



COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

Mary Broz-Vaughan
Director

October 25, 2021

Complainant: David Fowler
Association: Hillcrest Farms Community Association
File Number: 2022-00734

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 August 26, 2021. The Association provided a response to the complaint dated September 22, 2021. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman which was received September 29, 2021.

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 and we cannot provide a determination on such a complaint. Common interest community law is limited to the Virginia Condominium Act, the Property Owners’ Association Act, and the Virginia Real Estate Cooperative Act.

This Determination is final and not subject to further review.

Determination

The Complainant has alleged that the Association has violated paragraphs one and five of §55.1-1807¹ of the Property Owners’ Association Act by passing a resolution that allows owners to attend board meetings virtually, but requires board members to attend meetings in person. The Complainant also believes this requirement is a violation of §55.1-1832(B)² of the Property Owners’ Association Act which allows lot

¹ Every lot owner who is a member in good standing of a property owners' association shall have the following rights:

1. The right of access to all books and records kept by or on behalf of the association according to and subject to the provisions of § 55.1-1815, including records of all financial transactions;

5. The right to serve on the board of directors if duly elected and a member in good standing of the association, unless the declaration provides otherwise.

² A. Unless expressly prohibited by the declaration, (i) any notice required to be sent or received or (ii) any signature, vote, consent, or approval required to be obtained under any declaration or bylaw provision or any provision of this chapter may be accomplished using electronic means.

B. The association, the lot owners, and those entitled to occupy a lot may perform any obligation or exercise any right under any declaration or bylaw provision or any provision of this chapter by use of electronic means.

C. An electronic signature meeting the requirements of applicable law shall satisfy any requirement for a signature under any declaration or bylaw provision or any provision of this chapter.

D. Voting on, consent to, and approval of any matter under any declaration or bylaw provision or any provision of this chapter may be accomplished by electronic means, provided that a record is created as evidence of such vote, consent, or approval and maintained as long as such record would be required to be maintained in nonelectronic form. If the vote, consent, or approval is required to be obtained by secret ballot, the electronic means shall protect the identity of the voter. If the electronic means cannot protect the identity of the voter, another means of voting shall be used.

E. Subject to other provisions of law, no action required or permitted by any declaration or bylaw provision or any provision of this chapter need be acknowledged before a notary public if the identity and signature of such person can otherwise be authenticated to the satisfaction of the board of directors.

F. Any meeting of the association, the board of directors, or any committee may be held entirely or partially by electronic means, provided that the board of directors has adopted guidelines for the use of electronic means for such meetings. Such guidelines shall ensure that persons accessing such meetings are authorized to do so and that persons

owners to perform “any obligation or exercise any right under any declaration or bylaw provision or any provision of this chapter by use of electronic means.” The Complainant stated that he has been excluded from several meetings as a result of this resolution

The Complainant further alleges a violation of the Virginia Fair Housing Act, but because that is not an act that falls under our authority, we cannot consider whether such a violation has occurred, and would suggest that the Complainant contact the Fair Housing Office for further guidance on that matter.

The Association responded to the Complaint by stating that the resolution does not violate the Condominium Act, that it meets the requirements of the Act, and that the Complainant can participate by attending the meeting.

This office has no authority to review or interpret a resolution or any other governing document of an association, but we can address allegations of violations of common interest community law resulting from the application of governing documents. In this instance, the Complainant alleges that he has been denied the right to attend a meeting virtually.

I do not find that there has been a violation of §55.1-1807(1) or (5). The former is regarding access to books and records and there was no mention of a request for access to the books and records, and the latter is regarding an owner’s right to serve on an association board which does not appear to be applicable since the Complainant is a member of the board. While we could potentially delve further into the concept of “serving” on the board and whether this particular situation allows the Complainant to serve, that would be a review and decision for the courts, as the term serve or service is not defined in common interest community law, which means we cannot create or provide a definition.

Effective July 1, 2021, the General Assembly enacted new legislation that permitted associations to hold meetings entirely or partially by electronic meetings. This legislation was an amendment to the existing language in §55.1-1832. The statute also states, in Paragraph F, that “[t]he board of directors shall determine whether any such meeting may be held entirely or partially by electronic means.” The Complainant hinges his theory that he should be permitted to attend the meeting virtually on Paragraph B of the same statute which states “[t]he association, the lot owners, and those entitled to occupy a lot may perform any obligation or exercise any right under any declaration or bylaw provision or any provision of this chapter by use of electronic means.” The

entitled to participate in such meetings have an opportunity to do so. The board of directors shall determine whether any such meeting may be held entirely or partially by electronic means.

“Electronic means” means any form of communication, not directly involving the physical transmission of paper, that creates a record that may be retained, retrieved, and reviewed by a recipient of such communication. A meeting conducted by electronic means includes a meeting conducted via teleconference, videoconference, Internet exchange, or other electronic methods. Any term used in this definition that is defined in § 59.1-480 of the Uniform Electronic Transactions Act shall have the meaning set forth in such section.

Complainant believes this language provides for his right to attend the meeting electronically if he so chooses. However, under the Property Owners' Association Act definitions, the definition of "electronic means" seems to provide two definitions – one for "electronic means" and one for "a meeting conducted by electronic means." The definition for electronic means, which is the only term used in §55.1-1832(B), pertains only to communication. Whereas the definition for a meeting conducted by electronic means sets forth multiple ways in which a meeting can be held electronically. Because there is a definition for 'electronic means' and a separate definition for a "meeting conducted by electronic means" and because §55.1-1832(B) does not mention a meeting conducted by electronic means, it appears that §55.1-1832(B) only pertains to communication since it makes no mention of meetings. As such, I cannot find that the Association is in violation of this statute.

I would also note that if §55.1-1832(B) applied to meetings, it would appear that an owner could require an association to hold a meeting virtually even if the board chose not to do so. The discretionary language in §55.1-1832(F) does not support such a reading of the law.

Required Actions

No action is required of the Association.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Hillcrest Farms Community Association