



COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

Terence R. McAuliffe
Governor

July 15, 2014

Maurice Jones
Secretary of
Commerce and Trade
Jay W. DeBoer
Director

Complainant: David and Elizabeth Sarrett
Association: Nolde Bakery Condominium
File Number: 2014-03756

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 in December of 2013. The Association responded by letter dated January 13, 2014 rather than by following its own complaint procedure or the Common Interest Community Ombudsman Regulations (Regulations). The Complainant resubmitted its Complaint in January 28, 2014 and received no response from the Association. In April of 2014, a Common Interest Community Complaint was submitted to this office (File No. 2014-02967), alleging that the Association had failed to respond in a reasonable timeframe to a submitted complaint. The Common Interest Community Ombudsman followed up with the Association, which in turn responded to the Complaint and scheduled a consideration of the Complaint for May 30, 2014. A Final Determination was provided to the Complainant dated June 6, 2014. The Complainant submitted its Notice of Final Adverse Decision to the Office of the Common Interest Community Ombudsman June 12, 2014 and it was received June 16, 2014, well within the 30-day timeframe required by law and regulations.

Determination

The Complainant submitted ten allegations to the Association. Not all of these allegations were appropriate for the Complaint Procedure, as some alleged violations of the condominium instruments or something other than common interest community law or regulations. As a result, this office will not address or provide a determination for the

following allegations (as set forth in the Complaint):

Item 4 –the Association did not include suggested additions to the minutes;

Item 5 –the Association was alleged to have failed to include proxy forms in meeting notice;

Item 6 – the Association did not respond to questions submitted to the board;

Item 7 – there is an improper number of directors on the board, per the bylaws;

Item 8 – the Association has not completed carpet cleaning and repairs to deck, also how to improve services with vendors; and

Item 10 – the Association has not provided testing results.

The allegations that do fall under the Condominium Act include:

Item 1 – the Association has failed to carry out a reserve study;

Item 2 – the Association has failed to provide quarterly budget reports upon request;

Item 3 – the Association has failed to provide notice of meetings; and

Item 9 – the Association has failed to follow its own complaint procedure.

The Association has stated in its final determination that a reserve study has been completed and a copy was provided to the Complainant on May 30, 2014. Once the reserve study was completed, the Association obtained compliance with the Condominium Act and no further action is required. While there may have been a conflict with common interest community law at one point in time, the final determination from the Association does not indicate a current conflict with common interest community law or regulations in relation to the reserve study.

In its response to Item 2, the Association states that quarterly budget reports are not available because the Association does not create such a report but it does provide monthly reports which are available at the management office. The Association is correct that when responding to a request for books and records, it does not have to create a report if such report does not already exist. It is not clear if quarterly budget reports exist. The NFAD provided what may be contradictory information. "Quarterly reports" were mentioned at a November 18, 2013 annual meeting as part of what appeared to be a budget discussion. Specifically, the minutes stated "the quarterly reports will be sent to the home owners via mail and via email after the Board of Directors reviews them." It is not clear if the referenced quarterly reports are for something other than the budget. The Association's January 13, 2014 response letter to the Complainant also states that "all homeowners received an email blast on December 19, 2013 which contained 2013-3rd quarterly financial report and budget for 2014."

Based on the information contained in the NFAD, and because of the contradictory nature of this information, my office cannot determine if quarterly budget reports exist. Certainly there does appear to be some type of discrepancy as to their existence and it is understandable that the Complainant was under the impression that such reports exist. Because the existence of the quarterly budget reports cannot be ascertained, I cannot make a determination as to whether the Association has failed to provide information that

was requested and whether there is a conflict with common interest community laws or regulations.

Providing notice of meetings is an integral and required action on the part of the Association. Proving that notice was not provided, as alleged in Item 3, is a difficult task. Several examples of notices were included with the NFAD, but the Complainant alleged that no notices had been received. A review of minutes provided in the NFAD showed that on only one occasion was there any person in attendance at the board meetings other than the manager or members of the board. Including a non-board member in the list of attendees seems to indicate that had there been other owners in attendance at other board meetings, they also would have been included in the minutes. It cannot be ascertained whether this lack of attendance was a result of insufficient notice or apathy on the part of the owners. Based on the content of the NFAD, there was not sufficient evidence to draw a definitive conclusion as to whether notice was provided for all meetings and therefore no determination can be made.

One issue that is clear is that that the Association initially failed to respond to the Complaint in a manner that complied with the Regulations and the Association's own complaint procedure. It was not until my office was asked to intervene that the Association provided consideration of the Complaint and a letter that generally met the requirements of a final determination. As part of its review and response however, the Association did not, according to the Complainant, provide notice to other owners that a meeting was being held to consider the Complaint. Like any other meeting, notice of this meeting should have been provided to all owners. If the subject matter fell under the topics that are acceptable for executive session under §55-79.75, the board would have to move in open session to enter executive session and vote upon the subject matter when it returns to the open session.

Required Actions

I cannot determine if the Association creates quarterly budget reports or only monthly budget reports. In either case, such reports, if they exist, must be provided to the owners if they are requested in a manner that complies with the Condominium Act and if they do not fall under one of the excluded categories contained in §55-79.74:1. If a future request for quarterly budget reports is made in compliance with the Condominium Act, and proof can be provided that quarterly budget reports have been provided in the past, I fully anticipate that the Association will provide such reports. If the Association does not, the matter will be referred to the Common Interest Community Board.

It is unclear to me if the Association is providing notice of meetings as required by law. The existence of a copy of a notice is not sufficient to prove that it was sent. The Complaint contained notices that were confusing, as there were multiple notices with 3 different dates for one meeting, and another notice stated that the meeting would be at 11 pm (rather than 11 am which was the actual time the meeting was held). In addition, all the notices provided appeared to be for special board meetings, which often require less notice, making it more difficult for owners to attend. It is also a concern that no one other

than the board and the association manager attended any of the board meetings for which minutes were provided.

I am also aware that most meetings are held a significant distance from the condominium, which, while not a violation of the Condominium Act, does seem to squelch the opportunities for owners to attend. While I do not find that there has been a conflict with common interest community law or regulations in relation to providing notice of meetings, I would note that taken together, the information provided in the NFAD creates an appearance that the Association is not facilitating owner attendance at its board meetings. It is incumbent upon the Association to make every effort to plan future meetings in advance, provide sufficient notice, and ensure that notice is accurate. The Association has a responsibility to carry out its duties in as transparent a way as possible. This includes providing accurate and timely notice of meetings.

The Association needs to review its own complaint procedure as well as the Common Interest Community Ombudsman Regulations. The Association has a legal and regulatory responsibility to provide an appropriate response to any complaint that alleges a violation of common interest community law or regulations. The Final Determination provided by the Association failed on several counts to meet the requirements of the Regulations. The Association's registration number was not included, the manager's name and license number was not included, and while notice was given of the Complainant's right to file a Notice of Final Adverse Decision with my office, no contact information was provided.

The fact that this office had to ask the Association to respond appropriately to a submitted Complaint seems to strongly indicate that the association complaint procedure is not being carried out in a manner that complies with the law or regulations. In the event that this office receives notice in the future that the Association has failed to comply with common interest community law or regulations when responding to a properly submitted complaint, the matter will be referred to the Common Interest Community Board for whatever action it may consider appropriate.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Nolde Bakery Condominium