

1 **Final agency action regarding decision below:**

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3 **ALJFIN ALJ Decision final by statute**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 MIKE P. HARRIS

8 Petitioner,

9
10 vs.

11 POINTE SOUTH MOUNTAIN
12 RESIDENTIAL ASSOCIATION

13 Respondent.

No. 07F-H067017-BFS

**ADMINISTRATIVE LAW JUDGE
DECISION**

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17 **HEARING:** March 12, 2007 and March 28, 2007.

18 **APPEARANCES:** Mike P. Harris appeared personally. The Pointe South
19 Mountain Residential Association was represented by its attorneys, Lynn M. Krupnik,
20 Esq. and Kristina L. Pywowarczuk, Esq.

21 **ADMINISTRATIVE LAW JUDGE:** Brian Brendan Tully

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23 Based upon the evidence of record, the Administrative Law Judge makes the
24 following Findings of Fact, Conclusions of Law and Order:

25 **FINDINGS OF FACT**

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27 1. Mike P. Harris ("Petitioner") is the owner of a residence located within The Pointe
28 South Mountain Residential Association ("Respondent") in Phoenix, Arizona.
29 2. Petitioner also served as a director, but not an officer, of Respondent's board of
30 directors for several years.
3. Respondent is managed by City Property Management Company ("CPMC").

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007
(602) 542-9826

- 1 4. Members of Respondent are governed by The Pointe South Mountain
2 Residential Association Restated Declaration of Homeowner of Homeowner
3 Benefits and Assurances dated 10/1/04 ("CC&RS") and The Point South
4 Mountain Residential Association Amended Bylaws as of 10/21/92 ("Bylaws").
- 5 5. The Arizona Department of Building, Fire and Life Safety ("Department") is
6 authorized by statute to process petitions from condominium or planned
7 community associations and its members for violations of applicable contractual
8 documents and/or statutes. Such petitions are then forwarded to the Office of
9 Administrative Hearings, an independent agency, for formal evidentiary hearings.
- 10 6. On or about December 21, 2006, Petitioner filed a written Petition against
11 Respondent with the Department, the terms of which are incorporated herein by
12 reference. The Petition contains 20 allegations of wrongdoing by Respondent,
13 with multiple subsets under most of the allegations.
- 14 7. The tribunal granted Respondent's motion for summary judgment as to
15 Petitioner's allegations number 7, 15, 18, and the first bullet point of 20, which
16 reads: "Frank Frangul pushed Barry Smith out the door at the January 11, 2005
17 Board Meeting."
- 18 8. Respondent was not required to provide Petitioner with a lawyer in this matter
19 under its Directors and Officers Liability insurance policy ("D&O insurance").
- 20 9. Respondent did obtain proper D&O insurance.
- 21 10. Respondent's president, Kay Hatch, did execute a Quit Claim Deed for Lot 1585
22 under the mistaken belief that the property was owned by Respondent. Once the
23 mistake was recognized, it was corrected. No damage was caused to the real
24 property owner.
- 25 11. On or about May 24, 2004, Respondent's then treasurer, Dave Harp, made two
26 \$25,000.00 investments with Respondent's funds on its behalf. Mr. Harp is found
27 to have acted within the scope of his authority as Respondent's corporate
28 treasurer to make such investments, which did not require Respondent's board of
29 directors to approve.
- 30 12. Article 5.3.2 Suspension of the CC & RS reads as follows:

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2 In [sic] any Owner shall be in arrears in the payment of any
3 amounts due under any of the provisions of this Declaration for a
4 period of fifteen days, or shall be in default in the performance of
5 any of the terms of this Declaration for a period of fifteen days, that
6 Owner's right to vote as a Member of the Association shall be
7 suspended automatically and shall remain suspended until all
8 payments are made and defaults cured.

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- 13. There are members of Respondent who own multiple lots. The Administrative Law Judge finds that Article 5.3.2 applies to an owner of a specific lot. Therefore, if the owner of multiple lots is suspended pursuant to that provision, the suspension applies only to the specific lot in arrears but not to all lots owned by such a member. A multiple property owner is not totally disenfranchised for voting purposes for being in arrears for a specific lot. A multiple property owner may still vote via their lots in good standing.
 - 14. Petitioner was a candidate for Respondent's board of directors in Respondent's 2006 election. Petitioner lost the election. He claims that multiple owners of lots with some in arrears were permitted to vote using the ballots for the lots not in arrears. Petitioner also claims that certain delinquent ballots should have been counted.
 - 15. Respondent was not required to conduct a runoff election for the 2006 election. The owners of all lots in good standing, including multiple owners with lots in arrears which lots could not vote, were eligible to vote. Respondent improperly determined that the owner of Lot 351 was delinquent at the time of the election and did not count the owner's ballot. After the first day of hearing, Respondent determined that the owner had not been delinquent and was eligible to vote. Respondent then opened the ballot, which reflected that the owner voted for Frank Frangul and Les Meyers. The ballot for Lot 351 did not change the election results.

16. Respondent is found to maintain Respondent's common areas in a reasonable manner.¹
17. Respondent's board did not fail to uphold their fiduciary duties relative to the property management contract. Further, Respondent is not required to have a comprehensive landscaping contract as alleged by Petitioner.
18. Respondent is found to have given proper notice of special board meeting as required.
19. Petitioner failed to establish his right to record board meetings using a tape recorder. Therefore, the board acted within its discretion to not permit Petitioner to record such meetings, which are open to members but not to the public.
20. Petitioner failed to establish that Respondent was required to publish articles he authored in its newsletter. While Petitioner may feel that his articles are helpful, Respondent should be able to control the content of its newsletter.
21. Respondent's property management company is found to have failed to timely provide Petitioner with requested documents in December 2006. Petitioner was provided with requested documentation in four days rather than the required three days. Petitioner failed to establish any harm for the one day delay.

CONCLUSIONS OF LAW

1. A.R.S. § 41-2198.01 permits a member of a homeowners association to file a petition against the association with the Department. That statute provides that such petitions will be heard before the Office of Administrative Hearings.

¹ On the first day of hearing, Petitioner's last witness was Blanch Prokes, a member of Respondent and a property manager for another property management company, who testified on direct examination about Respondent's maintenance of the common areas. The timing of Ms. Prokes' testimony was determined by Petitioner. Her direct testimony was concluded at approximately 4:55 p.m. Respondent's lead counsel, Lynn M. Krupnik, Esq., indicated that she had prepared to cross-examine Ms. Prokes, but due to the late hour, the length of time needed to conduct her cross-examination of the witness and the need to pickup her daughter at daycare before 6:00 p.m., the tribunal continued the cross-examination of Ms. Prokes to the second hearing date. Ms. Prokes indicated that she would attend. On the second day of hearing, Petitioner indicated that Ms. Prokes would not appear for cross-examination. Therefore, Ms. Prokes' direct examination was stricken from the record due to Respondent being unable to cross-examine her. The parties stipulated to the admission of photographic evidence taken by Ms. Prokes.

- 1 2. Pursuant to A.A.C. R2-19-119(B), Petitioner has the burden of proof in this
2 matter. The standard of proof is preponderance of the evidence. A.A.C. R2-19-
3 119(A).
- 4 3. Respondent violated by provisions of Bylaws Section 2 by not properly and timely
5 counting the ballot for Lot 351, which did not affect the outcome of the 2006
6 board election.
- 7 4. Respondent violated the provisions of Bylaws Article IX by failing to allow
8 Petitioner to timely review the delinquency report used for the 2006 board
9 election.
- 10 5. The Administrative Law Judge concludes that Petitioner failed to sustain his
11 burden of proof on the remaining issues set forth in his Petition.
- 12 6. The Administrative Law Judge concludes that Petitioner is not the prevailing
13 party in this matter and that he is not entitled to reimbursement of his \$550.00
14 filing fee paid to the Department from Respondent, pursuant to A.R.S. § 41-
15 2198.02(A).

16 **ORDER**

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19 **IT IS ORDERED** that Respondent be admonished that it must assure that future
20 election ballots are properly counted so that no member eligible to vote is
21 disenfranchised, regardless of whether it will affect the outcome of the election, and
22 must assure that CPMC, or any successor property management company, timely
23 complies with Article IX of the Bylaws.
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27 Done this day, April 17, 2007

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30 Brian Brendan Tully
Administrative Law Judge

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Original transmitted by mail this
____ day of _____, 2007, to:

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By _____