



COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

March 11, 2019

Brian Ball
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Michael Wiley
Association: Three Flags Homeowners Association
File Number: 2019-02080

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 December 21, 2018. The Association provided a response to the Complainant dated February 2, 2019. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated February 7, 2019 and received February 15, 2019.

Determination

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 §55-530(F) (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.

The Complainant alleged that the Association improperly terminated its contract with the community association manager by meeting in an executive session and not returning to an open meeting, as required by §55-510.1(C)¹ of the Property Owners' Association Act. He also noted that the management company was not present when the Association made its decision in the executive session. The Complainant included a cover letter which cannot be considered since it was not part of the original complaint to the association. In addition, documents that were included in the NFAD that were dated after the date the Complainant submitted his complaint to the Association will not be considered in this determination, since they, also, were not part of the original complaint to the Association.

The Association provided three different paragraph quotations in its response to the Complaint. The first was the aforementioned statute from the Property Owners' Association Act, §55-510.1(C). The second was a paragraph from Section 5 of the Bylaws of the Association, and the third was a paragraph from Section 3 of the Bylaws. The second reference was to a portion of the Bylaws entitled "Action Taken without a Meeting" and the third reference was entitled "Management Agent." The Association stated in its final decision that the decision to issue a letter to the management company terminating the contract was done in an open board meeting.

The Complaint did contain a copy of minutes from October 13, 2018, which appeared to indicate that the board did adjourn a meeting "in order for the Board to discuss and act on private issues." I am assuming the discussion of private issues was an executive session since the board meeting had been adjourned. The issues discussed, according to the minutes, included the decision to request a formal termination of the management contract and to write a termination letter that all the board members would sign. There is nothing in the minutes that indicates the board returned to an open meeting to vote on these matters, but instead, it appears the board voted during the private discussion.

Based on the minutes, it appears the Association did not move into executive session correctly, nor did it move out of an executive session properly. It also appears that the board voted on a matter or matters during executive session, rather than in an open meeting.

¹ C. The board of directors or any subcommittee or other committee thereof may convene in executive session to consider personnel matters; consult with legal counsel; discuss and consider contracts, pending or probable litigation and matters involving violations of the declaration or rules and regulations adopted pursuant thereto for which a member, his family members, tenants, guests or other invitees are responsible; or 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 thereof, 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.

The requirements for executive session are fully spelled out in §55-510.1(C) of the Property Owners' Association Act. The board should have had an affirmative vote in an open meeting prior to convening in executive session. The reason for the executive session needed to fall under one of the acceptable reasons as outlined in §55-510.1(C). After the discussion in executive session was complete, the board needed to return to an open meeting and vote upon the matter in order to make the decision effective. There did not appear to be a motion and purpose stated before going into executive session, it is not clear if the reason for convening in executive session was appropriate although it did appear that the board was discussing a contract, and the board does not appear to have reconvened in open meeting to vote on its decision, but instead, voted during the executive session.

As far as the failure of the Association to include the management company in its meeting, there is no requirement that they do so under the Property Owners' Association Act.

Required Actions

The Association needs to ensure that any future executive sessions fully comply with the requirements set forth in the Property Owners' Association Act. A failure to do so may result in referral of the matter to the Common Interest Community Board for enforcement action if it considers such action appropriate.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Three Flags Homeowners Association