



COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

Terence R. McAuliffe
Governor

November 4, 2015

Maurice Jones
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Cynthia Mostoller
Association: Forest Edge Cluster Association
File Number: 2016-00991

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 her Complaint to the Association dated August 26, 2015. The Association provided a final determination dated September 25, 2015 and the Complainant then submitted her Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated October 11, 2015 and it was received October 16, 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) of the 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 Complaint submitted to the Association by the Complainant alleged that the Association had held an executive session of the board of directors and that a vote was taken in that executive session to move forward on an erosion project that would cost the Association approximately \$25,000. The Complainant alleged that this was a violation of §55-510.1 of the Property Owners' Association Act, and that the approved meeting minutes showed that the erosion project was discussed and voted on in executive session.

The Complainant also alleged a violation of the Virginia Nonstock Corporation Act (VNCA) but because the VNCA is not common interest community law and does not fall under the jurisdiction of this office, that allegation will not be considered nor will it be included in this Determination.

In its response to the Complaint, the Association stated that the Complainant had failed to submit the Complaint in the 60-day timeframe required by the Association's complaint procedure. However, at the time of the meeting in question, and at the time the minutes for that meeting were approved, no complaint procedure had been adopted by the Association, despite the fact that all Associations were required to adopt a complaint procedure no later than September 28, 2012. A complaint procedure was adopted on June 26, 2015. In light of the Association's failure to have a complaint procedure in place as required by common interest community law and regulations, I cannot ignore the Complaint and the concerns that were outlined in that complaint, even if they were submitted past a 60-day timeframe outlined in the association complaint procedure.

The Association did note in its response that the erosion project had been discussed in other open board meetings and that the owners were "aware this project was under consideration by the sitting board as early as January 2015." The Association also discussed the allegations related to the Virginia Nonstock Corporation Act, but as noted previously, those allegations cannot be considered in this Determination.

§55-510.1 of the Property Owners' Association Act¹ is very precise as to what can be considered during an executive session and how an executive session should be

¹ 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

carried out. Based on the approved minutes of the meeting in question, which provided specific information about the executive session, it appears that the purpose of the executive session was not given when moving to go into executive session, nor does it appear that the board reconvened in an open meeting or voted on the matter in that open meeting.

It is not clear, based on the information provided in the Complaint, if the subject matter of the meeting was appropriate for an executive session. The minutes state that a bid was discussed, and there is no language in §55-510.1 that allows for the discussion of bids during executive session. It does appear that there was a violation of common interest community law and that the executive session was not carried out in accordance with §55-510.1 of the Property Owners' Association Act. I cannot ascertain how extensive the violation was, since the minutes are somewhat ambiguous, but there appears to be enough information to unmistakably demonstrate that the board did not reconvene in an open meeting and it did not vote on the erosion project in open meeting.

Required Actions

The Association must comply with all provisions of the Property Owners' Association Act and specifically ensure that all future executive sessions are held in accordance with §55-510.1 of the Property Owners' Association Act. If such sessions are not held in accordance with the Property Owners' Association Act, and future NFADs are received by this office alleging such failure, the matter will be referred to the Common Interest Community Board for whatever action it may deem appropriate.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Forest Edge Cluster Association

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.
