



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Glenn A. Youngkin
Governor

Brian P. Wolford
Interim Director

G. Bryan Slater
Secretary of Labor

August 16, 2024

Complainant: Don Pence
Association: Aldie Estates 1 Homeowners Association
File Number: 2025-00218

DETERMINATION - NOTICE OF FINAL ADVERSE DECISION

Introduction

This matter came before the Office of Common Interest Community Ombudsman ("Office") for review on July 25, 2024, as a result of the Notice of Final Adverse Decision ("NFAD") submitted by Don Pence ("Complainant"). The Complainant initially submitted complaints to the Aldie Estates 1 Homeowners Association Board of Directors ("Board") on May 1, 2024; and the Board issued a notice of final decision on June 27, 2024. Therefore, the NFAD was timely filed and within the jurisdiction of this Office, which has been designated to review final adverse decisions and determine if the decisions conflict with laws or regulations governing common interest communities.

Issues to be Decided

In the Complaints, the Complainant raises four issues: (1) the Board failed to convene a board meeting; (2) the Board failed to provide the Complainant notice of board meetings; (3) the Board failed to provide the minutes of board meetings requested by the Complainant; and (4) the Board discussed and transacted business of the Association in informal settings. As explained below, the Office finds that the Board complied with the applicable law with regard to issues 1 and 2; but that the Board failed to comply with applicable law as to issues 3 and 4.

Authority

In accordance with its regulations, the Common Interest Community Ombudsman (CICO), as designee of the Agency Director, is responsible for determining whether a "final adverse decision may be in conflict with laws or regulations governing common interest communities." (18 Va. Admin. Code ("VAC") § 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 of the Code of Virginia of 1950, as amended ("Va. Code") 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.

The only documents that will be considered when reviewing a NFAD, in accordance with Regulation 18 VAC 48-70-90, are the association complaint submitted by a complainant to the association (and any documents included with that original complaint), the final adverse decision from the association, and any supporting documentation related to that final adverse decision. Other documents submitted with the Notice of Final Adverse Decision cannot be reviewed or considered. Further, this Determination is final and not subject to further review or appeal pursuant to Va. Code § 54.1-2354.4(C).

If, within 365 days of issuing a determination that an adverse decision is in conflict with laws or regulations governing common interest communities, we receive a subsequent NFAD for the same violation, the matter will be referred to the Common Interest Community Board to take action in accordance with Va. Code §54.1-2351 or §54.1-2352 as deemed appropriate by the Board.

Determination

As described more fully below, the Office has determined, upon a review of the materials submitted with the NFAD, that there is insufficient evidence to conclude that the Board acted in conflict with the applicable law as to issues 1 and 2; but that the Board did act in conflict with the applicable law as to issues 3 and 4. This determination will address each issue raised by the Complainant separately.

1. Board failed to convene board meeting.

The Complainant alleges that the Board failed to convene a board meeting. The Complainant states that the Board has had homeowners’ association (HOA) meetings but not board of directors’ meetings. The Board, in its response points out that the HOA meetings were the board of directors’ meetings and that there is no distinction.

It is true that the Property Owners’ Association Act references board of director meetings; however, any association meeting open to all the members with the board of directors present, and where the business of the association is discussed and transacted, is a board of directors meeting. The applicable law does not provide for a different or separate HOA meeting. Va. Code §55.1-1816. Subsection G the Va. Code §55.1-1815 refers to meetings of the association, which shall be convened at least once a year, however, this Office interprets the terms “meetings of the association” to include board of directors’ meetings. In other words, the terms “meetings of association” is broader and more encompassing, to include board of directors’ meetings, and the

initial association meetings to elect its board of directors. In this case, since both parties agreed that the Board had HOA meetings, this Office cannot conclude that the Board's actions conflict with the applicable law.

2. Board failed to provide the Complainant notices of board meetings.

The Complainant asserts that his multiple requests to be notified of board of directors' meetings were ignored by the Board. The Board, in its response, points out that it has provided the Complainant notices of its meetings in accordance with the Complainant's request. The Complainant admits that he received notices of the HOA meetings but not those of board meetings. As pointed above, this issue stems from the distinction without a difference as to HOA and board of directors' meetings. Thus, since both parties agreed that notification was provided as to HOA meetings, this Office cannot find that the Board's actions conflict with the applicable law.

3. Board failed to provide minutes of board meetings as requested by the Complainant.

The Complainant alleges that the Board failed to provide the minutes of board of directors, subcommittee or other committee meetings that he requested. The Board initially responded that it has not had any board of directors, subcommittee, or other committee meetings; however, the Board later acknowledged that it had communications and made decisions through emails and text messages. The Board also seems to acknowledge that making decisions via electronic devices was not the best way to go but implies that the legal counsel advised against the Board sharing the email communications and text messages. The Virginia Property Owners' Association Act gives any homeowner in good standing access to the association's minutes of the meetings. *See*, Va. Code §§ 55.1-1815; 55.1-1816. And the POAA requires boards to take minutes at its meetings to make available to its lot owners. *See*, Va. Code § 55.1-1816(A). The exclusion of subsection C of Va. Code § 55.1-1815: meeting minutes of executive section of the board of directors, does not apply in this case because the meetings were not held pursuant to Va. Code §§ 55.1-1816(C).

Since the Board elected to use emails, telephones, and text messages in communicating and transacting the association business, those communications, in the absence of any other documentation, formulate the minutes for those meetings (though the meetings themselves are likely improper). Therefore, the Board is obligated to make the emails and text messages available for members' inspection and coping in accordance with Va. Code §§ 55.1-1815 and 55.1-1816. Failure to do conflicts with the applicable law.

4. Board discussed and transacted business of the Association in informal settings.

The Complainant states that the Board conducted the business of the Association through the telephone, email and text messages is in violation of Va. Code § 55.1-1816. The minutes of the board meeting on June 26, 2024, indicates that the Association's business, such as contracts, appointment or reappointments of board members, and repairs have been discussed, voted upon, approved, and ratified by the board members via emails and texts. The applicable law states in pertinent part that:

A. All meetings 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. Va. Code §55.1-1816 (A).

In this case, the Complainant states that the Association Board of Directors frequently discussed and transact the Association business either through email, over the telephones or text messages without proper notice to the membership. The Board does not deny such allegations. Rather, Diana Fritts, speaking on behalf of the Board, gave excuses such as the Board members being too busy, having other commitments; and that some decisions need to be made quickly. These reasons simply do not justify a failure to comply with the applicable statutes. The General Assembly requires association business to be discussed and transacted in the sunshine and in an appropriate forum where lot owners can attend, comment, and observe. *See*, Va. Code §55.1-1816. Thus, this Office finds that the Board here is blatantly circumventing the open meeting requirements of Va. Code §55.1-1816 (A). The Board should cease this immediately and come into compliance with the open meeting requirements of the POAA.

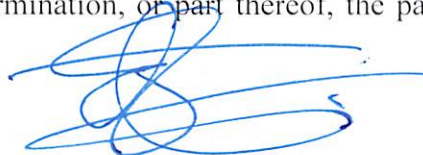
Conclusion

As to the Complainant's complaints, based upon the information in the record, including the original complaint, its accompanying documents, as well as the NFAD, this Office concludes that the Board acted consistent with the applicable law as to issues 1 and 2, but this Office finds that the Board's actions are in conflict with the applicable laws regarding issues 3 and 4.

Decision

This Office finds no violation of the applicable laws on the part of the Board as to failure to convene board of directors' meetings, and failure to provide notice of board of directors meeting, and therefore no action is required of the Board on those issues. However, this Office finds the Board did not act in compliance with the applicable law regarding its failure to provide access to the minutes of the board meeting and its failure to discuss and transact Association business in an open meeting rather than doing so through secretive communications out of view of its lot owners. As a result, this Office recommends that the Board: (1) provide the Complainant access to the emails and text messages involved in the business of the Association; and (2) immediately cease and desist from using email, telephone, and text messages from dealing with the Association business and instead hold meetings in open forums as required by Va. Code § 55.1-1816.

If any party is dissatisfied with this determination, or part thereof, the party could seek remedies in civil court.



Justina Ehiawaguan, Esquire
CIC Ombudsman

cc: Board of Directors

Aldie Estates 1 Homeowners Association