



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

October 20, 2020

Ralph S. Northam
Governor

Brian Ball
Secretary of
Commerce and Trade

Complainant: Melissa Peery
Association: Astoria Condominium
File Number: 2021-00738

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 multiple complaints to the Association. The Association provided a response to all submitted complaints dated August 21, 2020. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated September 13, 2020 and received September 17, 2020.

Authority

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 §54.1-2354.4 (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.

Determination

The Complainant submitted additional documentation with the NFAD, but as is always the case, and as mandated by the Regulations (18 VAC 48-70-90) this office only utilizes the original association complaint submitted to the association (along with any documentation submitted to the association with that complaint) and the association's final decision (along with any documentation that accompanied it) when providing a Determination. We cannot consider any additional or new information provided with a NFAD.

The NFAD was composed of seven different complaints. The first Complainant alleged that the Association violated 55.1-1949(B)(1)¹ of the Condominium Act, by failing to properly document an email vote, thereby not providing notice and evidence of actions to the community.

The Association responded to this Complaint by stating that it had taken action outside of a meeting, as permitted under its Bylaws, when it used email voting. The Association did not consider the complaint appropriate for the association complaint procedure since it does not pertain to a violation of common interest community law or regulation.

This office has never viewed email communication as a form of meeting. Which is not to say that it is not possible to hold a meeting via email, only that such a situation has not yet arisen in a NFAD. In this case, there is insufficient information in the Complaint to determine the exact nature of the email voting. As such, I cannot find that a meeting took place. The portion of the Condominium Act cited by the Complainant does not require documentation of an email vote, only documentation, in the form of minutes, of meetings, which is not applicable if no meeting took place.

In her second Complaint, the Complainant alleges that the Association has failed "to give seven days' notice of meetings," and failed "to provide copies of board materials to the community when received by the board." The Complainant stated that the Association has failed to provide board materials for months at a time, and board materials have not been shared with the community since September 2019. The Complainant believes the failure to provide seven days' notice is a violation of §55.1-1949(A)², but incorrectly identified §55.1-1949(C) as the applicable law for the failure to

¹ B. 1. Except as otherwise provided in the condominium instruments, the provisions of this subsection shall apply to executive board meetings at which business of the unit owners' association is transacted or discussed. All meetings of the unit owners' association or the executive board, including any subcommittee or other committee of such association or board, shall be open to all unit owners of record. The executive board shall not use work sessions or other informal gatherings of the executive board to circumvent the open meeting requirements of this section. The unit owners' association may, to the extent that the condominium instruments or adopted rules expressly provide, send notice by electronic means if consented to by the officer to whom the notice is given. Minutes of the meetings of the executive board shall be recorded and shall be available as provided in § 55.1-1945.

² 1. Meetings of the unit owners' association shall be held in accordance with the provisions of the condominium instruments at least once each year after the formation of the association. The bylaws shall specify an officer or his agent who shall, at least 21 days in advance of any annual or regularly scheduled meeting and at least seven days in advance of any other meeting, send to each unit owner notice of the time, place, and purposes of such meeting. In the event of cancellation of any annual meeting of the

provide copies of board materials. Instead, the correct code section is §55.1-1949(B)(3)³.

The Association did not address the seven days' notice complaint but it did respond to the allegation that it had not provided board materials as required by law. The Association wrote in its response that the materials "are available for inspection by the members at the same time that the materials are disseminated to the Board." It also wrote that "[t]he Act does not require that the documents/materials be affirmatively sent to unit owners nor that they be posted..."

The Association is correct that there is no requirement under the law to disseminate the agenda packets and any other meeting material. Instead, the board must ensure the agenda packets are available for inspection at the same time they are provided to the members of the board. As for the seven days' notice, this notice requirement applies only to unit owners' association meetings and not meetings of the executive board. Generally the condominium instruments will dictate the notice requirements for executive board meetings, while the Condominium Act dictates the manner in which that notice should be provided. §55.1-1949(B)(2).⁴

In her third Complaint, the Complainant wrote that she believed the Association violated §55.1-1957⁵ by failing to provide notice of pesticide use on common elements when portions of the condominium were treated for a bed bug infestation. The Complainant learned of the treatment of the bed bugs when a notice was sent to owners alerting them that bed bugs had been found and treated.

The Association agreed that the Condominium Act requires 48 hours' notice prior to applying a pesticide and that notice was not provided in this instance. The Association also stated that it believed immediate action was necessary to treat the bed bugs and that the chemicals being used did not require advance notice. The Association obtained an email from the exterminator after the application of the treatment where the treatment was described as a disinfectant commonly used in hospitals, daycares and nursing homes. The Association acknowledged the notice requirements and said that it "will endeavor to comply with them" in the future.

unit owners' association at which directors are elected, the seven-day notice of any subsequent meeting scheduled to elect such directors shall include a statement that the meeting is scheduled for the purpose of the election of directors.

³ 3. Unless otherwise exempt as relating to an executive session pursuant to subsection C, at least one copy of all agenda packets and materials furnished to members of the executive board or subcommittee or other committee of the executive board for a meeting shall be made available for inspection by the membership of the unit owners' association at the same time such documents are furnished to the members of the executive board.

⁴ 2. Notice of the time, date, and place of each meeting of the executive board or of any subcommittee or other committee of the executive board, and of each meeting of a subcommittee or other committee of the unit owners' association, shall be published where it is reasonably calculated to be available to a majority of the unit owners.

⁵ The unit owners' association shall post notice of all pesticide applications in or upon the common elements. Such notice shall consist of conspicuous signs placed in or upon the common elements where the pesticide will be applied at least 48 hours prior to the application.

Associations have an absolute responsibility to provide 48 hours' notice prior to the application of pesticides in or upon the common elements. The difficulty however, is in determining what is or is not a pesticide, and the Condominium Act does not provide any guidance as to what constitutes a pesticide. While some chemicals are clearly considered pesticides and even labeled as such, in this case, I cannot determine if Steri-Fab is a pesticide and therefore would require notice of application.

The fourth Complaint alleged a violation of §55.1-1949, Paragraph C⁶, and was based on an improper meeting purpose being provided to owners and board members. According to the Complainant, the board convened in executive session with the stated purpose of discussing the management company contract. However, the Complainant alleges that instead, the Board discussed other topics, and accused the Complainant of "collaborating and encouraging others to criminally harass our on sight[sic] team..." The Complainant also said that no vote in open session occurred nor was there any subsequent documentation of the meeting.

The Association stated that the purpose of the meeting was to discuss the management contract and that the board anticipated that they would be discussing the General Manager's performance. Because the General Manager was an employee of the management company, the board felt that it was appropriate to hold an executive session since they would be addressing personnel matters related to the Manager. The Manager's supervisor and employer were also present. The Association denies that anything else was discussed in executive session that would be inappropriate.

The Condominium Act does allow an executive organ to enter an executive session for the purpose of discussing or considering contracts and to address personnel matters. I am not certain that the personnel aspect enters into this equation as personnel, in this context, are employees of the association, not employees of another company. The employee referenced here was an employee of the Management Company and not an employee of the Association. The Association did not address its alleged failure to return to an open meeting to vote on the outcome of the discussion or the failure to document the meeting. While any minutes would likely not be available to owners, the Condominium Act does require minutes of board meetings to be recorded. Without being present at the meeting, it is impossible to determine if anything other than what was appropriate was discussed in the executive session nor can I determine if there was anything discussed that required a subsequent vote in an open meeting.

⁶ C. The executive board or any subcommittee or other committee of the executive board may convene in executive session to consider personnel matters; consult with legal counsel; discuss and consider contracts, probable or pending litigation, and matters involving violations of the condominium instruments or rules and regulations promulgated pursuant to such condominium instruments for which a unit owner, his family members, tenants, guests, or other invitees are responsible; or discuss and consider the personal liability of unit owners to the unit owners' 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 executive board 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 executive board or subcommittee or other committee of the executive board, 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 do not require the disclosure of information in violation of law.

The fifth Complaint alleged that some messages submitted to the existing method of communication (Building Link) were being moderated, which would be a violation of §55.1-1950⁷. The Complainant noted that she cannot prove this. The Complainant also wrote that it can take several hours or as long as a weekend for messages to appear on Building Link, and said that postings she had made in 2019 were removed from the site and then supposedly returned to the site, despite the fact that this it is not possible to do this.

The Association responded to this complaint by confirming that it was aware a post from the Complainant had not been posted on Building Link, but stated that this was done by mistake and that now all posts are posted without prior approval. The Association also acknowledged that board members had previously thought all posts had to be approved administratively, not substantively. The Association wrote that there is no requirement that any post be immediate and therefore a failure to post immediately is not a violation of the statute.

If the Association failed to post a submission, it would appear that it did violate the applicable statute, but has since taken action to correct this violation. While there is no requirement that the method of communication be immediate, I do think that since the statute is providing for communication regarding any matter concerning the unit owners' association, immediacy is an important component of a communication method and it would be ideal if the Association could find a way to ensure immediacy of posts to Building Link or whatever method of communication it provides. If a communication is held up by hours or even a day, it may no longer be pertinent to the matter it was meant to address. But, as noted by the Association, there is no required time frame in the law itself.

In a sixth complaint, the Complainant alleged that the Association has violated §55.1-1949(B)(1)⁸ by holding unannounced work sessions and unannounced executive sessions to approve new onsite management staff. The Complainant does not believe that the Association held a meeting to review the new staff. A new maintenance person was also brought on board without a meeting. The Complainant also believes the President has used working sessions with the management company to "attempt to modify association policy without open session discussion..." The Complainant stated that several policies have been put in place by the management company without being considered in an open meeting by the Board.

⁷ A. The executive board shall establish a reasonable, effective, and free method, appropriate to the size and nature of the condominium, for unit owners to communicate among themselves and with the executive board regarding any matter concerning the unit owners' association.

B. Except as otherwise provided in the condominium instruments, the executive board shall not require prior approval of the dissemination or content of any material regarding any matter concerning the unit owners' association.

⁸ B. 1. Except as otherwise provided in the condominium instruments, the provisions of this subsection shall apply to executive board meetings at which business of the unit owners' association is transacted or discussed. All meetings of the unit owners' association or the executive board, including any subcommittee or other committee of such association or board, shall be open to all unit owners of record. The executive board shall not use work sessions or other informal gatherings of the executive board to circumvent the open meeting requirements of this section. The unit owners' association may, to the extent that the condominium instruments or adopted rules expressly provide, send notice by electronic means if consented to by the officer to whom the notice is given. Minutes of the meetings of the executive board shall be recorded and shall be available as provided in § 55.1-1945.

The Association responded to these allegations by stating that there was “nothing in the complaint that alleges that meetings of the Board were held. Accordingly the Panel finds that this complaint facially is related to the President’s powers and authority under the Bylaws and not the Act; accordingly, it is not actionable.” The Association also noted that the General Manager has “certain authority and powers regarding the daily administration of the building and that she can make changes which do not need to be approved by the Board.”

The difficulty with this particular complaint, as is so often the case with these types of allegations, is that it is very difficult to prove a meeting happened if it has not been announced. While the board, or members of the board, may have taken some type of action, there is no way to prove that such action resulted from an unannounced meeting. As such, no determination can be provided as to whether there was a violation of the open meeting requirements contained in §55.1-1949. As for the President meeting with the management company, the authority of the President is dependent upon the authority outlined in the governing documents of the association and not common interest community law. It seems unlikely that the President violated open meeting requirements by meeting with the management company since open meeting requirements only apply to meetings of the executive board.

The final Complaint pertained to §55.1-1949(B)(1)⁹ and alleged a failure to hold committee meetings properly. Specifically, the Complainant alleged the association has failed to provide proper notice of committee meetings, to hold open committee meetings and to document the committee meetings. These allegations were regarding Covenants Committee meetings and meetings between the Secretary and the management team. One of the unannounced Covenants Committee meetings was later cancelled.

The Association responded by saying that because a committee meeting was cancelled, “any alleged defect in notice is moot...” As for meetings on the key, pet policy and bike room, the Association stated that these were not committee meetings, but instead a meeting between the committee chair and management. The Association argues that because there was no quorum of members there was no meeting and no violation. The same argument was provided for the failure to provide notice of meetings between the Secretary and management team.

I agree with the Association that a cancelled meeting cannot be in violation of common interest community law. The single person meetings with management do not appear to be, as outlined in the Condominium Act, meetings of the executive board and therefore may not require notice.

⁹ Ibid.

Required Actions

While there were a couple of instances where the Association may have violated common interest community law, it also appears that the Association has since addressed these issues. As such, I do not find additional action necessary on the part of the Association, but I would caution it to take great care going forward in order to make certain it remains in compliance with common interest community law.

Please feel free to contact me if you have questions.

Sincerely,

A handwritten signature in cursive script that reads "Heather S. Gillespie".

Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Astoria Condominium