

ORDER NO. 2014-009
Docket No. BE-14-12-189

IN THE MATTER OF:	§	BEFORE THE BANKING
	§	
THE PALMS MEMORIAL	§	
GARDENS, INC., dba THE PALMS	§	
MEMORIAL GARDENS	§	
	§	
PORTLAND, TEXAS	§	
(CERTIFICATE OF AUTHORITY	§	
NO. 272)	§	
	§	
AND	§	
	§	
PALMS MEMORIAL GARDENS	§	
CEMETERY ASSOCIATION dba	§	
THE PALMS MEMORIAL GARDENS	§	
	§	
AND	§	
	§	
CARLOS APARICIO, AS PRESIDENT OF	§	
PALMS MEMORIAL GARDENS, INC.;	§	COMMISSIONER OF TEXAS
AS PRESIDENT OF PALMS	§	
MEMORIAL GARDENS CEMETERY	§	
ASSOCIATION; AND INDIVIDUALLY;	§	
	§	
AND	§	
	§	
HELEN APARICIO, AS VICE-PRESIDENT	§	
OF PALMS MEMORIAL GARDENS, INC.;	§	
AS VICE-PRESIDENT, SECRETARY	§	
AND TREASURER OF PALMS	§	
MEMORIAL GARDENS CEMETERY	§	
ASSOCIATION; AND INDIVIDUALLY	§	AUSTIN, TRAVIS COUNTY, TEXAS

CONSENT ORDER

On this day, the matter of The Palms Memorial Gardens, Inc. (the Corporation), the Palms Memorial Gardens Cemetery Association (the Association), and Carlos Aparicio and Helen Aparicio, in their individual and representative capacities, all of whom are collectively

referred to as Respondents, was submitted to me, Charles G. Cooper, Banking Commissioner of the State of Texas (Commissioner), for consideration and action.

1. On January 4, 2011, the Texas Department of Banking (Department) issued the Corporation certificate of authority number 272 under Texas Health and Safety Code (Health Code) Chapter 712 to operate a perpetual care cemetery in Portland, Texas, referred to in this Consent Order (Order) as the Cemetery. On or about November 20, 2012, the Association formed and authorized its officers to acquire and operate the Cemetery. The Department instituted this action to establish, among other things, that the owners of a perpetual care cemetery cannot unilaterally cancel the perpetual care status of the cemetery and remove the cemetery from the regulatory authority of the Department.
2. The Department has jurisdiction over all Respondents and the subject matter of this proceeding pursuant to Health Code Chapter 712 (Chapter 712). The Commissioner has the authority to issue this Order and to assess administrative penalties pursuant to Health Code §§ 712.0441 and 712.0442.
3. Respondents have been properly notified regarding their right to an administrative hearing under Chapter 712 and are represented by legal counsel.
4. The statutory provisions at issue in this matter include Health Code §§ 712.001, 712.003, 712.0032, 712.0036, 712.0037, 712.0039, 712.00395, 712.004, 712.008, 712.009, 712.021, 712.025, 712.028, 712.029, 712.041, 712.042, 712.044, 712.0441, 712.0442, and 712.0443. Also involved are Texas Finance Code §§ 31.002(a)(56) and 35.207 and Business Organizations Code § 1.002. Regulations at issue in this matter include 7 Texas Administrative Code (TAC) §§ 26.1, 26.2, 26.3, 26.4, 26.5, 26.11, and 26.12.

5. Any violation of this Order could subject Respondents to additional regulatory or enforcement actions authorized by Health Code §§ 712.0441 to 712.0445 and other provisions of Texas law. Nothing in this Order diminishes the regulatory or enforcement powers of the Department, the Commissioner, or the Texas Finance Commission of Texas under Chapter 712 or other applicable law.
6. For purposes of this proceeding, Respondents knowingly and voluntarily waive:
 - a. Service upon Respondents of this Order;
 - b. The right to present defenses to the allegations in this proceeding;
 - c. Notice and hearing prior to imposition of this Order;
 - d. The filing of proposed findings of fact and conclusions of law;
 - e. The issuance of a proposal for decision by an administrative law judge;
 - f. The filing of exceptions and briefs with respect to such proposal for decision;
 - g. Any review of this Order by the Texas Finance Commission; and
 - h. Judicial review of this Order as provided by Texas Government Code § 2001.171 et seq., and any other challenge to the validity of this Order.
7. Respondents agree to this Order solely for the purpose of this proceeding, and without admitting or denying any violations of law or regulations. This Order does not constitute an admission by Respondents that Chapter 712 or a rule adopted or order issued under Chapter 712 has been violated.
8. The Commissioner has considered the matter and finds as follows:
 - a. Palms Memorial Gardens (the Cemetery), Portland, Texas, was previously known as San Patricio Memorial Gardens Cemetery (San Patricio Cemetery) and was

operated by San Patricio Memorial Gardens, Inc. (San Patricio) under Department certificate of authority number 153. In 2009, San Patricio declared bankruptcy.

- b. On March 15, 2010, the Bankruptcy Court for the Southern District of Texas authorized the sale of San Patricio Cemetery to Reliable Transport, Inc., a company of which Helen Aparicio was president and for which Carlos Aparicio acted as agent. The Bankruptcy Court's order explicitly did not modify the purchaser's obligation to comply with state law or otherwise limit the Department's ability to exercise its regulatory power.
- c. On June 4, 2010, the bankruptcy trustee deeded San Patricio Cemetery to Reliable Transport, Inc. On August 2, 2010, Reliable Transport, Inc. deeded San Patricio Cemetery to the Corporation.
- d. On January 4, 2011, the Department issued certificate of authority number 272 to the Corporation to operate the Cemetery.
- e. On August 28, 2012, the Commissioner issued Cease and Desist Order No. 2012-028 against the Corporation for failure to timely renew its certificate of authority to operate a perpetual care cemetery in Texas for 2012 and for failure to make timely required payments to the perpetual care fund (Fund), which resulted in a shortage in the Fund.
- f. On or about November 20, 2012, unknown to the Department, the Association held its organizational meeting in Grand Prairie, Texas, and its directors authorized its officers to acquire and operate the Cemetery.
- g. On February 27, 2013, the Commissioner and the Corporation entered into Agreed Order No. 2013-004 (the Agreed Order) whereby the Corporation agreed

to pay an administrative penalty in the amount of Two Thousand Dollars (\$2,000.00) and to correct the Fund shortage in the amount of Fourteen Thousand Seven Hundred Fifty-Eight Dollars and Eighty Cents (\$14,758.80) pursuant to a schedule of payments. The Agreed Order effected the cancellation and withdrawal of Order No. 2012-028.

- h. At the time the Corporation entered into the Agreed Order with the Department, Respondents made no mention that three months earlier the Association had been formed with the mission to acquire the Cemetery.
- i. By letters dated March 12, 2013 and April 25, 2013, the Department notified the Corporation that it failed to timely renew its certificate of authority to operate the Cemetery for 2013.
- j. On May 9, 2013, the Department notified the Corporation that the Cemetery was scheduled for examination on May 22, 2013, and provided the Corporation a list of all required records.
- k. On May 16, 2013, counsel for the Corporation and the Association wrote Frost Bank, the trustee of the Fund, that the Corporation had converted the Cemetery to ownership by the Association, effective January I, 2013. The counsel directed Frost Bank to "transfer the assets out of The Corporation's accounts to the Association's accounts and to make distributions to the Association, as indicated."
- l. On May 20, 2013, counsel for the Corporation advised the Department that the Corporation did not file an application to renew its certificate of authority because the Cemetery was now owned and operated by a non-profit unincorporated

association of plot owners and the Cemetery was no longer subject to regulation by the Department.

- m. On May 22, 2013, the Department's examiner sought to initiate the examination to determine the adequacy of the records and documents of the Cemetery operations, to review the financial records of the Fund, to review any documents that confirmed the sale of the Cemetery, and to inspect the maintenance of the Cemetery. Access to the necessary cemetery records was not provided to the examiner.
- n. On July 29, 2013, the Commissioner issued Order No. 2013-019, ordering the Corporation, among other things, to cease operating a perpetual care cemetery without a certificate of authority and to comply with the Agreed Order. The Corporation requested a hearing.
- o. On September 4, 2013, the Corporation signed Deed Without Warranty, conveying the Cemetery to the Association, purportedly effective January 1, 2013.
- p. On October 3, 2013, the Commissioner issued Order No. 2013-024, ordering the Association, Carlos Aparicio, and Helen Aparicio to, among other things, cease operating a perpetual care cemetery without a certificate of authority. The Association requested a hearing.
- q. On October 23, 2013, the Department conducted an on-site examination of the Cemetery, as of September 30, 2013.
- r. The Department determined that as of March 31, 2014, the remaining shortage to the perpetual care fund related to the Agreed Order was \$4,258.80. On July 2,

2014, Respondents paid the \$2,000 penalty due under the Agreed Order and paid the remaining \$4,258.80 Fund shortage related to the Agreed Order.

- s. An additional shortage to the Fund accrued for the period from November 2012 through July 15, 2014, because the Association collected perpetual care fees from purchasers, which Respondents called "maintenance fees," and did not remit such fees to the Fund. Therefore, as of July 15, 2014, the shortage to the perpetual care fund is \$11,079.97.
- t. The Respondents continually violated many provisions of Chapter 712 from the beginning of their ownership of the Cemetery. The three reports of examination issued by the Department that assigned an overall rating show a deterioration from a rating of 3, which indicates marginal, to a rating of 5, which indicates poor, on the last two exams.
- u. As of the date of this Order, Respondents owe the Department fees in the amount of \$4,103.41.
- v. The Department has agreed to waive any penalties for past violations, but asserts that a penalty should be automatically imposed if Respondents fail to comply with this Order. In determining the amount of such a penalty, and as required by Health Code § 712.0441, the Commissioner has considered the seriousness of the violations, Respondents' compliance history, and Respondents' good faith in attempting to comply with Chapter 712. The violations are very serious because Respondents formed the Association to take the Cemetery out of perpetual care without notifying the Department, failed to pay sums due under the Agreed Order according to the schedule of the Agreed Order, failed to renew the Corporation's

certificate of authority as agreed to in the Agreed Order, sold many plots over a one and one-half year period without making deposits to the perpetual care fund, and did not provide records for examinations. Additionally, Respondents' compliance history is poor as evidenced by their history of poor ratings on Department examinations and their failure to abide by the terms of the Agreed Order. Finally, Respondents did not exercise good faith in attempting to comply with Chapter 712 in that they acted to remove themselves from the operation of Chapter 712 without telling the Commissioner and entered into the Agreed Order after they had already formed the Association.

- w. The Commissioner additionally finds that the matters recited in the foregoing paragraph establish that Respondents have a pattern of willful disregard for the requirements of Chapter 712, and the rules of the Finance Commission so that the maximum administrative penalty permitted under Section 712.0441 would be justified.

ORDER

It is hereby ORDERED, ADJUDGED and DECREED that:

1. By August 25, 2014, Respondents will do the following:
 - a. Provide the Department the 2014 Annual Statement and Renewal Application and accompanying fee to the Department, along with evidence that the Corporation was reinstated by the Texas Secretary of State and that all other applicable governmental filings were made, such as assumed name certificates and a good standing certificate from the Texas Comptroller of Public Accounts.

- b. Provide the Department a financial statement reflecting the Corporation's having a net worth of at least \$75,000.
- c. Provide the Department a recorded deed conveying the Cemetery from the Association back to the Corporation.
- d. Provide the Department a revised purchase agreement form that reflects the name of the Corporation and complies with perpetual care disclosure requirements, including the definition of perpetual care and the amount required to be deposited.
- e. Provide the Department a revised certificate of ownership form that reflects the name of the Corporation and the definition of perpetual care.
- f. Provide the Department revised Cemetery rules and regulations that reflect the name of the Corporation.
- g. Provide the Department with a revised price list that reflects the Corporation as seller and complies with perpetual care regulations.
- h. Provide evidence to the Department that the Association has assigned to the Corporation all purchase agreements that were entered into by the Association and for which a conveyance document has not yet been issued.
- i. Provide the Department copies of the notices sent to all persons who entered into purchase agreements with the Association informing them that the Cemetery is once again a perpetual care cemetery.
- j. Provide the Department a photo of the cemetery signage reflecting that the cemetery is a perpetual care cemetery and including the other information required by Health Code § 712.007(b).

2. The perpetual care fund shortage as of July 15, 2014, totals \$11,079.97 and will be repaid as follows:
 - a. Respondents will cause the trustee of the fund to transfer all undistributed income as of June 30, 2014, to the principal to reduce the shortage to the principal.
 - b. Respondents will pay the remaining shortage by depositing to the Fund:
 - i. \$750.00 per month by the 51 day of each month.
 - ii. The first payment will be due August 5, 2014.
 - iii. Confirmation of each deposit must be faxed or emailed to the Department by the 6 day of each month.
 - iv. If any installment payment is not received within five calendar days of its due date, the entire sum becomes immediately due and payable, without further notice to Respondents.
 - v. If the entire sum becomes immediately due and payable and is not paid within thirty (30) days, this matter will be referred to the Office of the Attorney General for collection.
 - c. Perpetual care fees collected on purchase agreements from July 16, 2014, through August 31, 2014, must be remitted to the Fund by September 20, 2014, and confirmation of the deposit faxed or emailed to the Department no later than September 21, 2014. Perpetual care collected on subsequent contracts will be deposited within statutorily required guidelines.
3. Respondents shall pay the \$4,103.41 for fees due to the Department as of the date of this Order by cashier's check or money orders to the Department on the same schedule and terms as that set out for repayment of the perpetual care fund shortage in the preceding

paragraph, except that the fees will commence to be repaid on the earlier of the following:

- a. the 5th day of the first month after the perpetual care shortage is paid or
 - b. one year from the date this Consent Order is signed.
4. Respondents agree to pay the following penalties and agree to the following remedies:
- a. If Respondents fail to provide, by August 25, 2014, to the Department any part of the documents required by Paragraph 1, the penalty shall be \$10,000.00, and Respondents must cease and desist from cemetery operations, except for maintenance of the Cemetery and allowing burials for persons who are legally entitled, as of August 25, 2014, to be buried in the Cemetery.
 - b. If Respondents fail to make any payment required under this Consent Order to either the perpetual care fund or the Department, in addition to the other remedies specified herein, they agree to pay a penalty of \$1,000.00 for each late payment.
5. Respondents are jointly and severally liable for all perpetual care fund shortages, fees and penalties due under this Order.

EFFECTIVE DATE

This Order against Respondents is effective on the date signed by the Commissioner, and subject to its terms, Respondent may not appeal.

Signed on this 23rd day of July, 2014.

/s/Robert Bacon
for Charles G. Cooper
Banking Commissioner of Texas

AGREED AS TO FORM AND SUBSTANCE:

THE PALMS MEMORIAL GARDENS, INC.,
dba The Palms Memorial Gardens

By: /s/ Carlos Aparicio
Carlos Aparicio, President

PALMS MEMORIAL GARDENS CEMETERY ASSOCIATION
dba The Palms Memorial Gardens

By: /s/ Carlos Aparicio
Carlos Aparicio, President

By: /s/ Carlos Aparicio
Carlos Aparicio
As President of
Palms Memorial Gardens, Inc.;
As President of Palms Memorial Gardens Cemetery
Association; and Individually

By: /s/ Helen Aparicio
Helen Aparicio
As Vice-President
Of Palms Memorial Gardens, Inc.;
As Vice-President, Secretary
and Treasurer of Palms
Memorial Gardens Cemetery
Association; and Individually

APPROVED AS TO FORM:

/s/ Philip R. Bishop
Philip Bishop
Attorney for Respondents

/s/ Deborah H. Loomis
Deborah H. Loomis Deputy General Counsel
Texas Department of Banking