



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

Brian Ball
Secretary of
Commerce and Trade

Mary Broz-Vaughan
Director

August 12, 2020

Complainant: Marvin Kenan
Association: Retreat at Chancellorsville Homeowners Association
File Number: 2021-00189

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 April 17, 2020. The Association provided a response to the Complainant dated June 24, 2020. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated July 15, 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." (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.

Determination

The Complainant has outlined three separate concerns regarding his association, its board of directors, and decisions regarding community benches. Two of those concerns are outside the scope of authority for this office and as they are related to the decision making authority of the board, and the funding of the benches. Neither of those falls under common interest community law and there was no allegation of a violation of common interest community law related to those complaints.

The issues raised in the third complaint were that the Board of Directors failed to hold a public meeting where owners would have had the opportunity to comment or discuss the bench issue, and that the Board of Directors failed to provide minutes of its actions at its next meeting. The Complainant believes the Association violated 55-510.2 (now 55.1-1816¹) of the Property Owners' Association Act and stated that this statute requires that "a record of the decided action is published within the minutes of the next meeting of the Board."

The Association wrote in its response to the Complaint that "the Board of Directors has the authority to act outside of a meeting as permitted in Article III, Section 5 of the Bylaws and 13.1-865 of the Virginia Code." The Association stated that it had the authority to decide how it would fund the benches and could adopt rules and regulations regarding the installation of the benches.

While I understand the Complainant's frustration, I cannot find that the Association has violated common interest community law. There is nothing in the Property Owners Association Act that specifies when a board must have a meeting to discuss potential action that it may take. And while the Property Owners' Association Act does require notice of all meetings, if there is language in the Bylaws that allows a

1

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.

board to act outside of a meeting, this office cannot make a determination that an action outside of a meeting is improper since we can neither interpret nor enforce governing documents of an association. In addition, the Virginia Nonstock Corporation Act, which was also referenced in the Association's response, allows for action without a meeting, but this office cannot interpret or enforce that Act and therefore cannot determine if it would be applicable and appropriate in the present situation.

While I can confirm that 55.1-1816 of the Property Owners' Association Act does require notice of all meetings, it is not clear from the complaint if the Board actually held a meeting or if it simply took action without a meeting. It seems the issue here may be that no meeting was actually held, thus no notice was required, and the Association took action without a meeting based on its belief that it could do so under its own Bylaws as well as the Virginia Nonstock Corporation Act. Without evidence of a meeting taking place, this office cannot find that the Association failed to provide notice of a meeting.

A failure to record the minutes of the vote and present them at the next public meeting must be a requirement under either the Bylaws or the Virginia Nonstock Corporation Act. There is no such requirement in the Property Owners Association Act. There is a requirement that minutes be recorded for a board meeting, but as noted above, I am not able to determine if there was an actual meeting or merely action taken without a meeting. Because I cannot determine if there was an actual meeting and because there is no requirement in common interest community law that minutes must be presented at the next public meeting, I cannot make a determination that a failure to record or provide such minutes was a violation of the Property Owners' Association Act.

Required Actions

No action is required of the Association as it pertains to the Complaint. However, the Association did not fully adhere to the Common Interest Community Ombudsman Regulations when drafting its response to the Complaint. Future final decisions must include the Complainant's right to file a Notice of Final Adverse 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). In addition, the Association's registration number must be included as well as the common interest community manager's name and license number (18 VAC 40-70-50 (10)³), if applicable.

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.

³ 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.

Please feel free to contact me if you have questions.

Sincerely,

Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Retreat at Chancellorsville Homeowners Association, Inc.