



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Terence R. McAuliffe
Governor

August 7, 2015

Maurice Jones
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: David Hipple
Association: Mountain View Acres Property Owners Association
File Number: 2016-00211

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 two complaints to the Association. The first Complaint was dated June 10, 2015 and the second was dated June 11, 2015. The Association provided a final determination to both Complaints but provided no date on the final determination. The Complainant then submitted his Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated July 16, 2015 and it was received July 22, 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 submitted a Complaint asking the Association why he had not received notification of board meetings despite a written request for such notification. The Complainant stated that the only notice he has received was for member meetings of the Association. The Complainant also submitted a Complaint asking the Association whether liability insurance has been obtained and if so, what does the insurance cover and at what cost?

The Association responded to the first complaint by stating that no notification of board meetings was provided because there had been no meetings. However, the Association also noted in its response that there had been a meeting to fill a vacant board position. The Association stated that the Complainant will be notified of all future board meetings. The Association noted that due to an upcoming court case that includes the Complainant as a witness, the Complainant and his wife will be barred from board meetings where the board discusses the case.

The Association responded to the second complaint by noting that there is no requirement to have liability insurance since the Association does not own any common property.

The Association does appear to have failed to provide notice of a meeting to the Complainant. §55-510.1 (B) states:

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.

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.

If the Association held a board meeting to fill a vacant position through the board's power of appointment, it would appear that such meeting should have been announced to the members. In addition, the Board cannot exclude the Complainant from future board meetings where pending litigation may be discussed. If pending litigation is not appropriate for discussion in an open meeting, the Association may convene in executive session to do so, as long as it fully complies with §55-510.1(C) of the Property Owners' Association Act when it does so. This portion of the Act states:

The board of directors or any subcommittee or other committee thereof may convene in executive session 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. The motion shall state specifically the purpose for the executive session. Reference to the motion and the stated purpose for the executive session shall be included in the minutes. The board of directors shall restrict the consideration of matters during such portions of meetings to only those purposes specifically exempted and stated in the motion. No contract, motion or other action adopted, passed or agreed to in executive session shall become effective unless the board of directors or subcommittee or other committee thereof, following the executive session, reconvenes in open meeting and takes a vote on such contract, motion or other action which shall have its substance reasonably identified in the open meeting. The requirements of this section shall not require the disclosure of information in violation of law.

The Property Owners' Association Act does not require liability insurance, and because the jurisdiction of this office is limited to common interest community law and regulations, no determination can be provided as to whether the Association should procure liability insurance. Such a determination is dependent upon the governing documents, the association itself and the guidance of legal counsel.

Required Actions

The Association must ensure that it provides notice of **all** meetings to owners. It must also make certain that it honors all requests for notice on a continuing basis. The Association cannot deny owners the right to attend a meeting if pending litigation that involved the owners will be discussed at that meeting, but the Association can convene in executive session to discuss pending or probable litigation.

I will also note that the Association failed to provide a final determination that was in compliance with the Common Interest Community Ombudsman Regulations. Specifically, 18 VAC 48-70-50 requires the following:

8. After the final determination is made, the written notice of final determination shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the complainant at the address provided or,

if consistent with established association procedure, delivered by electronic means, provided the sender retains sufficient proof of the electronic delivery, within seven days.

9. The notice of final determination shall be dated as of the date of issuance and include specific citations to applicable association governing documents, laws, or regulations that led to the final determination, as well as the registration number of the association. If applicable, the name and license number of the common interest community manager shall also be provided.

10. The notice of final determination shall include the complainant's right to file a Notice of Final Adverse Decision with the Common Interest Community Board via the Common Interest Community Ombudsman and the applicable contact information.

The correct language and information must be included in any future final determinations from the Association in response to a submitted association complaint. Based on additional information provided by the Association, it appears there was a misunderstanding as to whether the complaints submitted were actually complaints as opposed to questions. Because they were submitted on the association complaint form and referenced possible violations, rather than merely asking for information, it was appropriate to respond to the submissions as complaints.

Any failure to carry out the "required actions" may result in a referral of this matter to the Common Interest Community Board for whatever enforcement action it considers appropriate.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Mountain View Acres Property Owners Association