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COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

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Director

December 3, 2024

Complainant: Ben LoPresti
Association: Smithfield Manor Townhomes Community Association, Inc.
File Number: 2025-01092

DETERMINATION - NOTICE OF FINAL ADVERSE DECISION

Introduction

This matter came before the Office of Common Interest Community Ombudsman ("Office") for review on October 25, 2024, as a result of the Notice of Final Adverse Decision ("NFAD") submitted by Ben LoPresti ("Complainant"). The Complainant initially submitted eight different complaints to the Smithfield Manor Townhomes Community Association, Inc., Board of Directors ("Board") on March 6, 2024; April 12, 2024; April 13, 2024; April 14, 2024, April 16, 2024, April 17, 2024, and July 11, 2024; and the Board issued a notice of final decision on all the complaints on October 16, 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 alleged eight issues in which the Board failed to comply with applicable authorities. Specifically, it is alleged that the Board failed to: (1) open the board of directors' meeting to all members of the Association; (2) provide the Complainant records about the results of the most recent election of the board members; (3) give the Complainant the opportunity to participate in the election of board members; (4) provide records of decisions by board members regarding legal consultations; (5) provide minutes of the Board of Directors' meeting; (6) provide a copy of the Association membership list and addresses; (7) provide books and financial records; and (8) respond to a request to be notified of all meetings. As explained more fully below, the Office finds that the Board complied with the applicable law regarding issues 5, 6, 7 and 8; but that the Board failed to comply with applicable law as to issues 1, 2, 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 conflicts 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

The Office has determined, upon a review of the materials submitted with the NFAD, that there is insufficient evidence to conclude that the Board’s actions or lack thereof violated the applicable law as to issues 5, 6, 7, and 8; but that the Board did act in conflict with the applicable law as to issues 1, 2, 3, and 4. This determination will address each issue raised by the Complainant separately.

1. The Board failed to comply with statutory provisions for closed executive session:

The Complainant alleges that on February 6, 2024, the Board held a meeting that was closed to the Association members. He states that the Board seemed to have had an executive session, immediately after the annual meeting, but the Board did not make a motion and specify the purpose of the executive session nor did the Board reconvene in an open forum afterward to identify the substance of the matters discussed in the closed executive meeting.

The Board, in its response, did not address this allegation, as a result, we assume that Board does not dispute the allegation. The applicable law in this case states in pertinent part that: “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.” Va. Code §§ 55.1-1816(A). The Code allows for closed executive meetings in limited circumstances when certain conditions are satisfied.

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; 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. Va. Code §§ 55.1-1816(C).

The allegation in this case is that Board convened a so-called closed executive session following the open annual meeting. There is no evidence that before convening the executive session, the Board made a motion and stated the purpose for the closed executive session. Furthermore, following the executive session, the Board did not reconvene in open meeting and vote on the matter(s) that should have reasonably been identified in the open meeting. Thus, the alleged closed meeting held by the Board on February 6, 2024, failed to comply with the applicable law.

2. The Board failed to provide the Complainant records about the results of the most recent election of the board members.

The Complainant states that the Association management company, Modern Collective, emailed homeowners on January 24, 2024, that the election of the board of directors took place and that the votes were in and accounted for. The Complainant asserts that he submitted a request for records about the results and specific details of the supposed election. He specifically asked for the date, total number of in-person ballots, total number of absentee ballots, and total number of votes for each candidate. The Complainant states that the Board failed to provide the requested records.

The Board, in its response, states that it provided the Complainant responses to all his questions regarding the election processes. The Board claims that the answers to the Complainant's questions that were provided are results of the election, date that notices were sent to homeowners, date in which election took place, and the minutes of the meeting in which the election took place.

The Virginia Property Owners' Association Act gives a homeowner the right to examine or obtain all the books, records, and minutes of the association, subject to some exclusions and exceptions. Va. Code §§55.1-1807 and 55.1-1815. In this case, the Complainant points out that he requested certain information which was not provided. The Board makes a general claim that it provided answers to all the Complainant's questions regarding the election. However, there is no evidence that the Board provided the specific information the Complainant requested, such as the total number of in-person ballots that were cast at the election, the total number of ballots received electronically, and the total number of votes for each of the candidates. The Board needed to have provided the requested information or let the Complainant know why such information was not provided. Thus, the Board's failure to do so is contrary to the applicable law.

3. The Board failed to give the Complainant an opportunity to participate in the election of board members.

The Complainant alleges that on January 24, 2024, the Association management company informed the homeowners that an election of board of directors took place, and that the votes were in, and accounted for. The Complainant states that in the Association meeting that took place on October 8, 2023, some people were nominated and some volunteered to run for seats on the board of directors, and the homeowners were informed that an election would be forthcoming where the homeowners could participate.

The Board, in its response, attempted to address the Complaint, however, due to the grammatical construct of the response, it is difficult to decipher what the Board is claiming. The response states in pertinent part that the Complainant:

“...received responses to all questions regarding the election processes via email by The Modern Collective Real Estate Group (our previous management company September 4th 2023-February 9th, 2024 concerning results of election, date that notices were sent to homeowners, date in which election took place as well as minutes of the meeting in which the election took place ...”

It is unclear whether or not the Board is claiming that it sent the notice of the meeting where the board of directors were elected to the homeowners prior to the election. If that was the case, the Board should have made it clear in its response and/or forwarded a copy of the notice to this Office. Since none of that was done in this case, we turn our attention to whether the Board violated the applicable law for failure to provide proper notice of the meeting where the board of directors were elected to the Complainant.

The Virginia Property Owners' Association Act gives homeowners in good standing the right to cast a vote in any issue requiring a vote by the association membership. Specifically, the VPOAA states: "Every lot owner who is a member in good standing of a property owners' association shall have ... 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." Va. Code §55.1-1807 (2). In this case, the Complainant states that he was deprived of his right to cast a vote in the election of the board of directors because the Board failed to provide him with the notice of the meeting where the election was held. Since there is no evidence to show that the Board provided the Complainant a proper notice of the meeting, we conclude that the Board violated the applicable law.

4. The Board failed to provide records of decisions by board members regarding legal consultations.

The Complainant asserts that on January 24, 2024, the Association management company informed homeowners that in November of 2023 the Association (or neighborhood) made a decision to retain legal counsel. The Complainant points out that he was on the Board in November 2023 but was unaware of any such decision. He states that he then requested for the records of the decision made by the Association to hire legal counsel, but the Board failed to provide said records.

Again, the Board in its response did not address the issue. If the Board or the Association as a whole made a decision to retain legal counsel, the Board should have a record of such decision, or at the least, the minutes of the meeting where the Association neighborhood made the decision to retain legal counsel, as such a decision would reasonably be expected to be captured in those meeting minutes. The Complainant may obtain such record/minutes pursuant to Va. Code §§55.1-1815; 1816. Since the Board failed to respond to the Complainant's request for the record of the decision made by the neighborhood to retain legal counsel, the Board is in violation of the applicable law.

5. The Board failed to provide minutes of the Board of Directors' meeting.

The Complainant alleges that the Board held a meeting on February 6, 2024, that was closed to the homeowners and that he requested the minutes of the meeting but was denied. The Board, in its response, states minutes of meetings are posted on the Association community website. The Board points out that all minutes can be obtained through the Association portal.

While the Complainant is entitled to have access to the minutes of the board of directors under Va. Code §§55.1-1815 and 1816; there is no evidence before this Office that shows that the Complainant is unable to obtain the requested minutes from the Association portal or that the minutes are not available on the Association portal. Therefore, we cannot conclude that the Board violated the applicable law.

6. The Board failed to provide copy of the Association membership list and addresses.

The Complainant claims that he requested, but the Board failed to provide, a copy of the Association membership list and addresses. In its response, the Board states that the membership list and addresses of homeowners are on the Association portal for access any time by any homeowner. Again, though the Complainant is permitted to obtain membership list and addresses under Va. Code §§55.1-1815 and 1816; we do not have any evidence to show that the Complainant is unable to obtain said information via the Association portal or that the information is not available on the Association portal. As a result, we are unable to find that the Board violated the applicable law.

6. The Board failed to provide books and records.

The Complainant alleges that he requested, and the Board failed to provide, a copy of the books and records, including all financial transactions, and detailed records of receipts and expenditures relating to the operation and administration of the Association within the past 12 months.

The Board, in its response, points out that all books and financial records have been made available to homeowners through the Association community portal which is accessible to members. The Virginia Properties Owners' Association Act allows the homeowners in good standing access to the association books and records. See, Va. Code §§55.1-1815 and 1816. In this case, the Board made its books and financial records easily accessible to all homeowners through its portal, and we do not have any evidence to show that the Complainant is unable to access the portal or unable to obtain the requested records. Thus, we cannot conclude that the Board is in violation of the applicable law.

8. The Board failed to respond to a request to be notified of all meetings.

The Complainant states that on April 15, 2024, he requested that he be notified on a continual basis of all meetings of the board of directors or of any subcommittee or other committee of the board of directors. The Complainant asserts that the Board has failed to respond to his request. The Board, in its response, points out that due to the fact that the Association has been in the process of transitioning from one management company to another, it has not had board of directors' meetings or subcommittee meetings since April 15, 2024.

The applicable law requires that homeowners who make a request to be notified, must be notified accordingly. The applicable law states in pertinent part that:

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. §55.1-1816(B).

In this case, the Complainant contends that the Board has failed to respond to his request. While the best practice would have been for the Board to acknowledge and respond to the request for notices of meetings, the Board is not required under the applicable law to do so, and as a result, we cannot impose upon the Board a condition that does not exist under the applicable law. Therefore, we cannot conclude that the Board violated applicable law for not acknowledging the Complainant's request to be notified of meetings. We do note, however, that the Board nonetheless remains obligated under the VPOAA to notify the complainant of any and all meeting that are held after submission of his request.

The Board's Final Decision Failed to Comply with CIC Regulations.

In reviewing this NFAD complaint, it was not difficult to notice that the Board's final decision is significantly lacking in form and substance. It did not address or discuss most of the Complainant's allegations. It appears that whoever drafted the decision was not familiar with the Regulations governing the required contents for a board's final decision. The Board did not cite any of its governing documents, laws, or regulations that supports its decision. Additionally, the Board failed to provide necessary information in its final decision. The Common Interest Community Ombudsman Regulations require an association's final decision to include:

- 1) Date of issuance;
- 2) Specific citations to applicable association governing documents, laws, or regulations that led to the final determination;
- 3) The association's registration number;
- 4) The name and license number of the common interest community manager, if applicable;
- 5) The complainant's right to file a Notice of Final Adverse Decision with this Office; and
- 6) The necessary contact information of this Office. Regulations, 18 VAC 48-70-50.

Thus, the Board's response is deficient under the Regulations, 18 VAC 48-70-50. Therefore, we strongly encourage the Board to make the necessary corrections and changes to its processes to ensure that it includes all required information in any future final decisions it issues to its membership or citizens who file a complaint with the Association.

Conclusion

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's actions are

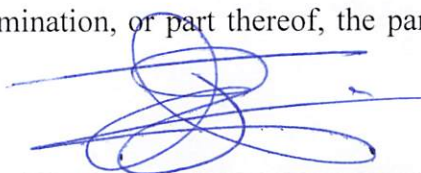
consistent with the applicable law as to issues 5, 6, 7, and 8; but this Office finds that the Board's actions or lack thereof, violate the applicable laws regarding issues 1, 2, 3 and 4. Additionally, we find that the Board's final decision failed to comply with the Regulations with regard to the information that must be included in its final decisions.

Decision

Since this Office finds no violation of the applicable laws as to the allegations that the Board failed to provide records of the most recent election; minutes of meeting of the board of directors, copy of membership list and addresses, books and records of financial statements, and response to request to be notified of meetings; 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 open the board of directors meeting to homeowners; failure to provide opportunity for the Complainant to participate in the election of the board members; failure to provide requested information regarding election; and failure to provide record of the decision or meeting where the Association decided to retain legal counsel. As a result, this Office recommends that the Board: (1) provide the requested information if it has not done so; (2) refrain from holding closed meetings; and (3) provide proper notice and hold elections of the board of directors in open forum as required by Va. Code § 55.1-1816.

As noted above, the Board failed to provide a final decision that comports with a formal final decision format or contains the necessary information as required by Common Interest Community Ombudsman Regulations. Therefore, the Board must ensure that it is familiar with those requirements and, in future decisions, includes the necessary information in all its future final decisions.

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

A handwritten signature in blue ink, consisting of several overlapping loops and a horizontal line extending to the right.

Justina Ehiawaguan, Esquire
CIC Ombudsman

cc: Board of Directors
Smithfield Manor Townhomes Community Association, Inc.