



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

October 18, 2019

Brian Ball
Secretary of
Commerce and Trade

Complainant: Kelly Convirs-Fowler
Association: Hillcrest Farms Community Association
File Number: 2020-00842

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 two complaints to the Association dated August 28, 2019. The Association provided a response to the Complainant dated September 19, 2019. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated September 25, 2019 and received September 30, 2019.

Determination

The Complainant included two complaints in her NFAD. The first alleged a failure on the part of the Association to respond to questions submitted through the Association's method of communication, as required by 55-510.2¹ (now §§55.1-1817). The Complainant asked several questions of the board of directors, via the designated method, and never received a response.

The second complaint alleged that the Association failed to provide proper notice for a board of directors meeting when it provided notice that the meeting would begin at 7:00 p.m., but instead convened an executive session at 6:12 p.m., motioned to go into executive session for covenant hearings and then entered an open meeting at 7:17 p.m.

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.

The Complainant believes the Association violated §55-510.1² (now §55.1-1816) of the Property Owners' Association Act by holding an executive session prior to a board meeting without giving notice of the executive session or moving from an open meeting into executive session as required by the law. The Complainant wrote that this method of holding "regularly executive meetings with no affirmative vote in an open meeting" has happened a number of times.

The Association's response to the allegation that it failed to respond to questions sent through the accepted method of communication was that the current website only allows for submission of questions and does not provide an open dialog due to the potential private nature of some of the questions and concerns posed to the board. Instead, questions submitted via the website are disseminated to the proper person and a response will then be given. The Association noted that the response may not be immediate due to the possible need to research the inquiry or discuss the question with board members.

The Association's response to the alleged failure to provide proper notice of a board meeting was that the executive sessions referred to were "due process hearings" and that the due process hearings follow a different set of notice requirements under §55-79.80:2. The Association further noted that due process hearings are not open to general membership due to the private nature of those hearings. The Association wrote that it will continue to hold all due process hearings prior to the Board of Director meetings but the Board will wait to call the board meeting to order until after the hearings are held and the result of the hearings will be voted on in open session.

I do not believe the Association is violating §55.1-1817. The reason for this is that there is no requirement in that statute that an association or its board of directors respond to questions, inquiries, or any other form of communication. While it would certainly be reasonable to expect a response, absent such language in the law, we cannot force an association to respond to general inquiries. I would note there are instances where a

² All meetings of the board of directors, including any subcommittee or other committee of the board of directors, where the business of the association is discussed or transacted shall be open to all members of record. The board of directors shall not use work sessions or other informal gatherings of the board of directors to circumvent the open meeting requirements of this section. Minutes of the meetings of the board of directors shall be recorded and shall be available as provided in subsection B of § 55.1-1815.

C. The board of directors or any subcommittee or other committee of the board of directors may (i) convene in executive session to consider personnel matters; (ii) consult with legal counsel; (iii) discuss and consider contracts, pending or probable litigation, and matters involving violations of the declaration or rules and regulations adopted pursuant to such declaration for which a member or his family members, tenants, guests, or other invitees are responsible; or (iv) 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 of the board of directors, 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.

response is required, for example, when requesting books and records or when submitting a Notice of Final Adverse Decision. But in the type of situation described in the complaint, the statute does not specifically require a response from the board, only that there be a method of communication with the board.

As to the second complaint the Association appears to have inadvertently used a Condominium Act statute when responding to the complaint related to meeting notice, rather than the applicable statute under the Property Owners' Association Act. The reference should have been, I believe, to the former §55-513 which is now §55.1-1819³.

I cannot agree with the Association's position that the notice for due process hearings is so different than that for board meetings that it negates the requirement that all members be given notice of all meetings. The notice to the member accused of a violation is different than a standard meeting notice for a board or committee meeting, but that does not do away with the general notice requirement for all meetings.

Under §55-509 of the Property Owners' Association Act, which is the law in place when the alleged violation took place, a meeting is defined as "the formal gathering of the board of directors where the business of the association is discussed or transacted" (the current version of the Property Owners Association Act removes the definition for a meeting and inserts new language to that effect under §55.1-1816(A)⁴). It would appear that a covenant hearing, and I found nothing in the NFAD to suggest otherwise, would meet the definition of a meeting and therefore, based on common interest community law, and specifically §55-510.1 (now §55.1-1816), notice should be given to all members of the due process hearings, not just the board meeting that take place afterwards.

It seems that the issue here is that the Association held an executive session prior to a scheduled board meeting but did not provide notice of that executive session, and only gave notice of the open board meeting to follow at 7:00 p.m. Based on the minutes for the meeting, the Board did make a motion "in an open meeting" to move into executive session for the purpose of covenant hearings, but I am not certain that the meeting was, in fact, open, if no one ever received notice of it.

The Association clearly understands that what they held was a meeting, based on the minutes provided with the complaint, and recognized the need to motion in an open meeting before entering an executive session. The board is well within its rights to move into executive session for the purpose of considering violations of the declaration or rules and regulations, but it must first make a motion in an open meeting. A meeting cannot be considered open if the association members have not been given notice of it.

³ Notice of a hearing, including the actions that may be taken by the association in accordance with this section, shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the member at the address of record with the association at least 14 days prior to the hearing. Within seven days of the hearing, the hearing result shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the member at the address of record with the association.

⁴ A. All meetings of the board of directors, including any subcommittee or other committee of the board of directors, **where the business of the association is discussed or transacted** shall be open to all members of record. The board of directors shall not use work sessions or other informal gatherings of the board of directors to circumvent the open meeting requirements of this section. Minutes of the meetings of the board of directors shall be recorded and shall be available as provided in subsection B of § 55.1-1815. (emphasis added)

Required Actions

As required by the Property Owners Association Act, “[a]ll meetings of the board of directors, including any subcommittee or other committee of the board of directors, where the business of the association is discussed or transacted shall be open to all members of record.” A failure to provide notice of a meeting in the future may result in a referral of the matter to the Common Interest Community Board for whatever action it may deem appropriate.

The Association must also make certain that it includes the Association registration number, the Manager’s name and license number and the contact information for filing a Notice of Final Adverse Decision, as required by the Common Interest Community Ombudsman Regulations (18 VAC 40-70-50 (9) and (10)⁵).

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Hillcrest Farms Community Association

⁵ 9. The notice of final determination shall be dated as of the date of issuance and include specific citations to applicable association governing documents, laws, or regulations that led to the final determination, as well as the registration number of the association. If applicable, the name and license number of the common interest community manager shall also be provided.

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.