

OPEN MEETING ITEM
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COMMISSIONERS
JEFF HATCH-MILLER - Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES
GARY PIERCE



ARIZONA CORPORATION COMMISSION

22

Arizona Corporation Commission
DOCKETED

DATE: JANUARY 30, 2007

JAN 30 2007

DOCKET NO: W-20477A-06-0558

DOCKETED BY	nr
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TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Yvette Kinsey. The recommendation has been filed in the form of an Opinion and Order on:

**MINGUS PANORAMA ESTATES HOMEOWNERS ASSOCIATION
(ADJUDICATION)**

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

FEBRUARY 8, 2007

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

FEBRUARY 13, 2007 and FEBRUARY 14, 2007

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Secretary's Office at (602) 542-3931.

BRIAN C. McNEIL
EXECUTIVE DIRECTOR

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF THE APPLICATION OF
MINGUS PANORAMA ESTATES
HOMEOWNERS ASSOCIATION FOR AN
ADJUDICATION THAT IT IS NOT A PUBLIC
SERVICE CORPORATION

DOCKET NO. W-20477A-06-0558

DECISION NO. _____

OPINION AND ORDER

DATE OF HEARING: January 8, 2007
PLACE OF HEARING: Phoenix, Arizona
ADMINISTRATIVE LAW JUDGE: Yvette B. Kinsey
APPEARANCES: Mr. Patrick Black, FENNEMORE CRAIG, on behalf of
Mingus Panorama Estates Homeowners Association;
and
Mr. Kevin Torrey, Staff Attorney, Legal Division, on
behalf of the Utilities Division of the Arizona
Corporation Commission.

BY THE COMMISSION:

On September 1, 2006, Mingus Panorama Estates Homeowners Association (“Association” or “Mingus” or “Applicant”) filed with the Arizona Corporation Commission (“Commission”) an application for adjudication that it is not a public service corporation under Arizona law.

On September 26, 2006, the Commission’s Utilities Division Staff (“Staff”) filed a insufficiency letter in this docket stating the Applicant’s application had not met the sufficiency requirements as outlined in the Arizona Administrative Code (“A.A.C.”).

On October 31, 2006, Staff filed a sufficiency letter indicating the Applicant’s application has met the sufficiency requirements as outlined in the A.A.C.

On November 13, 2006, by Procedural Order, the hearing in this matter was scheduled to commence on January 8, 2007 and other procedural deadlines were set.

On December 8, 2006, Staff filed its Staff Report recommending approval of the Applicant’s

1 application with conditions.

2 On December 12, 2006, Applicant filed a Notice of Filing Certification of Publication and no
3 intervention requests were filed.

4 On December 29, 2006, Mingus filed its Response to the Staff Report.

5 On January 8, 2007, a full public hearing was held before a duly authorized Administrative
6 Law Judge of the Commission at its offices in Phoenix, Arizona. Mingus and Staff appeared through
7 counsel at the hearing and presented evidence and testimony. No members of the public appeared to
8 give public comment. At the conclusion of the hearing, the matter was taken under advisement
9 pending submission of a Recommended Opinion and Order to the Commission.

10 * * * * *

11 Having considered the entire record herein and being fully advised in the premises, the
12 Commission finds, concludes, and orders that:

13 **FINDINGS OF FACT**

14 1. Mingus is an Arizona non-profit corporation incorporated on July 27, 2006. The
15 Association was formed for the purpose of representing homeowners who will be residing in a 69
16 residential lot subdivision known as Mingus Panorama Estates ("MPE"), which is located in an
17 unincorporated area in Yavapai County, 1.5 miles east of Cottonwood, Arizona. The legal
18 description for the area Mingus intends to serve is attached hereto as Exhibit A, and incorporated
19 herein by reference.

20 2. On September 1, 2006, Mingus filed with the Commission an application for
21 adjudication that it is not a public service corporation under Arizona law.

22 3. The property to be served by the Association is a 79.92 acre parcel located in the
23 southeast corner of Section 35 of the Township 16 North, Range 4 East.

24 4. According to the Association's application, MPE is not located within or adjacent to
25 the Certificated service area of any public service corporation or municipal domestic water service
26 provider.

27 5. According to Staff's Engineering Report, the MPE lots will be served by a domestic
28 water system that will be owned and maintained by the Association and constructed by the

1 developer.¹

2 6. At hearing, Mingus' witness testified that the wastewater service to MPE will be
3 provided through the use of septic tanks.

4 7. According to Staff's Engineering Report, the proposed MPE system will consist of a
5 well with an expected production rate of 35-45 gallons per minute ("GPM"), booster pumps, pressure
6 tanks, water treatment system, chlorination system, 51,300 gallon storage tank, a distribution system
7 to serve the 69 lots and fire flow at 500 GPM for one hour.

8 8. Staff concludes that the proposed system will have adequate capacity to serve MPE.

9 9. According to Staff's Report, the certified operator for the MPE system will be
10 Contract Wastewater Operations, LLC.

11 10. Staff reported that the proposed MPE system is not within an Active Management
12 Area ("AMA").

13 11. At hearing, the Association's witness indicated that a designation of assured water
14 supply application is currently pending before the Yavapai Board of Supervisors.

15 12. The proposed system is not operational and therefore there are no Arizona Department
16 of Environmental Quality ("ADEQ") or Arizona Corporation Commission ("ACC") compliance
17 issues. However, once the system is constructed Mingus will be subject to ADEQ monitoring
18 requirements.

19 13. On January 23, 2006, the U.S. Environmental Protection Agency ("EPA") reduced the
20 arsenic maximum containment level ("MCL") from 50 parts per billion ("ppb") to 10 ppb. According
21 to Staff's Report, the proposed MPE system includes water treatment equipment that will enable the
22 system to deliver water that complies with the new arsenic standard of 10 micrograms per liter.
23 Additionally, Staff noted that the Association has filed an application with ADEQ for an Approval to
24 Construct ("AOC") for the facilities needed to construct the system.

25 14. The Association's application includes a copy of the Association's Articles of
26 Incorporation ("Articles"), Bylaws and a draft Declaration of Covenants, Conditions and Restrictions

27

28 ¹ Clara Y. Mak is the developer.

1 (“CC&Rs”), which will govern development and operation of the MPE subdivision, including water
2 system matters.

3 15. Article 7.1.5, of the draft CC&Rs states:

4 “If the Arizona Corporation Commission attempts to exercise its jurisdiction over the
5 Association to declare or adjudicate the Association as a public service corporation,
6 then and in that event, the Association may, at its option, take whatever action is
7 necessary, including the sale and disposition of all water related facilities and assets, to
8 preclude the Arizona Corporation Commission’s regulation of the Association.”

9 At hearing, the Association’s witness agreed to delete this provision prior to recording the CC&Rs
10 with the Recorder’s Office.

11 16. In Commission Decision No. 55568 (May 7, 1987), the Commission issued a policy
12 directive regarding applications for adjudication not a public service corporation, and provided the
13 following criteria for evaluation of such applications:

- 14 (a) The application must be submitted by a non-profit homeowners association;
- 15 (b) The application must be a bona fide request by a majority of the membership
16 of the association through a petition signed by 51 percent or more of the then
17 existing members;
- 18 (c) All associations making an application must have complete ownership of the
19 system and necessary assets;
- 20 (d) Every customer must be an owner/member with equal voting rights and each
21 member is or will be a customer;
- 22 (e) The service area involved encompasses a fixed territory which is not within the
23 service area of a municipal utility or public service corporation, or if it is, the
24 municipal utility or public service corporation is unable to serve;
- 25 (f) There is a prohibition against further sub-division evidenced by deed
26 restrictions, zoning, water restrictions, or other enforceable governmental
27 regulations; and
- 28 (g) The membership is restricted to a fixed number of customers, actual or
potential.

1 17. Applicant is a non-profit homeowners' association.

2 18. The current owner of the property to be served and the Declarant of the CC&Rs, is
3 Clara Y. Mak, the developer for the MPE subdivision. At hearing, Mrs. Mak testified the sale of the
4 residential lots has not yet commenced. Therefore, at this time the current membership of the
5 Association is represented Mrs. Mak as the Board of Directors. According to Staff's Report, on
6 August 30, 2006, the Association's Board of Directors adopted a resolution that approved and
7 supported its application for adjudication not a public service corporation.

8 19. According to Article 2.2 of the draft CC&Rs for the Association, "Upon completion of
9 construction of the Water System, Declarant for and in consideration of the Association agreeing to
10 provide water service to the Project, shall assign and transfer the Water System to the Association".
11 At hearing, the Applicant's witness testified that the water system has not yet been constructed and
12 that the owners will convey ownership of the water system to the Association as stated in Article 2.2
13 of the draft CC&Rs for the Association.

14 20. Staff recommends that Mingus file with Docket Control an executed agreement which
15 conveys ownership of the water system to the Association within 18 months of any Decision in this
16 matter.

17 21. Articles 5.7.1 and 5.7.2 of the Association's draft CC&Rs provide that every customer
18 is a member/owner with equal voting rights and that each member is or will be an owner. In Staff's
19 Staff Report, Staff noted that the draft Association Bylaws did not mirror the language in draft
20 Articles 5.7.1 and 5.7.2. Therefore, Staff recommends the Association amend the proposed Bylaws
21 to include a provision as stated in Article 5.7.1 and 5.7.2. Further, Staff recommends that Mingus file
22 with Docket Control as a compliance item, in this docket, the required changes to the Bylaws within
23 18 months of a Decision in this matter.

24 22. Articles 2.1 and 2.2 of the Association's draft CC&Rs provide that the service area
25 involved encompasses a fixed territory which is not within the service area of the municipal utility or
26 public service corporation. At hearing, Applicant's witness testified that the proposed area is
27 surrounded by Forest Service Land and State Trust Land on three sides and MPE does not have the
28 ability to purchase more land to expand the development. Additionally, Applicant's witness testified

1 that Mingus contacted Arizona Water Company ("AWC") to provide water to the subdivision. AWC
 2 said it was unable to serve the adjudication area as it was not within AWC's current CC&N and
 3 AWC had no facilities close by. In Staff's Report, Staff noted that there were no Bylaws that
 4 mirrored the wording in the draft Articles 2.1 and 2.2. Therefore, Staff recommends that Mingus file
 5 with Docket Control, as a compliance item, in this docket, the required changes to the Bylaws within
 6 18 months of a Decision in this matter.

7 23. Article 3.23 of the Association's draft CC&Rs prohibits the further subdivision of the
 8 existing lots.

9 24. The Association's draft CC&Rs restrict membership to a fixed number of actual or
 10 potential customers, as they are designed for 69 lots.

11 25. In Staff's Report, Staff recommended approval of the Association's application for
 12 adjudication not a public service corporation subject to the following conditions:

13 1) That Mingus file with Docket Control, as a compliance item in the Docket, the
 14 recorded CC&Rs for the Association as presented in the application.

15 2) That Mingus file with Docket Control, as a compliance item in this docket, a
 16 copy of the executed agreement which conveys ownership of the water system
 17 to the Association as stated in Article 2.2 of the Association's CC&Rs.

18 3) That Mingus file with Docket Control, as a compliance item in this docket,
 19 revised Bylaws which mirrors the wording in Article 5.71. and 5.7.2 of the
 20 CC&Rs which states that "every customer is a member/owner with equal
 21 voting rights and that each member is or will be a customer".

22 4) That Mingus file with Docket Control, as a compliance item in this docket, a
 23 copy of the revised Bylaws which mirror the required criteria found in 2.1 and
 24 2.2 of the CC&Rs which states that "the service area involved encompasses a
 25 fixed territory which is not within the service area of the a municipal utility or
 26 public service corporation".

27 26. Staff further recommends that the Commission's decision granting this adjudication
 28 not a public service company to Mingus be considered null and void should Mingus fail to file the

1 required documentation within 18 months of any Decision in this matter.

2 27. In Applicant's Response to the Staff Report filed on December 29, 2006, Applicant
3 agreed with Staff's recommendation to revise the Association's Bylaws to mirror language found in
4 the CC&Rs. Prior to hearing, Mingus revised the draft CC&Rs and Bylaws to include the language
5 proposed by Staff.

6 28. Applicant's Response to Staff's Report also included a copy of the Unanimous
7 Written Consent of the Directors in Lieu of a Meeting dated December 18, 2006, which adopted
8 Resolution No. 1- Revision of Bylaws of the Association.

9 29. Based on the updated information provided by Mingus in its Response, Staff agreed at
10 hearing that recommendations 3 and 4, as stated in Findings of Fact 25, had been satisfied.

11 30. Staff witness also testified at hearing that Staff believes with Mingus' compliance with
12 Staff's recommendations, the Association will comply with the Commission's criteria for being
13 adjudicated not a public service corporation, and that the adjudication will be in the public interest.

14 CONCLUSIONS OF LAW

15 1. The Commission has jurisdiction over the subject matter of this application.

16 2. Notice of the application was provided in accordance with the law.

17 3. The conditions set forth herein are reasonable.

18 4. Upon compliance with the conditions herein, Applicant would not be a public service
19 corporation within the meaning of Article XV of the Arizona Constitution.

20 5. Mingus remains subject to the applicable laws, regulations and order of other
21 regulatory agencies, including, but not limited to ADEQ, ADWR and Yavapai County.

22 ORDER

23 IT IS THEREFORE ORDERED that the application of Mingus Panorama Estates
24 Homeowners Association for adjudication not a public service corporation is hereby granted
25 conditioned upon its compliance with the conditions set forth below.

26 IT IS FURTHER ORDERED that Mingus Panorama Estates Homeowners Association shall
27 delete section 7.1.5 of the Codes, Covenants & Restrictions before they are recorded with the
28 Yavapai County Recorder's Office.

1 IT IS FURTHER ORDERED that Mingus Panorama Estates Homeowners Association shall
2 file with Docket Control, as a compliance item in this matter, within 18 months of this Decision, a
3 copy of its Bylaws and its recorded Declaration of Codes, Covenants & Restrictions consistent with
4 this Decision.

5 IT IS FURTHER ORDERED that Mingus Panorama Estates Homeowners Association shall
6 file with Docket Control, as a compliance item in this matter, within 18 months of this Decision, a
7 copy of the executed agreement which conveys ownership of the water system to the Mingus
8 Panorama Estates Homeowners Association as stated in the Article 2.2 of the Mingus Panorama
9 Estates Homeowners Association recorded Declaration of Codes, Covenants & Restrictions.

10 IT IS FURTHER ORDERED that in the event Mingus Panorama Estates Homeowners
11 Association fails to comply with the above conditions with the specified time, this Order adjudicating
12 Mingus Panorama Estates Homeowners Association not a public service corporation shall be
13 considered null and void, after due process.

14 IT IS FURTHER ORDERED that if the Bylaws or recorded Declaration of Codes,
15 Covenants & Restrictions of the Mingus Panorama Estates Homeowners Association are ever
16 changed to allow further subdivision of the current 69 lots in the requested adjudication area, to allow
17 an increased number of memberships, to allow expansion of the property to be served, or to change
18 the equal voting requirements, then the adjudication granted herein shall immediately become null
19 and void, and Mingus Panorama Estates Homeowners Association shall file an application for a
20 Certificate of Convenience and Necessity within thirty (30) days of the change.

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1 IT IS FURTHER ORDERED that Mingus Panorama Estates Homeowners Association is
2 hereby advised of its continuing obligations under the applicable laws, regulations and orders of other
3 regulatory agencies, including but not limited to the Arizona Department of Environmental Quality,
4 Arizona Department of Water Resources and Yavapai County.

5 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

6 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

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CHAIRMAN _____ COMMISSIONER

COMMISSIONER _____ COMMISSIONER _____ COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive
Director of the Arizona Corporation Commission, have
hereunto set my hand and caused the official seal of the
Commission to be affixed at the Capitol, in the City of Phoenix,
this ____ day of _____, 2007.

BRIAN C. McNEIL
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____

1 SERVICE LIST FOR:

MINGUS PANORAMA ESTATES HOMEOWNERS
ASSOCIATION

2

3 DOCKET NO.:

W-20477A-06-0558

4

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