



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Terence R. McAuliffe
Governor

December 7, 2015

Maurice Jones
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Dorin Vincent
Association: Isle of Wycht Homes Association, Inc.
File Number: 2016-01348

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 his complaint to the Association on July 2, 2015. The Association provided a final determination to the Complainant dated October 29, 2015 and the Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated November 11, 2015 and received November 23, 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 to the Association that consisted of three separate complaints. The first complaint alleged that the Association had failed to provide a copy of the fidelity bond required by §55-514.2 of the Property Owners Association (POA) Act as part of a disclosure packet (pursuant to §55-509.5 of the POA Act) received by the Complainant.

The second complaint alleged that the Association has failed to conduct a reserve study in the required timeframe of five years, as set forth in §55-514.1 of the POA Act. According to the Complainant, the last reserve study was completed in March of 2010. In addition, the Complainant has alleged that the Association has not prepared a budget for FY 2015 that complies with the requirements of §55-514.1.

The third and final complaint alleges that the Association has misused executive sessions of the board of directors by failing to vote on the matters discussed in executive session in an open session. In addition, the Complainant alleges that the executive session meetings were held without notice to the members.

In its response, the Association stated that it did have a \$50,000 "fidelity including Employee Dishonesty." It is not clear if this is sufficient coverage for the Association, and no copy of the policy was included with the Association's response. §55-514.2(B) of the POA Act requires "[s]uch bond or insurance policy shall provide coverage in an amount equal to the lesser of \$1 million or the amount of the reserve balances of the association plus one-fourth of the aggregate annual assessment income of such association. The minimum coverage amount shall be \$10,000."

In response to the failure to have a reserve study conducted in the required timeframe, the Association stated that it has received a proposal from a reserve study specialist and that the board voted to move forward on the proposal.

The Association provided a listing of past meetings and their minutes in response to the allegation that executive sessions were held inappropriately. It does not appear that the Association responded specifically to the Complainant's allegations regarding executive sessions which must be held in accordance with §55-510.1 of the POA Act. The applicable portion of the Act provides

[t]he 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.

While the Association did provide minutes of meetings that had been held, it is not possible to ascertain from those minutes whether they were regular meetings of the board, or executive sessions, or a combination of both. It appears that these could also have been board meetings that were simply held without notice to the members, or at least to the Complainant, which would be a violation of §55-510.1, which states “[a]ll meetings of the board of directors, including any subcommittee or other committee thereof, shall be open to all members of record.”

It is impossible to determine if the Association does have the required fidelity bond or employee dishonesty policy in place since no copy was provided to the Complainant or included with the Association’s response to the Complainant. While it appears that the Association is working toward obtaining a reserve study, it is currently in violation of the POA Act which requires the Association to “[c]onduct at least once every five years a study to determine the necessity and amount of reserves required to repair, replace and restore the capital components...” Based on the minutes provided to the Complainant, it appears that the Association may have been holding meetings without notice, rather than misusing executive sessions. Again, this is unclear based on the documentation provided.

Required Actions

The Association must make every effort to ensure that it complies with the Property Owners’ Association Act. In order to ensure that the fidelity bond in place meets the requirements of the POA Act, the Association must provide this office, within fourteen days of the date of this Determination, a copy of the fidelity bond/employee dishonesty policy, along with a breakdown of the reserves on hand and the annual aggregate assessments of the Association. If, after receipt of this information, it is determined that the Association has not met the requirements of §55-514.2 of the POA Act, it will be given the opportunity to come into compliance.

While I commend the Association for moving forward on its efforts to conduct a reserve study, more concrete evidence is required to demonstrate that the reserve study will be completed as quickly as possible. If the Association has entered into a contract with the reserve study specialist, a copy of that contract must be provided to this office within fourteen days of the date of this Determination. If no contract is in place, a timeline must be submitted to this office within the same timeframe, outlining the steps the Association is taking to complete the reserve study and the expected timeframe for doing so.

Finally, the Association must ensure that it is familiar with, and complies with, the open meeting requirements of the POA Act, to include carrying out executive sessions correctly. All meetings require notice to the owners, and executive sessions are to be utilized in only very particular situations and must begin with a motion in an open session and end with a vote in an open meeting (if a vote is appropriate).

Both the Complainant and the Association are welcome to contact me if they have any questions regarding this Determination or the requirements that have been set forth.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Isle of Wyght Homes Association, Inc.