



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

March 9, 2016

Terence R. McAuliffe
Governor

Maurice Jones
Secretary of
Commerce and Trade

Complainant: Katharine Kamminga
Association: Tartan Village Association
File Number: 2016-01898

Jay W. DeBoer
Director

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 on December 6, 2015. The Association provided a final determination to the Complainant dated January 26, 2016 and the Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated January 30, 2016 and received on February 3, 2016.

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 several different violations of common interest community law. The first allegation is that the Association has violated §55-510.2¹ of the Property Owners' Association Act by failing to provide a reasonable and effective method of communication. According to the Complainant, three methods of communication are currently provided: website bulletin board, contact the management company, and attend board meetings. The Complainant states that the bulletin board has been deactivated and has no current discussion forums. The Complainant expressed concern that the bulletin board contained language that the board would not necessarily respond to posted inquiries (by a posting or other communication). The Complainant stated that when contacting the management company she typically received a thank you or was told her request had been forwarded to the Board, with no further communication. The Complainant shared her belief that addressing the board at a board meeting did not result in a response and any follow up questions would have to take place at the following meeting, 30 days away.

The Complainant also alleges violations of §55-510.1(A) and (C) of the Property Owners' Association Act. She believes that the Association violated these statutes when it met in executive session to discuss a complaint she submitted in July of 2015. The Complainant also believes the Association violated §55-510(F) of the POA Act when it failed to make minutes from prior board meetings available on the Association's website.

The Association's Final Determination states that the Association does not believe §55-510.2² of the Property Owners' Association Act requires "a Board response for every such communication or for any such communication." Instead, the Association believes this portion of the Virginia Code requires only "that there be a channel for owners to convey their views to the Board" and goes on to state that the Board "has established such a communication channel through its website discussion board."

I have received conflicting information regarding the website discussion board, with the Complainant stating that it is not functioning and the Association stating that it is. A preliminary review of the website was inconclusive since this office does not have access to the portion of the site where the discussion board resides. Assuming that the discussion board is currently functional, I do not find that the discussion board fails to meet the requirements of §55-510.2, nor do I believe that there is any requirement under that statute that association boards must respond to inquiries they receive through such a method of communication.

In response to the allegation that an executive session was improperly used to review a complaint, the Association responded by stating that "many of the issues regarding your complaints took place in Executive Session because the session discussed

¹ "The board of directors shall establish a reasonable, effective, and free method, appropriate to the size and nature of the association, for lot owners to communicate among themselves and with the board of directors regarding any matter concerning the association."

² An error in the original Final Determination from the Association had listed this as §55-510.1(C), but the Association acknowledged this error in a follow-up letter to the Office of the Common Interest Community Ombudsman, and the language of the original letter provided sufficient contextual background to make it obvious that the use of §55-510.1(C) was an error.

privileged communications between the Board and its legal counsel regarding the legal issues raised by the complaint.”

Under §55-510(C), “[t]he board of directors or any subcommittee or other committee thereof may convene in executive session to ... consult with legal counsel...” The Complainant stated that counsel was not present for the executive session, but the Association stated in its Final Determination that the Board met in executive session “because the session discussed privileged communications between the Board and its legal counsel regarding the legal issues raised by the complaint.” Privileged communications between an attorney and client are not governed by common interest community law or regulations. Because of this, a determination cannot be provided as to the validity of those communications in the present case.

The Association stated in its response to the third allegation regarding a failure to post minutes on the website, that draft minutes are available at the board meetings as part of the agenda packet and a copy is available at the same time such documents are provided to the Board. The Association also noted that owners can request copies of the minutes.

A failure to post minutes on the website of the Association is not a violation of the Property Owners’ Association Act. §55-510(F) of the Property Owners’ Association Act requires only that “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.” There is nothing in the law that requires the minutes to be posted online. As with any other book or record of the Association, an owner in good standing can request access to the minutes for copying or inspection as outlined in §55-510(B): “...all books and records kept by or on behalf of the association, shall be available for examination and copying...”

Required Actions

No actions are required of the Association, other than to ensure that the bulletin board on the Association’s website is fully functional if it is to act as the method of communication required by the Property Owners’ Association Act under §55-510.2.

Sincerely,



Heather S. Gillespie

Common Interest Community Ombudsman

cc: Board of Directors
Tartan Village Community Association