



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

March 10, 2020

Brian Ball
Secretary of
Commerce and Trade

Mary Broz-Vaughan
Director

Complainant: Karamjit Sidhu
Association: Greenfield Crossing Homeowners' Association
File Number: 2020-01667

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 his complaints to the Association dated October 2, 18 and 20, 2019. The Association provided a final decision dated January 4, 2020. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated January 6, 2020 and received January 8, 2020.

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..." (18 VAC 48-70-120 and §54.1-2354.4) 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 18 VAC 48-70-90 (Common Interest Community Ombudsman 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 Common Interest Community Ombudsman Regulations (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.

Complaint

The Complainant submitted twenty-three complaints to the Association. They are grouped here by subject and statute to the extent possible. The Complaint/Violation numbers used by the Complainant are used here as well. Many of the complaints overlap one another and pertain to the same statute.

The first grouping of complaints is related to §55-510 (now §55.1-1815)¹ of the Property Owners' Association Act. Specifically, the Complainant alleged that the Association failed to provide notice of a September 16, 2019 board meeting seven days in advance, failed to mail notice to each association member and did not provide a purpose for the meeting (Complaints 1 and 3).

The next grouping is related to alleged violations of §55-510.1 (now §55.1-1816)² of the Property Owners Association Act. The Complainant alleged that the Association failed

¹ G. Meetings of the association shall be held in accordance with the provisions of the bylaws at least once each year after the formation of the association. The bylaws shall specify an officer or his agent who shall, at least 14 days in advance of any annual or regularly scheduled meeting and at least seven days in advance of any other meeting, send to each member notice of the time, place, and purposes of such meeting. In the event of cancellation of any annual meeting of the association at which directors are elected, the seven-day notice of any subsequent meeting scheduled to elect such directors shall include a statement that the meeting is scheduled for the purpose of the election of directors.

Notice shall be sent by United States mail to all members at the address of their respective lots unless the member has provided to such officer or his agent an address other than the address of the member's lot. In lieu of sending such notice by United States mail, notice may instead be (i) hand delivered by the officer or his agent, provided that the officer or his agent certifies in writing that notice was delivered to the member, or (ii) sent to the member by electronic mail, provided that the member has elected to receive such notice by electronic mail and, in the event that such electronic mail is returned as undeliverable, notice is subsequently sent by United States mail. Except as provided in subdivision C 7, draft minutes of the board of directors shall be open for inspection and copying (a) within 60 days from the conclusion of the meeting to which such minutes appertain or (b) when such minutes are distributed to board members as part of an agenda package for the next meeting of the board of directors, whichever occurs first.

² 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.

B. Notice of the time, date, and place of each meeting of the board of directors or of any subcommittee or other committee of the board of directors shall be published where it is reasonably calculated to be available to a majority of the lot owners.

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

Notice, reasonable under the circumstances, of special or emergency meetings shall be given contemporaneously with the notice provided to members of the association's board of directors or any subcommittee or other committee of the board of directors conducting the meeting.

Unless otherwise exempt as relating to an executive session pursuant to subsection C, at least one copy of all agenda packets and materials furnished to members of an association's board of directors or subcommittee or other committee of the board of directors for a meeting shall be made available for inspection by the membership of the association at the

to publish notice of an upcoming September 16, 2019 board meeting by deleting the meeting from the association website (Complaint 2). The Complainant believed that the Association did not make the same meeting open to all owners and held a meeting despite the lack of notice (Complaint 4). The Complainant also stated that the Association did not give notice contemporaneously when provided to the board of directors for a special meeting held on September 16, 2019 (Complaint 5). The Complainant contends the Association failed to make an agenda packet available at the same time it was made available to the board for the same meeting (Complaint 6). The Complainant stated that the Association said there was no agenda and that one is not required for a special meeting of the board of directors. The Complainant also believed the meeting was not a special meeting but instead a regular meeting of the board of directors.

The Complainant alleged a violation of §55-509.3:2.3 (now §55.1-1807)³ of the Property Owners' Association Act regarding notice of meetings for the same reasons as set forth in the above paragraph (Complaint 7). The Complainant alleged that the Association failed to provide notice of a meeting between July 15, 2019 and September 9, 2019 since the board made a decision during that time period to establish a Google Message forum (Complaint 8). In addition, the Complainant alleged that the Association violated paragraph 2 of §55-509.3:2.2 (now §55.1-1807)⁴ of the Property Owners' Association Act when it permitted members not in good standing to vote or submit proxies on several occasions (Complaint 20).

The Complainant alleged the Association violated §55-510.2 (now 55.1-1817)⁵ of the Property Owners' Association Act by "establishing a Google message forum between July 15, 2019 and September 9, 2019 was not notified to all homeowners and is restricted which violates the 'effective and free method of communication' part of the statute" (Complaint 9). The Complainant alleged additional violations of this statute, stating "the HOA supposedly setup an email addresses for the board and ARB committee without a meeting or notice because the homeowners have no way of knowing who controls email address accounts" (Complaint 10). Another additional alleged violation of this statute includes a failure by the Association to disclose "the fact that members exist on the Communications Committee..." when it posted information on the association website asking for volunteers for the Communications Committee (Complaint 19).

same time such documents are furnished to the members of the board of directors or any subcommittee or committee of the board of directors.

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

3. The right to have notice of any meeting of the board of directors, to make a record of any such meeting by audio or visual means, and to participate in any such meeting in accordance with the provisions of subsection G of § 55.1-1815 and § 55.1-1816;

⁴ Every lot owner who is a member in good standing of a property owners' association shall have the following rights:

2. The right to cast a vote on any matter requiring a vote by the association's membership in proportion to the lot owner's ownership interest, unless the declaration provides otherwise;

⁵ 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.

Additional allegations related to meeting notice were that the association failed to provide notice of a meeting: when it decided to remove flags from the association flagpole (Complaint 11); when it decided to cut down a tree (Complaint 12); when it decided to remove association directors from an insurance policy (Complaint 13); when it added to a board meeting agenda and distributed money to a family in the association (Complaint 14); and, when ballot votes were reviewed (Complaint 21). The Complainant also believes that from June 2019 to the present, the Association failed to provide notice to owners of "ARB" committee meetings and votes to amend the ARB guidelines (Complaint 15). The Complainant said that he requested continual notice of these meetings but was not provided it. No copy of a written request for continual notification was included in the NFAD, which is a requirement under the law if you wish to receive such notification.

The Complainant alleged violations of §55.510.1.A, B and C (now §55.1-1816)⁶, stating that the board of directors entered executive session in order to decide board positions and no election took place in an open meeting (Complaints 16 & 17). The Complainant also wrote that the Association split the Secretary/Treasurer position in executive session in violation of the same statute (Complaint 18).

The Complainant also alleged that the Association is not enforcing rules and regulations of the association in a uniform manner, thus violating §55.1-1828 and §55.1-1819 of the Property Owners' Association Act. He references several instances where he believes other owners are failing to comply with the requirements of the association (Complaints 22 and 23).

Association Response

The Association's final decision addressed each complaint/violation by number. In response to Complaint 1, the Association noted that it has historically provided at least two weeks' notice of meetings, and that the statute requires it to publish notice "where it is reasonably calculated to be available to a majority of the lot owners." As to Complaint 2, the Association stated the meeting never occurred. The Association's response to Complaints 3, 4, 5, 6, and 7 was the same as its response to Complaint, with the additional reiteration that the alleged meeting never took place.

As for Complaint 8, the Association noted that no meeting took place, and that the Google message board resulted from a Board of Directors Resolution dated February 21, 2018. This same response was indicated for Complaint 9. The Association also applied

⁶ 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.

the same response to Complaint 10, with additional language noting that the “the GC BOD’s web site, email address, Google Message Forum, and the ARB’s email address does, in fact ‘provide reasonable, effective and free communications to communicate among members and the Board.’”

In response to Complaint 11, the Association stated that no meeting took place and the flags were not removed, but instead, were replaced due to wear and tear. A similar response was provided for Complaint 12 – no meeting was held, and the decision to cut the tree down resulted from an inquiry by the Complainant and a determination by the Association that a tree was blocking a light necessary for traffic and an offer was made by HLS to cut the tree down at no cost.

The Association requested additional information in order to respond to Complaint 13. It is not clear if that information was provided – there was no evidence of such in the NFAD.

In response to Complaint 14, the Association again notes that no meeting was held, and that there were email discussions between the board and the management company regarding reimbursement to the association family for the website.

The Association stated that no meetings took place as alleged in Complaint 15.

As to Complaint 16, the Association referenced the draft minutes of the September 9, 2019 meeting where a motion was made in an open meeting to elect officers for the board of directors, and the motion was seconded and passed. The Association applies this same response to Complaint 17 and also notes that the Bylaws provide for election of officers by the board of directors. The same response is provided for Complaint 18, noting that the Bylaws allow for the same office to be held by the same person.

In response to Complaint 19, the Association wrote that the website “is a clear example of a ‘reasonable, effective and free method of communications,’” and that the omission of a name on the Communications Committee was an oversight.

The Association did not respond to Complaint 20, noting that there is ongoing litigation related to the election and the documents referenced have been requested in discovery by the Complainant’s attorney. The same response was provided for Complaint 21, with an additional note that there was no meeting of the board of directors after the May 2019 Annual Meeting.

The Association addressed Complaints 22 and 23 with explanations regarding the perceived violations, but because these two complaints are dependent upon the governing documents of the Association, they will not be addressed in this Determination.

Determination

This NFAD contained an enormous amount of information and many allegations, but there was little in the way of support for those allegations. Complaints 1, 2, 3, 4, 5, 6, and 7 all rely on a meeting that was allegedly held without notice on September 16, 2019.

In its response to these complaints, the Association stated that such a meeting was never held. If the meeting was never held, any complaints related to meeting notice are without merit. There was no evidence in the NFAD that demonstrated that a meeting was held. Therefore, I do not find that the Association was in violation of common interest community law with respect to Complaints 1 through 7.

Complaint 8, alleging a meeting without notice also seems without merit in light of the fact that the Association stated that it had a resolution dating back to February 2018 addressing the adoption of the Google forum and email addresses that were the supposed topic of the meeting. In addition, no evidence was provided of a meeting, only that a meeting may have taken place between July 15, 2019 and September 9, 2019. Without evidence of a meeting taking place, I cannot find that the Association failed to provide notice of a meeting.

The allegation in Complaint 9 that the Association did not provide a reasonable, effective and free method of communication, a violation of §55.1-1817, when it failed to notify every member of the existence of the Google forum cannot be seen as a violation of the applicable statute, since there is nothing in that statute that requires notice to all members of such communication method. While notification may be logical if a new method of communication is adopted, the statute does not require such notification.

The Complainant alleges the same violation of §55.1-1817 in Complaint 10, stating that “no record of the approval of email addresses has been recorded in an open meeting.” Again, no violation of the specified statute can be found as the statute only requires that a method of communication exist. §55.1-1817 does not address how it is to be created or approved. The Complainant also alleged a failure to provide notice of the meeting that took place to create or adopt the email addresses, but the Association said, prior to these allegations, that the February Resolution 2018 was voted on and passed in March 2018 by the Board of Directors. Because this office cannot review or interpret governing documents of an association, such as a Resolution, we cannot provide a determination as to whether the February 2018 Resolution was sufficient to create and adopt email addresses.

According to the Association, the flags in Complaint 11 were not removed but merely replaced. No meeting took place and therefore no notice of a meeting was required. No evidence of a meeting was included in the NFAD. I find no violation.

In Complaint 12, the Association said that it did not have a meeting to decide whether it should cut down a tree, but instead responded, according to the final decision, to a potentially dangerous situation where a tree was shielding a light. If there was no meeting, and no evidence was provided that there was a meeting, no notice of a meeting was required and no violation has occurred.

The Association did not provide a response to Complaint 13 as it needed additional information to do so, and stated this in the final decision. Without a final decision on this Complaint, no Determination can be provided.

Complaint 14, asserting that there was no notice of a meeting regarding payment to an association family for website services appears to be without merit since the Association stated that no meeting was held to determine whether to reimburse the family,

but there were email discussions on the topic. Since there was no meeting there can be no violation of the meeting notice requirements.

The 15th complaint, related to ARB guideline amendments, and alleging a failure to provide notice of a meeting that happened between June 11, 2019 and the present does not provide any evidence of a meeting having been held. In addition, the Association said in its final decision that there was no meeting during this time to “discuss ARB covenants violations and voting and approval of change to the ARB guidelines.” Any other portions of this complaint are irrelevant if there was no meeting. If no meeting was held, there can be no violation of meeting notice requirements.

Executive sessions are appropriate only for a limited number of circumstances, and unless the Association convened in executive session for one of the accepted reasons as listed in §55.1-1816.C, it may not have been appropriate for the Association to enter into executive session to discuss the officer elections. However, there was not enough information in Complaint 16 or the Association’s response to make that determination. It does appear, however, that regardless of whether the Association entered executive session properly, it did return to an open meeting and vote on the officer elections in that open meeting.

Complaint 17 alleged the Association failed to use a ballot vote to elect officers. The Association replied to this complaint by stating that a ballot vote was not required and that the Bylaws of the Association require that the officers be elected by the board. Because this complaint is dependent upon a governing document of the association, no determination can be provided by this office.

Complaint 18, another allegation of improper use of an executive session, was related to the “splitting” of the Secretary and Treasurer positions. The Association replied that the Bylaws of the Association allow these positions to be held by two people or both positions may be held by one person and that the election of officers was done in open session. As above, because this complaint is dependent upon a governing document of the Association no determination can be provided by this office.

No violation can be found regarding Complaint 19, where the Complainant has alleged that the Association did not disclose existing members on a committee and therefore violated the requirement for a reasonable, effective and free method of communication. There does not appear to be a connection between the committee members and the applicable statute and the Complainant does not explain how the failure to list committee members violates the statute.

In regard to Complaint 20, where the Complainant has alleged that the Association allowed members not in good standing to cast votes and proxies, I can find no violation of §55.1-1807.2. As required by the statute, it appears members in good standing were permitted to vote and thus no violation occurred. The right of members not in good standing to vote is entirely outside the scope of common interest community law and dependent upon an association’s own governing documents and not addressed in the statute.

The 21st Complaint alleged a failure to provide notice of a meeting to check ballots. There is not sufficient evidence to determine if a meeting took place, since no specific date is provided, and instead, a range of days as to when the meeting may have occurred was given by the Complainant. It is not clear whether the business of the association was carried out at this alleged meeting as I do not fully understand what was alleged to have taken place. The Association stated that no meeting took place. Absent sufficient information, I cannot make a determination as to whether there was an improperly noticed meeting.

Complaints 22 and 23 alleged that the Association failed to enforce its rules and regulations. Because the only way to determine the validity of this complaint would be for this office to review and interpret those governing documents, no determination can be provided since such review is outside the scope of our authority.

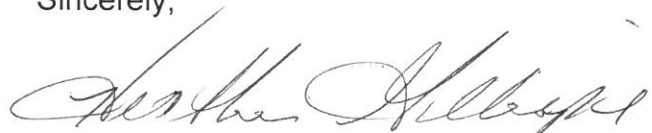
Required Actions

The Association needs to make certain it enters executive session only for reasons that are permitted under common interest community law. It was not clear if there was a violation related to executive session so this is merely a cautionary suggestion for the future.

The Final Decision lacked information required under the Common Interest Community Ombudsman Regulations. The Association must make certain for any future final decisions that it includes the Association registration number, the Manager's name and license number (if applicable), the right to file a Notice of Final Adverse Decision 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)⁷).

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Greenfield Crossing Homeowners' Association

⁷ 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.