

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

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3 **ALJFIN ALJ Decision final by statute**

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5 **STATE OF ARIZONA**
6 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

7
8 DOUGLAS DEWAR,

9 Petitioner,

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11 vs.

12 GAINNEY RANCH COMMUNITY
13 ASSOCIATION,

14 Respondent.

No. 08F-H089006-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

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17 **HEARING:** January 22, 2009

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

21 **ADMINISTRATIVE LAW JUDGE:** Michael G. Wales

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

26 **FINDINGS OF FACT**

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

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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 Ranch
3 Community Association; the Amended and Restated Declaration of Covenants,
4 Conditions, Restrictions Assessments, Charges, Servitudes, Liens, Reservations and
5 Easements (“CC & Rs”) (collectively known as “Governing Documents”) and applicable
6 statutes for planned communities.

7 4. Douglas Dewar (“Petitioner”) is a member of both Respondent and the
8 Golf Villas, one of Respondent’s satellite associations. As a member of the master
9 association and satellite association, Petitioner is contractually bound to abide by the
10 rules and use restrictions set forth in the governing documents of both associations.

11 5. In 2007, a dispute arose between Petitioner, the Golf Villas satellite
12 association and another one of the latter’s members concerning Petitioner’s enclosure
13 of his trash bins outside of his residence.

14 6. On March 22, 2007, Respondent’s Board of Directors conducted an
15 emergency board meeting without notice to its members. The emergency board
16 meeting was called to order immediately following a meeting between Respondent’s
17 Board and the Golf Villas’ Board of Directors.

18 7. The minutes of Respondent’s March 22, 2007 emergency board meeting
19 reflect that the Board Members present discussed the Mr. Carter’s and Golf Villas’
20 request that Respondent enforce the Golf Villa Board’s decision of January 23, 2007 not
21 to allow Petitioner’s trash container enclosure. Those minutes reflect that Respondent’s
22 Board instructed Respondent’s executive director to commence a process to enforce
23 the decision of the Golf Villas’ board and its architectural committee against Petitioner.

24 8. Thereafter, Petitioner filed a Petition against Respondent with the Arizona
25 Department of Fire, Building and Life Safety (“Department”) alleging the March 22, 2007
26 Board Meeting violated the Open Meeting law set forth in A.R.S. § 33-1804. The
27 Department forwarded Petitioner’s Petition against Respondent to the Office of
28 Administrative Hearings, an independent agency, for formal hearing before
29 Administrative Law Judge Brian Tulley.
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1 9. Upon hearing evidence regarding Petitioner’s single count Petition,
2 Administrative Law Judge Tully made a determination Respondent committed a
3 violation of the governing documents by conducting the emergency board meeting on
4 March 22, 2007 without notice to its members. Judge Tully also noted that A.R.S. § 33-
5 1804(C) provides that “[t]he failure of any member to receive actual notice of a meeting
6 of the board of directors does not affect the validity of any action taken at that meeting.”

7 10. On March 12, 2008, Petitioner filed an eight-count Petition against
8 Respondent with the Department. The eight-count Petition, alleging violations of
9 various statutes and Respondent’s governing documents relating to the alleged
10 disapproval of, and subsequent enforcement actions regarding, Petitioner’s same trash
11 container enclosure, is the subject of the instant hearing. The Department forwarded
12 Petitioner’s eight-count Petition to the Office of Administrative Hearings, an independent
13 agency, for the instant formal hearing.

14 11. After hearing testimony and reviewing the exhibits presented at the
15 hearing on the eight-count Petition, the undersigned Administrative Law Judge makes
16 the following findings:

17 12. Regarding Count 1, Respondent did not violate Section 2, Article 1(F) of
18 the Gainey Ranch Architectural Rules, as alleged by Petitioner, when Respondent, on
19 January 24, 2007, “Refused to approve my application to install an enclosure to screen
20 my garbage cans.” The evidence of record clearly established that the Respondent,
21 which is the master association, did approve Petitioner’s application. It was the satellite
22 association, Golf Villas, a non-party to the instant action, which refused to approve
23 Petitioner’s application. Section 2, Article 1(F) of the Gainey Ranch Architectural Rules
24 provides that if an applicant requests in writing an immediate decision on his
25 application, and if the master association and satellite association architectural
26 committees do not provide a written decision to the applicant within 3 working days, the
27 application is deemed approved. As stated above, Respondent approved the
28 application. The satellite association, Golf Villas, did not, but Golf Villas is not a party to
29 the instant action, and as such, even if the satellite association Golf Villas had violated
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1 Section 2, Article 1(F), this tribunal has no authority to order Golf Villas to abide by the
2 architectural rules.

3 13. Regarding Count 2, Respondent did not violate Section 2, Article 1(H) of
4 the Gainey Ranch Architectural Rules, as alleged by Petitioner, when Respondent, on
5 March 12, 2007, "received an appeal from my neighbor's attorney regarding my trash
6 enclosure and did not immediately notify me of the appeal." The evidence of record
7 established that on Sunday, March 11, 2007, attorney Kent Berk, representing one of
8 Petitioner's neighbors, sent an e-mail to Respondent's attorney Burt Cohen and to Paul
9 Carter, the President of satellite association Golf Villas, demanding that Golf Villas, and
10 Respondent, enforce Golf Villas' rule that trash containers may not be kept outside
11 except for collection times¹. On March 12, 2007, attorney Cohen forwarded the e-mail
12 to Fed Thielen, Respondent's Executive Director at the time. Section 2, Article 1(H) of
13 the Gainey Ranch Architectural Rules requires immediate notification of an applicant if
14 the Architectural Committee's decision in regards to the applicant is appealed by an
15 aggrieved owner. Mr. Berk's e-mail of March 11, 2007, however, does not constitute an
16 appeal of any decision by the Architectural Committee, and therefore, Section 2, Article
17 1(H) of the Gainey Ranch Architectural Rules does not apply.

18 14. Regarding Count 3, Respondent did not violate Article V, Section 3 of the
19 Gainey Ranch Master Declaration, as alleged by Petitioner, when, on March 22, 2007,
20 as alleged by Petitioner, "The Board of Directors directly heard a complaint from the
21 Golf Villas satellite association Instead of referring the complaint to The Council of
22 Presidents." Article V, Section 3 of the Gainey Ranch Master Declaration provides for
23 an advisory group, known as the Council of Presidents, to consider and make
24 recommendations to the master association's Board of Directors on certain enumerated
25 conflicts between the master association and any satellite association. The evidence of
26 record established that on March 22, 2007, a meeting was held between Respondent's
27 Board of Directors and the Golf Villas' Board of Directors. This meeting was held prior
28 to the "emergency meeting" of Respondent's Board of Directors on March 22, 2007 as

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30 ¹ Respondent is the property management vendor for all satellite associations and therefore, is the entity
charged with advising owners that they have violated any of the satellites associations' rules, and if
necessary, subsequently enforcing the satellite associations' rules for them.

1 described above. First and foremost, the evidence of record did not establish that the
2 meeting between the two Boards was anything other than a meeting to coordinate
3 enforcement of Golf Villas rules as they apply to trash receptacles. Secondly, and
4 equally as important, nothing in Article V, Section 3 of the Gainey Ranch Master
5 Declaration suggests that referral to the Council of Presidents is anything but
6 discretionary. Thus, even if a conflict existed between the two Boards as to proper
7 enforcement of Golf Villas rules, referral to the Council of Presidents is not mandatory.

8 15. Regarding Count 4, Respondent did not violate Section 2 , Article 1(H) of
9 the Gainey Ranch Architectural Rules, as alleged by Petitioner, when, on March 22,
10 2007, "The Board of Directors held a meeting to consider my trash enclosure without
11 allowing me to be present to present my case." At hearing, Petitioner suggested again
12 that Mr. Berk's e-mail constituted an appeal, and as such, he should have been notified
13 to be present at the March 22, 2007 Board Meeting to argue against the "appeal." As
14 discussed above, Section 2, Article 1(H) of the Gainey Ranch Architectural Rules
15 requires immediate notification of an applicant if the Architectural Committee's decision
16 in regards to the applicant is appealed by an aggrieved owner. Also as discussed
17 above, Mr. Berk's e-mail of March 11, 2007 does not constitute an appeal of any
18 decision by the Architectural Committee, and therefore, Section 2, Article 1(H) of the
19 Gainey Ranch Architectural Rules does not apply.

20 16. Regarding Count 5, Respondent did not violate Section 2 , Article 1(F) of
21 the Gainey Ranch Architectural Rules, as alleged by Petitioner, when Respondent, on
22 April 3, 2007, "Sent me a letter demanding that my trash enclosure be removed even
23 though it had been approved as stated in the rules." At hearing, Respondent again
24 contended that since he did not receive written approval of his trash enclosure by
25 Respondent within three working days it was deemed approved pursuant to Section 2,
26 Article 1(F) of the Gainey Ranch Architectural Rules, and, as such, Respondent should
27 not be ordering the trash enclosure to be removed. As discussed above, however,
28 Respondent, in sending the enforcement letter, was simply exercising its duties as
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1 property manager for satellite association Golf Villas, which had denied Petitioner's
2 application, and Respondent was properly demanding removal on behalf of Golf Villas².

3 17. Regarding Count 6, Respondent did not violate Article IV, Section 2(j) of
4 the Gainey Ranch Master Declaration, as alleged by Petitioner, when Respondent, on
5 April 3, 2007, "Sent me a letter demanding that my trash cans be stored in my garage."
6 Article IV, Section 2(j) of the Gainey Ranch Master Declaration states, in pertinent part,
7 that trash containers shall be kept in a location where they are not visible from a
8 neighboring property. As discussed above, Respondent, in sending an enforcement
9 letter, was simply exercising its duties as property manager for satellite association Golf
10 Villas, which had denied Petitioner's application, and Respondent was properly
11 demanding removal on behalf of Golf Villas.

12 18. Regarding Count 7, Respondent did not violate A.R.S. § 33-1804; Article
13 XIV, Section 2 of the Gainey Ranch Master Declaration; or Article III, Section 2 of the
14 Gainey Ranch Bylaws, as alleged by Petitioner, when Respondent, on May 4, 2007,
15 "Mailed A ballot to owners proposing an amendment to the master declaration which
16 had not been properly approved by the Board of Directors. Petitioner contended that
17 Board approved the ballot at the March 22, 2007 Board Meeting, and because owners
18 were not given notice of the March 22, 2007 Board Meeting, the ballot is invalid. First
19 and foremost, A.R.S. § 33-1804(C) provides that "[t]he failure of any member to receive
20 actual notice of a meeting of the board of directors does not affect the validity of any
21 action taken at that meeting." Thus, the ballot is not invalidated by the fact the Board
22 failed to give the owners notice of its March 22, 2007 meeting. Petitioner also
23 contended that Article XIV, Section 2 of the Gainey Ranch Master Declaration and
24 Article III, Section 2 of the Gainey Ranch Bylaws require that the master declaration
25 may only be amended by an election at which members are physically present.
26 Nothing in either Article requires such physical presence and nothing in either article or
27 statute prohibits the mailing of ballots to owners.

28 19. Regarding Count 8, Respondent did not violate A.R.S. § 33-1804; A.R.S.
29 § 33-1812; Article XIV, Section 2 of the Gainey Ranch Master Declaration; Article V,

30 ² Petitioner has not appealed, or brought any legal challenge to, Golf Villas denial of his application to
keep his trash receptacle outside of his garage.

1 Section 2(a) of the Gainey Ranch Articles of Incorporation; or Article VII, Section 1 of
2 the Gainey Ranch Articles of Incorporation, as alleged by Petitioner, when on June 15,
3 2007, Respondent "Recorded an amendment to the master declaration. No meeting of
4 the owners was held to discuss or vote on the amendment." The evidence of record
5 established that the only act by Respondent on June 15, 2007 was the recording of the
6 Amendment clarifying that satellite associations may enact their own separate and
7 distinct rules regarding placement and visibility of trash receptacles. No evidence was
8 presented that the act of recording the recording itself violated any of the alleged
9 statutes or alleged sections of the governing documents. Petitioner also asserted that
10 the Amendment should not have been recorded because there was not a physical
11 meeting and votes were not physically cast. This contention, however, has been
12 addressed and dismissed above. In this last and final count contained in his Petition,
13 however, Petitioner also contended that the election by written ballot violated A.R.S. §
14 33-1812. A.R.S. § 33-1812 states "...the association...may provide for voting by some
15 other form of delivery." Thus, just as the Respondent's governing documents do not
16 prohibit action by written ballot, neither does A.R.S. § 33-1812.

17 CONCLUSIONS OF LAW

18 1. The Department has the statutory authority to process petitions against
19 planned communities.

20 2. The Office of Administrative Hearings has the statutory authority to
21 conduct evidentiary hearings and to issue orders in disputes between members and
22 planned communities pursuant to A.R.S. § 41-2198.02.

23 3. Pursuant to A.A.C. R2-19-119(B), Petitioner has the burden of proof in this
24 matter. The standard of proof is preponderance of the evidence. A.A.C. R2-19-119(A).

25 4. Petitioner has not established by a preponderance of evidence that
26 Respondent violated any of the alleged provisions of A.R.S. § 33-1801 *et. sec.* or any of
27 the alleged provisions of the Respondent's governing documents.

28 5. Although Respondent prevailed in this matter, an administrative proceeding
29 is not an "action" such as to make attorney's fees awardable under A.R.S. §§ 33-
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1 1807(H) or 12-341.01.³ Respondent's request for attorneys' fees, set forth in its
2 Amended Answer, filed November 20, 2008, must therefore be denied.

3 6. Petitioner is not the prevailing party and is not entitled to be reimbursed
4 the cost of his filing fee under A.R.S. § 41-2198.02(A).

5 **ORDER**

6 Based on the foregoing,

7 **IT IS ORDERED** dismissing the Petition against Respondent Gainey Ranch
8 Community Association, Inc. in its entirety in Case No. HO 08-9/006.

9 **IT IS FURTHER ORDERED** denying Respondent's request for attorney's fees.

10 Pursuant to A.R.S. §41-2198.04(A), this Order is the final administrative decision
11 and it is not subject to a request for rehearing.

12 A party may appeal a final administrative decision pursuant to Title 12, Chapter
13 7, Article 6. See A.R.S. § 41-1092.08(H). A.R.S. § 12-904(A) provides, in pertinent
14 part, that: "[a]n action to review a final administrative decision shall be commenced by
15 filing a complaint within thirty-five days from the date when a copy of the decision
16 sought to be reviewed is served upon the party affected. . . . Service is complete on
17 personal service or five days after the date that the final administrative decision is
18 mailed to the party's last known address."

19 Done this day, January 28, 2009.

20 Office of Administrative Hearings

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³ See *Semple v. Tri-City Drywall, Inc.*, 172 Ariz. 608, 611-612, 838 P.2d 1369, 1372-73 (App. 1992)
30 (Prevailing party in administrative claim before Registrar of Contractors was not entitled to attorney's
fees from its opponent under A.R.S. § 12-341.01(A) because administrative hearing is not an "action").

Michael G. Wales
Administrative Law Judge

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Original transmitted by mail this
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