



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Terence R. McAuliffe
Governor

January 8, 2018

Todd Haymore
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Jason Hook
Association: Burnett's Mill Subdivision Homeowners' Association, Inc.
File Number: 2018-01571

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

The Complainant submitted a complaint to the Association, dated October 27, 2017. The Association provided a response to the Complainant dated November 22, 2017. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated November 25, 2017 and received November 29, 2017.

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 five violations by the Association. Of these, four pertained to common interest community law and one was related to enforcement of the rules of the Association. Only the four related to common interest community law, particularly the Property Owners' Association Act, will be addressed here.

The first allegation is that the Association failed to conduct an annual meeting as required by law. 55-510(F)¹ sets forth this requirement. An annual meeting, to include an election, had been scheduled for September 21, 2017 but was "skipped" according to the Complainant. The Complainant further alleged that the Association failed to provide proper notice of meetings by failing to comply with 55-510(F) which requires 14-day notice for annual or regularly scheduled meetings, and seven-day notice for any other meeting as well as the time, place and purposes of the meeting. The Complainant wrote that the Association skipped the annual meeting and instead conducted it as a regular board meeting. The Complainant states that by doing so the Association also failed to provide proper notice of the board meeting. The Complainant wrote that no purpose is provided with notice for other association meetings that are held approximately quarterly and that there had been variations in the date the annual meeting was to be held and that these variations indicated a meeting must have taken place to decide the final date and no notice was provided of that meeting.

The Complainant also alleged that the Association failed to provide access to the books and records in violation of 55-510(B)² and 55-509.3:2(1)³ of the Property Owners' Association Act. This violation resulted when the Complainant requested a copy of a proposed 2018 budget that had not yet been approved by the board or presented to the members and the Association denied the request. The Association did respond to the Complainant by writing that "[i]t would be wholly inappropriate for us to send out the preliminary budget before the Board has even seen it. You will receive a copy of the approved budget at the same time it is presented to the entire membership." The

¹ F. Meetings of the association shall be held in accordance with the provisions of the bylaws at least once each year after the formation of the association. The bylaws shall specify an officer or his agent who shall, at least 14 days in advance of any annual or regularly scheduled meeting, and at least seven days in advance of any other meeting, send to each member notice of the time, place, and purposes of such meeting.

² B. Subject to the provisions of subsection C and so long as the request is for a proper purpose related to his membership in the association, all books and records kept by or on behalf of the association, shall be available for examination and copying by a member in good standing or his authorized agent including but not limited to:

1. The association's membership list and addresses, which shall not be used for purposes of pecuniary gain or commercial solicitation; and
2. The actual salary of the six highest compensated employees of the association earning over \$75,000 and aggregate salary information of all other employees of the association; however, individual salary information shall not be available for examination and copying during the declarant control period.

Notwithstanding any provision of law to the contrary, this right of examination shall exist without reference to the duration of membership and may be exercised (i) only during reasonable business hours or at a mutually convenient time and location and (ii) upon five business days' written notice for an association managed by a common interest community manager and 10 business days' written notice for a self-managed association, which notice reasonably identifies the purpose for the request and the specific books and records of the association requested.

³ 1. The right of access to all books and records kept by or on behalf of the association according to and subject to the provisions of § 55-510, including records of all financial transactions

Complainant alleged that the proposed budget was not included in agenda packets in violation of 55-510.1(B)⁴. He also stated that no budget information was included for the unscheduled board meeting that took place September 21, 2017 which “was supposedly going to include a ‘discussion’ of the budget.” The Complainant stated that he has not received a copy of the proposed budget to date.

The final allegation that fell under our purview was that the Association had failed to provide continual notice of board meetings pursuant to 55-510.1(B)⁵ despite his request for same. The Complainant wrote that he had made a request annually for two years and that in 2016 he received notice of board meetings and due process meetings, but in 2017 received notice of board meetings and notice that due process meeting would be scheduled as needed. Having received no notice of due process meetings, the Complainant alleges that either the Association has failed to provide notice as required, or that there were no such due process hearings.

The Association responded to the first allegation regarding a failure to hold an annual meeting by writing that the meeting was called to order but quorum could not be obtained. The meeting was then closed and a board meeting was called to order.

The Association's response to the second allegation regarding a failure to provide notice focused on the Complainant's confusing the applicable statutes. The Association believed that the Complainant confused the requirements for board meeting notice, as contained in 55-510.1⁶ with the notice requirements for meetings of the members, as provided in 55-510 (Footnote 1). The Association also wrote that notice of board meetings had been provided to the Complainant, as he had requested, and that changes to the meeting dates were posted on the bulletin board on premises. As to the allegation that the board held a meeting to decide to change the annual meeting date, the Association argued that the Board of Directors is not required to schedule a meeting for such a change.

The Association responded to the allegations that it had failed to provide access to the proposed budget by noting that incorrect information had been provided by the Complainant and that the Association intended to provide “a copy of the DRAFT budget at the same time it was presented to the membership.” The Association also stated that the draft budget was included in the agenda packet that was available in the management office at the same time the board received its agenda packet for the September 21 meeting. The Association did acknowledge that a copy of the draft budget was omitted from the homeowner packet at the meeting, but said this was a mistake and will be addressed. The Association stated that it had mailed a copy of the budget to all owners, and included a copy with its final decision to the Complainant.

⁴ Unless otherwise exempt as relating to an executive session pursuant to subsection C, at least one copy of all agenda packets and materials furnished to members of an association's board of directors or subcommittee or other committee thereof for a meeting shall be made available for inspection by the membership of the association at the same time such documents are furnished to the members of the board of directors or any subcommittee or committee thereof.

⁵ A lot owner may make a request to be notified on a continual basis of any such meetings which request shall be made at least once a year in writing and include the lot owners' name, address, zip code, and any e-mail address as appropriate. Notice of the time, date, and place shall be sent to any lot owner requesting notice (i) by first-class mail or e-mail in the case of meetings of the board of directors or (ii) by e-mail in the case of meetings of any subcommittee or other committee of the board of directors.

⁶ B. Notice of the time, date and place of each meeting of the board of directors or of any subcommittee or other committee thereof shall be published where it is reasonably calculated to be available to a majority of the lot owners.

The response to the last allegation that the Association has failed to provide proper continual notice was that the manager had responded to the requests for continual notice and provided such notice via email. The Association acknowledged that the Complainant had requested notice by both email and mail, but also noted that the statute itself provides for mail or email so the Association chose to respond using the latter. As to the due process meetings, the Association said that notice was provided that they would be held as needed immediately before meetings.

It appears that the Association attempted to hold an annual meeting and was unable to obtain quorum. Had the Association made no effort to provide notice of the annual meeting, they most certainly would have been in violation of §55-510. However, it did provide notice and it was a failure to show up on the part of the owners that caused the lack of quorum. While we cannot review or interpret the governing documents of an association, it may be worthwhile to review whether there are any further requirements in those documents that pertain to the inability to obtain quorum at an annual meeting.

There was no information provided by either party that showed that there had been any notice of the board meeting that took place after the Association was unable to obtain quorum for the annual member meeting on September 21, 2017. I could find nothing in the record that indicated notice had been provided for a board meeting, only that notice had been provided for the annual meeting. These are two separate meetings and while it may seem logical that notice for one should be sufficient as notice for the other, I do not think that is the case. Notice must be provided for all meetings, and if two meetings were to take place that day, two different notices should have been provided. Or one notice that made it clear a board meeting would follow the annual meeting.

I do believe the Complainant has misinterpreted or misapplied two separate statutes in relation to the allegations that the Association failed to provide a purpose for meetings. While there is a requirement that a purpose be provided for notice of an annual meeting ("meeting of the association" per 55-510(F)), there is no such requirement for notice of board meetings ("board of directors" per 55-510.1(B)). As to the alleged changes in meeting time for the annual meeting, I do not see it necessary for a board to have a meeting to make a date change if the governing documents and corporate law allow it. While I will never encourage decision making outside of a meeting, there are times when it is the logical and simplest way to resolve an outstanding issue or question.

A draft document that has not yet been approved by the board is generally not considered to be part of the books and records of the association. As such, I cannot find the Association at fault for not providing a copy of a draft budget, especially if the board itself had not yet seen it or approved it. While it can be very helpful to include such documents as part of an agenda packet for a meeting, I am not certain that such documents are truly part of the books and records until they have been approved. Unfortunately, common interest community law does not specifically define when a document becomes part of the books and records, and therefore I cannot provide a definitive decision on this particular issue.

The Association did provide continual notice to the Complainant, but I agree with the Complainant that it was not sufficient. While the primary board meeting notice was

provided, additional meeting notices, i.e. the due process hearings, were not provided, and simply stating that they will be on an as needed basis prior to scheduled board meetings is not sufficient notice. §55-510.1(B) requires notice of all meetings including committee and subcommittee meetings and it also permits owners to request continual notice. If the Association holds the due process hearings as part of the board meetings and at the same time as those board meetings are scheduled, that should be sufficient for notice. But if, as appears to be the case here, they are held prior to the board meeting, meaning they are held at a different time, notice of such a meeting should be provided to anyone who requests continual notice.

Required Actions

The Association does need to address its inability to obtain quorum. This is a matter for discussion between the board, its manager and possibly its attorney. Common Interest Community law does require a meeting of the association at least once a year.

If the Association considers a draft budget to be part of its books and records, it must provide a copy of such draft to anyone who requests it in compliance with the applicable statute. However, if the Association does not consider such draft to be part of the books and records until it has been approved, there is no such requirement. Because this issue is not specifically defined in the Property Owners' Association Act, this office cannot determine when a document should be considered to be part of the books and records.

The Association must ensure it provides continual notice to those who request it. The time, date and place of all board meetings, including committees and subcommittees, must be provided to the individual requesting continual notice.

Please feel free to contact my office if you have any questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Burnett's Mill Subdivision Homeowners' Association, Inc.