



COMMONWEALTH of VIRGINIA  
Department of Professional and Occupational Regulation

Ralph S. Northam  
Governor

March 22, 2019

Brian Ball  
Secretary of  
Commerce and Trade

Jay W. DeBoer  
Director

Complainant: Malynda Hetrick  
Association: Three Flags Homeowners Association  
File Number: 2019-02130

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*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.*

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Complaint

The Complainant submitted a complaint to the Association dated January 18, 2019. The Association provided a response to the Complainant dated February 13, 2019. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated February 16, 2019 and received February 21, 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 included a number of concerns in the complaint she submitted to the Association. Her first complaint was that residents should not be in fear of retaliation when contacting board members. There was no allegation that any violation of common interest community law had taken place and therefore this is not a complaint that falls under our jurisdiction and therefore no final determination can be provided. The second complaint was that an open vote was not conducted in order to terminate the management company. The Complainant referenced §55-510 of the Property Owners' Association Act (Act) but did not specify which portion of the statute was involved. That particular statute refers to meetings of the association and access to the books and records. I believe that the Complainant meant to refer to §55-510.1(C)<sup>1</sup> which addresses executive sessions of the board of directors. The third complaint was a statement that "assessments and late fees penalty should be of five percent" with a reference to §55-513.3<sup>2</sup> of the Act.

The remainder of the Complaint included questions or suggestions and did not reference or suggest any violations of common interest community law or provide any references to a specific statute or statutes. As previously stated, only allegations of violations of common interest community law or regulation can be addressed in this Determination.

As was the case with a recent NFAD submitted to this office about the same association and outlining a nearly identical complaint about a failure to vote in an open meeting, the Association quoted three different paragraphs in its response to the Complaint. The first paragraph was 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 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.

Unlike the previous NFAD submitted to this office that alleged the same violation for the same association at the same meeting, there was no supporting evidence of the

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<sup>1</sup> 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.

<sup>2</sup> Except to the extent that the declaration or any rules or regulations promulgated pursuant thereto provides otherwise, the board may impose a late fee for, not to exceed the penalty provided in § 58.1-3915, any assessment or installment thereof that is not paid within 60 days of the due date for payment of such assessment.

allegations related to a failure to vote in an open session. The Complainant stated that there was a failure to vote in an open meeting and the Association stated that they did vote in open session. Without evidence there is no determination that this office can make on this NFAD regarding the question as to whether there was a violation of §55-510.1(C) of the Property Owners' Association Act. As to whether there was a violation of §55-513.3, again, there was no evidence that showed there had been a violation of this statute, and even if such evidence had been provided, it is unlikely that this office could have provided a determination since the language of §55-513.3 is driven by the declaration of an association and this office cannot review or interpret those documents.

Required Actions

Nothing is required of the Association at this time.

Please feel free to contact me if you have questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Heather Gillespie".

Heather S. Gillespie  
Common Interest Community Ombudsman

cc: Board of Directors  
Three Flags Homeowners Association