



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

April 9, 2015

Terence R. McAuliffe
Governor

Maurice Jones
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Elizabeth Poarch
Association: Sherwood Manor Homeowners' Association
File Number: 2015-02336

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 October 31, 2014. The Association provided a final determination dated February 23, 2015. The Complainant submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated March 17, 2015 and received March 18, 2015.

Determination

The Common Interest Community Ombudsman (CICO), as designee of the Director, is responsible for determining whether a "final adverse decision may be in conflict with laws or regulations governing common interest communities." (18VAC 48-70-120) The process of making such a determination begins with receipt of a NFAD that has been submitted to this office in accordance with §55-530(F) (Code of Virginia) and the Common Interest Community Ombudsman Regulations (Regulations). A NFAD results from an association complaint submitted through an association complaint procedure. The association complaint must be submitted in accordance with the applicable association complaint procedure and, as very specifically set forth in the Regulations, "shall concern a matter regarding the action, inaction, or decision by the governing board, managing agent, or association inconsistent with applicable laws and regulations.

Under the Regulations, applicable laws and regulations pertain solely to common interest community laws and regulations. Any complaint that does not concern common interest community laws or regulations is not appropriate for submission through the association complaint procedure. In the event that such a complaint is submitted to this office as part of a NFAD, a determination cannot be provided.

The Complainant has alleged in her Complaint that the Association has failed to distribute draft minutes of the Association's annual meeting to the board members. The meeting took place in November, 2013 (the Complaint was submitted to the Association

October 31, 2014). The Complainant alleges that this is a violation of §55-510 of the Code of Virginia, and specifically that it is a violation of a portion of Paragraph (F): “ Except as provided in subdivision C 7, draft minutes of the board of directors shall be open for inspection and copying (i) within 60 days from the conclusion of the meeting to which such minutes appertain or (ii) when such minutes are distributed to board members as part of an agenda package for the next meeting of the board of directors, whichever occurs first.” The Complainant stated that the “minutes are now 9 months past due.” The Complainant also notes in her Complaint that distribution of minutes has been variable throughout the year, and minutes are sometimes provided only shortly before the board will be voting on their approval at a meeting.

In its final decision, the Association provided the Complainant a copy of the draft minutes for the 2013 annual meeting. It also assured the Complainant that “all requests for draft minutes will be complied with according to the covenants and applicable state and federal law.”

I believe that the Complainant has misunderstood the application of §55-510(F) to the current situation. The language¹ the Complainant has referenced in support of her Complaint pertains only to minutes of the board of directors, and not to the minutes of the annual meeting. In addition, this language simply requires that minutes of the board of directors meetings be made available for inspection and copying either within 60 days of the meeting for which the minutes were taken, or when they are distributed to the board members as part of an agenda package. §55-510(F) does not require an association to distribute the minutes, it simply requires an association to make the draft minutes available for inspection and copying.

As for any specific timeframes related to the distribution of minutes or agenda packets to the board of directors, there is no language in the Property Owners’ Association Act that dictates when minutes or agenda packets must be distributed to an association board of directors. The only place where such language may exist would be in the governing documents of the association.

The Complainant has also alleged that the Association is in violation of its own governing documents, specifically the Articles of Incorporation, Declaration of Covenants, Conditions and Restrictions, and Amended Bylaws. As noted previously in this Determination, no determination can be provided if the alleged violation is of something other than common interest community law or regulations. As such, no determination can be provided as to whether the Association has violated its governing documents.

Along with the concerns outlined in the association complaint, the Complainant included an “addenda” to the initial Complaint in the NFAD, and stated that the Association

¹ Except as provided in subdivision C 7, draft minutes ***of the board of directors*** (emphasis added) shall be open for inspection and copying (i) within 60 days from the conclusion of the meeting to which such minutes appertain or (ii) when such minutes are distributed to board members as part of an agenda package for the next meeting of the board of directors, whichever occurs first. §55-510(F)

considered the Complaint in an unannounced meeting and that it went into executive session after hearing the Complainant's comments. I would agree with the Complainant that notice must be provided for all meetings, even for those meetings where a board of directors is providing consideration of a submitted association complaint. §55-510.1 of the Property Owners' Association Act is clear: "All meetings of the board of directors, including any subcommittee or other committee thereof, shall be open to all members of record." I also agree with the Complainant that an executive session is not appropriate for discussion of an association complaint, unless that discussion is in alignment with the acceptable reasons for convening in executive session, which include:

...to consider personnel matters; consult with legal counsel; discuss and consider contracts, pending or probable litigation and matters involving violations of the declaration or rules and regulations adopted pursuant thereto for which a member, his family members, tenants, guests or other invitees are responsible; or discuss and consider the personal liability of members to the association, upon the affirmative vote in an open meeting to assemble in executive session. 55.510.1(C)

There was no information provided that demonstrated that the Association had misused the executive session, it was simply stated that the Association went into executive session to consider the complaint.

Required Actions

While this office will not usually address any additional complaints or concerns outlined in a cover letter that has been included with a NFAD, in this instance, since the concerns relate to the actual complaint procedure, I will address such concerns. Based on the information provided in the cover letter, the Association may have improperly carried out its obligations under the Regulations and common interest community law. I ask the Association to thoroughly review the manner in which it considers association complaints, and ensure that it is meeting the open meeting requirements of the Property Owners' Association Act and that it is not improperly using executive sessions. If the Association has any questions about these required actions, please contact me.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Sherwood Manor Homeowners' Association