

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

DERALD MORGAN, RICK AND CINDY)
GRAVER, WILLIAM AND GLORIA PHIPPS,)
and DAVID LOTT,)

Complainants,)

v.)

File No. WC-2017-0037

CARL RICHARD MILLS,)
CARRIAGE OAKS ESTATES,)
DISTINCTIVE DESIGNS, and)
CARING AMERICANS TRUST)
FOUNDATION, INC. (f/k/a Caring)
Americans Foundation, Inc.))

Respondents.)

**COMPLAINANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST
RESPONDENTS**

COME NOW Complainants Derald Morgan, Rick and Cindy Graver, William and Gloria Phipps, and David Lott (“Complainants”) by and through counsel, and hereby requests that the Court grant partial summary judgment in favor of Complainants and against Respondents. Pursuant to Mo. Sup. Ct. R. 74.04, Complainants aver that no genuine issue of material fact exists in regard to the issue of whether Carriage Oaks Not-for-Profit Water and Sewer Corporation (the “Non Profit”) was properly formed under Chapter 393, RSMo., and that Complainants are entitled to judgment as a matter of law on that issue. Additionally, Complainants seek summary judgment on the issue of whether the transfer of assets between Caring Americans and the Non Profit was void. Because Caring Americans did not obtain approval from the Commission prior to transfer, Complainants believe they are entitled to

summary judgment on that issue as well. Complainants incorporate by reference their Statement of Uncontroverted Material Facts and their Legal Memorandum in Support Thereof.

WHEREFORE, for the reasons set forth herein, and in Complainants' Statement of Uncontroverted Material Facts and Suggestions in Support, Complainants request this Court grant summary judgment in favor of Complainants and against Respondents on the issues of whether Carriage Oaks Not-for-Profit Water and Sewer Corporation was properly formed and whether the transfer of assets by Caring American to the Non-profit was void; for costs and expenses incurred herein; and for such other and further relief as the Court deems just and proper.

Respectfully Submitted,
SCHENEWERK & FINKENBINDER,
ATTORNEYS AT LAW, LLC

By: /s/ Karl Finkenbinder

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COMPLAINANTS' STATEMENT OF UNCONTROVERTED MATERIAL FACTS

COME NOW Complainants Derald Morgan, Rick and Cindy Graver, William and Gloria Phipps, and David Lott ("Complainants") by and through counsel, Schenewerk & Finkenbinder, Attorneys at Law, LLC, and for their Statement of Uncontroverted Material Facts in Support of its Motion for Partial Summary Judgment, states as follows:

STATEMENT OF UNCONTROVERTED FACTS

1. Complainants are property owners in Carriage Oaks Estates subdivision. *Exhibit A, Amended Complaint.*

RESPONSE:

2. Carriage Oaks, LLC is the owner and Distinctive Designs Ltd. is the developer of Carriage Oaks Estates, a residential subdivision in Stone County, Missouri. *Exhibit B, Respondents' Motion to Dismiss Complainant's Amended Petition.*

3. Carl Mills, through his trust, is the manager and controlling owner of Carriage Oaks and Distinctive Designs Ltd. *Exhibit B.*

RESPONSE:

4. After its inception, Carriage Oaks and Distinctive Designs owned, operated, maintained the water and sewer systems that provide service to the residents of Carriage Oaks Estates. *Exhibit B.*

RESPONSE:

5. Carriage Oaks Estates Homeowners Association, of which Complainants are members, is charged a fee every year for expenses associated with the operation of the water and sewer system. *Exhibit B.*

RESPONSE:

6. In 2016, Respondent Carl Mills caused the ownership of the waste water treatment facility and water facility that serves Complainants to be transferred to Caring Americans Trust Foundation, Inc. (“Caring Americans”). *Exhibit B.*

RESPONSE:

7. Prior to transfer, Respondents did not obtain a permit from the Public Service Commission or approval to operate the water and sewer system. *Exhibit A.*

RESPONSE:

8. Caring Americans is a non-profit corporation organized for charitable and educational purpose and was not formed as a water and company. *Exhibit C, Articles of Incorporation*

RESPONSE:

9. Complainants are not members, shareholders, or owners of Caring Americans. *Exhibit A, Amended Complaint.*

RESPONSE:

10. In 2017, Caring Americans purported to transfer the water and sewer system to the Carriage Oaks Not-for-Profit Water and Sewer Corporation (“Not-for-Profit”). *Exhibit D, General Warranty Deed.*

RESPONSE:

11. Respondent Carl Mills is a Director of the Not-for-Profit. *Exhibit E, Articles of Incorporation.*

RESPONSE:

12. Caring Americans did not make a showing to the Commission by seeking approval of the transfer with the Commission or filing the required approval issued by the Department of Natural Resources to show that the converted or new nonprofit water and sewer company is in compliance with all statutory requirements.

RESPONSE:

13. The Not-for-Profit Bylaws are drafted in a manner that allow members to hold more than one Membership Interest and allows a single member to receive multiple votes based on the number of membership interests held. *Exhibit F, Not-for-Profit Bylaws*

RESPONSE:

14. The Not-for-Profit also allow prospective utility consumers to be members. *Exhibit F, Not for Profit Bylaws. Exhibit F.*

RESPONSE:

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**COMPLAINANTS' LEGAL MEMORANDUM IN SUPPORT OF THEIR MOTION FOR
PARTIAL SUMMARY JUDGMENT**

COME NOW Complainants Derald Morgan, Rick and Cindy Graver, William and Gloria Phipps, and David Lott ("Complainants") by and through counsel, Schenewerk & Finkenbinder, Attorneys at Law, LLC, and state the following in support of their Motion for Summary Judgment:

I. INTRODUCTION

Complainants are entitled to judgment as a matter of law on the issue of whether Carriage Oaks Not-for-Profit Water and Sewer Corporation was formed in compliance with Chapter 393 and on the issue of whether the transfer of assets between Caring Americans and the Non Profit is void. Because Respondents have not complied with Chapter 393 and because there are no material facts in dispute, Complainants are entitled to judgment as a matter of law. ¹

¹ The Non Profit is currently structured in a way that gives Respondents control over the manner in which the water and sewer system is operated. Furthermore, Complainants are not

STANDARD FOR GRANTING SUMMARY JUDGMENT

Summary judgment is proper where the moving party has demonstrated, through pleadings, depositions, answers to interrogatories, admissions, and affidavits that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.

Mo.R.Civ.Pro., Rule 74.04(b). The movant on a motion for summary judgment bears the burden of proof. *ITT Commercial Finance v. Mid-Am Marine*, 854 S.W.2d 371 (Mo. 1993). The key to summary judgment is the party's undisputed right to judgment as a matter of law; it is not simply the absence of a fact question. *Id.* at 381. When a movant makes a *prima facie* showing that no genuine issues of material fact exist and that the movant is entitled to judgment as a matter of law, the non-movant's only recourse is to show via affidavit, depositions, interrogatory answers or admissions, that at least one material fact is genuinely disputed. *Id.*; Mo.R.Civ.Pro.

74.04(c)(2). If the non-movant cannot contradict the showing made by the moving party, judgment is properly entered against the non-movant because the moving party has already established a right to judgment as a matter of law. *ITT Commercial Finance*, 854 S.W.2d at 381.

members of the Non Profit because they have not "agree[d] to use services furnished by the [Non Profit]" as required by Sections 393.921 and 393.839, RSMo. Complainants have no control or ability to influence the manner in which the water and sewer services are provided. Even if the Complainants had agreed to use the services of the Non Profit and were members of the Non Profit, they would still have little to no ability to protect themselves from Respondents' coercive and abusive practices in operating the Non Profit because Respondent, the developer, owns a majority of lots in the subdivision, and is therefore afforded more voting power according to the Bylaws of the Non Profit..

ARGUMENT

A not-for-profit corporation must have all of its members as utility customers, and operate the utility *only* for the benefit of its members. See *In the Matter of Rocky Ridge Ranch Property Owners Association for an Order of the Public Service Commission Authorizing Cessation of the PSC Jurisdiction and Regulation Over its Operations*, Case No. WD-93-307 (Mo. P.S.C.). Sections 393.921 and 393.839, RSMo. state that: “No person shall become a member of a nonprofit [sewer or water] company unless such person shall *agree* to use services furnished by the company when such shall be available through its facilities.” (emphasis added). The ability to agree to use services implies choice. The lot owners have no choice as to what water and sewer utility to use because there is no other option. They do not currently agree to be members of the Non Profit. Despite not being members, they do receive the services of the Non Profit. For that reason, the Non Profit currently does not operate only for the benefit of members; it serves non-members as well.

The purpose of the statute requiring that a not-for-profit operate only for the benefit of its members is that by having all the customers as members, the customer-members have the power to set their own rates and manage their own services. In the present case, none of the owners receiving utility service are members of the Non Profit and they do not have the ability to set their own rates or manage their own services. The owners at Carriage Oaks Estates subdivision have no control or say over the operations of the water and sewer system. Furthermore, Complainants have no choice but to use the services provided by the Non Profit since the Carriage Oaks Estates Declaration restricts the owners from installing their own well and septic system. Accordingly, the Complainants are at the mercy of the Non Profit, which is controlled by

Respondents. The public interest analysis requires the Commission to retain jurisdiction over this matter.

The Non Profit does not comply with Chapter 393.

Additionally, the Non Profit was not created in compliance with Sections 393.839.1, 393.921.1, 393.839.7, and 393.921.7. The Bylaws are currently drafted in such a manner that gives Respondents more voting power than allowed in Sections 393.839.7 and 393.921.7, RSMo. Sections 393.839.7 and 393.921.7, RSMo. require that each member be entitled to “one vote on each matter submitted to a vote at a meeting.” Article II, Section 2 of the Bylaws violate the “one member, one vote” requirement by allowing members to hold “more than one Membership Interest.” Because Respondents would hold more than one Membership Interest, they would be entitled to multiple votes on any particular matter. Likewise, the Bylaws violate Sections 393.839.1 and 393.921.1, RSMo. by allowing *prospective* utility consumers to be members. Sections 393.839.1 and 393.921.1, RSMo. limit membership to persons who “agree to use services furnished by the company when such shall be available through its facilities.” The water and sewer utility services have been operation for nearly twenty years. Accordingly, they are presently available and membership is therefore limited to those persons receiving utility services.

The Bylaws of the Nonprofit are currently drafted in a manner that allows Respondents to retain control over the management of the water and sewer system and violate Chapter 393, RSMo. Because the Nonprofit has not complied with the requirements of Chapter 393, the transfer of assets was not valid. Moreover, entities that are subject to Commission jurisdiction must seek Commission approval to transfer their assets pursuant to 393.190, RSMo. The transfer of assets of a water or sewer corporation under the Commission’s jurisdiction without proper

authorization is void. Section 393.190.1, RSMo. For that reason, Complainants are entitled to judgment in their favor as a matter of law.

Conclusion

Because there are no genuine issues of material fact and because Complainants are entitled to judgment as a matter of law, the Public Service Commission should grant Complainants' Motion for Partial Summary Judgment on the issue of whether the Non Profit Complies with Chapter 393 and whether the transfer of assets from Caring Americans to the Non Profit was valid. Complainants are at the mercy of Respondents since they have no choice but to accept the water and sewer services provided by the Non Profit. They have not agreed to accept the services of the Non Profit. They have been forced to accept such services since the utility services are offered by no other utility and the Declaration prohibits them from installing their own well and septic system. Despite being forced to accept the utilities provided by the Non Profit, Complainants have no ability to vote or influence the decisions related to the operation of the water and sewer system because they are not members of the Non Profit. Even if they were members with voting rights, Respondents would control the manner in which the Non Profit is operated because the Bylaws are written in such a way as to give Respondents votes for each lot they own. Since Respondent, the developer of the subdivision, owns the majority of the lots, Respondents control how the Non Profit is operated it

Respectfully submitted,

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