



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

April 25, 2019

Brian Ball
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Eric Fagerholm
Association: Montclair Property Owners' Association
File Number: 2019-02371

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 August 28, 2018. The Association provided a response to the Complainant dated February 25, 2019. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated March 19, 2019 and received March 22, 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 an extensive cover letter with his NFAD that was not part of the association complaint submitted to the Association. As has always been the case, this office does not consider additional information submitted in a cover letter if that information was not part of the original complaint to an association, since the Association did not have an opportunity to review and respond to the additional information.

The Complainant has alleged three violations of common interest community law. The first violation is related to §55-509.3:2¹ of the Property Owners' Association Act. The Complainant alleged that the Association failed to provide him and the other owners the opportunity to vote on an eminent domain taking of common area in the community. The Complainant references a requirement within the Association's Declaration that states that any transfer of property to any public agency, authority, or utility must be done in accordance with the Declaration which requires the vote of members of the Association. Because no such vote occurred regarding the transfer of a portion of common area, the Complainant believes that the right to vote afforded him by §55-509.3:2 was denied.

While it does appear, based on the information provided, that the Declaration of the Association may require a vote of the membership in the situation outlined in the Complaint, this office has no authority to review or interpret any governing documents of an association, including the declaration. As such, I cannot provide a determination as to whether the Association has violated any provision of common interest community law by failing to provide the membership an opportunity to vote prior to transferring the land referenced in the Complaint since it is the Declaration that requires such a vote and the law itself does not define what specific situations require a vote by the membership.

The second complaint alleges a violation of §55-510.1² of the Property Owners' Association Act. Here the Complainant stated that he believes the Association violated the law when it failed to discuss issues related to the common area and eminent domain action in an open meeting. The Complainant also wrote that the Association failed to have a recorded vote on the matter and did not provide any minutes on a vote. The Complainant was under the impression that the Association board had been in executive session prior to an open meeting in July 2017 but said that little or no information was shared with the members in the open meeting. The Complainant also noted that at a September 2017 meeting, the Association provided inaccurate information related to the costs of a possible adverse possession of the land being discussed and "failed to discuss in any open meeting the taking of the parcel...or how MPOA intends to resolve the issue of the failure to value the parcel adequately."

¹ Every lot owner who is a member in good standing of a property owners' association shall have the following rights:

2. 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, except to the extent that the declaration provides otherwise...

² A. All meetings of the board of directors, including any subcommittee or other committee thereof, 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. Minutes of the meetings of the board of directors shall be recorded and shall be available as provided in subsection B of § 55-510.

There is simply not enough information provided to prove that the Association was holding a meeting or meetings without notice. The allegations are not specific enough and there is no way for this office to determine, based on the information provided, if there was a meeting held without notice. While the law does require that all meetings be open to all members, it does not seem that there is any way to prove that a meeting without notice was held. Boards do make decisions outside of meetings and depending upon the governing documents of an association, may have authority to do so. As to the allegation that the Association was not sharing information about the possible taking of common area, there was no reference to a violation of common interest community law regarding this issue, and I am not aware of any common interest community law that specifically outlines what information an association must share with its members. While I encourage transparency at all times, I cannot, in the present case, find that the Association violated §55-510.1.

The third complaint was that the Association violated §55-516.2³ by not obtaining a value for the common area that was based on its “highest and best use as though it were free from restriction to sole use as a common area.” The Complainant argues that the Association did not negotiate the valuation for the common area properly and was under the belief that it did not own the common area being considered for the taking which resulted in a taking of the property by the County for \$100.00. The Complainant stated that the County Tax Mapper showed an assessed value of \$80,500.00 for the piece of land. The Complainant also references the requirement in the Declaration that a vote of the members be obtained before transferring common area.

The Property Owners’ Association Act does not define “highest and best use as though it were free from restriction to sole use as a common area” and this office does not have the capacity to determine how to arrive at a proper value for a piece of land, and this piece of land in particular. Determining whether the Association obtained a proper value is outside the scope of our authority since it would require research and review of documents and information well outside the bounds of the Property Owners’ Association Act and common interest community laws and regulations in general.

The Association responded to the Complaint by stating that it “does not accept” the allegations of statutory violations. The Association also responded to the multiple actions proposed by the Complainant, however, those proposed actions will not be addressed here as the responsibility of this office is to determine whether a violation of common interest community law or regulation has taken place and not whether actions an

³ When any portion of the common area is taken or damaged under the power of eminent domain, any award or payment therefor shall be paid to the association, which shall be a party in interest in the condemnation proceeding. The common area that is affected shall be valued on the basis of the common area's highest and best use as though it were free from restriction to sole use as a common area.

Except to the extent the declaration or any rules and regulations duly adopted pursuant thereto otherwise provide, the board of directors shall have the authority to negotiate with the condemning authority, agree to an award or payment amount with the condemning authority without instituting condemnation proceedings and, upon such agreement, convey the subject common area to the condemning authority. Thereafter, the president of the association may unilaterally execute and record the deed of conveyance to the condemning authority.

A member of the association, by virtue of his membership, shall be estopped from contesting the action of the association in any proceeding held pursuant to this section.

association has been asked by a complainant to take in response to a complaint are appropriate.


Ultimately, I do not find that there have been violations of common interest community law. Of the three complaints, two were directly tied into the Association's declaration and therefore outside the scope of review and authority of this office. We cannot review the governing documents of an association, nor can we interpret them in order to determine if an association is complying with the law and those documents. While any failure to hold an open meeting may be troubling, a board taking action without a meeting is not necessarily in contravention of the law, depending upon the governing documents of the association and its corporate status. In this case there was no proof of a specific or particular meeting without notice and without such proof I cannot find that such a meeting took place.

Required Actions

Nothing is required of the Association at this time.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Montclair Property Owners' Assoc.