



COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

March 15, 2019

Brian Ball
Secretary of
Commerce and Trade
Jay W. DeBoer
Director

Complainant: Charelyn Nicholls
Association: Pretty Lake Village Condominium Association
File Number: 2019-02078

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 November 12, 2018. The Association provided a response to the Complainant dated January 25, 2019. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated February 11, 2019 and received February 12, 2019.

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 alleged numerous violations in her Association Complaint. However, only those complaints that alleged a violation of common interest community law, which in this case is the Condominium Act, will be addressed here. While there were a number of complaints related to the Virginia Nonstock Corporation Act and the Association's own condominium instruments, as noted above, our jurisdiction is limited to common interest community law, and we have no authority to provide a determination regarding the Nonstock Corporation Act or any association's governing documents.

The Complainant alleged that the sole board member of the Association is delinquent in paying assessments and therefore "should not be on the board because he is not in good standing and is in violation of the Condo Act, Section 55-79.72:3.2¹." The Complainant did not explain how the board member violated this provision of the Condominium Act which pertains to members in good standing and the right to vote. Without an explanation as to how the board member is violating this statute, there is no way for this office to determine if there has been a violation of the statute.

The Complainant alleged a failure by the Association to hold annual meetings, which would be a violation of §55-79.75(A)². According to the Complaint the last annual meeting was held on October 20, 2016. The Complainant believes that the failure to have annual meetings has "caused violations of my right to vote (Condo Act, Section 55-79.72:3.2³), failure to fill vacancies on the board (Condo Act, Section 55-79.73.B⁴) and

¹ Every unit owner who is a member in good standing of a unit owners' association shall have the following rights:

2. The right to cast a vote on any matter requiring a vote by the unit owners' association membership in proportion to the unit owner's ownership interest, except to the extent that the condominium instruments provide otherwise;

² A. Meetings of the unit owners' association shall be held in accordance with the provisions of the condominium instruments at least once each year after the formation of said association.

³ Every unit owner who is a member in good standing of a unit owners' association shall have the following rights:

2. The right to cast a vote on any matter requiring a vote by the unit owners' association membership in proportion to the unit owner's ownership interest, except to the extent that the condominium instruments provide otherwise;

⁴ B. The bylaws shall provide whether or not the unit owners' association shall elect an executive organ. If there is to be such an organ, the bylaws shall specify the powers and responsibilities of the same and the number and terms of its members. Except to the extent the condominium instruments provide otherwise, any vacancy occurring in the executive organ shall be filled by a vote of a majority of the remaining members of the executive organ at a meeting of the executive organ, even though the members of the executive organ present at such meeting may constitute less than a quorum because a quorum is impossible to obtain. Each person so elected shall serve until the next annual meeting of the unit owners' association at which time a successor shall be elected by a vote of the unit owners. The bylaws may delegate to such organ, inter alia, any of the powers and responsibilities assigned by this chapter to the unit owners' association. The bylaws shall also specify which, if any, of its powers and responsibilities the unit owners' association or its executive organ may delegate to a managing agent.

failure to my right to comment on, or bring up, additional matters (Condo Act, Section 55-79.75.D⁵).”(footnotes added) The Complainant also wrote that the board “failed to hold board meetings and/or provide notice of meetings (55-79.75(B)⁶) and did not provide meeting minutes to keep the owners apprised.

The Complainant also alleged that the Association has failed to maintain the common elements as required by §55-79.79(A)⁷ of the Condominium Act, and has failed to maintain adequate reserves in accordance with §55-79.83:1(B)⁸. The Complainant alleged that the Association failed to assess units for water usage, which she believes is a violation of §55-79.83(C)⁹. Finally, the Complainant alleged that the Association provided her an

⁵ D. Subject to reasonable rules adopted by the executive organ, the executive organ shall provide a designated period of time during a meeting to allow unit owners an opportunity to comment on any matter relating to the unit owners' association. During a meeting at which the agenda is limited to specific topics or at a special meeting, the executive organ may limit the comments of unit owners to the topics listed on the meeting agenda.

⁶ B. Except as otherwise provided in the condominium instruments, the provisions of this subsection shall apply to executive organ meetings. All meetings of the unit owners' association or the executive organ, including any subcommittee or other committee thereof, shall be open to all unit owners of record. The executive organ shall not use work sessions or other informal gatherings of the executive organ to circumvent the open meeting requirements of this section. The unit owners' association may, to the extent the condominium instruments or rules adopted thereto expressly so provide, send notice by electronic transmission consented to by the officer to whom the notice is given. Minutes of the meetings of the executive organ shall be recorded and shall be available as provided in § 55-79.74:1.

Notice of the time, date and place of each meeting of the executive organ or of any subcommittee or other committee thereof, and of each meeting of a subcommittee or other committee of the unit owners' association, shall be published where it is reasonably calculated to be available to a majority of the unit owners.

⁷ A. Except to the extent otherwise provided by the condominium instruments, all powers and responsibilities, including financial responsibility, with regard to maintenance, repair, renovation, restoration, and replacement of the condominium shall belong (i) to the unit owners' association in the case of the common elements, and (ii) to the individual unit owner in the case of any unit or any part thereof, except to the extent that the need for repairs, renovation, restoration or replacement arises from a condition originating in or through the common elements or any apparatus located within the common elements, in which case the unit owners' association shall have such powers and responsibilities.

⁸ B. To the extent that the reserve study conducted in accordance with this section indicates a need to budget for reserves, the unit owners' association budget shall include, without limitations:

1. The current estimated replacement cost, estimated remaining life and estimated useful life of the capital components;
2. As of the beginning of the fiscal year for which the budget is prepared, the current amount of accumulated cash reserves set aside, to repair, replace or restore the capital components and the amount of the expected contribution to the reserve fund for that fiscal year; and
3. A general statement describing the procedures used for the estimation and accumulation of cash reserves pursuant to this section and the extent to which the unit owners' association is funding its reserve obligations consistent with the study currently in effect.

⁹ C. To the extent that the condominium instruments expressly so provide, (i) any common expenses paid or incurred in making available the same off-site amenities or paid subscription television service to some or all of the unit owners shall be assessed equally against the condominium units involved and (ii) any common expenses paid or incurred in

inaccurate resale certificate that included an improper charge and failed to include a copy of the Common Interest Community Board Association Registration Certificate.

In its Final Determination, the Association stated that the complaints related to violations of the Virginia Nonstock Corporation Act would not be addressed as the Association is not a nonstock corporation and therefore the Act does not apply. The Association noted that an Annual Meeting was scheduled for February 28, 2019, and this office has learned that the meeting was held and the Complainant was present at the meeting. The Association found that the complaint regarding the reserve fund was denied since the statute "does not require 100% funding of all reserves." The Association also noted that the funds expended from the reserve account were for capital components that "were not expected to fail as they have."

As to the complaint regarding maintenance of the property, the Association denied the complaint, noting that identified violations had been remedied. The Association stated that the complaint regarding a failure to distribute minutes "is not well founded as nothing in the law...requires the dissemination of such information without a specific request." Replacing the water meters, according to the Association is not required by 55-79.83(C) and the Association does not have the funds to replace all of the meters. The Association did agree to address this matter in the annual meeting.

The Association stated that the deficiency noted in the resale certificate was the result of information from the prior management company and that accounting records will be obtained for the Complainant to review. The Association did not address the allegation regarding a failure by the Association to include the certification regarding the annual report.

All associations are required to hold a meeting of the owners at least once a year. Based on the information provided, it appears the Association failed to hold an annual meeting for several years, but has now scheduled and held an annual meeting. The Complainant's belief that the lack of annual meeting caused a violation of her right to vote is resolved by the holding of an annual meeting. The Complainant's belief that there was a failure to fill vacancies on the board is moot, now that an annual meeting has been held, as is the Complainant's allegation that she was denied a right to comment on, or bring up, additional matters.

There is no specific number of board meetings that must be held under the Condominium Act. If the condominium instruments contain a specific number, such requirement would not fall under the jurisdiction of this office and we could not enforce any such requirement for board meetings. If board meetings were held and no notice was provided, that clearly would be a violation of the Condominium Act, but there was no specific information provided to bolster such an allegation. As was noted by the Association in its Final Determination, there is no requirement under the Condominium Act that an association provide copies of minutes to owners, unless such copies have been requested.

providing metered utility services to some or all of the units shall be assessed against each condominium unit involved based on its actual consumption of such services.

While the Complainant's allegation that the Association has failed to properly maintain the common elements is an allegation related to the Condominium Act, this office has no authority to determine what constitutes proper maintenance of a condominium and therefore cannot provide a determination as to whether an association is properly maintaining its common elements. In addition, such maintenance is very often premised on language contained in the condominium instruments and therefore further supports the fact that this office would have no jurisdiction.

While associations are required to carry out reserve studies every five years, and to review the results of that study annually "to determine if reserves are sufficient" (55-79.83:1(A)(2)) there is no language in the statute that requires an association to fully fund the reserves or to put any specific sum into them. It is up to the executive organ to "[m]ake any adjustments the executive organ deems necessary to maintain reserves, as appropriate."

The allegation that the Association has failed to "assess units for water usage for the 'Condo' Act, Section 55-79.83(C) is not a complaint that this office can address. This portion of the Condominium Act specifically references the condominium instruments which takes this matter outside the scope of this office's authority.

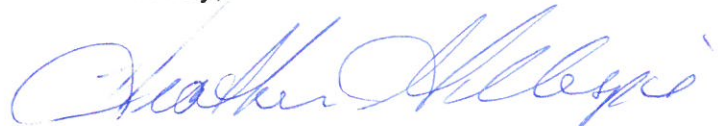
Finally, the allegation that the Resale Certificate was inaccurate and lacked a copy of the annual report filed with the Common Interest Community Board is not something that we can fully address as we cannot determine if the purported debt was accurate. The Association stated that it will provide necessary documents to the Complainant to determine whether the possible debt owed is correct. As for the annual report, I have reviewed the records and the Association has filed an annual report with the Common Interest Community Board, which is what we would have required had we found that the Association failed to file.

Required Actions

Nothing is required of the Association at this time.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Pretty Lake Village Condominium Association