



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

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Governor

Brian P. Wolford
Interim Director

G. Bryan Slater
Secretary of Labor

July 30, 2024

Complainant: Janet L. Weatherford-Baker
Association: Bien Venue Plantation
File Number: 2024-02148

DETERMINATION - NOTICE OF FINAL ADVERSE DECISION

Introduction

This matter came before the Office of Common Interest Community Ombudsman ("Office") for review on March 28, 2024, as a result of the Notice of Final Adverse Decision ("NFAD") submitted by Janet L. Weatherford-Baker ("Complainant"). The Complainant initially submitted a complaint to the Bien Venue Plantation Property Owners' Association, Inc., Board of Directors ("Board") on March 14, 2024, and the Board issued a notice of final decision on March 18, 2024, on the complaint. 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 Complaint, the Complainant raises one major issue: (1) Whether the Board's method of amending the Association Declaration violates applicable law. As explained below, this Office concludes that the action of the Board does not violate applicable law.

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 the Board’s action to amend the Association Declaration to ban short-term rentals does not violate the applicable law. This determination is addressed below.

1. Does the action of the Board in amending the Association Declaration violate the law?

The Complainant alleges that the Board acted unfairly and deceptively secured the consent of the homeowners to add a short-term rental ban to the Association Covenants. The Complainant states that the Board sent out approval/consent forms to each homeowner asking that the form should be signed, dated, and returned to the Board before October 15, 2023. The Complainant posits that the Board, failing to receive the required 2/3 approvals before October 15, 2023, extended the time to return the forms. The Complainant asserts that after extending the time without notification to the homeowners, the Board went on and used various tactics, such as phone calls and home visits, to persuade homeowners to approve the ban. The Complainant also alleges that the Board falsely claimed that the ban was necessary to curtail the vandalism that was being perpetrated by the short-term renters. The Complainant claims that, upon investigation, the alleged vandalism was the work of another homeowner, not the short-term renters.

The Board in its response simply states that it went through the covenant amendment with guidance and consultation of legal counsel and that it obtained the approval of 2/3 of the property owners to add an amendment banning short-term rentals. The Board states that its decision to add a ban of short-term rentals to the covenant was based on the homeowners' concerns of vandalism, destruction, and disruption of the Association community property.

Under the Common Interest Community law, an association is not permitted to prohibit a homeowner from renting out his/her property, except when expressly authorized in the declaration. *See*, Property Owners Association Act, Va. Code §55.1-1806. In this case, the Association had no restrictions against property rental in its declaration until 2023 when it proceeded to amend its declaration to include a ban on short-term rentals. In accordance with Va. Code §55.1-1829(D), the Association sought and obtained 2/3 votes of the lot owners to amend its declaration to include a ban to short-term rentals. According to the Minutes from the Board of Director meeting on December 2, 2023, there were 92 votes in favor of the ban, 11 votes against, and 29 homeowners abstained or did not reply. The Complainant argues that the Board used false pretense and applied pressure to get the votes. The Board's ulterior motive or its method of obtaining the required votes is not within the jurisdiction of this Office. Based on the evidence, the Board may have made its preference known and pushed for it, but the Complainant enjoyed the same right to lobby, advocate, or campaign for her position. Nothing under the common interest community law prohibits such activities.

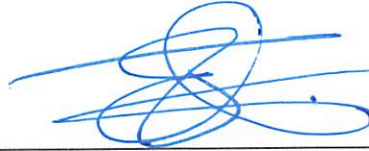
Notwithstanding the above, there are areas of concern related to the Board's response to the Complaint. Specifically, the Board did not actually issue a formal final decision, it merely sent an email to the Complainant stating that it sought legal counsel in the process. The Common Interest Community Ombudsman Regulations require an association's final decision to include, amongst other things, specific citations to applicable association governing documents, laws, or regulations that led to the final determination; the registration number of the association; the name and license number of the manager, if applicable; and the complainant's right to file a Notice of Adverse Decision with the Ombudsman office as well as the applicable contact information of the Ombudsman office. 18 VAC 48-70-50. The Board's email does not contain any of the above required information. Thus, the Board's response is deficient under the Regulations, 18 VAC 48-70-50.

Conclusion

As to the Complainant's allegations, 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 did not violate the applicable law and as a result, no further action is required on that issue. However, this Office does find that the Board's final determination did not comport with the regulations setting forth an association's obligations to cite authorities that support its determination.

Decision

While this Office does not find that the Board violated applicable law, it nevertheless, finds that the Board's email as its final decision was deficient. Therefore, this Office encourages the Board to fully acquaint itself with the Virginia Condominium Act's provisions as well as the Common Interest Community Regulations for the contents of its final decisions so that it can ensure that it follows those provisions precisely. By doing so, the Board can ensure that it includes the necessary information in all its future final decisions. If the Complainant is dissatisfied with this determination, or part thereof, the Complainant could seek remedies in civil court.



Justina Ehiawaguan, Esquire
CIC Ombudsman

cc: Board of Directors
Bien Venue Plantation Property Owners' Association.