



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: Melissa Peery  
Association: Astoria Condominium  
File Number: 2021-01096

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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 multiple complaints to the Association dated August 23, 2020, October 1, 2020, and October 10, 2020. The Association provided a response to all submitted complaints 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 1, 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 first complaint submitted by the Complainant alleged that the Association had failed to provide a document upon request. The Complainant is an owner and member of the executive board of the Association. Under §55.1-1945(B)<sup>1</sup> all owners in good standing have the right to examine and copy the books and records of an association. The Complainant had requested a copy of the contract between an IT Consultant and the Association. The Complainant stated that she made the request twice and both times the request went unacknowledged.

In response to the allegation that the Association had failed to provide a copy of the contract it had entered into with the IT consultant, the Association wrote that there was no contract and therefore it could not provide one. According to the Association, the consultant was working off a retainer. The Association did provide the Complainant a copy of the invoice from the consultant that showed the retainer had been paid. The Association stated, "there is no violation of the law since the document requested does not exist."

The second complaint alleged that either the Association held a meeting without notice or the other board members used email or phone calls to plan for an election at a special meeting held on August 20, 2020. The Complainant alleges that board members had planned for this meeting and that this was obvious due to the manner in which the meeting was carried out and that "they had clear roles and responsibilities assigned including who would validate that members were in good standing." The Complainant alleges that the other members of the executive board are in violation of §55.1-1949<sup>2</sup> of the Condominium Act for meeting without notice or for discussing this meeting in advance.

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<sup>1</sup> B. Subject to the provisions of subsection C, all books and records kept by or on behalf of the unit owners' association, including the unit owners' association membership list, and addresses and aggregate salary information of unit owners' association employees, shall be available for examination and copying by a unit owner in good standing or his authorized agent so long as the request is for a proper purpose related to his membership in the unit owners' association and not for pecuniary gain or commercial solicitation. Notwithstanding any provision of law to the contrary, this right of examination shall exist without reference to the duration of membership and may be exercised (i) only during reasonable business hours or at a mutually convenient time and location and (ii) upon five business days' written notice for a unit owner association managed by a common interest community manager and 10 business days' written notice for a self-managed unit owners' association, which notice shall reasonably identify the purpose for the request and the specific books and records of the unit owners' association requested.

<sup>2</sup> 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.



In response to the second Complaint, the Association stated, “there is no evidence that any such meeting occurred.” The Association acknowledged that board members spoke to each other about possible candidates and spoke individually to candidates, but said that no meeting had been held.

The third Complaint alleged that the Association, its common interest community manager and its legal counsel violated §54.1-2354.4 of the Code of Virginia by failing to respond to an association complaint submitted by the Complainant in accordance with the CIC Ombudsman Regulations. The Complainant alleged that actions by the common interest community manager and legal counsel were improper or coordinated. The Complainant also noted that there was an incorrect address for the management company in the complaint procedure

The Association did not fully address this complaint. It did note that it heard the complaint and “no further action will be taken in regards to this assertion.”

It is difficult to determine if the Association violated §55.1-1945 of the Code of Virginia when it failed to provide a contract to the Complainant. The Association stated that there was no contract, and that the consultant was paid a retainer against which he billed. The Association did provide the Complainant a copy of the invoice that showed the retainer had been paid. The Complainant also wrote that the Association failed to acknowledge her requests for the contract. Under §55.1-1945 there is no requirement to provide or create a document that does not exist. If there was no contract between the consultant and the Association, the Association cannot provide one. While courtesy might ask that the Association respond to any request for documents, there is no legal requirement that an association respond to a request for books or records if they do not have the requested documents.

The question as to whether there was a meeting held without notice or whether there was some type of interaction between executive board members, other than the Complainant, is impossible for this office to decide. We cannot determine if a meeting was held where the business of the unit owners’ association was discussed or transacted, per §55.1-1949, if no evidence is provided to prove such a meeting took place.

As to whether board members other than the Complainant may have discussed the special meeting and election via email or telephone, even if they had done so, this is not a violation of the applicable statute. Emails and phone calls are not meetings, unless the members gathered for a teleconference or possibly, if they were all seated at the same time at their computers and emailing each other. There was no evidence of either of these situations. Based on the information provided in the NFAD, I do agree

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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.



that if the meeting and election progressed as described, it might appear that there was prior planning of the meeting and that planning may have been done during an unnoticed meeting, but we simply cannot prove that such a meeting took place and therefore I cannot find a violation of §55.1-1949.

The final complaint raised the Association's failure to respond to the Complainant's association complaint. The Complainant alleged a violation of §54.1-2354.4 of the Condominium Act, and I would add that such a failure is also a violation of the Common Interest Community Ombudsman Regulations. The Complainant is correct that the Association failed to respond to her submitted association complaint in accordance with the Common Interest Community Ombudsman Regulations. However, this failure has already been addressed by this office and the Association, as is evidenced by this NFAD and the inclusion of the complaint in it, remedied the situation once they were advised by this office to do so.

The Complainant included the Association's legal counsel and management company in her allegations regarding the failure to respond to her submitted complaint, but it is ultimately the responsibility of the executive board to carry out the complaint process, not that of the manager or legal counsel. In addition, we have no authority over any attorney and any jurisdiction over a manager or management company would be only to the extent that such individual or company is in violation of the Common Interest Community Manager Regulations. A complaint against a manager or management company alleging a violation of the Common Interest Community Manager Regulations would have to be submitted as a DPOR Complaint (<http://www.dpor.virginia.gov/File-Complaint>) rather than an association complaint.

#### 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  
Astoria Condominium