

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 DOUGLAS DEWAR,

8 Petitioner,

9
10 vs.

11 GAINNEY RANCH COMMUNITY
12 ASSOCIATION,

13 Respondent.

No. 08F-H088002-BFS

**ADMINISTRATIVE LAW JUDGE
DECISION**

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17 **HEARING:** April 8, 2008.

18 **APPEARANCES:** Douglas Dewar appeared personally. The Gainey Ranch
19 Community Association was represented by its attorney, Burton T. Cohen, Esq.

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

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22 Based upon the entire record in this matter, the Administrative Law Judge makes
23 the following Findings of Fact, Conclusions of Law and Order:

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25 **FINDINGS OF FACT**

- 26
27 1. Gainey Ranch Community Association ("Respondent") is a master homeowners
28 association located in Scottsdale, Arizona.
29 2. Within the boundaries of Respondent are 19 Satellite sub-associations, who also
30 have their own board of directors and architectural committees.

- 1 3. Respondent is governed by the following: the Bylaws of the Gainey Ranch
2 Community Association (“Bylaws”); the Articles of Incorporation for the Gainey
3 Ranch Community Association; the Amended and Restated Declaration of
4 Covenants, Conditions, Restrictions Assessments, Charges, Servitudes, Liens,
5 Reservations and Easements (“CC & Rs”) (collectively known as “Governing
6 Documents;” and applicable statutes for planned communities.
- 7 4. Douglas Dewar (“Petitioner”) is a member of both Respondent and the Golf
8 Villas, one of Respondent’s Satellite associations.
- 9 5. In 2007, a dispute arose between Petitioner, the Golf Villas Satellite association
10 and another one of the latter’s members concerning Petitioner’s enclosure of his
11 trash bins outside of his residence.
- 12 6. On March 22, 2007, Respondent’s board of directors conducted an emergency
13 board meeting without notice to its members. The emergency board meeting was
14 called to order immediately following a meeting between Respondent’s board
15 and the Golf Villas’ board of directors.
- 16 7. The minutes of Respondent’s March 22, 2007 emergency board meeting reflect
17 that the board members present discussed the Golf Villas’ request that
18 Respondent enforce the Golf Villa board’s decision of January 23, 2007 not to
19 allow Petitioner’s trash container enclosure. Those minutes reflect that
20 Respondent’s board instructed Respondent’s executive director to commence a
21 process to enforce the decision of the Golf Villas’ board and its architectural
22 committee against Petitioner.
- 23 8. The minutes of the March 22, 2007 emergency board meeting do not reflect that
24 Respondent’s board went into executive session at any time to obtain legal
25 advice from its counsel, who was present by invitation.
- 26 9. The minutes of the March 22, 2007 emergency board meeting do not state the
27 reason for the emergency board meeting or reflect that Respondent’s board
28 discussed any potential legal actions.
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- 1 10. Petitioner subsequently filed a single count Petition against Respondent with the
2 Arizona Department of Fire, Building and Life Safety (“Department”) and he paid
3 the single count Petition fee of \$550.00 to the Department.
- 4 11. The Department forwarded Petitioner’s Petition against Respondent to the Office
5 of Administrative Hearings, an independent agency, for formal hearing.
- 6 12. Upon review of Petitioner’s Petition, the undersigned Administrative Law Judge
7 made a determination that the Petition contained more than a single count
8 alleged violation. As a result, the Administrative Law Judge issued an Order
9 dismissing all alleged violations except for the first one listed in the Petition.
- 10 13. The scope of the instant hearing is whether Respondent committed a violation by
11 conducting the emergency board meeting on March 22, 2007 without notice to its
12 members.
- 13 14. Respondent’s Governing Documents have no provision for its board to conduct
14 an emergency meeting without prior notice to its membership.
- 15 15. Respondent contends that it conducted the emergency board meeting pursuant
16 to A.R.S. § 33-1804(C), which permits a board to conduct an emergency board
17 meeting if emergency circumstances require a board action prior to the time
18 notice of a board meeting can be given.
- 19 16. While Respondent’s executive director testified at the hearing that another
20 member of the Golf Villa Satellite association had threatened Respondent with
21 legal action, the minutes of the March 22, 2007 emergency board meeting do not
22 reflect any discussion of that potential legal action or that the board had gone into
23 executive session to obtain any legal advice during that meeting, which lasted 20
24 minutes.
- 25 17. There is no credible evidence that a true emergency existed requiring a quorum
26 of Respondent’s board to meet without notice to its membership.
- 27 18. The fact that Respondent’s board voted to direct its executive director to
28 commence a process to enforce the Golf Villas Satellite association’s
29 determination to not allow Petitioner’s trash enclosure supports a finding that
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1 time was not of the essence in scheduling a board meeting for the issues
2 discussed at the emergency board meeting on March 22, 2007.

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4 **CONCLUSIONS OF LAW**

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- 6 1. The Department has the statutory authority to process Petitions against planned
7 communities.
 - 8 2. The Office of Administrative Hearings has the statutory authority to conduct
9 evidentiary hearings and to issue orders in disputes between members and
10 planned communities pursuant to A.R.S. § 41-2198.02.
 - 11 3. Pursuant to A.A.C. R2-19-119(B), Petitioner has the burden of proof in this
12 matter. The standard of proof is preponderance of the evidence. A.A.C. R2-19-
13 119(A).
 - 14 4. Respondent violated the provisions of A.R.S. § 33-1804(A) by conducting an
15 emergency board meeting on March 22, 2007 contrary to statute. The meeting
16 did not comply with the requirements of A.R.S. § 33-1804(A) (1), as there is no
17 credible evidence that Respondent's board sought legal advice from its counsel
18 during the meeting, and there is no credible evidence that Respondent's board
19 met to discuss pending or contemplated litigation pursuant to A.R.S. § 33-
20 1804(A) (2), since the minutes of the emergency board meeting do not reflect
21 any such discussion and Respondent's board did not go into executive session
22 on that date to discuss any such matters with its counsel in attendance.
 - 23 5. A.R.S. § 33-1804(C) provides that "[n]otice to members of meetings of the board
24 of directors is not required if emergency circumstances require action by the
25 board before notice can be given." The credible evidence of record does not
26 support a conclusion that emergency circumstances required action by
27 Respondent's board before notice of a board meeting could be sent to its
28 members. There is no credible evidence that Respondent's board could not have
29 given members notice of the agenda of the emergency board meeting within the
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1 time frame set forth in Respondent's Governing Documents and applicable
2 statutory provisions.

- 3 6. Pursuant to A.R.S. § 41-2198.02(A), the Administrative Law Judge may assess a
4 civil penalty upon Respondent for its violation of the statutory and Governing
5 Documents' requirements for conducting a board meeting with proper notice to
6 its members. The imposition of a civil penalty against Respondent is warranted in
7 this matter.
- 8 7. The Administrative Law Judge concludes that Complainant sustained his burden
9 of proof in this matter. Pursuant to A.R.S. § 41-2198.02(A), the Administrative
10 Law Judge shall order Respondent to pay Petitioner his filing fee of \$550.00 paid
11 to the Department.
- 12 8. Notwithstanding the foregoing, A.R.S. § 33-1804(C) provides that "[t]he failure of
13 any member to receive actual notice of a meeting of the board of directors does
14 not affect the validity of any action taken at that meeting."

15 **ORDER**

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17 IT IS ORDERED that Petitioner be deemed the prevailing party in Case No. HO
18 08-8/002.

19 IT IS FURTHER ORDERED that Respondent comply in the future with the
20 requirements of A.R.S. § 33-1804(C) by only conducting emergency meetings of its
21 board of directors when legitimate "emergency circumstances require action by the
22 board before notice can be given" to its members.

23 IT IS FURTHER ORDERED that Respondent pay Petitioner his filing fee of
24 \$550.00 paid to the Department in this matter within 30 days of the date of this Order.

25 IT IS FURTHER ORDERED that Respondent pay a civil penalty in the amount of
26 \$150.00 to the Department within 30 days of the date of this Order.

27 Pursuant to A.R.S. § 41-2198.04(A), this Order is the final administrative
28 decision and it is not subject to a request for rehearing. This Order is enforceable
29 through contempt of court proceedings, pursuant to A.R.S. § 41-2198.02(B).
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Done this day, April 28, 2008

Brian Brendan Tully
Administrative Law Judge

1 Original transmitted by mail this
2 ____ day of _____, 2008, to:

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16 By _____
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