

**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.), CARRIAGE)
OAKS NOT-FOR-PROFIT WATER AND)
SEWER CORPORATION)

Respondents.)

**RESPONDENTS' RESPONSE IN OPPOSITION TO COMPLAINANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT AGAINST RESPONDENTS**

Respondents, by and through their counsel Husch Blackwell LLP, hereby respectfully request that the Missouri Public Service Commission (the "PSC") deny the Complainants' Motion for Partial Summary Judgment. Complainants' are not entitled to an award of summary judgment because there exists a genuine dispute of material facts regarding the voting structure of Carriage Oaks Not-for-Profit Water and Sewer Corporation ("Carriage Oaks NFP") and its compliance with Chapter 393. Additionally, there exists a genuine dispute of material facts regarding the validity of the transfer of the assets from Caring Americans Trust Foundation, Inc. to Carriage Oaks NFP. Because such genuine dispute of facts exists, Complainants' Motion for Partial Summary judgment should be denied. Respondents incorporate by reference their answers to Statement of Uncontroverted Material Facts and Additional Material Facts for Consideration and their Legal Memorandum in support thereof.

Respondents respectfully ask the PSC to deny the Complainants' Motion for Partial Summary Judgment; for costs and expenses incurred herein and for such further relief as the PSC deems just and proper.

Respectfully submitted,

HUSCH BLACKWELL LLP

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**RESPONDENTS' RESPONSE TO COMPLAINANTS' STATEMENT OF
UNCONTROVERTED MATERIAL FACTS AND ADDITIONAL MATERIAL FACTS
FOR CONSIDERATION**

Respondents by and through their attorneys of record, Husch Blackwell, LLP, provide this Response to Complainants' Statement of Uncontroverted Facts and Additional Material Facts for consideration by the court:

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

RESPONSE: On the basis of information and belief, admit.

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.*

RESPONSE: Admit.

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

RESPONSE: Admit.

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: Admit.

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: Admit.

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: Admit.

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: Admit, with clarification. Respondents’ contend that because they do not operate a public utility, they are not nor have they ever been, subject to the jurisdiction of the Public Service Commission (“PSC”). Because they are not subject to the jurisdiction of the PSC, no approval or permit was required for the transfer of the water and sewer facilities.

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: Admit.

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

RESPONSE: Admit.

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: Admit.

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

RESPONSE: Admit, with clarification. The Board of Directors of Not-for-Profit consists of five individuals, each of whom own land in Carriage Oaks Estates, including Mr. Mills.

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: Deny. Staff counsel recommended the Not-for-Profit be formed to resolve the issues raised by Complainants. The Not-for-Profit did obtain an Operating Permit from the Missouri Department of Natural Resources. *Exhibit 1, Operating Permit.* Additionally, the Not-for-Profit did obtain the required approval by the Missouri Department of Natural Resources to showing it is in compliance with all statutory requirements. *Exhibit 2, Letter from Department of Natural Resources.*

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: Admit, with clarification. Each member may hold more than one Membership Interest in the event they own more than one lot. Each Membership Interest is entitled to one vote for the election of Directors. ¶2 Exhibit F, Not-for-Profit Bylaws.

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

RESPONSE: Deny. Membership is limited to property owners and customers located within the specific geographic area designated to be served by the Not-for-Profit. ¶3 Exhibit F. The Geographic Service Area is defined only to apply to Carriage Oaks Estates. Exhibit A of Exhibit F, Not-for-Profit Bylaws.

Respondents' Statement of Additional Material Facts

15. Respondents are not and have never been subject to the jurisdiction of the Public Service Commission because they do not, nor have they ever, operated a public utility. *Exhibit B, Respondents' Motion to Dismiss Complainant's Amended Petition.*

16. In accordance with Section 393.825 and 393.900 RSMo, the Missouri Department of Natural Resources has found the Not-for-Profit to be in full statutory compliance. *Exhibit 3, Respondents Motion to Dismiss Complainants Second Amended Complaint.*

Respectfully submitted,

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**RESPONDENTS' LEGAL MEMORANDUM IN OPPOSITION OF COMPLAINANTS'
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Respondents by and through their attorney of record, Husch Blackwell, LLP, state the following in opposition to Complainants' Motion for Partial Summary Judgment:

INTRODUCTION

Respondents are not entitled to judgment as a matter of law on the issues of: (i) whether Carriage Oaks Not-For-Profit ("Carriage Oaks NFP") was formed in compliance with Chapter 393; and (ii) whether the transfer of the assets from Caring Americans Trust Foundation Inc. ("Caring Americans") to Carriage Oaks NFP was void because there exist genuine disputes of material facts surrounding both issues.

STANDARD FOR GRANTING SUMMARY JUDGMENT

Summary judgement is proper only when the movant can establish that **no** genuine disputes of material facts exists. MO. R CIV. PRO., RULE 74.04(b); *ITT Commercial Finance v. Mid-Am Marine*, 854 S.W. 2d 371, 376 (Mo. 1993). The movant on a motion for summary judgment bears the burden of proof and must make a prima facie showing that no genuine dispute of material fact exists. *ITT Commercial Finance*, 854 S.W. 2d at 381. “Genuine dispute” exist, for the purposes of summary judgment, where record contains competent materials that evidence to plausible, by contradictory, accounts of essential fact. *Id.* at 382. In a motion for summary judgment, the record is viewed in a light which is most favorable to the nonmovement. *Id.* Any evidence in the record that presents a genuine dispute as to material facts defeats the movant’s prima facie showing. *Id.*

ARGUMENT

Complainants are not entitled to summary judgment on either of the proposed issues because both such issues contain genuine disputes of material facts.

Compliance with Chapter 393

First and foremost, Complainants’ allege that Carriage Oaks NFP is not in compliance with Chapter 393 RSMo because its Bylaws are drafted in such a manner as to allow members to hold more than one vote. Respondents contend that the Bylaws are not in violation of Chapter 393 because each Membership Interest (as defined in the Bylaws) is entitled to only one vote.

While members may hold more than one Membership Interest, nothing in Chapter 393 prevents such structure. To hold otherwise would be patently unfair. A landowner owning ten lots should have more influence over the delivery and receipt of water and sewer services than a landowner holding one lot. Complainants wrongfully argue an individual holding a small portion of the land

serviced by Carriage Oaks NFP should have the same say and voting power as an individual holding a majority of the land. Giving a member who has a small percentage of overall ownership such a substantial amount of influence is clearly against legislative intent.

Additionally, this voting structure is not unique to Carriage Oaks NFP and is used by similar not-for-profit water and sewer corporations across the state of Missouri. Lastly, Respondents note that under Sections 393.825 and 393.900 RSMo, the Missouri Department of Natural Resources (“MO DNR”) has the authority and to review each and every not-for-profit water and sewer corporation formed under Chapter 393 to determine if their corporate formation documents are in compliance with all statutory requirements. MO DNR has reviewed the bylaws of Carriage Oaks NFP and found them in full compliance with Chapter 393.

Complainants also allege that Carriage Oaks NFP violates Chapter 393 because Complainants now disclaim their membership rights; therefore allowing them to make an argument of non-compliance because Carriage Oaks NFP allegedly provides services to individuals who are not members. Respondents note that this argument made by Complainants is recent, only first occurring in November 2017 (approximately 11 months after the formation of Carriage Oaks NFP) and should be characterized as a blatant mischaracterization of the statutory language. Each lot in Carriage Oaks Estates is subject to a set of Easements, Covenants, and Restrictions, which have been properly recorded with the Stone County Recorder of Deeds (the “Restrictions”). These Restrictions, which each of the Complainants had full access to review prior to purchasing their lots, set forth limitation on both the water and sewer systems. When Complainants purchased their lot(s) in Carriage Oaks Estates, they were accepting these Restrictions and agreeing to receive services from whatever entity currently, or would later, provide such water and sewer services. The Complainants should not be allowed to arbitrarily

disclaim their membership in Carriage Oaks NFP for the sole purpose of supporting their argument of non-compliance.

Therefore, in light of the foregoing, there most certainly exists a genuine dispute of material facts concerning Carriage Oaks NFP's compliance with Chapter 393. As such, summary judgment is not appropriate on this issue.

Jurisdiction of the PSC

Secondly, the Complainants contend that they are entitled to summary judgment on the issue of whether the transfer of assets between Caring Americans and Carriage Oaks NFP was void. Respondents have, and continue to maintain, that the PSC does not have, nor has it ever had, jurisdiction over the water and sewer systems of Carriage Oaks Estates. As initially set forth in their Motion to Dismiss Complainants' Amended Petition, and as repeatedly mentioned in virtually every subsequent filing, Respondents contend that the PSC lacks jurisdiction because the water and sewer systems of Carriage Oaks Estates are not public utilities because they were not operated for gain nor were they providing services to the public. Because the PSC lacks jurisdiction over the water and sewer facilities, the Respondents argue that the underlying transfer was not void because PSC approval was not necessary. As such, there exists a genuine dispute of material fact as to whether the transfer of assets from Caring Americans to Carriage Oaks NFP was void.

CONCLUSION

Complaints have failed to present a prima facie case that no genuine issue of material facts exists on the issues of (i) whether Carriage Oaks NFP is in compliance with Chapter 393; and (ii) whether the transfer of assets from Carriage Oaks NFP to Caring Americans is void. Therefore, the Complainant's motion for partial summary judgment should be denied.

Respectfully submitted,

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