



August 27, 2024

OPINION
OF
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Attorney General

Opinion No. 2024-13

To: Senator Craig W. Brandt, New Mexico State Senate

Re: Opinion Request – The Mariposa Homeowners Association and the New Mexico Homeowners Association Act

Question

When does New Mexico law terminate a housing developer’s exclusive control over the composition of the board of a master-planned community’s homeowners association (HOA) and require that lot owners elect board representation?

Answer

When a master-planned community transitions from developer ownership to resident ownership, the New Mexico Homeowners Association Act (HOAA), NMSA 1978, Section 47-16-8 (2013), governs the composition of the HOA’s board. Although the developer may initially determine the composition of the board, once 25% of the lots in the development (including undeveloped lots) are owned by lot owners other than the developer, at least one member of the HOA board—or no less than one quarter of the board—must be elected by lot owners. As ownership continues to transition from developer to lot owners, additional statutory requirements governing HOA board composition are triggered.

Background

It has been brought to the attention of this Office that the Mariposa housing subdivision (Mariposa) located in Rio Rancho, New Mexico, “is currently facing a situation where there is no representation of homeowners on the HOA board.” We review below the controlling provisions of

the HOAA, and to the extent that Mariposa is out of compliance with these requirements, we would urge Mariposa to follow state law and allow the lot owners to elect representation to the board of the Mariposa HOA.

Analysis

Under the HOAA, NMSA 1978, Sections 47-16-1 to -16 (2013, as amended through 2019), all residential-planned communities must organize as an association exclusively consisting of all lot owners in the development. Section 47-16-3 (2013). The HOAA defines “lot owner” as the “person or group of persons holding title to a lot, including a declarant.” Section 47-16-2(P) (2019). Further, “declarant” is defined as “the person or group of persons designated in a declaration as declarant or, if no declarant is designated, the person or group of persons who sign the declaration and their successors or assigns who may submit property to a declaration.” Section 47-16-2(I) (2019). The declarant is generally the developer, i.e., the owner of the real property to be developed for a planned community.

The HOAA authorizes the declarant to initially create an HOA by declaration. Section 47-16-4 (2013). During this initial period of declarant control of the association, the declarant has the power to “appoint and remove the officers and members of the board.” Section 47-16-8(A) (2013). Declarant control of the HOA is not, however, indefinite. The Act sets forth requirements for transitioning control of the association from the declarant to the lot owners. Section 47-16-8 governs this transition.

Based on the information provided to the NMDOJ, the Mariposa housing subdivision appears to fall under the statutory definition of a master-planned community:

[A] large-scale residential development that allows for a phasing of development that will take place over a long period of time, following comprehensive and coordinated planning review by a local government and approval of design and development standards beyond conventionally[-]platted subdivisions; provided that additional design and development standards approved by the local government shall be included in a site plan, area plan or master plan as required by the local government approving the development.

Section 47-16-2(Q) (2019). Accordingly, subsections C-G of Section 47-16-8 apply to the transition of control over the Mariposa HOA. These provisions are mandatory.

For a master-planned community such as Mariposa, the period of exclusive declarant control ends in one of two ways. The “declarant may voluntarily terminate the right to appoint and remove officers and members of the board before termination of the period of declarant control.” Section 47-16-8(D) (2013). If the declarant does not voluntarily cede control, Section 47-16-8 provides for a stepwise transition away from exclusive declarant control to lot owner control.

First, once 25% of the lots in a master-planned community are no longer owned by the declarant, the Act requires that lot owners other than the declarant elect one HOA board member (or no less than one quarter of the board):

Not later than sixty days after conveyance of twenty-five percent of the lots that are part of the development, and any additional lots that may be added to the development, to lot owners other than a declarant, at least one member and not less than twenty-five percent of the members of the board shall be elected by lot owners.

Section 47-16-8(E) (2013). The declarant retains, for the time being, control over appointing and removing the remaining three quarters of the board. *See id.*

Then, once 50% of the lots are conveyed away from the declarant, the Act transfers additional control over the composition of the HOA board to lot owners, and requires that 33% of the board shall be elected by lot owners other than the declarant:

Not later than sixty days after conveyance of fifty percent of the lots that are part of the development, and any additional lot that may be added to the development, to lot owners other than the declarant, no less than thirty-three percent of the members of the board shall be elected by lot owners other than the declarant.

Section 47-16-8-(F) (2013).

Finally, “not later than the termination of a period of declarant control, the lot owners shall elect a board of at least three members, at least a majority of whom shall be lot owners. The board shall elect the officers. The board members and officers shall take office upon election.” Section 47-16-8(G) (2013). At this point, the transition from developer control to lot owner control is complete.

The request made of this Office states that “[t]he residents [of Mariposa] believe the 25% threshold mandating electing/appointing a resident to the board under the [HOAA] has been met.” If the residents are correct in this regard, Mariposa appears to be out of compliance with the HOAA. Based on the limited information before us, we cannot formally calculate whether the 25% threshold is met in this case. Instead, we offer the following guidance with respect to the calculation of the thresholds set forth in Section 47-16-8.

The HOAA provides that, in order to calculate the percentage of lots owned by parties “other than the declarant,” the total number of lots in the development must be taken into account. A “lot” is defined as “a parcel of land designated for separate ownership or occupancy shown on a recorded subdivision plat for a development or the boundaries of which are described in the declaration or in a recorded instrument referred to or expressly contemplated by the declaration, *other than a common area.*” Section 47-16-2(O) (2019) (emphasis added). The total number of lots includes all lots owned by the declarant, § 47-16-2(P), and “any additional lot that may be added to the development,” Sections 47-16-8(E)-(F).

Together, these provisions indicate the total number of parcels in the development, present and anticipated, including those owned by the declarant, that must be included in the calculation of what percent of lots are owned by non-declarants. To the extent that at least 25% of the Mariposa lots—calculated as above—have been transferred to lot owners other than the declarant, the

requirements of Section 47-16-8 have been triggered and the lot owners are entitled to elect HOA board members in accordance with state law.¹

Conclusion

The declarant of the Mariposa housing development must follow state law, which mandates that once 25% of the lots in the development are owned by a party other than the declarant, the lot owners are entitled to elect one HOA board member (or no less than one quarter of the board). As such, not later than sixty days after conveyance of twenty-five percent of the lots, calculated as set forth in the HOAA, Mariposa must allow lot owners to vote on the election of one board member, or no less than one quarter of the board, in a manner consistent with the HOAA.

Please note that this opinion is a public document and is not protected by the attorney-client privilege. It will be published on our website and made available to the general public.

RAÚL TORREZ
ATTORNEY GENERAL

/s/ Seth C. McMillan
Seth C. McMillan
Deputy Solicitor General

¹ See NM Att’y Gen. (Aug. 17, 2021) (opinion regarding the end of exclusive declarant control under the HOAA and serving as a useful example of the statutory calculation being performed and applied to determine when the 25% threshold has been reached).