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May 11, 2021

VIA E-MAIL

Mr. Donald A. Walcott  
150 Washington Avenue  
Suite # 207  
Santa Fe, New Mexico 87501

Re: AAFPO v. Angel Fire Resort

Dear Don:

It's come to my attention that yesterday, after several months of posting a roster of board members that indicated that six of the terms would expire in 2021 – thereby signaling that those seats would be up for election at the annual membership meeting in June – AAFPO suddenly posted a new roster indicating that only three of the seats would be vacated. The announcement was a departure not only from AAFPO's previous website postings, but also from the representations AAFPO made to members at the board meetings at which the new directors were appointed. Over the weekend, it seems, AAFPO strategically assigned particular appointees to particular seats to maximize their staying power.

I understand that members are none too happy about this about-face, which never came up during the May 6 board meeting and which must have resulted from yet another colloquy among board members from which their fellow board member Mark Manley was excluded. Members understandably regard the maneuver – in conjunction with the board's concurrent attempt to amend a slew of by-laws at the eleventh hour, a matter about which Mr. Manley was also left in the dark – as a cynical effort by an unpopular board to cling to power it would otherwise be hard-pressed to retain. I myself find it surprising that an organization supposedly dedicated to the rights of its members would go out of its way to disenfranchise them, and that a

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self-styled watchdog that demands transparency and accountability from the Resort would operate so opaquely and high-handedly toward its own constituents.

My purpose in writing to you today, however, isn't to identify the obvious public-relations implications of AAFPO's abrupt change of tune, but rather to point out its illegality. As I'm sure you're aware, AAFPO's own by-laws provide that a board member appointed by the board itself to replace a director who has resigned "shall serve until the next election of directors." By-Laws art. VI, § 5. I gather from AAFPO's latest posting that the board is claiming support for its new position from NMSA 1978, § 53-8-19(B) (1975), which states that "[a] director elected or appointed to fill a vacancy shall be elected or appointed for the unexpired term of his predecessor in office."

But AAFPO is apparently ignoring other sections of the Nonprofit Corporation Act that make the by-law controlling over the statute. For example, the statute provides that "[t]he right of the members ... to vote may be ... enlarged ... to the extent specified in the articles of incorporation or the bylaws." Id. § 53-8-15(A). It also declares that "[w]henever, with respect to any action to be taken by the ... directors of a corporation, the articles of incorporation or bylaws require the vote or concurrence of a greater proportion of the ... members ... than required by the Nonprofit Corporation Act, the provisions of the articles of incorporation or bylaws shall control." Id. § 53-8-95. (Thus, since the by-laws require the concurrence of the members if any board-appointed director seeks to serve beyond the next election, the by-laws – not the statute – state the applicable rule.) And, perhaps most plainly, the statute provides that once the tenure of the very first board of directors has ended, "directors shall be elected or appointed in the manner and for the terms provided in the articles of incorporation or the bylaws." Id. § 53-8-18(B) (2003). I would also remind you of your statement to the court back in December, when you were arguing that the appointment of directors to seats vacated by resignation was governed by the by-laws: "[T]here is no conflict between the statute and the By-Laws at all." Reply in Support of Motion for Partial Summary Judgment at 8 (Dec. 30, 2020).

As I read article VI, section 1 of the by-laws, AAFPO has until Friday or Saturday – "[n]ot less than six (6) weeks prior to [the] annual meeting" – to "determine the number of directors to be elected." If AAFPO's website posting yesterday constituted its "determin[ation]" of this issue, I would urge AAFPO to correct the posting by Friday. I can predict with some confidence that if AAFPO's decision stands, AAFPO will face legal action – either from board candidates whose opportunities for election to the board have been unlawfully limited, or from members whose voting rights have been unlawfully suppressed, or both.

Sincerely,  
/s/ Kip Purcell  
Charles K. Purcell