



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

October 18, 2019

Brian Ball
Secretary of
Commerce and Trade

Complainant: Dorothy Simmons
Association: Green Run Homes Association
File Number: 2020-00742

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 July 12, 2019. The Association provided a response to the Complainant dated August 27, 2019. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated September 16, 2019 and received September 17, 2019.

Determination

The Complainant has alleged that the Association failed to disclose pending litigation, a violation of §55-509.5(7)¹ (now §55.1-1809(7)), when it issued a disclosure packet dated February 14, 2019. The Complainant stated that the Association is "is being

¹ A. Within 14 days after receipt of a written request and instructions by a seller or the seller's authorized agent, the association shall deliver an association disclosure packet as directed in the written request. The information contained in the association disclosure packet shall be current as of a date specified on the association disclosure packet. If hand or electronically delivered, the written request is deemed received on the date of delivery. If sent by United States mail, the request is deemed received six days after the postmark date. An association disclosure packet shall contain the following:

7. A statement of the nature and status of any pending action or unpaid judgment (i) to which the association is a party and (ii) that could or would have a material impact on the association or its members or that relates to the lot being purchased;

sued for \$500,000 by Florence Knight in the Virginia Beach Circuit Court” and that a “finding in favor of the plaintiff could have a detrimental impact on the Association...”

The Association responded to the allegation by noting that there are two specific times a lawsuit must be disclosed in a disclosure packet – when an active case or judgement could or would have a material impact on the Association or its members and when a case or judgement is related to the property for which the disclosure packet is being prepared. The Association noted that the second requirement was not applicable since the pending lawsuit is not related to the property for which the disclosure packet was issued.

As to the first requirement for disclosure, the Association stated in its response that it has never denied that there was a case currently pending in the Virginia Beach Circuit Court. The Association also wrote that because its legal costs are paid by the Association’s insurance company, which will likely “cover any adverse verdict,” it “is not at risk for an excess verdict and there is no likelihood that a special assessment will result regardless of the amount of an award against the Association.” The Association also wrote that it “appears that there will be no significant or ‘material’ increase in the cost of insurance for the Association or its members.”

The Association did note that its response to #13 on the disclosure packet coversheet could be interpreted as stating that the Association is not a party to **any** litigation, but that was not the intent when providing an answer to that particular portion of the disclosure packet coversheet.

The first question is whether the Association answered #13 (which is listed as #7 in §55-509.5, now §55.1-1809) in such a way that it appeared to be saying it was not a party to **any** litigation or did it intend to say that it was not a party to any litigation which either could or would have a material impact on the association or its members? The association did write in the disclosure packet that “[t]here are no suits or unpaid judgments pending to which the Association is a party...” but its answer was in response to the statute and the disclosure packet coversheet which require a statement as to whether there are pending suits of unpaid judgments to which the Association is a party which either could or would have a material impact on the association or its members. It is unclear if the Association was simply not specific enough in its response and meant to include the additional language regarding material impact, or if it intended to state that there are no suits or unpaid judgments.

The second question is whether the Association should have disclosed the pending litigation. Ultimately, there is an essence of subjectivity to this question. Clearly, the Association was a party to some form of litigation at the time the disclosure packet was created. It does not appear that the litigation was related to the property that was being sold, so there appears to be no violation as to that portion of §55-509.5(7), now §55.1-1809(7). The next question is whether the pending action “could or would have a material impact on the association or its members...” Unfortunately, making a determination as to whether the pending action could or would have a material impact on the association or its members is well outside the scope of this office. We cannot make a judgment as to the nature of the pending case and its potential outcome and subsequent impact on the Association.

The Association's response to item #13 on the disclosure packet could have been viewed as stating that there was simply no litigation pending since there was no reference to material impact. While the Association stated that it did not intend to imply there was no pending litigation, the Association itself recognized that the language could be interpreted that way. I do think this can be construed as a violation of §55-509.5(7) since a statement that there are no pending suits without the additional language about material impact could lead someone to believe that there are in fact, **no** pending suits at all. I am pleased that the Association has already recognized the potential problem and has a plan in place to more accurately answer the question of pending litigation in the future.

As for the need to disclose the currently pending litigation, as noted above, that is a truly subjective decision and outside the scope of this office. I cannot make a determination as to whether the pending case should have been revealed in the disclosure packet since I cannot determine whether it could or would have a material impact on the association or its members.

Required Actions

The Association does need to follow through with its intent to more carefully respond to item #13 (§55-509.5(7)) in future disclosure packets in order to ensure that it does not imply that there is **no** pending litigation (unless or until any pending litigation has been resolved). The Association must also make certain that it includes the Complainant's right to file a Notice of Final Adverse Decision in its decision as well as the contact information for doing so, as required by the Common Interest Community Ombudsman Regulations (18 VAC 40-70-50 (10)²).

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Green Run Homes Association

² 10. The notice of final determination shall include the complainant's right to file a Notice of Final Adverse Decision with the Common Interest Community Board via the Common Interest Community Ombudsman and the applicable contact information.