



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Robert F. McDonnell
Governor

June 7, 2013

James S. Cheng
Secretary of
Commerce and Trade

Gordon N. Dixon
Director

Complainant: Ben Jackson
Association: Merifield Acres Landowners Association
File Number: 2013-02954

The Office of the Common Interest Community Ombudsman has been designated to review final adverse decisions and determine if they may be in conflict with laws or regulations governing common interest communities. Such determination is within the sole discretion of the Office of the Common Interest Community Ombudsman and not subject to further review.

Complaint

Complainant submitted a complaint to the Association dated February 20, 2013. The Association provided a response to the Complaint dated April 24, 2013. Complainant submitted his Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman and it was received on May 2, 2013. I would make a special note that three complaints were submitted to the Association by three separate owners and three Notices of Final Adverse Decision were submitted to this office. Only one filing fee was received and therefore, this determination is intended only for Mr. Jackson, who drafted the check that was submitted in payment of the filing fee.

Determination

The Office of the Common Interest Ombudsman (OCICO) has reviewed the NFAD in its entirety. Any additional information submitted by Complainant that was not part of the original Complaint submitted to the Association was reviewed but not utilized in the Ombudsman's determination.

The Complainant has alleged that the Association is not an association that falls under the Virginia Property Owners Association Act (POA Act) and therefore the Association has no right to file a memorandum of lien (MOL) against owners for unpaid assessments. The Complainant also contends that the Association failed to adopt a complaint procedure but the reference for such failure appears to be from 2010 and no complaint procedure was required by any association until September 28, 2012. Thus the issue of not having a complaint procedure prior to September 28, 2012 is moot, as far as state law and regulations are concerned.

Complainant included a legal opinion from an attorney who had been asked to review some, but perhaps not all, of the governing documents and other recorded

documents of the association. Complainant also referenced meetings with the Mecklenburg Circuit Court Clerk regarding this issue. Additional correspondence between the Complainants and the Association, plats, bylaws, court orders and several other documents were included in the NFAD.

In its final adverse decision the Association maintained "its position that the filing of a lien ...was just and proper." The decision also essentially stated that the deed recorded against Complainant's lot provided a contractual obligation on the part of the Complainant to pay assessments and in turn allows the Association to take action in the form of a MOL in order to force payment of unpaid assessments.

This is a Catch-22 situation. The Complainant contends that the association does not appropriately fall under the POA Act. If this is the case, the Association has no obligation under common interest community laws or regulations to have a complaint process in place as it would not be considered a common interest community. In addition, if the Association is not an association under the POA Act, this office has no jurisdiction over the Association or over any Notice of Final Adverse Decision submitted to this office. The Association is currently registered with the Common Interest Community Board, which is why it was asked to adopt a complaint process, as our office will assume any association registered with us is, in fact, a common interest community. Had the Association provided information to this office showing that it was not a common interest community, it would not have been required to put a complaint process in place. In fact, we would have had no authority to request that it do so.

In its response to the Complainant, the Association has not claimed to be an entity that falls under the Property Owners Association Act. Instead it has relied on the recorded deed for the Complainant's lot and its belief that the Complainant entered into a contractual agreement to pay annual assessments and that the Complainant has subsequently agreed, via the deed, to having liens placed on its property.

Based on the information provided in this NFAD, I find that there is no way in which my office can provide a Determination. The true determination that must be made is whether the association's documents would categorize it as an association that falls under the POA Act. This office has no authority to review those documents and make such a determination as its jurisdiction lies solely within common interest community laws and regulations and does not extend to the review or enforcement of documents recorded against the Association. Until a legal decision has been made as to whether the association is or is not a common interest community that falls under the POA Act this office has no authority to provide a Determination.

Required Actions

I would suggest that the Association consider working with an attorney in order to draw a final conclusion as to whether it falls under the POA Act and is therefore a common interest community. The legal ramifications of acting as an association under the POA Act when, in fact, you are not, are far reaching. In addition, the legal ramifications can be

equally onerous if the association does fall under the POA Act but is not carrying out its obligations as required by law.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Merifield Acres Landowners Association