriculture	3
Water Quality Appeals Board	3

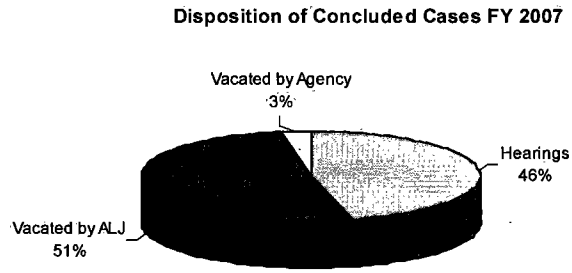
Board of Behavioral Health Examiners	2
Board of Osteopathic Examiners	2
Department of Administration	2
Arizona State Board of Optometry	1
Citizens Clean Elections Commission	1
Department of Education	1
Department of Public Safety - Concealed Weapons Permit Unit	1
Physical Therapy	1
Radiation Regulatory Agency	1

b. Number of Cases Filed Versus Cases Concluded:

In FY 2007, the conclusion rate (defined as cases concluded divided by new cases filed) was 97.77%.



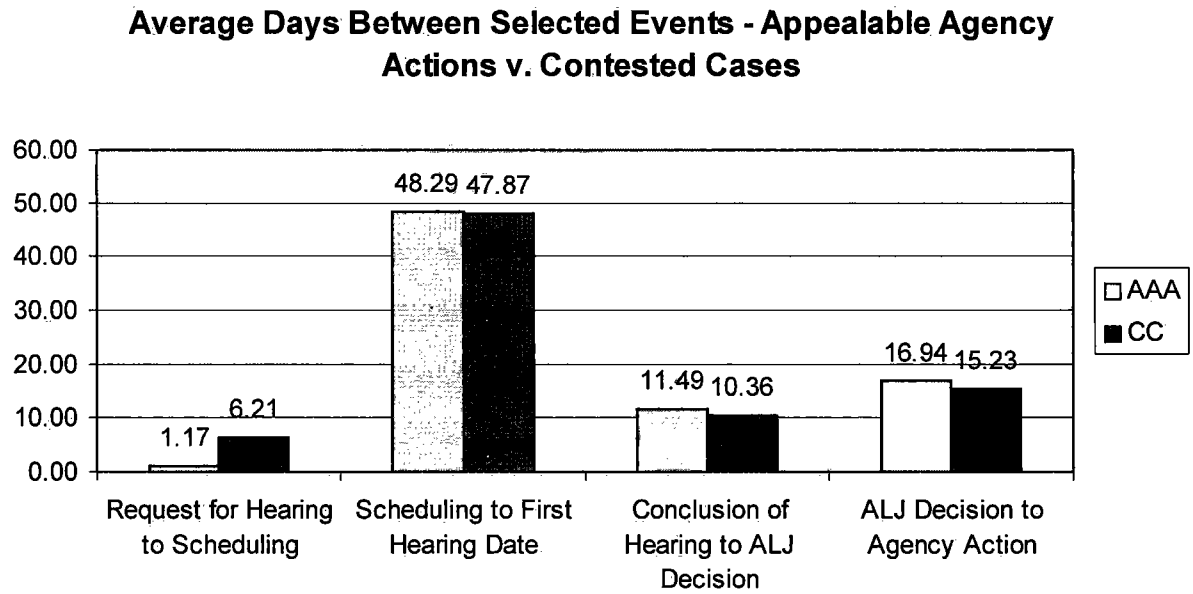
A.R.S. § 41-1092.05 calls for the setting of hearings within 60 days of a request for hearing by an agency in a "contested case" and within 60 days of an appeal of an "appealable agency action." Although an argument could be made that such timelines inevitably result in unnecessary hearing settings, case management at the OAH discourages cases being "on hold" or riding the calendar. Generally, a matter is vacated from the first hearing setting as the result of settlement and does not take up a second hearing setting. Therefore, on the whole, statutory time limits are beneficial to the larger process of regulatory action.



c. Timeline of Case Management:

A.R.S. § 41-1092.05(A) and § 41-1092.08(A) and (B) contemplate a rigorous timeline to expedite hearings and final agency actions. "Appealable agency actions" (defined as actions taken by an agency without a prior hearing) are required to be set for hearing within 60 days of a request by a party. "Contested cases" (defined as proposed actions for which a hearing is required) are required to be set within 60 days of an agency request. Administrative Law Judge Decisions must be transmitted to the agencies within 20 days of the conclusion of the hearing. The agency heads are required to take final action within 30 days of receipt. Boards and Commissions generally must take final action within 5 days of their next scheduled meeting.

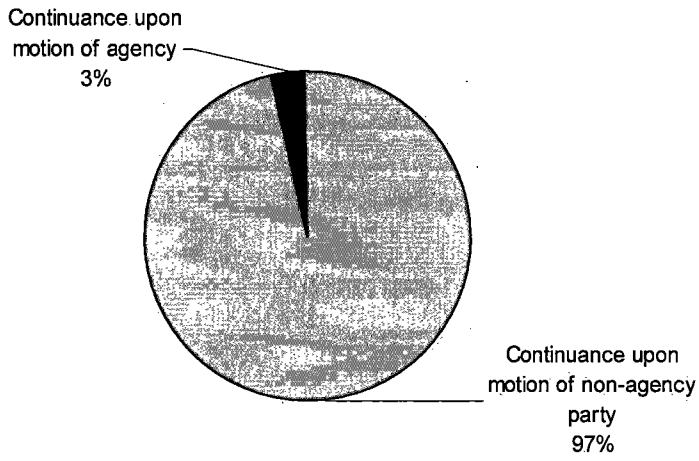
The following diagram illustrates the average timelines:



d. Incidence of Continuance:

A single continuance in FY 2007 added an average of 49.54 days to the total length of a case. Although 66.25% of all continuance requests were granted in FY 2007, the OAH has developed a well-deserved reputation for discouraging "convenience" continuances in favor of those based on "good cause." This is especially important because of the decrease in the number of Administrative Law Judges due to budget constraints. The frequency of continuance, defined as the number of continuances granted (954) divided by the total number of cases first scheduled (7,815), was 12.20%. The ratio of first hearing settings (7,655) to continued settings on the calendar (987) was 1 to 0.13.

The following chart illustrates the source of continuances.



The following list is a breakdown of FY 2007 continued settings and their sources, by agency.

AGENCY	Continued - Motion by non-agency party	Continued - Motion by agency party
Arizona Department of Commerce	4	0
Arizona Department of Financial Institutions	7	1
Arizona Health Care Cost Containment System	212	13
Arizona Lottery	1	0
Arizona Medical Board	5	0
Arizona State Retirement System	3	0
Board of Appraisal	2	0
Board of Nursing Care Institution Administrators Examiners	1	0
Citizens Clean Elections Commission	2	0
Department of Administration	3	0
Department of Administration - Capitol Police Parking	1	0
Department of Economic Security - CPS	11	1
Department of Education - Special Ed	16	0
Department of Environmental Quality	14	2
Department of Fire, Building, and Life Safety	18	1
DFBLS - Planned Community/Condominium	7	0
Department of Gaming	3	1
Department of Health Services	78	3
Department of Insurance	14	0
Department of Public Safety - Concealed Weapons	2	0
Department of Public Safety - Student Transportation	6	0
Department of Racing	2	2
Department of Real Estate	7	0
Department of Revenue	12	0
Department of Water Resources	1	0
Department of Water Resources	1	0
Department of Weights and Measures	2	0
Liquor Licenses and Control	6	1
Peace Officers Standards and Training	3	0
Pharmacy Board	1	0
Registrar of Contractors	488	6
Secretary of State	5	0
State Board for Charter Schools	2	1
State Board of Nursing	12	2
Water Quality Appeals Board	1	0
TOTAL	**953**	**34**

The following chart reflects the number of motions to continue that were entertained in FY 2007 and the percentage granted:

Client	Continuance Granted	Continuance Denied	Total Motions	% Granted
Arizona Department of Commerce	2	0	2	100
Arizona Department of Financial Inst.	12	0	12	100
Arizona Health Care Cost Containment	193	69	262	74
Arizona Lottery	1	0	1	100
Arizona Medical Board	4	1	5	80
Arizona State Retirement System	2	1	3	67
Board of Appraisal	2	0	2	100
Board of Behavioral Health Examiners	1	0	1	100
Board of Dental Examiners	0	1	1	0
Board of Nursing Care Institution Adm. Ex	1	0	1	100
Board of Osteopathic Examiners	1	0	1	100
Citizens Clean Elections Commission	3	0	3	100
Department of Administration	3	0	3	100
Capitol Police Parking	2	3	5	40
Department of Agriculture	1	1	2	50
Department of Economic Security - CPS	12	6	18	67
Department of Education - Special Ed	8	2	10	80
Department of Environmental Quality	24	1	25	96
Arizona Department of Financial Institutions	0	8	8	0
Department of Fire, Building, and Life Safety	25	6	31	81
DFBLS - Planned Community/Condominium	10	11	21	48
Department of Gaming	5	1	6	83
Department of Health Services	76	23	99	77
Department of Insurance	12	13	25	48
Department of Public Safety-C. Weapons	2	0	2	100
Department of Public Safety - St. Trans	7	1	8	88
Department of Racing	3	0	3	100
Department of Real Estate	7	1	8	88
Department of Revenue	12	3	15	80
Department of Water Resources	1	0	1	100
Department of Weights and Measures	0	1	1	0
Liquor Licenses and Control	7	11	18	39
Peace Officers Standards and Training	4	0	4	100
Pharmacy Board	1	0	1	100
Registrar of Contractors	477	313	790	60
Secretary of State	5	1	6	83
State Board of Accountancy	0	3	3	0
State Board for Charter Schools	4	1	5	80
State Board of Nursing	18	3	21	86
State Land Department	3	0	3	100
Water Quality Appeals Board	3	1	4	75
TOTAL	**954**	**486**	**1,440**	**66.25%**

2. Evaluation

a. Results of Public Evaluation:

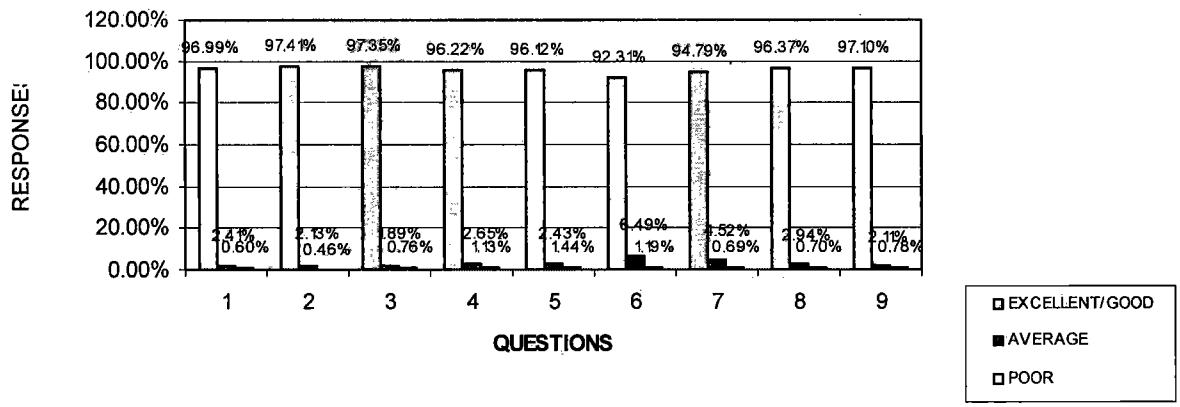
Since November 1996, the OAH has administered an evaluation procedure. The support staff provides a copy of the evaluation before the hearing in order to encourage all participants to respond. A discussion of the evaluation form is included in a video played before each hearing, or is otherwise addressed by the Administrative Law Judge. The results are not disclosed to the Administrative Law Judge. Hearing participants place completed evaluations in locked boxes located near the hearing rooms.

Those responding are asked to rate the following categories, on a scale of excellent, good, satisfactory, or poor:

1. Attentiveness of the Administrative Law Judge
2. Effectiveness in explaining the hearing process
3. Administrative Law Judge's use of clear and neutral language
4. Impartiality
5. Effectiveness in dealing with the issues of the case
6. Sufficient space
7. Freedom from distractions
8. Questions responded to promptly and completely
9. Treated courteously

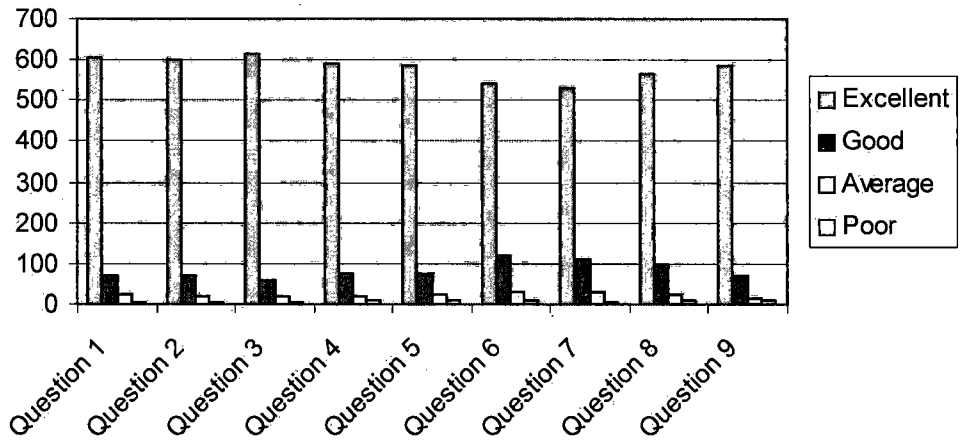
The results indicate that satisfaction is high among all groups, with those responding rating the OAH excellent to good in 92.31% to 97.41% of responses.

All Responses FY 2007



An analysis of the unrepresented parties indicates that even among this most vulnerable group, the OAH is seen to be functioning extremely well.

Unrepresented Responses FY 2007

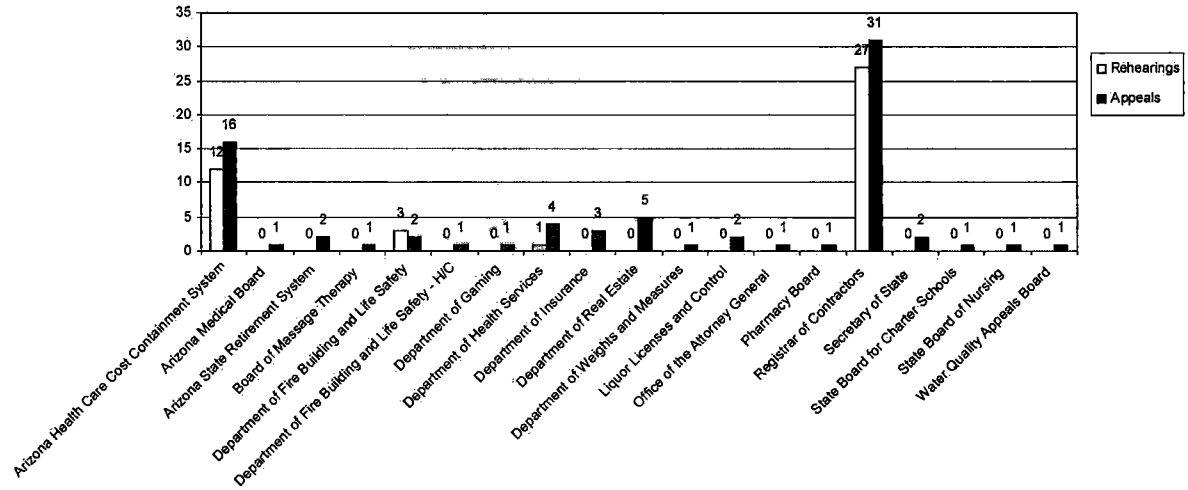


b. Incidence of Rehearing and Appeal:

Rehearings are permitted pursuant to A.R.S. § 41-1092.09 under certain conditions. In FY 2007, the rehearing rate (defined as rehearings scheduled divided by cases heard) was 1.48%.

Appeals to Superior Court are provided for pursuant to A.R.S. § 41-1092.08(H). In FY 2007, the judicial appeal rate (defined as judicial appeals taken divided by cases decided on the merits) was 2.65%. As reflected in the following diagram, rehearings and judicial appeals in FY 2007 were relatively rare. Both were concentrated at the Registrar of Contractors. Registrar of Contractors cases are primarily contests between two private litigants: homeowner versus contractor; and contractor versus subcontractor.

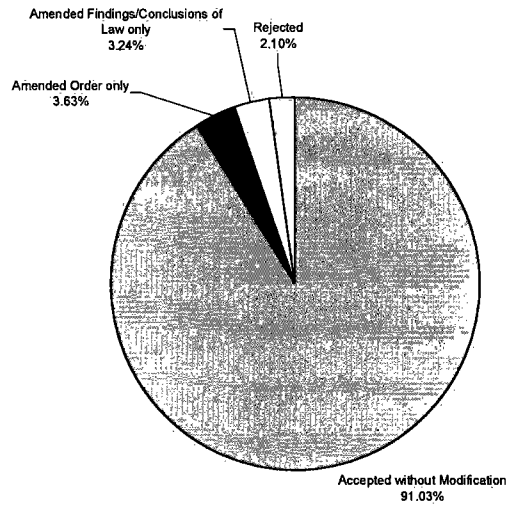
Judicial Appeals and Rehearings FY 2007



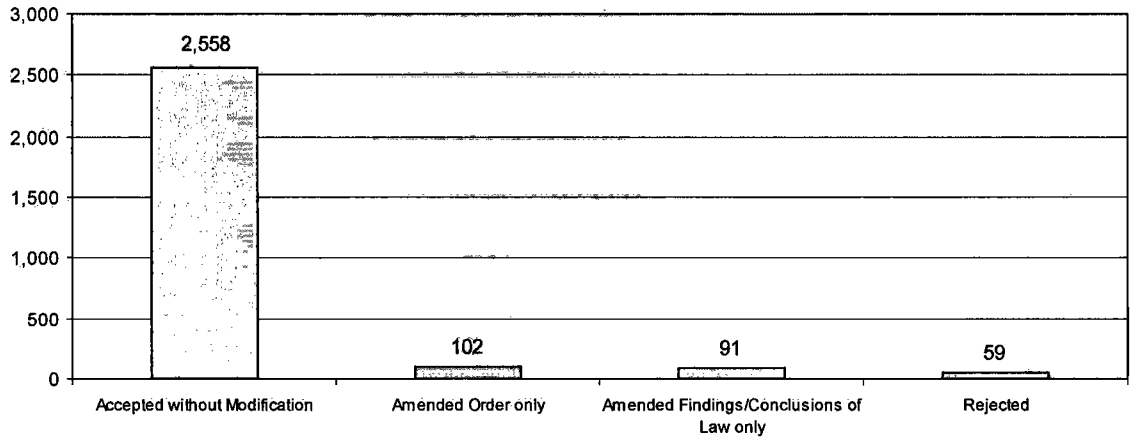
IV. Acceptance of Administrative Law Judge Decisions by Agencies

1. Agency Action

Agency acceptance of the Administrative Law Judge Decisions is very high. 91.03% of all decisions acted upon by the agencies were accepted without modification. Agency acceptance was 94.7% if viewed from the vantage point of acceptance of Findings of Fact and Conclusions of Law, the core function of the Administrative Law Judge. 52.85% of modifications made by the agencies were in the Recommended Order (penalty portion).



The following chart reports the number of cases in the various categories of agency response.

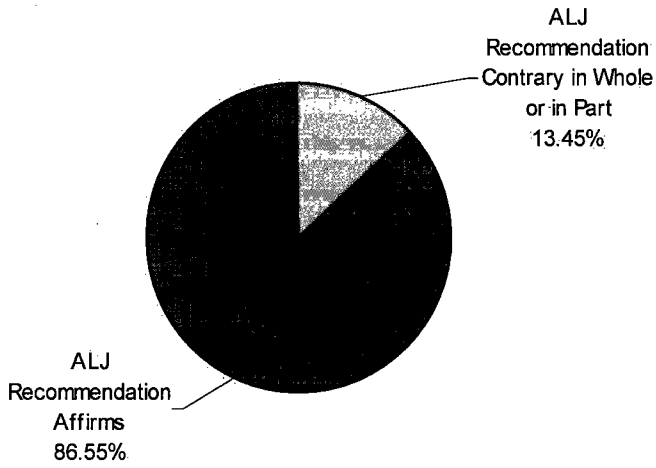


The following chart reports the breakdown of agency response by agency. The following are detailed: cases which became moot before agency action; cases which were subsequently certified by the OAH due to agency inaction; and cases which were not subject to agency modification or rejection by statute. This chart further illustrates that modifications and rejections are few relative to the decisions accepted.

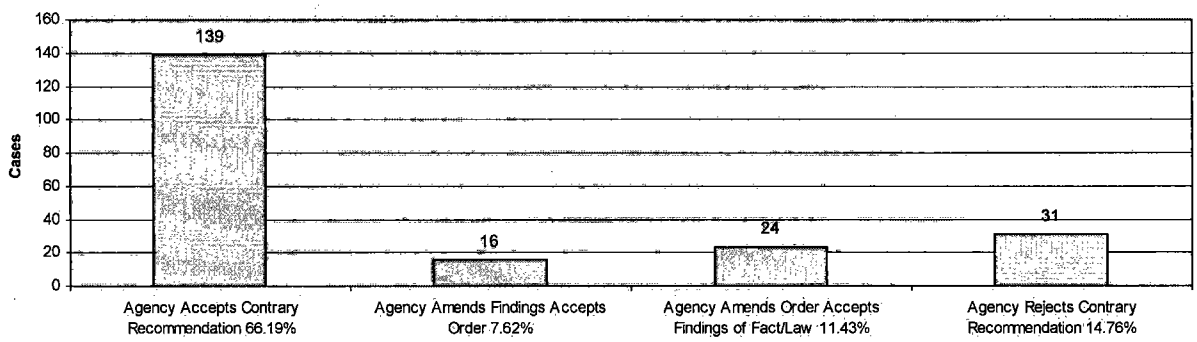
	Accept	Amend Order	Amend Findings	Reject	Certified	Moot	Final	Total
Attorney General	1	0	0	0	0	0	0	1
Acupuncture Bd of Ex.	1	0	0	0	0	0	0	1
Board of Accountancy	7	0	0	0	0	0	0	7
Dept. of Commerce	1	0	0	0	0	1	0	2
Department of Education	0	0	0	0	0	0	2	2
Department of Admin.	1	0	0	0	0	0	0	1
AHCCCS	968	6	61	2	37	9	0	1,083
Arizona Retirement Bd.	5	0	0	2	0	0	0	7
Bd. of Charter Schools	0	1	0	0	0	1	0	2
Fire, Bldg. and Life Safety	57	0	0	0	0	5	21	83
Behavioral Health	3	0	0	0	0	0	0	3
Financial Institutions	4	0	3	0	1	1	0	9
Board of Appraisal	5	0	1	0	1	0	0	7
DPS - Student Trans.	6	1	0	0	0	3	0	10
Bd of Chiropractic Ex.	1	1	0	0	0	0	0	2
DOA - Capitol Police	55	0	0	0	0	0	0	55
DES - CPS	85	1	6	0	1	0	0	93
DPS - Concealed W	0	0	0	0	0	1	0	1
Dept. of Environmental Q	0	0	0	1	0	0	0	1
Dept. of Health Services	174	0	2	0	2	2	0	180
Weights/Measures	0	1	0	0	0	3	0	4
Department of Gamings	6	0	0	0	0	0	0	6
Department of Insurance	24	0	0	0	0	18	0	42
Department of Land	1	0	0	0	0	0	0	1
Liquor License/Control	33	3	0	0	0	1	0	37
Arizona Lottery	3	0	0	0	0	0	0	3
AZ. Medical Board	0	2	2	0	1	0	0	5
Medical Radiologic Bd	4	1	1	0	0	1	0	7
Nursing Care Institutions	3	0	0	0	0	0	0	3
Secretary of State	8	0	0	0	1	2	0	11
State Board of Nursing	19	2	0	0	0	1	0	22
Bd of Osteopathic Ex	1	0	0	0	0	0	0	1
Physician Assistants	1	0	2	0	0	0	0	3
Physical Therapy	1	0	0	0	0	0	0	1
Department of Racing	3	0	0	0	0	1	0	4
Dept. of Real Estate	28	3	0	0	1	0	0	32
Department of Revenue	0	0	0	0	0	0	4	4
Registrar of Contractors	1,045	79	12	1	13	12	0	1,162
Schools for Deaf/Blind	0	0	0	0	0	1	0	1
Structural Pest Control	4	1	1	0	1	0	0	7
TOTAL	**2,558**	**102**	**91**	**6**	**59**	**63**	**27**	**2,906**

In FY 2007, Administrative Law Judges rendered decisions that were contrary in whole or contrary in part to agencies' original positions in 13.45% of cases. Agency acceptance of contrary decisions was high at 85.24%.

Recommendations Contrary to Original Agency Action FY 2007



Agency Response to Contrary Recommendations FY 2007



The following chart reports the breakdown of agency responses to contrary decisions.

Client	Accepted	Amended Order	Amended Findings	Rejected	Certified	Total
Arizona Dept. of Commerce	1	0	0	0	0	1
Department of Administration	1	0	0	0	0	1
AHCCCS	42	5	17	22	3	89
Arizona Retirement Bd	1	0	0	0	0	1
Board of Charter Schools	0	1	0	0	0	1
Dept. of Fire, Building, and Life Safety	11	0	0	0	1	12
Dept. of Financial Institutions	0	0	1	1	1	3
Board of Appraisal	0	0	0	1	0	1
DOT - Student Trans.	1	1	0	0	0	2
Capitol Police Parking	20	0	0	0	0	20
DES-CPS	8	0	3	1	0	12
DOT - Concealed Weapons	0	0	0	0	1	1
Department of Health Services	5	0	2	2	1	10
Weights and Measures	0	1	0	0	0	1
Department of Insurance	0	0	0	0	3	3
Liquor Licenses and Control	14	2	0	0	1	17
Arizona Medical Board	0	1	1	1	0	3
Medical Radiological Bd	0	1	0	0	0	1
Secretary of State	1	0	0	1	1	3
State Board of Nursing	3	1	0	0	0	4
Physician Assistants	1	0	0	0	0	1
Department of Racing	1	0	0	0	0	1
Dept. of Real Estate	9	2	0	1	0	12
Registrar of Contractor	8	0	0	0	0	8
Structural Pest Control	0	1	0	1	0	2
TOTAL	**127**	**16**	**24**	**31**	**12**	**210**

2. Agency Inaction With Subsequent OAH Certification of Finality

Beginning August 21, 1998, the OAH was required to certify the Administrative Law Judge Decision as the final administrative decision if the OAH had not received the agency, board or commission's action accepting, modifying or rejecting the recommended decision within 30 days of transmission. Special rules apply if the board or commission meets monthly or less frequently. A.R.S. § 41-1092.08(D). In FY 2007, 73 Administrative Law Judge Decisions were certified by the OAH as final administrative decisions.

Agency	Certified
Department of Insurance	27
Registrar of Contractors	12
Arizona Health Care Cost Containment System	8
Department of Fire Building and Life Safety	5
Department of Health Services	3

Department of Public Safety - Student Transportation	3
Department of Weights and Measures	3
Secretary of State	2
Arizona Department of Commerce	1
Citizens Clean Elections Commission	1
Department of Public Safety - Concealed Weapons Permit Unit	1
Department of Racing	1
Liquor Licenses and Control	1
Medical Radiologic Technology Board of Examiners	1
State Board for Charter Schools	1
State Board of Nursing	1
State Land Department	1
State Schools for the Deaf and the Blind	1

V. Motions for Change of Administrative Law Judge Granted Pursuant to A.R.S. § 41-1092.07

A.R.S. § 41-1092.01(C)(9)(b) requires that the OAH report the number of motions for change of Administrative Law Judge for bias, prejudice, personal interest or lack of necessary expertise which were filed and the number granted. In FY 2006, 9 motions were filed and one motion was granted.

VI. Violations of A.R.S. § 41-1009

Pursuant to A.R.S. § 41-1092.01(C)(9)(c), the OAH reports that it has no knowledge of violations of A.R.S. § 41-1009 by any agency.

VII. Recommendations for Changes in the Administrative Procedures Act

The regulated community has long complained about inconsistent procedures among the various agencies. The following recommendations point to the areas where uniformity or greater consistency can be accomplished:

1. Right to settlement conferences in "contested cases."
A.R.S. § 41-1092.03 provides that appellants to "appealable agency actions" be entitled to settlement conferences with an agency representative. No such right exists for "contested cases," which include most disciplinary proceedings. Such a conference may be beneficial in expediting informal disposition of contested cases.

2. Establish uniform standards for appeal rights notice.
Currently there are no standards for how, and with what degree of specificity, appeal rights to Superior Court should be communicated to parties once the agency has acted.

3. Establish uniform basis for rehearing.
Parties must research the specific rules of each agency, board or commission to determine the bases for rehearing since there is little uniformity. Standardizing and recapitulating possible bases in Title 41 would make the process easier, particularly for the unrepresented.

4. Conform rehearing and appeal rules.
Currently parties have 30 days from service of an agency's final action, which is presumed after 5 days of mailing to the party's last known address, to request a rehearing under A.R.S. § 41-1092.09(A)(1) and (C). However, under A.R.S. § 12-904(A), parties have 35 days to file an appeal to Superior Court upon service, presumed after 5 days of mailing to the party's last known address. Conforming the time limits for requesting rehearings and filing appeals will simplify the process by eliminating varying time limits for parties to act on final orders and will allow agencies to frame the effective dates of their final orders to a single date.

VIII. Recommendation for Changes or Improvements in Agency Practice with Respect to the Administrative Procedures Act

Recoupment of Costs for Administrative Hearings:
Billed costs to non-General Fund supported agencies, boards and commissions (ISA agencies), pursuant to A.R.S. § 41-1092.01(E) and (K), could be recouped by them by extending the statutory authority found in isolated statutes to all such ISA agencies.

An example of statutory authority for recoupment is found in A.R.S. § 32-128(H), which permits the Board of Technical Registration to recoup certain costs:

> H. On its determination that a registrant or a home inspector has violated this chapter or a rule adopted pursuant to this chapter, the board may assess the registrant or the home inspector with its reasonable costs and expenses incurred in conducting the investigation and administrative hearing. All monies collected pursuant to this subsection shall be deposited, pursuant to sections 35-146 and 35-147, in the technical registration fund established by section 32-109 and shall only be used by the board to defray its expenses in connection with disciplinary investigations and hearings. Notwithstanding section 35-143.01, these monies may be spent without legislative appropriation.

To avoid any appearance of impropriety by the ISA agencies, such recoupment might be limited to settlements or to cases where the ISA agency prevails before the independent Administrative Law Judge, or only as incident to disciplinary orders.

Appendix

Published Articles:

1. The Administrative Law Judge
2. Consolidation and Severance of Cases
3. Homeowner Petitions Against An Association

The Administrative Law Judge

By Cliff J. Vanell
Vol. 40, August 2006

Director's note: OAH is committed to fairness and making hearings accessible to all. This article is part of a series of informational articles to educate the public and parties who appear before us about the hearing process and how to better present their cases. The following article may be found at OAH's website at www.azoah.com along with all previous articles published in the OAH Newsletter.

Who are they? Prior to the creation of the Office of Administrative Hearings (OAH), administrative hearings were conducted at the state agencies, boards and commissions by hearing officers who were employees or contractors of the agencies whose actions were at issue. The relationship between the agency and the hearing officer understandably made it difficult for the public to assume the impartiality of the hearing officer. The OAH was created to address the inherent problem of perception involved in such in-house proceedings. Transferring hearings to an independent agency for adjudication by Administrative Law Judges (ALJs) with no relationship to the agencies has enhanced public confidence in the fairness of the process.

In creating the OAH, the Arizona Legislature envisioned highly trained ALJs to provide full, fair, independent, and prompt hearings and decisions.[1] To ensure that goal, the Legislature mandated that the OAH Director make appropriate appointments of judges to preside over cases, provide training, solicit comment from parties, and set up and maintain a system to evaluate the ALJs. In addition, the Legislature provided a method by which a party may have an ALJ removed from a case by filing a motion with the Director when there is evidence of bias, prejudice, personal interest or lack of necessary expertise.

Where do they come from? In light of these mandates, great weight is placed in assessing candidates for the position on commitment to the OAH mission of fairly and impartially deciding cases. Each candidate is assessed for his or her spirit of collegiality, ability to master a variety of specialties among a wide range of subjects, creativity, openness to peer review, and willingness to undertake continuing education to enhance his or her legal reasoning and writing skills.

The ALJs come from a variety of backgrounds. Brief statements of the ALJs' professional backgrounds are available on the OAH website. Regardless of background and experience, certain skills and values have been identified which are at the core of who the ALJ becomes. The very fact that hearings are called "hearings" establishes the pivotal nature of listening. The very act of listening involves the need for patience. At hearing, the ALJ must be willing to give great latitude for personal style, choice of words, cadence and volume in speaking, and how the parties choose to approach their cases. The ALJ must be able to effectively explain the procedures that will be employed at hearing and be able to rule on objections in a way that helps parties know what was objectionable and how to proceed. Because every case is the most important for the parties, the ALJ must be willing to give each case the attention it deserves, without distraction and with as much understanding as the ALJ can muster. ALJs must therefore be conscious of the forces that can distract them, be they unguarded presuppositions, routine, professional pride, annoyance with an unruly witness or party, or personal problems. Lastly, dispassion is not to be mistaken for impartiality. The ideal ALJ is one who is impartial, not because dispassionate or uninterested, but because he or she is equally passionate for and interested in the needs of both parties.

What do they want? The ALJs want to decide cases fully and fairly. Full participation by parties is essential to that task. Parties must develop the evidentiary record. No expertise of the ALJ can substitute for relevant testimony or evidence. Therefore, the ALJs have acted affirmatively to assist all parties in preparing and presenting their cases. First, the OAH rules were designed by the ALJs to simplify the administrative process. In addition, the ALJs have written dozens of articles, available online (http://www.azoah.com/OAHArticles.htm) to assist parties in preparing for hearing and presenting evidence. In addition, the ALJs have participated in training videos, also available online, which discuss and demonstrate opening statements and closing arguments, and direct and cross examinations. ALJ decisions are searchable online. Researching an ALJ's approach in similar cases is useful in knowing what an ALJ might need to best understand your case.

Maintaining Integrity and Quality. The ALJ presides over cases coming before the OAH. Interim orders, the conduct of the hearing, and the resulting decision are within the ALJ's sound discretion. In light of the need to protect the ALJ's independence, OAH's primary quality control and management strategy has been to provide continuous feedback to the ALJs.

Such feedback has taken various forms. All parties are given an evaluation form at the beginning of each hearing and are given the opportunity to submit it for comment to the Director's attention. Such comments are compiled and generalized so as not to influence an ALJ's decision. Since November 1996, evaluations are handed out to four major groups of hearing participants: represented private party; unrepresented private party; counsel for a private party; and counsel for the agency. The results are not disclosed to the ALJs. To make sure that all participants are encouraged to respond, the bailiff provides a copy of the evaluation to parties before the beginning of the hearing. The essential function of the evaluations is to determine whether OAH has provided an accessible and respectful forum for the determination of the truth. Evaluation results indicate that satisfaction is high among all groups, as is illustrated in the quarterly statistics reported in the OAH Newsletters, available online. An analysis of the unrepresented parties for any sample quarter indicates that even among this most vulnerable group, the OAH is seen to be functioning extremely well.

The ALJs are monitored for compliance with the 20 day statutory mandate for issuing decisions. In addition, the annual evaluation of ALJs focuses on ensuring that the ALJs' written decisions and orders are clear and complete, displaying good knowledge of statutes and rules governing assigned hearings, and that cases are managed effectively, including holding prehearing conferences to expedite the proceedings when appropriate, and ruling on motions and issuing appropriate orders in a timely manner. ALJs necessarily receive feedback by way of complaints that are fielded as well as through motions for change of ALJ. Each ALJ is required to review final administrative decisions by the agencies which modify facts, conclusions of law, or which reject the ALJs' decisions to determine if errors were made and as a means for improving writing skills.

In addition to training, which includes State Bar sponsored continuing legal education, privately presented courses, as well as contracted presentations, the OAH provides 40 hours per year of continuing education opportunities to each ALJ to ensure professional development.

Most importantly, the OAH is a collegial organization and the interplay among the ALJs is the greatest source of learning. The give and take, having their thoughts challenged, seeking advice and second opinions, having to justify positions and first takes on a subject – these are all invaluable processes to achieve and maintain quality.

Where have they gone? One of our numbers has left us in death, and I take this time to recall ALJ Neal Jordan. Others have gone on to take positions with the judiciary, or other positions of esteem, such as with the Arizona State Bar. Some have left to pursue private professions. Our alumni are available

online. Such esteemed alumni attest to the quality of the ALJ cadre.

Footnotes

1 A.R.S. § 41-1092.01 mandates that ALJs possess necessary technical expertise. A.R.S. § 41-1092.07 requires that the ALJs allow all parties the opportunity to respond and present evidence and argument on all relevant issues, and exercise reasonable control over the manner and order of cross-examining witnesses and presenting evidence to make them effective for ascertaining the truth. A.R.S. § 41-1092.05 provides that continuances are to be granted only for good cause. The ALJs must base any findings of fact exclusively on the evidence and on matters officially noticed. A.R.S. § 41-1092.08 mandates that written decisions contain a concise explanation of the reasons supporting the decision and that the decision, which may become the final administrative decision upon agency inaction, be transmitted to the agencies, boards, and commissions within 20 days.

Author

Consolidation and Severance of Cases

By Daniel G. Martin, Administrative Law Judge
October 2006

Director's note: OAH is committed to fairness and making hearings accessible to all. This article is part of a series of informational articles to educate the public and parties who appear before us about the hearing process and how to better present their cases. The following article may be found at OAH's website at www.azoah.com along with all previous articles published in the OAH Newsletter.

Consolidation

Consolidation is the process by which two or more separate cases are joined for purposes of an administrative hearing. At the Office of Administrative Hearings ("OAH"), cases may be consolidated in one of two ways: (1) the referring agency consolidates the cases prior to transmitting them to the OAH for hearing; or (2) one or more of the parties files a motion to consolidate after the cases have been transferred and set for hearing.

Motions to consolidate are governed by Arizona Administrative Code ("A.A.C.") Rule R2-19-109. According to this rule, cases are eligible for consolidation if (1) the cases involve substantially similar factual or legal issues, or (2) all parties are the same. See A.A.C. Rule R2-19-109(A).

Procedure

A party who is considering a motion to consolidate must first determine whether the cases to be consolidated have all been referred to the OAH for hearing (this may be done by looking up the cases on the OAH's website, www.azoah.com). The OAH does not have jurisdiction over cases that have not yet been referred for hearing, and therefore is unable to consolidate such cases with existing cases on the OAH's docket. A motion to consolidate a case that has not yet been referred for hearing (and which therefore is not yet subject to the OAH's jurisdiction) will be denied as having been prematurely filed.

Once it has been determined that all of the cases for which consolidation is being sought are within the jurisdiction of the OAH, a formal motion to consolidate may be filed. By rule, that motion must be directed to the Administrative Law Judge who is assigned to the case with the earliest pending hearing date. See A.A.C. Rule R2-19-109(B). Again, this information may be determined by reviewing the case information available on the OAH's website. A motion to consolidate, like any other motion filed with the OAH, must be copied to every other party involved in the matters for which consolidation is being requested. Also, although not required, the moving party should consider providing a courtesy copy of the motion to the Administrative Law Judge(s) assigned to the other case(s) for which consolidation is being sought.

The principle that will most directly guide the Administrative Law Judge's decision as to whether to grant a motion to consolidate is whether consolidation will increase administrative efficiency. Thus, every motion to consolidate should explain, in detail, how such efficiency will be attained. As a general rule, a motion that simply recites the criteria listed in A.A.C. Rule R2-19-109(A) will not be considered persuasive. The Administrative Law Judge must be able to understand why convening a single hearing will make for a more orderly presentation of evidence, and how consolidation will facilitate the resolution of the issues presented.

If the motion to consolidate is granted, the hearing typically will be scheduled on the latest pending hearing date, and will be assigned to the Administrative Law Judge who is scheduled to hear the case on that date. Thus, the practical effect of consolidation in most instances is that the earlier case(s) will be continued to the later hearing date. A party may, however, request that the hearing be accelerated to an earlier hearing date, or that the consolidated cases be set for hearing on a different date. Such requests should be included in the party's motion.

Practical Considerations

As a general rule, a motion to consolidate is most likely to be granted when the basis for the motion is the fact that all of the parties are the same (though a showing still must be made that the consolidation will promote administrative efficiency). A more difficult issue arises when the circumstances involve a single complainant and multiple respondents (as can be the case, for example, in matters arising out of the Registrar of Contractors where a complaint has been filed against both a general contractor and one or more subcontractors). In this situation, a showing for consolidation may be made when the complaint arises out of the same basic fact pattern; however, the moving party still must demonstrate that efficiency will best be served by proceeding against all of the respondents at the same time. A third scenario involves the case of multiple complainants and a single respondent. Similar to the situation involving the single complainant and multiple respondents, one of the key inquiries will be whether the complaints arise from the same or a similar set of facts. Consolidation is less likely to be granted if each of the complainants is raising a separate set of issues. The final scenario involves the case of multiple complainants and multiple respondents. This situation is the least likely to give rise to consolidation, as the degree of complexity generated by the involvement of multiple parties on both sides will generally be considered a barrier, rather than an aid, to efficient case resolution through a single hearing.

In each of the above situations, the final determination as to whether consolidation will be permitted lies squarely within the discretion of the Administrative Law Judge to whom the motion is directed. Parties considering consolidation can advance their cause by filing their motions as early as possible in the process, and by concisely identifying each of the reasons why consolidation should be granted.

Severance

Severance, as the name implies, is the process by which two or more consolidated cases are severed from each other so that each may be heard individually. In accordance with A.A.C. Rule R2-19-109(D), cases may be severed upon motion by one or more of the parties, or in the discretion of the assigned Administrative Law Judge.

Severance is less common than consolidation, but may be ordered when the assigned Administrative Law Judge concludes that the cases involved contain sufficiently different issues of fact and/or law that continued consolidation will not promote efficient case resolution. Orders for severance are most common in cases that are consolidated prior to their referral to the OAH for hearing. However, on occasion an Administrative Law Judge may determine that a case previously consolidated upon motion has simply proved too unwieldy, or that consolidation did not give rise to the efficiencies believed to be present at the time of consolidation, and order severance.

In contrast to a motion for consolidation, a motion for severance should explain to the Administrative Law Judge why continued consolidation will not promote administrative efficiency. Some examples of grounds on which a motion to sever may be granted include (1) the existence of different parties with divergent interests, (2) the absence of a common set of operative facts, (3) distinct issues of law, and/or (4) different or contradictory requests for relief.

If an order for severance is issued, the newly separated cases will be re-set for hearing. If a party filing a motion for severance has any preference for particular hearing dates (including retaining the original hearing date), such preference should be expressed in the motion.

Conclusion

As can be seen from the foregoing discussion, the determination as to whether to grant a motion to consolidate or sever depends heavily on the particular facts and circumstances of the cases involved. Thus, parties should exercise particular care in explaining why consolidation or severance should be granted, and provide specific analysis as to how the granting of their motion will contribute to administrative efficiency.

Author

Revised 06/27/07 to add footnotes not previously reflected on the htm version of this article.

Homeowner Petitions Against An Association [1]

By Cliff J. Vanell, Director

Director's note: OAH is committed to fairness and making hearings accessible to all. This article is part of a series of informational articles to educate the public and parties who appear before us about the hearing process and how to better present their cases. The following article may be found at OAH's website at www.azoah.com along with all previous articles published in the OAH Newsletter.

Overview

In Laws 2006, Chapter 324, the Arizona Legislature created a revolutionary system of adjudication of disputes between homeowners [2] and their associations as an alternative to filing an action in court. Filing a petition with the Department of Fire, Building and Life Safety, the means by which such a matter is brought before the Office of Administrative Hearings (OAH), is a less costly and faster method of resolving disputes. Harnessing the advantages of streamlined procedures and a fast track which has proven itself since January 1996, disputes are resolved at OAH in generally less than 90 days. The OAH Administrative Law Judges have a great deal of leeway to consider evidence and to craft pre-hearing orders so as to maximize efficiency. However, there are costs to the process, some apparent, others less so.

There is an immediate cost to the homeowner in the nature of a filing fee.[3] Defending even a non-meritorious petition can be costly for an association, and the expense is ultimately borne by the association members, including the homeowner, through assessments. A homeowner will be reimbursed the filing fee by the association only if the homeowner is determined by the Administrative Law Judge to be the prevailing party. The homeowner therefore has an immediate interest in filing a valid petition, and one that can be proven. An unsubstantiated or invalid petition will result in the loss of the filing fee. Likewise, the association has an economic interest in evaluating the homeowner's petition to determine to what extent the alleged facts are really in dispute and whether the allegations have merit. What follows is offered in the way of a checklist to guide both homeowner and association.

Homeowner

1. Do I have a valid petition?

- **Am I alleging a violation of a statute in Title 33 or the community documents?**

  Only disputes that allege a violation of the provisions of A.R.S. Title 33 Chapter 9 (condominium associations) or Chapter 16 (planned community associations), or the provisions of the condominium or planned community documents can be heard by the OAH. For example, if the association is required to provide 24 hours notice of a Board meeting according to the association governing documents, and held a meeting without doing so, one would have a valid petition. Allegations of criminal acts, libel, slander, etc. which constitute violations of the criminal statutes of Title 13, or which constitute civil torts

are not within the jurisdiction of the OAH.

- **Is the violation by the association?**

  The petition must deal with a dispute between a homeowner and a condominium or planned community association. Disputes between two homeowners or with an individual board member of an association cannot be heard by the OAH.

- **Is it your dispute?**

  A homeowner has no standing to pursue a dispute on behalf of another homeowner. For example, if another homeowner is aggrieved by the denial of an architectural modification in violation of the association guidelines, only the aggrieved homeowner may bring a petition against the association.

- **Is it a current dispute?**

  There must be a current dispute. For example, if board meetings were held without notice but the practice has now been conformed to notice requirements and prior actions taken in violation of the notice requirements subsequently ratified, there may have been a technical violation of the association's governing documents, but it is no longer in dispute. Another way to look at it is to ask yourself whether a remedy can be fashioned by the Administrative Law Judge? If there is no remedy, or the situation has already been remedied, it is probably not a current dispute.

- **Has the dispute been previously adjudicated?**

  If the petition item has been decided by a court or previously has been addressed in a hearing before the OAH, it cannot be revisited. OAH has no authority for contempt proceedings or enforcement of prior decisions. However, failure by a party to comply with a decision issued by the OAH may result in the other party seeking enforcement of the Administrative Law Judge's decision through a contempt of court proceeding in Superior Court

2. Can I prove my petition?

The homeowner bears the burden of proving the allegations of the petition. Therefore, it is incumbent on the homeowner to have evidence to substantiate each allegation in the petition. Alleging counts that were not proven at hearing will be taken into account when determining whether the homeowner was the prevailing party and is entitled to reimbursement of the filing fee. Limiting the petition to strong allegations with good evidence maximizes the chances of having the filing fee reimbursed.

3. Are my expectations realistic about what I can accomplish?

The availability of the OAH hearing process ideally should result in compliance with statutes and association documents without the need to file a petition. The possibility of civil penalties together with the relative ease of bringing an action can provide motivation for an association to take the necessary action to comply with the applicable statutes and/or governing documents.

On the other hand, the Administrative Law Judge has no power to undo the passage of time or undo hurt feelings. The Administrative Law Judge cannot order damages or restitution. Civil penalties are reserved

for situations where it can be demonstrated that an association has acted punitively or in bad faith.

Association

1. Could the association have done a better job of communicating with the homeowner? If not in time to avoid a petition now, can a better job be done in the future?

Conflict is unavoidable. Credible dispute resolution systems at the association level can go a long way toward relieving tensions and fostering mutual trust. The best way to avoid a petition is to become aware of what the statutes and the community documents require. Associations should then either conform to them or follow the necessary procedures to change them.

2. Can the association rectify any deficiencies before the hearing?

Mistakes can occur, but many errors or omissions can be rectified. Doing so can avoid petitions being filed to compel such action. Correcting errors or omissions before hearing goes a long way toward streamlining the process and avoids expense to the association in the long run. Voluntarily rectifying errors may also avoid civil penalties as it demonstrates good faith.

3. Does the association have any valid defenses?

When a petition is filed, a response is required within 20 days. This is the time to begin examining the association's procedures to determine if the homeowner's points are well taken. Proceeding to hearing when there is no valid defense may factor into whether a civil penalty is appropriate.

4. Are there facts that can be agreed to?

Often the disagreement is not about the facts of the case so much as the interpretation of a statutory requirement or a provision of the association documents. If the association is willing to stipulate to a fact, proof of the fact then becomes unnecessary. This saves time and costs and allows the Administrative Law Judge to concentrate on the parties' arguments.

Conclusion

The OAH process provides a speedy and cost-effective method for resolving disputes that in the past might have taken years and tens of thousands of dollars in fees and costs. The filing fee creates economic incentive for a homeowner to bring meritorious petitions and potential civil penalties discourage vindictive behavior by an association. Unlike most litigation, these parties must continue to live with each other, literally. Associations that are diligent in acting appropriately under the community documents and law and who communicate well with homeowners can avoid unnecessary expense and acrimony. Because the expenses associated with hearings, be it reimbursement of the filing fee or incurring attorneys fees and costs, are ultimately passed on to the homeowners, both parties' interests are inextricably linked. The OAH process provides fair, impartial, and prompt hearings, and, in a sense, is like the ideal health care provider - approachable, affordable, user-friendly. But no matter how much you may like your doctors, the best course is not to need them.

Footnotes

1. Although an association can also file a petition against a member, this article is written from the point of view of a homeowner bringing a petition.

2. The term "homeowner" is used as a general term to include both homeowners and condominium owners.

3. The filing fee pays for the costs of sustaining the hearings program.

Author

Homepage | Frequently Asked Questions

Case Status | Background of the OAH | About the Assigned ALJ | Comments and Questions | OAH Procedural Rules Governing Hearings | Summary of Rules | Statutory Rules Governing Hearings | Articles from the OAH Newsletter | Filing a Motion Electronically | OAH Quarterly Statistics

Exhibit 3

REFERENCE TITLE: homeowners' associations; disputes; administrative hearings

State of Arizona
Senate
Fiftieth Legislature
First Regular Session
2011

SB 1148

Introduced by
Senator Biggs

AN ACT

AMENDING SECTIONS 41-2141, 41-2198.02 AND 41-2198.04, ARIZONA REVISED STATUTES; RELATING TO THE DEPARTMENT OF FIRE, BUILDING AND LIFE SAFETY.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 41-2141, Arizona Revised Statutes, is amended to read:

41-2141. Department of fire, building and life safety; establishment; purposes; components

A. The department of fire, building and life safety is 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.

B. THE DEPARTMENT OF FIRE, BUILDING AND LIFE SAFETY HAS AS AN ADDITIONAL PURPOSE THE PROTECTION OF THE PUBLIC INTEREST IN MAINTAINING THE SUBSTANTIAL RESPONSIBILITY FOR INTERPRETING AND ENFORCING THE TERMS OF MOBILE HOME PARK RENTAL AGREEMENTS THROUGH ITS HEARING OFFICER FUNCTIONS AND HAS EXERCISED THAT RESPONSIBILITY FOR MOBILE HOME COMMUNITIES FOR MANY YEARS, INCLUDING INTERPRETATION OF STATUTES REGULATING THOSE COMMON INTEREST COMMUNITIES AND THE INTERPRETATION AND ENFORCEMENT OF THE OTHERWISE PRIVATE CONTRACTS AND RULES THAT GOVERN THOSE COMMUNITIES, EVEN THOUGH THE COMMUNITIES THEMSELVES ARE NOT DIRECTLY LICENSED BY THE DEPARTMENT. ACCORDINGLY, THE DEPARTMENT OF FIRE, BUILDING AND LIFE SAFETY PERFORMS A SIMILAR FUNCTION FOR CONDOMINIUMS REGULATED BY TITLE 33, CHAPTER 9 AND PLANNED COMMUNITIES REGULATED BY TITLE 33, CHAPTER 16 IN THAT THE DEPARTMENT, THROUGH ITS HEARING OFFICER FUNCTION, APPLIES AND ENFORCES THE STATUTES REGULATING THOSE COMMON INTEREST COMMUNITIES AND THE INTERPRETATION AND ENFORCEMENT OF THE OTHERWISE PRIVATE CONTRACTS AND RULES THAT GOVERN THOSE COMMUNITIES. SIMILARLY, THE DEPARTMENT DOES NOT DIRECTLY LICENSE THOSE COMMUNITIES. It is also the purpose of the department to establish a procedure to protect the consumer of such products and services, INCLUDING THE OWNERS IN CONDOMINIUMS AND PLANNED COMMUNITIES AS WELL AS THE RENTERS IN MOBILE HOME PARK COMMUNITIES.

~~B.~~ C. The department of fire, building and life safety consists of the board of manufactured housing, the installation standards committee, the state fire safety committee and the director of the department. The director's office consists of the deputy director, the office of manufactured housing, the office of state fire marshal and the office of administration.

~~C.~~ D. The attorney general shall act for the department in all legal actions or proceedings and shall advise the department on all questions of law arising out of the administration of this chapter.

Sec. 2. Section 41-2198.02, Arizona Revised Statutes, is amended to read:

41-2198.02. Orders; penalties; disposition

A. The administrative law judge may order any party to abide by the statute, condominium documents, community documents or contract provision at issue and may levy a civil penalty on the basis of each violation. For

purposes of actions brought under the Arizona mobile home parks residential landlord and tenant act, the civil penalty shall not exceed five hundred dollars. All monies collected pursuant to this article shall be deposited in the state general fund to be used to offset the cost of administering the administrative law judge function, except that monies collected from disputes involving condominiums or planned communities as prescribed in section 41-2198.01, subsection B shall be deposited in the condominium and planned community hearing office fund established by section 41-2198.05. If the petitioner prevails, the administrative law judge shall order the respondent to pay to the petitioner the filing fee required by section 41-2198.01.

B. The order issued by the administrative law judge is binding on the parties unless a rehearing is granted pursuant to section 41-2198.04 based on a petition setting forth the reasons for the request for rehearing, in which case the order issued at the conclusion of the rehearing is binding on the parties. ~~Notwithstanding sections 41-1092.08, subsection B and 41-1092.09, an order issued by the administrative law judge in an action regarding a condominium or planned community is the final administrative decision and is not subject to a request for rehearing.~~ The order issued by the administrative law judge is enforceable through contempt of court proceedings AND IS SUBJECT TO JUDICIAL REVIEW AS PRESCRIBED BY SECTION 41-1092.08.

Sec. 3. Section 41-2198.04, Arizona Revised Statutes, is amended to read:

41-2198.04. Rehearing; appeal

A. ~~Except for an action relating to condominium documents or planned community documents or the statutes regulating condominiums or planned communities,~~ A person aggrieved by a decision of the administrative law judge may apply for a rehearing by filing with the director a petition in writing pursuant to section 41-1092.09. Within ten days after filing such petition, the director shall serve notice of the request on the other party by mailing a copy of the petition in the manner prescribed in section 41-2198.01 for notice of hearing.

B. The filing of a petition for rehearing temporarily suspends the operation of the administrative law judge's action. If the petition is granted, the administrative law judge's action is suspended pending the decision on the rehearing.

C. In the order granting or denying a rehearing, the director shall include a statement of the particular grounds and reasons for the director's action on the petition and shall promptly mail a copy of the order to the parties who have appeared in support of or in opposition to the petition for rehearing.

D. In a rehearing conducted pursuant to this section, a corporation may be represented by a corporate officer or employee who is not a member of the state bar if:

1. The corporation has specifically authorized such officer or employee to represent it.

2. Such representation is not the officer's or employee's primary duty to the corporation but is secondary or incidental to such officer's or employee's duties relating to the management or operation of the corporation.

Sec. 4. Legislative findings and intent; department of fire, building and life safety; community disputes

It is the intent of the legislature to find, determine and clarify all of the following after careful consideration of the case Gelb v. Department of Fire, Building and Life Safety, 1 CA CV 09-0744, filed October 28, 2010 (Ct. App. 2010):

1. The department of fire, building and life safety has exercised substantial responsibility for many years in the enforcement and application of state laws and private contracts that regulate the relationships between those who reside in and those who control certain types of common housing, namely, mobile home park residential communities.

2. The legislature has determined that while the direct licensure of mobile home parks and their owners may not have been necessary, the regulation of their private, legal relationships with their tenants has been and continues to be an important consumer protection function of the department of fire, building and life safety and that department has developed considerable expertise in interpreting, enforcing and applying the statutes relating to these mobile home communities and in interpreting, applying and enforcing the terms of the leases, rules and other documents that regulate the relationship between the residents of the mobile home parks and the owners and managers of those parks, and doing so in a cost-effective manner for the residents.

3. The legislature further determines and finds that while direct licensure and regulation of condominiums and planned communities may not be necessary at this time, the legislature has repeatedly found over the years that owners in condominiums and planned communities are frequently subjected to inconsistent, unreasonable and often unlawful enforcement and application of the declarations, rules and bylaws that govern their communities, their managers and their boards of directors, and owners are often unable to afford the cost of formally litigating their disputes in the superior court.

4. The legislature further finds that the continuing use of the existing hearing officer function in the department of fire, building and life safety will provide for an efficient use of already-established common interest community expertise at this agency, will provide an important consumer protection for owners in condominiums and planned communities and will efficiently and effectively provide for resolution of these common interest community disputes without the expense, formality and difficulty of requiring a trial in the superior court in every instance, and will do so without the cost and bureaucratic complexity of creating an entirely new administrative body to perform these important functions, while still maintaining the ability and right to recourse in the superior court, and without threat to the core functions of the judiciary.

Exhibit 4

Office of Administrative Hearings

1400 West Washington, Suite 101 - Phoenix, Arizona 85007
Telephone (602)-542-9826 FAX (602)-542-9827

Douglas A. Ducey
Governor

Greg Hanchett
Interim Director

March 23, 2017

Mr. R.L. Whitmer
6333 N. Scottsdale Road
Casita 21
Scottsdale, AZ 85250
rlwnaz@gmail.com

Via US mail and email

Re: Your email of March 21, 2017

Dear Mr. Whitmer:

I am in receipt of your email of March 21, 2017 (received in our office on March 22, 2017) inquiring as to filing a "contempt proceeding" against the Hilton Casitas Homeowners Association with the Office of Administrative Hearings (OAH) and whether there is a filing fee. I am unaware of any statutory process that exists to file any matter related to HOA complaints arising under ARS § 32-2199.02 et seq. directly with OAH. The administrative process for HOA cases envisioned under ARS § 32-2199.01 et seq. provides that a petition "shall be filed with the ***department***" (emphasis added), i.e., the Arizona Department of Real Estate, not the OAH. Furthermore, there is nothing in OAH's enabling statutes (ARS § 41-1092 et. seq.), that would enable OAH to enforce its own decisions through contempt proceedings that it would hold. Administrative tribunals have only those powers specifically prescribed by statute or rule. As I suggested in my March 6, 2017 letter to you, you should ***immediately*** seek the advice of an Arizona licensed attorney to assist you in deciding an appropriate course of action to take.

Sincerely,

Greg Hanchett
Greg Hanchett
Acting Director

Cc: Augustus Shaw IV, by email to ashaw@shawlines.com
Mark Bainbridge, by email to mark@bainbridgelawfirm.com

Mission Statement: We will contribute to the quality of life in the State of Arizona by fairly and impartially hearing the contested matters of our fellow citizens arising out of State regulation.

Exhibit 5

Arizona Office of Administrative Hearings

Homeowner Petitions Against An Association [1]

By Cliff J. Vanell

Note: OAH is committed to fairness and making hearings accessible to all. This article is part of a series of informational articles to educate the public and parties who appear before us about the hearing process and how to better present their cases. The following article may be found at OAH's website at www.azoah.com along with all previous articles published in the OAH Newsletter.

Overview

In Laws 2006, Chapter 324, the Arizona Legislature created a revolutionary system of adjudication of disputes between homeowners [2] and their associations as an alternative to filing an action in court. Filing a petition with the Department of Fire, Building and Life Safety, the means by which such a matter is brought before the Office of Administrative Hearings (OAH), is a less costly and faster method of resolving disputes. Harnessing the advantages of streamlined procedures and a fast track which has proven itself since January 1996, disputes are resolved at OAH in generally less than 90 days. The OAH Administrative Law Judges have a great deal of leeway to consider evidence and to craft pre-hearing orders so as to maximize efficiency. However, there are costs to the process, some apparent, others less so.

There is an immediate cost to the homeowner in the nature of a filing fee.[3] Defending even a non-meritorious petition can be costly for an association, and the expense is ultimately borne by the association members, including the homeowner, through assessments. A homeowner will be reimbursed the filing fee by the association only if the homeowner is determined by the Administrative Law Judge to be the prevailing party. The homeowner therefore has an immediate interest in filing a valid petition, and one that can be proven. An unsubstantiated or invalid petition will result in the loss of the filing fee. Likewise, the association has an economic interest in evaluating the homeowner's petition to determine to what extent the alleged facts are really in dispute and whether the allegations have merit. What follows is offered in the way of a checklist to guide both homeowner and association.

Homeowner

1. Do I have a valid petition?

- **Am I alleging a violation of a statute in Title 33 or the community documents?**

  Only disputes that allege a violation of the provisions of A.R.S. Title 33 Chapter 9 (condominium associations) or Chapter 16 (planned community associations), or the provisions of the condominium or planned community documents can be heard by the OAH. For example, if the association is required to provide 24 hours notice of a Board meeting according to the association governing documents, and held a meeting without doing so, one would have a valid petition. Allegations of criminal acts, libel, slander, etc. which constitute violations of the criminal statutes of Title 13, or which constitute civil torts are not within the jurisdiction of the OAH.

- **Is the violation by the association?**

  The petition must deal with a dispute between a homeowner and a condominium or planned community association. Disputes between two homeowners or with an individual board member of an association cannot be heard by the OAH.

- **Is it your dispute?**

  A homeowner has no standing to pursue a dispute on behalf of another homeowner. For example, if another homeowner is aggrieved by the denial of an architectural modification in violation of the association guidelines, only the aggrieved homeowner may bring a petition against the association.

- **Is it a current dispute?**

  There must be a current dispute. For example, if board meetings were held without notice but the practice has now been conformed to notice requirements and prior actions taken in violation of the notice requirements subsequently ratified, there may have been a technical violation of the association's governing documents, but it is no longer in dispute. Another way to look at it is to ask yourself whether a remedy can be fashioned by the Administrative Law Judge? If there is no remedy, or the situation has already been remedied, it is probably not a current dispute.

- **Has the dispute been previously adjudicated?**

  If the petition item has been decided by a court or previously has been addressed in a hearing before the OAH, it cannot be revisited. OAH has no authority for contempt proceedings or enforcement of prior decisions. However, failure by a party to comply with a decision issued by the OAH may result in the other party seeking enforcement of the Administrative Law Judge's decision through a contempt of court proceeding in Superior Court

2. Can I prove my petition?

The homeowner bears the burden of proving the allegations of the petition. Therefore, it is incumbent on the homeowner to have evidence to substantiate each allegation in the petition. Alleging counts that were not proven at hearing will be taken into account when determining whether the homeowner was the prevailing party and is entitled to reimbursement of the filing fee. Limiting the petition to strong allegations with good evidence maximizes the chances of having the filing fee reimbursed.

3. Are my expectations realistic about what I can accomplish?

The availability of the OAH hearing process ideally should result in compliance with statutes and association documents without the need to file a petition. The possibility of civil penalties together with the relative ease of bringing an action can provide motivation for an association to take the necessary action to comply with the applicable statutes and/or governing documents.

On the other hand, the Administrative Law Judge has no power to undo the passage of time or undo hurt feelings. The Administrative Law Judge cannot order damages or restitution. Civil penalties are reserved for situations where it can be demonstrated that an association has acted punitively or in bad faith.

Association

1. Could the association have done a better job of communicating with the homeowner? If not in time to avoid a petition now, can a better job be done in the future?

Conflict is unavoidable. Credible dispute resolution systems at the association level can go a long way toward relieving tensions and fostering mutual trust. The best way to avoid a petition is to become aware of what the statutes and the community documents require. Associations should then either conform to them or follow the necessary procedures to change them.

2. Can the association rectify any deficiencies before the hearing?

Mistakes can occur, but many errors or omissions can be rectified. Doing so can avoid petitions being filed to compel such action. Correcting errors or omissions before hearing goes a long way toward streamlining the process and avoids expense to the association in the long run. Voluntarily rectifying errors may also avoid civil penalties as it demonstrates good faith.

3. Does the association have any valid defenses?

When a petition is filed, a response is required within 20 days. This is the time to begin examining the association's procedures to determine if the homeowner's points are well taken. Proceeding to hearing when there is no valid defense may factor into whether a civil penalty is appropriate.

4. Are there facts that can be agreed to?

Often the disagreement is not about the facts of the case so much as the interpretation of a statutory requirement or a provision of the association documents. If the association is willing to stipulate to a fact, proof of the fact then becomes unnecessary. This saves time and costs and allows the Administrative Law Judge to concentrate on the parties' arguments.

Conclusion

The OAH process provides a speedy and cost-effective method for resolving disputes that in the past might have taken years and tens of thousands of dollars in fees and costs. The filing fee creates economic incentive for a homeowner to bring meritorious petitions and potential civil penalties discourage vindictive behavior by an association. Unlike most litigation, these parties must continue to live with each other, literally. Associations that are diligent in acting appropriately under the community documents and law and who communicate well with homeowners can avoid unnecessary expense and acrimony. Because the expenses associated with hearings, be it reimbursement of the filing fee or incurring attorneys fees and costs, are ultimately passed on to the homeowners, both parties' interests are inextricably linked. The OAH process provides fair, impartial, and prompt hearings, and, in a sense, is like the ideal health care provider - approachable, affordable, user-friendly. But no matter how much you may like your doctors, the best course is not to need them.

Footnotes

1. Although an association can also file a petition against a member, this article is written from the point of view of a homeowner bringing a petition.

2. The term "homeowner" is used as a general term to include both homeowners and condominium owners.

3. The filing fee pays for the costs of sustaining the hearings program.

Author

Exhibit 6

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

WILLIAM M. BROWN, *Plaintiff/Appellant,*

v.

TERRAVITA COMMUNITY ASSOCIATION, INC., an Arizona non-profit corporation, *Defendant/Appellee.*

No. 1 CA-CV 14-0455
FILED 7-30-2015

Appeal from the Superior Court in Maricopa County
No. LC2012-000699-001
The Honorable Crane McClennen, Judge

VACATED

COUNSEL

William M. Brown, Scottsdale
Plaintiff/Appellant

Ekmark & Ekmark, L.L.C., Scottsdale
By Curtis S. Ekmark
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Andrew W. Gould joined.

S W A N N, Judge:

¶1 William M. Brown appeals the superior court's judgment granting attorney's fees to Terravita Community Association, Inc. ("the Association"). We hold that the fee award was not authorized under any of the four bases presented to the superior court. Accordingly, we vacate the award.

FACTS AND PROCEDURAL HISTORY

¶2 Brown initiated this action after the Arizona Department of Fire, Building and Life Safety rejected his complaint that the Association, which governs the planned community in which Brown is a homeowner, violated A.R.S. § 33-1805(A) by refusing to produce certain records. The superior court affirmed the administrative ruling, and the Association sought its attorney's fees. The Association moved for fees under A.R.S. § 12-341.01 and an attorney's fees provision in the community's Declaration of Covenants, Conditions, and Restrictions ("CC&Rs"). Brown opposed the motion on the grounds that his administrative complaint did not arise out of contract as required by A.R.S. § 12-341.01 and that, at the time he filed the complaint for judicial review, the governing community documents did not provide for an award of attorney's fees in an administrative action. In reply, the Association cited A.R.S. § 12-349 and Ariz. R. Civ. P. 11 as additional grounds for an award of fees. The court awarded the Association a portion of the fees it requested, but did not specify the statutory or other basis for the award. Brown timely appeals.

DISCUSSION

¶3 Brown contends that the superior court erred by granting attorney's fees to the Association under A.R.S. § 12-341.01 because his appeal of an administrative decision did not arise out of contract. The applicability of § 12-341.01 is a question of statutory interpretation that we review de novo. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 13, ¶ 12 (App. 2000).

¶4 Section 12-341.01(A) provides that "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney's fees." The statute permits an award of fees only in actions that could not exist but for the breach of contract and does not apply to "purely

statutory causes of action," or when a contract serves as the factual predicate of an action but is not the essential basis of it. *Keystone Floor & More, LLC v. Ariz. Registrar of Contractors*, 223 Ariz. 27, 30, ¶ 11 (App. 2009) (citation omitted). To determine whether an action arose out of contract for purposes of § 12-341.01(A), we consider "the nature of the action and the surrounding circumstances" and decide if the contract is the "cause or origin of the dispute." *Id.* at ¶ 10 (citations omitted). *See also A.H. ex rel. White v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 190 Ariz. 526, 529 (1997) (stating that when an action arises from statutory obligations, "peripheral involvement of a contract does not require the application of § 12-341.01(A)"). For example, in *Keystone*, we held that an administrative proceeding before the Registrar of Contractors and the subsequent action for judicial review did not arise out of contract under § 12-341.01(A) because it focused on the contractor's statutory duties, not its contractual obligations to the homeowner, even though those duties and obligations overlapped. 223 Ariz. at 31-32, ¶¶ 14-20.

¶5 Similarly, in this case the administrative proceeding and judicial review action concerned the Association's statutory obligation to produce records under A.R.S. § 33-1805(A). The fact that the Association's CC&Rs purportedly contain similar terms[1] does not change the nature of the underlying action. Neither the administrative proceeding nor the action for judicial review constituted an action "arising out of a contract" for purposes of applying § 12-341.01(A).

¶6 We reject the Association's contention that such a ruling is contrary to *A.H.*, in which our supreme court held that an action arises out of contract for purposes of § 12-341.01 when a statutory obligation is imputed as part of the parties' contract. 190 Ariz. at 530. The court in *A.H.* noted that it had previously examined the relevant statute (A.R.S. § 20-673(C)) and determined that it was "the functional equivalent of an 'other insurance' clause typical in insurance contracts," and, therefore, it was designed to be statutorily imputed to an insolvent insurer's contract when a statutory fund assumed its rights and obligations. 190 Ariz. at 530. Here, by contrast, we have found no authority -- including the plain language of the statute -- to support the notion that the Legislature intended to integrate A.R.S. § 33-1805 as part of the declarations, bylaws, articles of incorporation, and rules of all planned communities.

¶7 We also reject the Association's argument that Brown's complaint for judicial review arises out of contract based on § 12-341.01's policy to "mitigate

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1 The relevant portions of the CC&Rs are not part of the record on appeal.

the burden of the expense of litigation to establish a just claim or defense." The Association correctly identifies the policy of the statute as set forth in § 12-341.01(B). But, as discussed above, Arizona law is clear that the statute does not apply to all actions that tangentially involve a contract. Further, we observe an equally compelling policy argument that homeowners who initiate administrative actions to enforce their statutory rights should not confront potential liability for attorney's fees simply because a planned community association has chosen to restate its statutory obligations in its governing documents. We hold that the Association was not entitled to recover fees under § 12-341.01.

¶8 We further hold that the Association was not entitled to an award of fees based on the attorney's fees provision of the CC&Rs. That provision authorized fee awards to prevailing parties in actions instituted to enforce the CC&Rs.[2] As we have already discussed, Brown's action arose out of statute and was not an action to enforce any of the provisions of the CC&Rs.[3] The attorney's fees provision of the CC&Rs therefore did not apply. Further, because the superior court did not make the findings required for an award of sanctions, we reject the Association's contention that we may affirm the fee award as appropriate under A.R.S. § 12-349 or Rule 11.[4] *See* A.R.S. § 12-350 ("In awarding attorney fees pursuant to § 12-349, the court shall set forth the specific reasons for the award . . . ."); *Rogone v. Correia*, 236 Ariz. 43, 50, ¶ 22 (App. 2014) (holding that statutory findings for an award of fees under § 12-349 must be sufficiently specific to allow a reviewing court to test the validity of the judgment); *Wells*

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2 The CC&Rs were amended during the pendency of Brown's action to allow the Association to recover fees incurred defending administrative claims and related appeals. We reject the Association's argument that it was entitled to recover the fees it incurred in the already-pending action after the effective date of the amendment. *Cf. Bouldin v. Turek*, 125 Ariz. 77, 78 (1979) (holding that A.R.S. § 12-341.01 does not apply to actions commenced before its effective date because it is similar to a statute changing the measure of damages, a substantive provision that cannot be applied retroactively).

3 The Association claims in its answering brief that the CC&Rs also provide for an award of attorney's fees to the prevailing party in an action "arising out of . . . the operations of the Association," citing, for the first time, Article XVII, Section 17.05(iii) of the CC&Rs. That provision does not, however, appear in the record on appeal.

4 We decline the Association's invitation to find that Brown has waived the issue of the award's propriety under § 12-349 and Rule 11.

Fargo Credit Corp. v. Smith, 166 Ariz. 489, 497 (App. 1990) (vacating Rule 11 sanctions because, *inter alia*, trial court failed to "make specific findings to justify its conclusion").

CONCLUSION

¶9 We determine that the Association was not entitled to an award of attorney's fees on any of the four bases it cited in the superior court. We vacate the award.

¶10 Because this action does not arise out of contract, we deny the Association's request for an award of attorney's fees on appeal under § 12-341.01. In addition, we determine that the prerequisites to an award of fees under § 12-349 are not present, and therefore deny the Association's request for fees under that statute. As the prevailing party on appeal, Brown is entitled to an award of his appellate costs upon his compliance with ARCAP 21.

Ruth A. Willingham · Clerk of the Court
FILED: RT