



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

Brian Ball
Secretary of
Commerce and Trade

Mary Broz-Vaughan
Director

December 18, 2020

Complainant: John Lihach
Association: The Astoria Condominium
File Number: 2021-01194

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 October 2 and 8, 2020. The Association provided a response the submitted complaint dated October 26, 2020. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated November 2, 2020 and received November 5, 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 alleges that the Association was in violation of Virginia Code §55.1-1950(B)¹ when it failed to post a communication that he submitted for posting on the Association’s method of communication. The Complainant submitted information for posting that outlined his concerns about a non-owner serving on the board of directors. The Complainant said that the Association did not approve the posting of his submission until October 12, which was six days after his initial request. The Complainant also said that the Association was able to post a number of other submissions that other owners asked it to publish on the community forum.

The Association’s response to the alleged failure to post the Complainant’s message on the association forum stated that this failure was due to a misunderstanding as to when the switch from the existing community forum to a new one was to take place. The message was submitted to the Association for posting on October 6 and the Association stated that upon realizing the error, the submission was posted on October 12, 2020. The Association acknowledged that the failure to post the submission was in violation of §55.1-1950.

The second complaint was about the appointment of a non-owner to the board of directors. The Complaint believes this is a violation of §55.1-1954² of the Condominium Act. The individual was appointed in August of 2020, and resigned from the board in early October of 2020.

¹ 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.

² A. If the condominium instruments provide that any officer must be a unit owner, then any such officer who disposes of all of his units in fee shall be deemed to have disqualified himself from continuing in office unless the condominium instruments otherwise provide, or unless he acquires or contracts to acquire another unit in the condominium under terms giving him a right of occupancy effective on or before the termination of his right of occupancy under such disposition.

B. If the condominium instruments provide that any officer must be a unit owner, then notwithstanding the provisions of subdivision 1 of § 55.1-1912, the term "unit owner" in such context shall, unless the condominium instruments otherwise provide, be deemed to include any director, officer, partner in, or trustee of any person that is, either alone or in conjunction with another person, a unit owner. Any officer who would not be eligible to serve as such were he not a director, officer, partner in, or trustee of such a person, shall be deemed to have disqualified himself from continuing in office if he ceases to have any such affiliation with that person, or if that person would itself have been deemed to have disqualified itself from continuing in such office under subsection A were it a natural person holding such office.

The Association confirmed the Complainant's allegation that they had appointed a board member who was not an owner in the association and was therefore ineligible to serve on the board. The board member immediately resigned from his board position. The Association stated that it based its decision on a list it received from its management company that it believed contained owners of record but has since learned otherwise. The Panel responsible for hearing complaints stated that it would recommend to the Board that it improve the vetting process for candidates.

It is clear that the Association did, in fact, violate the Condominium Act, by not adhering to §55.1-1950. It is not clear if there was a violation of §55.1-1954 since this office cannot review or interpret the condominium instruments. Virginia Code §55.1-1954 is entirely dependent upon the condominium instruments of the association and without authority to review those documents, this office cannot determine if a violation of §55.1-1954 has occurred.

I would note that the association, in response to both complaints, acknowledged its errors and corrected the situation. In the first case by posting the unposted submission and in the second by notifying the board member he was ineligible to serve on the board, which resulted in his resignation. While it is unfortunate that the posting was not published in a timely manner, the association did come into compliance and correct the mistake. As for the appointment of the board member, again, the association corrected what may have been an improper action. Our goal is always to obtain compliance with the applicable common interest community law and it appears that such compliance had already taken place even before this NFAD was received.

Required Actions

No action is required.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
The Astoria Condominium