

**Before the
Commission on Common Ownership Communities
Montgomery County, Maryland**

In the Matter of:

Kathleen Viney	:	
15101 Glade Drive #1B	:	
Silver Spring, MD 20906	:	
Complainant,	:	
	:	
v.	:	Case No. 18-17
	:	November 2, 2017
Mutual 14 Condominium of Rossmoor	:	
c/o Linda O’Neil, President	:	
15101 Glade Drive #3A	:	
Silver Spring, MD 20906	:	
Respondent,	:	

**DECISION AND ORDER
(Before Winegar, Fine, and Gardner)**

The above-titled case came before the Commission on Common Ownership Communities for Montgomery County, Maryland (the “Commission”), pursuant to Chapter 10B of the Montgomery County Code. The Hearing Panel considered the testimony as well as other evidence of record and finds, concludes and orders as follows:

Background

Complainant Kathleen Viney (“Complainant” or “Ms. Viney”), is a resident homeowner of 15101 Glade Drive #1B, Silver Spring, MD 20906, a unit in the Mutual 14 Condominium of Rossmoor. Mutual 14 Condominium of Rossmoor (“Respondent” or the “Condominium”), is a condominium association in Montgomery County, Maryland, as defined by Section 11-101 of the Real Property Article, Maryland Code Annotated (“Maryland Condominium Act”). Its bylaws and master deed were recorded in August 2005.

Ms. Viney filed a complaint against the Respondent on or about May 22, 2017 and amended the complaint on August 25, 2017. The Montgomery County Commission on Common Ownership Communities (“CCOC”) took jurisdiction of the case at its regular meeting on September 6, 2017. All parties were notified of the jurisdictional decision on or about September 29, 2017. A hearing before a panel assigned by the CCOC was held on November 2, 2017. Commissioners Winegar, Fine and Gardner served on the panel.

The issues in this action arise out of an application by the Complainant requesting approval of the installation of rollup blinds at the edge of her patio. Her application was reviewed and denied by the Association’s Property Maintenance Committee. Thereafter, she appealed the denial to the Board of Directors for the Respondent, which never ruled on her appeal. In her original complaint, Ms. Viney claimed, among other things, that the Property Maintenance Committee was improperly constituted,

did not properly vote on her application, and that her appeal was never heard by the Board. In her amended complaint, Ms. Viney claimed that the Board President, Linda O'Neil, did not have authority to hire counsel to represent the Association in this action before the Commission.

The Complainant's specific allegations are as follows:

1. The Property Maintenance Committee was improperly constituted, having six members instead of the required "uneven number".
2. The Property Maintenance Committee improperly denied Complainant's application for an architectural modification because the decision was not memorialized by a vote.
3. The Property Maintenance Committee did not advise the Complainant of her right to appeal the committee's decision.
4. The Complainant's appeal was not included on the agenda of the next meeting of the Respondent's Board of Directors. Consequently, the Complainant was not properly provided an opportunity to appeal the Property Maintenance Committee's decision at the board level by the Respondent.
5. The Board of the Respondent failed to pass a resolution as to who should have authority to represent the Respondent in this dispute, and what actions should be taken to resolve it. The President of the Board consulted with an attorney without the knowledge, approval, or spending authorization of the Board. The Respondent improperly approved payment of the attorney's invoices, for services and spending not previously approved.
6. The President of the Respondent has a conflict of interest in her various roles.

The Complainant requested the following desired actions:

1. That the Property Maintenance Committee institute and follow proper procedures in the future.
2. That the Board of Directors institute a procedure to resolve disputes brought by residents against the Board or its committees.
3. That a summary of the complaint be included in a notice sent to all unit owners.

Each of these specific allegations is explored more fully below.

Allegation 1. The Property Maintenance Committee was improperly constituted, having six members instead of the required "uneven number".

Article X, Section 2, Operation, page 28-29 of the Condominium's Bylaws reads: "The [Property Maintenance Committee] shall be composed of an *uneven* number of three or more natural persons designated from time to time by the Board of Directors... The affirmative vote of a majority of the members of the [Property Maintenance Committee] shall be required in order to adopt or promulgate any rule or regulation, or to make any finding, determination, ruling, or order..." (emphasis added).

The Complainant reported that at the time her application was reviewed by the Property Maintenance Committee, the committee consisted of six members, including the Board President, Linda O'Neil. Ms. O'Neil explained that she has routinely been a part of the committee, at least on an *ex officio* basis as the Board President, and that as an *ex officio* member, she does not vote. It was noted that recently, an additional member has been appointed to the committee, thus making an uneven number. However, the non-voting status of the *ex officio* member (the "Board President") now calls into question the membership of the committee, because presumably the requirement for an uneven number of members is intended to ensure that there will never be a tie vote. Under questioning, Ms. O'Neil

explained that the committee appoints its own members, and the membership is not appointed or affirmed by the Board of Directors. She further noted that the committee does not take formal votes, and that its decisions are made cooperatively or by consensus.

Allegation 2. The Property Maintenance Committee improperly denied Complainant's application for an architectural modification because the decision was not memorialized by a vote.

In response to questioning, Ms. O'Neil acknowledged that the committee does not routinely take formal votes, as decisions are made cooperatively or by consensus.

Ms. O'Neil explained that the Complainant's architectural modification request was without precedent and was not consistent with the design standards of the community. She stated that no vote was needed because the committee reached a consensus that the proposal should be denied.

Allegation 3. The Property Maintenance Committee did not advise the Complainant of her right to appeal the committee's decision.

The allegation that the Property Maintenance Committee did not advise the Complainant of her right to appeal the committee's decision was largely undisputed.

Allegation 4. The condominium did not include the Complainant's appeal on the next Board agenda; consequently, the Complainant was not properly provided an opportunity to appeal the Property Maintenance Committee's decision at the board level by the Respondent.

The Respondent's President acknowledged that she did not include the Complainant's appeal on the next Board agenda. However, she noted that the Complainant did not renew her request for an appeal, and Ms. O'Neil considered the matter to have been resolved. She further noted that the Complainant has demonstrated the capacity to make requests and follow up on them. In the absence of a second request, she believed the Complainant was satisfied with the outcome. Finally, Ms. O'Neil stated that the Board had been dealing with several difficult issues, and the appeal hearing might have placed more pressure on the Board and/or created additional "friction" among the Board or between the Board and members.

Allegation 5. The Respondent failed to pass a resolution as to who should have the authority to represent the Respondent in this dispute, and what actions should be taken to resolve it. The President of the Board consulted with an attorney without the knowledge, approval, or spending authorization of the Board. The Respondent improperly approved payment of the attorney's invoices, for services and spending not previously approved.

The Respondent's President testified at the hearing that the Board was made aware of the complaint. She explained that because of a previous conflict, the Board had an agreement in place with Rees Broome, the law firm that represents it in this action, and that she contacted the firm to prepare a response to this case. She stated that the Board concurred with the decision, but did not formally vote on the action until October.

The President further testified that formal votes were taken in August and October 2017 authorizing the expenditure of funds for the attorney and clarifying the responsibility for representation before the Commission.

Allegation 6. The President of the Respondent has a conflict of interest in her various roles.

The Complainant expressed concern that Ms. O’Neil, as President of the Respondent, as a member of the Respondent Board, and as an *ex officio* member of the Property Maintenance Committee, had conflicting interests in the case and should not have been involved as a member of the Property Maintenance Committee, President of the Board, and primary liaison with the Respondent’s legal counsel. Ms. O’Neil stated that she was able to fulfill these roles objectively.

The Complainant presented anecdotal statements to the effect that Ms. O’Neil and the Board have not always discussed contracts and decisions in open session and that there have been times when decisions were made without full transparency to the members of the Association.

Procedural Objections and Issues

During the course of the hearing, the following procedural objections and issues were raised:

Objection 1. The Respondent was not properly notified of the hearing and/or of the amended complaint.

The Respondent reported that the Commission Exhibit 1 (the “CE1”)¹ was not properly provided to it prior to the hearing, and thus could not be reviewed for accuracy and acceptance. The Respondent also reported that the amended complaint was not properly provided to it prior to the hearing. The Respondent reported that the mailing from the CCOC included information clearly related to another CCOC case, and not to the case at hand.

Objection 2. The Respondent objected that the Complainant’s membership as a Commissioner on the Commission placed her in a position of conflict, and jeopardized the objectivity of the Commissioners hearing the case. The Respondent asserted that the filing of a case while the Complainant is serving as a Commissioner placed her in violation of the Commission’s standards of conduct.

Objection 3. The Respondent asserted that the Complainant may have engaged in *ex parte* communication with fellow Commissioners in relation to this case.

Objection 4. The Complainant counter-objected to the status of Commissioner John Radcliffe, who is the Vice President of the Respondent and testified in this case, noting that this status may have placed him in a position of conflict.

FINDINGS OF FACT

The Panel addresses the procedural objections that were raised at the hearing as follows:

Objection 1. The Respondent was not properly notified of the hearing and/or of the amended complaint.

It is undisputed that the Respondent may not have received the CE1 prior to the hearing. To resolve this issue, the panel did not accept the CE1 as an exhibit, but required each individual component of the CE1 to be presented for approval and entered into the record or at the hearing. With

¹ The CE1 is a collection of all of the pleadings and evidence received by the Commission before the hearing. The Commission routinely places all of these in a single exhibit entitled CE1, which is sent to the parties prior to the hearing and accepted in evidence at the start of the hearing.

regard to prior receipt of the amended complaint, it was included in the September 29, 2017 Summons and Notice of Hearing sent to Linda O'Neil at 15101 Glade Drive #3A, Silver Spring, MD 20906, referencing Case No. 18-17. Unfortunately, the mailing also included information regarding an unrelated case, and it is possible that the inclusion of the amended complaint was not noted by the Respondent or Respondent's Counsel. Nevertheless, the Panel feels that if the Respondent and Counsel read the document sufficiently well to determine that it included incorrect information, they had a reasonable opportunity to view the amended complaint. Thus, the objection was overruled.

Objection 2. The Respondent objected that the Complainant's membership as a Commissioner on the Commission placed her in a position of conflict, and jeopardized the objectivity of the Commissioners hearing the case.

At the outset of the hearing, the Respondent moved for the Commission Panel to deny jurisdiction of this case because the Complainant serves as a member of the Commission. The Respondent did not raise any specific facts to support its request. Instead, the Respondent based its request on the fact that lawyers who serve as volunteer panel chairs for the Commission are prohibited from presenting cases to the Commission. To this Panel's knowledge, the issue of whether a Commissioner may bring a case before the Commission while serving on the Commission has never been ruled on by the Commission or by the Montgomery County Ethics Commission.

By analogy to the Canons of Judicial Ethics, the panel notes that under Canon 3(d) of the Maryland Code of Judicial Conduct: "a judge shall recuse...herself from a proceeding in which the judge's impartiality might reasonably be questioned, including an instance when the judge has a personal bias or prejudice concerning a party or a party's lawyer or extra judicial knowledge of a disputed evidentiary fact concerning the proceeding..." In this case, the panel members had no prior knowledge of the facts except what they learned at the meeting when the Commission accepted jurisdiction. At that time, the Complainant recused herself from voting and did not participate in the discussion. Moreover, each of the panel members specifically stated on the record that they had not spoken to the Complainant about the case and did not have any prior knowledge of the facts in this case. Under these circumstances, the panel members were each satisfied that they could fairly and impartially rule on the facts and evidence presented in this case. See *In re Elrich S.*, 416 Md. 15 (2010). The Panel finds that the Complainant does not relinquish the rights accrued to her by virtue of citizenship in Montgomery County as a consequence of her membership on the Commission. The Panel also finds that the individual Commissioners appointed to hear this case did have the ability to view this case objectively and to make fair and reasoned decisions despite their interaction with the Complainant as a fellow Commissioner. The Panel therefore overrules this objection.

Objection 3. The Respondent asserted that the Complainant may have engaged in *ex parte* communication with fellow Commissioners in relation to the case.

All Commissioners denied engaging in *ex parte* communication with the Complainant about the case. The Panel determines that no improper communication took place regarding this case.

Objection 4. The Complainant counter-objected to the status of CCOC Commissioner John Radcliffe, representing the Respondent, noting that this status may have placed him in a position of conflict.

The Panel takes official note that individual Commissioners do not relinquish the rights accrued to them by virtue of membership in an Association as a consequence of their membership on the Commission. The Panel asserts that individual Commissioners have the ability to participate in

Association governance and representation objectively and to make fair and reasoned decisions despite their interaction with the Complainant as a fellow Commissioner.

Consequently, all of the procedural objections were overruled or denied. With regard to the specific allegations, the Panel finds the following:

Allegation 1. The Property Maintenance Committee was improperly constituted, having six members instead of the required “uneven number”.

The Mutual 14 Condominium of Rossmoor Bylaws, Article X, Section 2 (page 28-29) reads: “The [Property Maintenance Committee] shall be composed of an uneven number of three or more natural persons designed from time to time by the Board of Directors...” According to undisputed testimony from all parties, the number of committee members is not static, nor does it always comply with the requirement that the number be uneven. The status of Ms. O’Neil as a non-voting or *ex officio* member is unclear. According to further undisputed testimony from all parties, the members are appointed by the committee itself and not by the Board of Directors.

The Mutual 14 Condominium of Rossmoor Bylaws, Article V, Section 3(k) (page 8) reads: “The Board of Directors shall have all the powers and duties necessary for the administration of the affairs of the Council of Unit Owners.... The powers and duties of the Board of Directors shall include but not be limited to...to appoint the members of the [Property Maintenance Committee] provided for in Article X of these Bylaws and to appoint the members of such other committees as the Board of Directors may from time to time designate.”

The Panel finds that the Committee is not properly constituted. The Board of Directors must appoint an uneven number of members to the Committee by name. There is no provision for an *ex officio* or non-voting membership in the bylaws. The Board of Directors must clearly appoint Ms. O’Neil to full membership if (1) she wishes to join the Committee as a full member and (2) the appointment will not conflict with the requirement that there be an uneven number. The Board must formally appoint members to this Committee as qualified volunteers present themselves to the Board. The Committee itself does not have this authority. The governing documents do not prohibit the Board from appointing a liaison to the Committee, and Ms. O’Neil could serve in that capacity, should she so choose, and should the Board formally appoint her to that role. The Panel finds that, in any event, her status must be clarified by the Board.

Allegation 2. The Property Maintenance Committee improperly denied Complainant’s application for an architectural modification because the decision was not memorialized by a vote.

The Mutual 14 Condominium of Rossmoor Bylaws, Article X, Section 2 (page 28-29) reads: “The affirmative vote of the majority of the members of the [Property Maintenance Committee] shall be required in order to adopt or promulgate any rule or regulation, or to make any finding, determination, ruling, or order.” According to undisputed testimony from all parties, the Committee does not actually take votes, but operates by consensus. It is unclear whether the committee takes minutes, but it was generally agreed that the Members are reasonably aware of the dates, times and locations of the Committee’s meetings.

The Panel finds, in accordance with Maryland law and the Association’s bylaws, that the Property Management Committee must memorialize its decisions by motion, must take minutes and

make them available to residents, and must provide adequate notice of all meeting dates, times, and locations to the Members.

Allegation 3. The Property Maintenance Committee did not advise the Complainant of her right to appeal the committee's decision.

The Mutual 14 Condominium of Rossmoor Bylaws, Article X, Section 6 (page 30) reads: "The decisions of the [Property Maintenance Committee] shall be final except that any unit owner who is aggrieved by any action or forbearance from any action by the [Property Maintenance Committee] may appeal the decision... to the Board of Directors of the Council of Unit Owners and, upon the request of such unit owner, shall be entitled to a hearing before the Board of Directors."

Based on the Bylaws, Members are permitted to appeal decisions of the Committee to the Board of Directors. It is not clear that the Bylaws require the Committee to notify a Member of the right to appeal. In this case, the Complainant was apparently aware of her right to appeal because she pursued the appeal. The Panel finds that the Committee did not behave improperly by failing to proactively inform the Complainant of her right to appeal its decision. However, in the future, the Panel would urge the Respondent to advise its members that they have the right to appeal any decision by the Committee to the Board of directors.

Allegation 4. The condominium did not include the Complainant's appeal on the next Board agenda; consequently, the Complainant was not properly provided an opportunity to appeal the Property Maintenance Committee's decision at the board level by the Respondent.

The Mutual 14 Condominium of Rossmoor Bylaws, Article X, Section 6 (page 30) reads: "The decisions of the [Property Maintenance Committee] shall be final except that any unit owner who is aggrieved by any action or forbearance from any action by the [Property Maintenance Committee] may appeal the decision... to the Board of Directors of the Council of Unit Owners and, upon the request of such unit owner, shall be entitled to a hearing before the Board of Directors."

Based on the Bylaws, the Board has a duty to hear an appeal upon request. There is no provision for the request to be denied, and no requirement that a Member be sufficiently concerned or motivated to request more than once in order for a hearing to be heard. There is also no provision in the Bylaws that the Board be emotionally prepared to hear an appeal. The Board is obligated to hear an appeal upon request, pursuant to its own governing documents and procedures.

Allegation 5. The Board of the Respondent failed to make a decision and pass a resolution as to who should have authority to represent the Respondent in this dispute, and what actions should be taken to resolve it. The president of the Respondent consulted an attorney without the knowledge, approval, or spending authorization of the Board. The Respondent improperly approved payment of the attorney's invoices, for services and spending not previously approved.

The Mutual 14 Condominium of Rossmoor Bylaws, Article V, Section 3(c) (page 7) reads: "The Board of Directors shall have all the powers and duties necessary for the administration of the affairs of the Council of Unit Owners and the Condominium and may do all such acts and things as are not by law or by these Bylaws directed be exercised and done by the unit owners. The powers and duties of the Board of Directors shall include, but not be limited to...designation, hiring, and dismissal of the personnel necessary for the good working order of the condominium and for the proper care of the

common elements and to provide services for the project in a manner consistent with law and the provisions of these Bylaws and the Declaration.”

The Mutual 14 Condominium of Rossmoor Bylaws Article VI, Section 4 (page 12) reads: “The President shall be the chief executive officer of the Council of Unit Owners. He shall preside at all meetings of the unit owners and of the Board of Directors. He shall have all of the general powers and duties which are usually vested in the office of president of a corporation....”

The Respondent’s witnesses testified that an agreement between the Condominium and legal counsel predated the instant case because of a previous legal matter involving the Condominium. As the Board President, Ms. O’Neil has the authority to take steps to respond to a legal filing against the Condominium. It is not unreasonable that she would consult and retain an attorney that had already been selected by the Board on a previous occasion. The Board subsequently voted to authorize her to interact with legal counsel and to pay the legal bills associated with the case.

The panel finds that, while the use of the attorney and agreement to pay the bills may not have been done in the best and most transparent way, the outcome is not in violation of the governing documents or governing law.

Allegation 6. The President of the Board has a conflict of interest in her various roles.

The Panel takes official note that individual Condominium members do not relinquish the rights accrued to them by virtue of membership in a Condominium as a consequence of their membership on the Board or on multiple committees. The Panel finds that Association members have the ability to participate in Association governance and representation objectively and to make fair and reasoned decisions despite the possibility that their leadership may find outlet in various roles. There is no prohibition in the governing documents or state and local statutes limiting the participation of an Association Member to a single role or function. In the absence of a formally approved Board policy, it does not appear any rule was violated.

CONCLUSIONS OF LAW

This case considers whether a committee of the Association was properly constituted, properly empowered to make decisions, and whether those powers were properly exercised. The case further considers whether the Board properly fulfilled its responsibilities to address a resident dispute, and concomitantly whether the Board President acted improperly in any of the leadership roles she has undertaken.

With regard to the specific alleged violations, the panel concludes:

1. The Property Maintenance Committee was improperly constituted.
2. The Property Maintenance Committee improperly denied Complainant’s application for an architectural modification because the decision was not memorialized by a vote.
3. The Property Maintenance Committee was not required to advise the Complainant of her right to appeal the committee’s decision.
4. The Respondent Board improperly failed to include the Complainant’s appeal on the next Board agenda; consequently, the Complainant was not properly provided an opportunity to appeal the Property Maintenance Committee’s decision to the Respondent Board.

5. After the complaint was filed and notice received by the Respondent, the Board eventually approved payment of the attorney's invoices for services and spending not previously approved, and designated the Board President and Vice President as representatives. While these actions may not have been performed in compliance with "best practices", the outcome was not in violation of the governing documents or governing law.
6. The Board President, representing the Respondent, does not have a conflict of interest in her various roles under the governing documents or governing law.

With regard to the procedural objections raised during the hearing, the panel concludes:

1. The Respondent was not properly notified of the hearing and/or of the amended complaint by CCOC staff; nevertheless, the Panel concludes that the Respondent and counsel had a reasonable opportunity to see the amended complaint when it was sent as part of a summons on September 29, 2017. Each portion of the CE1 was individually presented into evidence, providing an opportunity for review and validation during the hearing. Thus, the objection was denied.
2. The Respondent objected that the Complainant's membership as a Commissioner on the Commission placed her in a position of conflict, and jeopardized the objectivity of the Commissioners hearing the case. The Panel asserts that individual Commissioners have the ability to view the case objectively and to make fair and impartial decisions despite their interaction with the Complainant as a fellow Commissioner. Thus, the objection was denied.
3. The Respondent asserted that the Complainant may have engaged in *ex parte* communication with fellow Commissioners in relation to the case. All Commissioners denied engaging in *ex parte* communication with the Complainant about this case. The Panel determines that no improper communication took place related to this case. Thus, the objection was denied.
4. The Complainant counter-objected to the status of Commissioner John Radcliffe, representing the Respondent, noting that this status may have placed him in a position of conflict. The Panel asserts that individual Commissioners have the ability to participate in Association governance and representation objectively and to make fair and reasoned decisions despite their interaction with the Complainant as a fellow Commissioner. Thus, the objection was denied.

ORDER

Based on the evidence of record, and for the reasons set forth above:

1. The Respondent must properly and formally constitute the Property Maintenance Committee (referred to as the Architectural and Environmental Control Committee) by Board motion, and to identify all members by name and term of membership for the record. This motion shall be included in the minutes of the regular open Board meeting at which the action is taken.
2. The Respondent must take affirmative steps to ensure that the composition of the Property Maintenance Committee is in compliance with the bylaw requirement that it include an uneven number of members. Ms. O'Neil's membership or liaison status should be clarified by the Board by motion. The Board should adopt a procedure for considering new members and overseeing committee function.
3. The Respondent must take affirmative steps to ensure that the Property Maintenance Committee is memorializing its decisions in writing through meeting minutes, and that all decisions are formalized by a vote of the committee members.

4. Should the Complainant wish to resurrect her request for an appeal of the Property Maintenance Committee's decision, the Respondent must schedule an appeal hearing at the next regular open Board meeting.
5. The Respondent must develop and present for adoption a formal policy or procedure for dispute resolution. This order should not be construed as a requirement that the Board adopt such a policy, but rather that the Board must reasonably consider a policy for dispute resolution.

In response to the particular requested outcomes from the Respondent, the Panel orders:

1. That the Property Maintenance Committee institute and follow proper procedures in the future, the Panel concurs.
2. That the Board of Directors take the required actions for instituting a procedure for resolution of disputes brought by residents against the Board or its committees, the Panel requires that the Board consider such a policy but declines to mandate any specific policy nor to mandate the adoption of such a policy in the absence of any other explicit requirement in the statute or governing documents.
3. That a summary of the complaint be included in a notice sent to all unit owners, the Panel denies this request.

The foregoing is concurred in by Commissioners Fine and Gardner.

The parties are hereby notified that Section 10B-13(j) of the Montgomery County Code declares that failure to comply with this decision and order is punishable by a \$500.00 civil fine as a Class A violation as set forth in Section 1-19 of the County Code. This civil fine may, at the discretion of the Commission, be imposed on a daily basis until there is compliance with this decision and order.

In addition to the issuance of a \$500.00 civil fine, the Commission may also refer the matter to the Office of the County Attorney in accordance with County Code Section 10-13(i) for appropriate legal action.

In the event of non-compliance with any order by the deadline set forth in this decision and order, the party in whose favor the order has been issued may request enforcement of the order by submitting a "Complaint for Enforcement" to the Office of Common Ownership Communities within the Department of Housing and Community Affairs, using the form available at the CCOC web site.

Any party aggrieved by the action of the Commission may file an appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order pursuant to the Maryland Rules of Procedure governing administrative appeals.

Aimee Winegar, Panel Chairwoman