



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

February 11, 2020

Brian Ball
Secretary of
Commerce and Trade

Complainant: Taylor Yorke
Association: Unit Owners Association of Hiddenbrooke Condominium
File Number: 2020-01513

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 seventeen complaints to the Association dated September 23, 2019. The Association provided a response to the Complainant dated November 21, 2019. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated December 12, 2019 and received December 16, 2019.

Authority

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 §54.1-2354.4 (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 for that portion of the NFAD.

Determination

The Complainant included seventeen complaints in the complaint submitted through the association complaint procedure and briefly described each one. She then provided further information and examples of the complaints, grouping them together in conjunction with when they took place.

The first five complaints were related to a special meeting posted as an executive session that the Complainant stated was held without proper notice. Specifically, the Complainant alleged that only one notice was posted in a location unlikely to be seen by a majority of owners. The meeting, according to the Complainant, was to be an executive session to discuss the budget and other associated matters. The Complainant alleges that the Association violated §55-79.72:3.3 (now §55.1-1939)¹ and §55-79.75.B (now §55.1-1949)² of the Condominium by failing to provide adequate notice of the meeting. In addition, the Complainant believes that the purpose of the executive session was contrary to the law, per §55-79.75.B² and C³ of the Condominium Act which provide a limited number of topics that can be discussed in an executive session.

¹ 3. The right to have notice of any meeting of the executive board, to make a record of such meetings by audio or visual means, and to participate in such meeting in accordance with the provisions of § 55.1-1949;

² B. 1. Except as otherwise provided in the condominium instruments, the provisions of this subsection shall apply to executive board meetings at which business of the unit owners' association is transacted or discussed. All meetings of the unit owners' association or the executive board, including any subcommittee or other committee of such association or board, shall be open to all unit owners of record. The executive board shall not use work sessions or other informal gatherings of the executive board to circumvent the open meeting requirements of this section. The unit owners' association may, to the extent that the condominium instruments or adopted rules expressly provide, send notice by electronic means if consented to by the officer to whom the notice is given. Minutes of the meetings of the executive board shall be recorded and shall be available as provided in § 55.1-1945.

2. Notice of the time, date, and place of each meeting of the executive board or of any subcommittee or other committee of the executive board, 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.

A unit owner may make a request to be notified on a continual basis of any such meetings, which request shall be made at least once a year in writing and include the unit owners' name, address, zip code, and any email address as appropriate. Notice of the time, date, and place shall be sent to any unit owner requesting notice (i) by first-class mail or email in the case of meetings of the executive board or (ii) by email in the case of meetings of any subcommittee or other committee of the executive board or of a subcommittee or other committee of the unit owners' association.

Notice, reasonable under the circumstances, of special or emergency meetings shall be given contemporaneously with the notice provided to members of the (i) executive board or any subcommittee or other committee of such board or (ii) subcommittee or other committee of the unit owners' association conducting the meeting.

³ C. The executive board or any subcommittee or other committee of the executive board may convene in executive session to consider personnel matters; consult with legal counsel; discuss and consider contracts, probable or pending litigation, and matters involving violations of the condominium instruments or rules and regulations promulgated pursuant to such condominium instruments for which a unit owner, his family members, tenants, guests, or other invitees are responsible; or discuss and consider the personal liability of unit owners to the unit owners' 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 executive board 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 executive board or subcommittee or other

The Complainant also wrote that the materials shared with the Board were not made available to the membership and thus the Association was in violation of §55-79.75.B². She also noted that owners were not permitted the opportunity to be heard, since no open meeting was held, and therefore the Association was in violation of §55-79.72:3.3¹ and §55-79.75.D⁴. And finally, the Complainant alleges that the Association failed to properly convene in executive session, a violation of §55-79.75.B² and C³, since no open meeting was held and as a result, the Board did not properly motion to go into executive session in an open meeting.

The second grouping of complaints was related to a special meeting held without notice where the Board took action to fill a board vacancy. According to the complaint, a board member was appointed and approved during the unnoticed meeting (such meeting was referenced in the Association's newsletter after the fact). The Complainant also alleges that the Board discussed proposals and bids, the removal of a tree, maintenance work, and changes to the common elements in private sessions with no notice to the owners. The Board also entered an executive session at an August meeting to swear in the new board member and to "conduct other undisclosed business the Board deemed to be 'private'."

The Complainant contends that by holding a meeting without notice and making decisions in that meeting without allowing owners to attend, the Association violated §55-79.72:3.3¹ and §55-79.75.B². She also alleges that the materials the Board used to make its decisions during the unannounced meeting were not made available to the owners, which is a violation of §55-79.75.B² and C³. She further alleges a violation of §55-79.75 B² since the topics of the unannounced meeting were not appropriate for discussion during an executive session, a violation of §55-79.72:3.3¹ and 55-79.75.B² for not allowing owners to be aware of and participate in the meeting, and a violation of §55-79.72:3.3¹ and 55-79.75.D⁴. for not allowing owners to be heard in the meeting.

The next grouping of complaints is related to special meetings, work sessions and informal meetings that the Complainant alleges the Board holds to conduct association business without providing notice to the owners of these meetings. The Complainant references an article in the association newsletter where the Board stated that it "continues to manage the affairs of our Condominium and communicates frequently by e-mail and phone as needed. We have held special meetings/Executive Sessions to discuss items that are sensitive not suitable for open discussion and will continue to do so if they are needed." The Complainant notes that no records of these meetings can be obtained since they are conducted in private and the Board does not take minutes for these meetings.

committee of the executive board, 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 do not require the disclosure of information in violation of law.

⁴ D. Subject to reasonable rules adopted by the executive board, the executive board 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 board may limit the comments of unit owners to the topics listed on the meeting agenda.

The Complainant alleges that the Association has violated §55-79.72:3.3¹ and §55-79.75.B² of the Condominium Act by conducting meetings via phone and email. She further alleges violations of §55-79.72:3.3¹ and §55-79.75.B² for the Association's failure to provide notice of these meetings, a violation of §55-79.75.B² for not making agenda materials available for these meetings at the same time they are distributed to the Board, violations of §55-79.72:3.3¹ and §55-79.75.D⁴ for not allowing owners to be heard at these meetings, and a violation of §55-79.74:1 (now §55.1-1945)⁵ for not maintaining minutes and other required records of the business conducted in these meetings.

The sixteenth complaint alleged that the Association failed to provide access to the books and records of the association, despite a written request from the Complainant. The seventeenth complaint alleged that the Association made repairs and renovations to the "Bistro" bathrooms in a manner that did not comport with the Bylaws of the Association or with §55-79.55 (now §55.1-1917)⁶ of the Condominium Act. The Complainant noted that

⁵ A. The declarant, managing agent, unit owners' association, or person specified in the bylaws of the association shall keep detailed records of the receipts and expenditures affecting the operation and administration of the condominium and specifying the maintenance and repair expenses of the common elements and any other expenses incurred by or on behalf of the association. Subject to the provisions of subsections B, C, and E, upon request, any unit owner shall be provided a copy of such records and minutes. All financial books and records shall be kept in accordance with generally accepted accounting practices.

B. Subject to the provisions of subsection C, all books and records kept by or on behalf of the unit owners' association, including the unit owners' association membership list, and addresses and aggregate salary information of unit owners' association employees, shall be available for examination and copying by a unit owner in good standing or his authorized agent so long as the request is for a proper purpose related to his membership in the unit owners' association and not for pecuniary gain or commercial solicitation. Notwithstanding any provision of law to the contrary, this right of examination shall exist without reference to the duration of membership and may be exercised (i) only during reasonable business hours or at a mutually convenient time and location and (ii) upon five business days' written notice for a unit owner association managed by a common interest community manager and 10 business days' written notice for a self-managed unit owners' association, which notice shall reasonably identify the purpose for the request and the specific books and records of the unit owners' association requested.

⁶ A. The declaration may allocate to each unit depicted on plats and plans that comply with subsections A and B of § 55.1-1920 an undivided interest in the common elements proportionate to either the size or par value of each unit. If par value is stated in terms of dollars, that statement shall not be deemed to reflect or control the sales price or fair market value of any unit, and no opinion, appraisal, or fair market transaction at a different figure shall affect the par value of any unit or any undivided interest in the common elements, voting rights in the unit owners' association, or liability for common expenses assigned on the basis of such par value.

B. If the basis for allocation provided in subsection A is not used, then the declaration shall allocate to each such unit an equal undivided interest in the common elements, subject to the following exception: Each convertible space so depicted shall be allocated an undivided interest in the common elements proportionate to the size of each such space, vis-a-vis the aggregate size of all units so depicted, while the remaining undivided interest in the common elements shall be allocated equally to the other units so depicted.

C. The undivided interests in the common elements allocated in accordance with subsection A or B shall add up to 1 if stated as fractions or 100 percent if stated as percentages.

D. If, in accordance with subsection A or B, an equal undivided interest in the common elements is allocated to each unit, the declaration may state that fact and need not express the fraction or percentage so allocated.

E. Unless an equal undivided interest in the common elements is allocated to each unit, the undivided interest allocated to each unit in accordance with subsection A or B shall be reflected by a table in the declaration, or by an exhibit to the declaration, containing three columns. The first column shall identify the units, listing them serially or grouping them together in the case of units to which identical undivided interests are allocated. Corresponding figures in the second

this community was for “adults age 55 or better” and that the replacement toilets were not of the proper height or seat length. An allegation also was included regarding Fair Housing Law, but that would have to be submitted through the Office of Fair Housing to obtain a decision as to whether such a violation has occurred.

The Association responded to the complaints by grouping them into ten categories – and, with only one exception, stating that it acknowledged and understood that it must follow the applicable law for each category. The categories, verbatim, were as follows:

1. Failure to conduct open meetings.
2. Failure to provide notice of all Board meetings.
3. Circumventing the open meeting requirement by discussing topics in Executive Session that are not exempt from the open meeting requirement.
4. Circumventing the open meeting requirement by conducting business by phone and/or electronic means, without notice to the membership and opportunity to be heard.
5. Failure to adequately indicate in meeting notices what matters are scheduled to be discussed.
6. Failure to furnish to the Association general membership materials shared with the Board members not otherwise prohibited from release under VA Condo Act Section 55-79.75.C.
7. Failure to provide Association general membership their right to be heard on matters under consideration prior to their being voted on.
8. Failure to maintain proper books, records, and minutes.
9. Failure to make available for examination books, records, and minutes[.]

The tenth category addressed the allegation that the Association failed to obtain owner approval when removing replacing the toilets in the Bistro area. The Association stated that it did take these actions but did not do so in violation of the Association’s bylaws or Fair Housing laws.

The Association wrote that it “understands and acknowledges...” its obligations under the Condominium Act as they apply to the allegations in the complaint, and it stated its intention to comply with applicable law⁷ going forward. However, the Association does

and third columns shall set forth the respective areas or par values of those units and the fraction or percentage of undivided interest in the common elements allocated to such units.

F. Except to the extent otherwise expressly provided by this chapter, the undivided interest in the common elements allocated to any unit shall not be altered, and any purported transfer, encumbrance, or other disposition of that interest without the unit to which it appertains is void.

G. The common elements shall not be subject to any action for partition until and unless the condominium is terminated.

⁷ There was some confusion in the Association’s response, as it used the code section numbers for the Property Owners’ Association Act instead of the correct code section numbers for the Condominium Act. To further complicate matters, the Complaint was submitted to the Association in September and the Association responded in November. On October 1, 2019, the recodification of Title 55 of the Code of Virginia was enacted, and therefore all code sections numbers changed. I believe this was merely a mistake on the part of the Association, although I would encourage it to make certain it is, in the future, properly tracking the Condominium Act and not misusing the code provisions from the Property Owners’ Association Act.

not admit to any violation of common interest community law, nor did it deny any violation of such law, other than in relation to item number 10. While I am pleased that the Association intends to walk the straight and narrow going forward, I do find that it did violate common interest community law on numerous occasions, and as a result, denied transparency to the owners. Much of common interest community law is intended to provide open and transparent leadership for associations and in this case that simply did not happen on numerous and repeated occasions.

Specifically, the Association violated §55.1-1939 by failing to provide notice of meetings, it also violated §55.1-1949.B, C, and D by failing to provide proper notice or any notice of board meetings, by failing to make agenda packets and materials available to owners at the same time they were made available to board members, by misusing and improperly convening in executive session on numerous occasions, by discussing inappropriate topics in executive session, and by failing to provide a designated period of time at board meetings to allow owners the opportunity to speak.

Since the Association openly acknowledged in its newsletter that the Board meets without notice to the owners, it also has violated §55.1-1949.B.1 which requires that “[m]inutes of the meetings of the executive board shall be recorded and shall be available as provided in §55.1-1945.” It appears no minutes were recorded for the unnoticed meetings. This also demonstrates a violation of §55.1-1945 which requires the Association to maintain such minutes and provide a copy if requested by any unit owner.

While there was an allegation that the Association violated §55.1-1917 of the Condominium Act, I do not find this to be the case. While owners are allocated interests in the common elements, the referenced statute does not address maintenance of those common elements and therefore no finding can be made that there was a violation.

Required Actions

The required actions are quite simple – the Association must ensure, going forward, that it fully complies with the statutes that it has been found to have violated. Any failure to do so in the future may result in a referral of this matter to the Common Interest Community Board for whatever action it may deem appropriate.

I would make special note that while this office does not generally review any documents related to anything that took place after the initial complaint was submitted to an association, the Complainant did submit a copy of a notice for a “Special Board Meeting” scheduled for January 23, 2020. The notice stated that the Board would go into executive session at the meeting. Despite the Association’s intent, in its November 21, 2019 complaint response, to comply with the Condominium Act going forward, it appears that this meeting would have been in violation of §55.1-1949.C since its stated purpose, “to fill a recent vacancy to the Board,” is not one of the accepted reasons for entering executive session. If the Board is not sufficiently familiar with the Condominium Act to carry out its obligation to fully comply with that Act, it will need to determine what actions it can take to ensure full compliance going forward.

In addition to the need to comply with the Condominium Act, the Association must better familiarize itself with the Common Interest Community Regulations that govern the complaint process and ensure going forward that it fully complies with those Regulations. According to the Complainant, the Association failed to acknowledge receipt of the association complaint in a timely manner. The Regulations (18 VAC 48-70-50.4⁸) require acknowledgement of receipt of a complaint within seven days of receipt. The Complainant stated that she emailed her complaint on the 23rd of September, and provided a hard copy on the 26th of September. She received acknowledgement of the complaint on October 21, 2019.

The Complainant also stated in her NFAD that the Association failed to provide notice to her of the time, date and location of the consideration of her complaint. She said that a flyer was posted for the meeting, but that she never received notice herself. This is a violation of the Regulations (18 VAC 48-70-50.7⁹), which require that a complainant receive notice of the time, date and location of the consideration of the complaint.

The Association must also make certain that it includes the Association registration number and the Manager's name and license number (if applicable) on the final decision. (18 VAC 40-70-50.9¹⁰).

Please keep in mind that all of the above actions are required going forward. None of these should prove difficult as they are merely requiring the Association to fully comply with the laws and regulations that govern condominiums. The Association is always welcome to contact my office if it has questions going forward.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Hiddenbrooke Condominium UOA

⁸ 4. The association shall provide written acknowledgment of receipt of the association complaint to the complainant within seven days of receipt. Such acknowledgment shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the complainant at the address provided, or if consistent with established association procedure, by electronic means provided the sender retains sufficient proof of the electronic delivery.

⁹ 7. Notice of the date, time, and location that the matter will be considered shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the complainant at the address provided or, if consistent with established association procedure, delivered by electronic means, provided the sender retains sufficient proof of the electronic delivery, within a reasonable time prior to consideration as established by the association complaint procedure.

¹⁰ 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.