



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Terence R. McAuliffe
Governor

March 3, 2017

Todd Haymore
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Veronica Hook
Association: Burnett's Mill Homeowners Association
File Number: 2017-01902

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 December 25, 2016. The Association provided a response to the Complainant dated January 24, 2017. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated February 5, 2017 and received February 7, 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.

Much of the complaint submitted to the Association was related to the governing documents of the Association and not to any alleged violation of common interest community law or regulation, and therefore these allegations did not meet the definition of an association complaint which "shall concern a matter regarding the action, inaction, or decision by the governing board, managing agent, or association inconsistent with applicable laws and regulations." This determination will only address the one allegation in the Complaint that alleged a violation of the Property Owners' Association Act.

In the portion of the Complaint related to a violation of common interest community law, the Complainant alleged that the Association violated §55-510.1(C)¹ of the Virginia Property Owners' Association Act. This allegation was based on an executive session where the Association allegedly "voted on and approved" a budget. In addition, the Complainant stated that she was "informed after disputing this issue numerous times, that voting took place during 'open session' and documentation stating otherwise in meeting minutes is a 'typo.'" The Complainant does not believe this explanation is accurate and outlines the timing of the various meetings and posits that it is unlikely that the board could have moved to go into executive session, discuss the matter, return to an open meeting and vote in that open meeting in the timeframe available.

While the Association did provide a final decision to the Complaint, it, inadvertently, I believe, failed to respond to the allegations related to the executive session. As such, there is no further information available to this office to determine if there was a violation of §55-510.1 as it pertains to executive sessions, or if there was additional information that may have explained the allegations contained in the Complaint. Because the Association failed to respond to that portion of the Complaint, I have no choice but to assume the allegations of the Complainant to be accurate and therefore must put the Association on notice that it should be extraordinarily cautious in the future of the way in which it utilizes the executive session provisions of §55-510.1.

Required Actions

The Association is on notice that it must take great care when utilizing the executive session provisions contained in the Property Owners' Association Act. While it was not possible to truly determine if there was, in fact, a violation of the Property Owners' Association Act in this instance, without any language to the contrary from the Association we must assume that there may have been a violation and caution the Association regarding any future executive sessions.

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 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.

Please feel free to contact me if you have questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Heather Gillespie". The signature is fluid and cursive, with the first name "Heather" and last name "Gillespie" clearly distinguishable.

Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Burnett's Mill Homeowners Association