



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Robert F. McDonnell
Governor

July 8, 2013

James S. Cheng
Secretary of
Commerce and Trade

Gordon N. Dixon
Director

Complainants: Kathleen Price and Jane Luckey
Association: Montebello Condominium Unit Owners Association
File Number: 2013-03088

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

Complainants submitted a complaint to the Association dated December 30, 2012. The Association provided a Final Adverse Decision to the Complainants dated March 13, 2013. Complainants submitted a Notice of Final Adverse Decision (NFAD) dated April 12, 2013 to the Department of Professional and Occupational Regulation but the NFAD was inadvertently filed in another division and was not received by the Office of the Common Interest Community Ombudsman until May 20, 2013. We apologize for the error and have taken pains to ensure that such a situation does not arise again.

Determination

The Office of the Common Interest Ombudsman has reviewed the NFAD in its entirety. Any additional information submitted by Complainants or the Association that was not part of the original Complaint submitted to the Association or the original Final Adverse Decision was reviewed but not utilized in the Ombudsman's determination.

Complainants allege four violations in their Complaint and subsequent NFAD. The first allegation is that the Association, by refurbishing the Community Center through the implementation of a Community Center Master Plan (Master Plan), will alter the use and the footprint of certain common elements of the Association. Complainants believe that such alteration would require an amendment to the plat of the condominium, which they argue is part of the condominium instruments, based on the definition for "condominium instruments" contained in the Condominium Act. Complainants note that §55-59.71 of the *Virginia Code* requires amendments to the condominium instruments to be approved by a two-thirds vote of ownership interests or a larger majority if required by the condominium instruments. In further support of their allegations, Complainants also allege that a failure to obtain such approval would be violation of a Consent Decree entered into by the Association in 1992.

A second allegation by the Complainants is that the Association will violate the Bylaws of the Association if it moves forward with the Master Plan. According to the Complainants, the Bylaws require a majority vote of the owners for any additions, alterations or improvements to the common elements costing in excess of a particular percentage of total annual assessments, and Complainants believe the costs estimated for this project would require such a vote.

The third allegation is that the Association has circumvented required procedures over the past years. Finally, in its fourth allegation, the Complainants allege that there is no method of communication as required by §55-79.75:1.

Looking at the allegations in reverse, there is nothing to indicate that the Association does not have a method of communication that complies with §55-79.71:1. According to the Association's Final Adverse Decision, the Association maintains a website owner forum that allows for communication among owners and with the board. This appears to be sufficient for the purposes of providing a reasonable, effective and free method of communication.

No documentation or support was provided to prove the third allegation, that the Association has circumvented required procedures. This is not an allegation that can be addressed by this office due to its general nature and lack of proof of the allegations.

The second allegation, that the Association will violate its Bylaws if it pursues its planned method of financing the project, is not one for which this office can provide a Determination. The jurisdiction of this office lies solely with possible violations or conflicts with common interest community laws and regulations. Here, where the Complainants believe that the Association may violate the bylaws as a result of its plans for the common elements and the method by which such changes will be funded, we have no authority to provide a Determination since such a violation does not fall under the jurisdiction of this office.

The Complainant's first and what appears to be primary allegation is that the Association must amend the condominium plat as a result of the planned alterations to the common elements and that any such amendment to the condominium instruments requires a two-thirds vote of the unit owners. The Association maintains that it must comply with the Bylaws of the Association, and those Bylaws authorize the Association to make additions, alterations or improvements to the common elements, within certain cost limits, without unit owner vote. If the cost limit is exceeded, as it would be with the implementation of the Master Plan, a majority of votes of the unit owners will be sufficient to authorize such changes.

The argument that the plat is part of the condominium instruments may be a sound argument, and it is true that an amendment to the condominium instruments does require a two-thirds vote. In addition, §55-59.58 sets forth, with specificity, what must be contained in the plats. However, there is nothing, to my knowledge, in the Condominium Act or Regulations that dictates what would precipitate an amendment to the plat and whether an

amendment is required in an instance such as the one being considered in the current situation.

Because the Condominium Act and Regulations do not speak to when, or if, the plat must be amended, I cannot reach a conclusion that the Association is violating the Condominium Act or any common interest community law or regulation by pursuing its planned changes to the Community Center and obtaining a vote of less than two-thirds of the unit owners.

Complainant's contention that the 1992 consent decree will be violated by the proposed changes is moot as this office has no authority to enforce a consent decree.

Required Actions

No action is required by the Association.

Sincerely,

A handwritten signature in cursive script, appearing to read "Heather S. Gillespie".

Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Montebello Condominium Unit Owners Association