



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

August 13, 2021

Mary Broz-Vaughan
Director

Complainant: Taylor York
Association: Hiddenbrooke Condominium Unit Owners Association
File Number: 2022-00092

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 April 24, 2021, with an amendment dated April 26, 2021, and additional complaints were submitted April 29, 2021. The Association provided a response to the complaint dated June 10, 2021. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman which was received on July 8, 2021.

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 and we cannot provide a determination on such a complaint. Common interest community law is limited to the Virginia Condominium Act, the Property Owners’ Association Act, and the Virginia Real Estate Cooperative Act.

This Determination is final and not subject to further review.

Determination

The Complainant has alleged multiple violations of the Virginia Condominium Act. The first complaint alleged that the Association is in violation of §55.1-1939 and §55.1-1949(B),¹ (C)² and (D)³ as well as HB 5005 (which cannot be addressed in this

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. Minutes of the meetings of the executive board shall be recorded and shall be available as provided in § 55.1-1945.

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.

A unit owner may make a request to be notified on a continual basis of any such meetings, which request shall be made at least once a year in writing and include the unit owners' name, address, zip code, and any email address as appropriate. Notice of the time, date, and place shall be sent to any unit owner requesting notice (i) by first-class mail or email in the case of meetings of the executive board or (ii) by email in the case of meetings of any subcommittee or other committee of the executive board or of a subcommittee or other committee of the unit owners' association.

Notice, reasonable under the circumstances, of special or emergency meetings shall be given contemporaneously with the notice provided to members of the (i) executive board or any subcommittee or other committee of such board or (ii) subcommittee or other committee of the unit owners' association conducting the meeting.

² 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.

³ D. Subject to reasonable rules adopted by the executive board, the executive board shall provide a designated period during each meeting to allow unit owners an opportunity to comment on any matter relating to the unit owners' association. During a

determination as it is not common interest community law). The Complainant believes the Association's Executive Board conducted electronic meetings and voted on matters of interest to owners without notice, without sharing access to the materials upon which the Board made their decision, and by not conducting electronic meetings in a way that allowed owners to observe or record those meetings, or be heard at those meetings. The Complainant stated that five such meetings took place and that the decisions made at these meetings are invalid.

The second complaint alleged a violation of §55.1-1949(C), and specifically that the board used an executive session to appoint a serving board member to a board position that was soon to be vacant. The Complainant alleges that the serving board member nominated himself to fill a vacancy that had a year remaining in its term and therefore increased his time on the board. The Complainant believes that there was no discussion of this matter and owners were not given an opportunity to be heard regarding this action. In addition, she believes insufficient notice was provided to owners, due to the wording in the meeting agenda, resulting in owners not being given adequate notice that a board member was resigning and the remaining board members would be voting to fill the vacated position. In an amended complaint dated April 26, the Complainant acknowledged that there had been a meeting where there was a vote to appoint the board member to the position that would be opening in the future. The Complainant noted that the agenda for this meeting did have an item that read "Filling Anticipated Vacancy on Board."

The Complainant also alleged that three of the Association's five board members gathered and discussed "non-privileged unit owners' association business in violation of the Virginia Condominium Act." The Complainant alleges that this gathering took place April 23, 2021 and was a violation of §55.1-1939 and §55.1-1949(B) since this meeting was not open to all unit owners of record and the board should not use work sessions or other informal gatherings to circumvent open meeting requirements.

The Complainant alleged that the Decorating Committee was in violation of §55.1-1949(B) when it met multiple times without notice to the owners, with the full consent and knowledge of the board. The Complainant does not know how frequently the committee met, but stated that they were able to narrow down carpet choices, take an opinion poll, and make a recommendation to the board regarding which carpet to choose. The Complainant wrote that the choice has still not been made known to the unit owners.

The Complainant also wrote that the Association appears to be making decisions outside board meetings since it raises topics in meetings and makes decision "without allowing Unit Owners to observe deliberations and be heard prior to the vote." In addition, the Complainant alleges that the Board does not permit owners to speak until after a matter has been voted on if the matter is controversial. The Complainant believes these actions are violations of §55.1-1939 and §55.1-1949(B) and (D).

meeting at which the agenda is limited to specific topics or at a special meeting, the executive board may limit the comments of unit owners to the topics listed on the meeting agenda.

Finally, the Complainant alleged the Association failed to comply with §55.1-1950,⁴ as there is no method of communication between unit owners or a way to bring comments and concerns to the Board in a public manner that allows all owners to be aware of the concerns.

The Association responded to the first complaint by referencing the language in §55.1-1949(B) that states “[E]xcept as otherwise provided in the condominium instruments...” The Association stated that Article III, Section 14 of the Association’s Bylaws allows the board to act via unanimous email vote. As such, the Association believes that it “acted lawfully and pursuant to its express authority under the above provision of the Association’s Bylaws...” Because the Association’s response is dependent upon a reading and interpretation of the condominium instruments, which is outside the scope of our authority, this office cannot make a determination as to whether the Association was in violation of §55.1-1949(B) when it made decisions via email on multiple occasions.

In its response to the complaint alleging a secret meeting, the Association denied that a secret meeting was conducted, and noted that the Complainant wrote in her amendment to the first complaint that there had been no secret meeting and withdrew the complaint. There is no determination necessary for this complaint.

As to the complaint alleging insufficient notice of the March board meeting, the Association again referenced its Bylaws, stating that board members must be given three days’ notice of regular meetings under the Bylaws, and that all board members and unit owners received notice (including the agenda) of the March 17, 2021 meeting seven days in advance of the meeting date. The Association said that the notice was emailed to owners, posted in each condominium building, and posted on the association website. The Association also wrote that the agenda contained an “item 7” entitled “Filling of Anticipated Board Vacancy.” It would appear that the Association provided sufficient notice of its March 17, 2021 board meeting, and included in its agenda language referencing its plan to fill a vacant position. The Condominium Act requires only that notice of a meeting “shall be published where it is reasonably calculated to be available to a majority of the unit owners.” As to whether agenda ‘item 7’ was specific enough to give notice to owners that a board member was going to fill a vacated board position, I cannot opine. Agendas are not required to be distributed with meeting notices, and nothing in the Condominium Act addresses what degree of specificity is required for board meeting agendas.

The Association denies a meeting of board members to discuss association business on or about April 23, 2021. The Association stated that no meeting or work session or other gathering had been planned, arranged or organized to conduct the business of the association. Instead, the Association suggested that this was an

⁴ 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.

everyday encounter among neighbors. There is no way for this office to determine whether the gathering of board members was an actual meeting where the members were discussing or transacting the business of the association, or simply a friendly interaction among owners who happened to be members of the board.

In response to the fifth complaint, the Association denies that there was a violation of the Condominium Act by the Design and Decorating Committee. The Board stated that it believed the committee did most of its work by telephone and email, and individual members contacted local carpet dealers. The Association acknowledged that the committee did display carpet samples in the lobby of each building so that owners could see what choices were available. The Association also noted that the committee was barred from holding in person meetings by the Governor's restrictions on in-person gatherings. As is often the case, it is nearly impossible for this office to determine if there has or has not been a meeting. If the committee made decisions via email and telephone, while not an ideal way to carry out its responsibilities since it limits involvement and observation by the owners, emails and telephone calls do not require meeting notice, unless the committee was holding actual telephone conferences. Based on the information provided, I cannot determine if there were actual committee meetings or merely telephone calls and emails between various committee members.

The Association responded to the sixth complaint by stating that every public meeting of the board includes an "owners' forum" which is included on the agenda. The Association further noted that it also allows owners to participate throughout the meetings, and does not impose restrictions on owners who wish to speak at the meetings. In response to the allegation that the board failed to provide sufficient notice of the matters to be considered at the March 17, 2021 meeting, the Association stated that the board considered and voted on three items of business and the three items were included on the agenda that was part of the meeting notice given to owners. The Condominium Act does not require that owners be permitted to comment on agenda items during a board meeting. Instead, the law requires that owners be given the opportunity to comment during a designated period at each meeting, with no specifics as to when that designated time should take place during the meeting.

The Association denies a violation of §55.1-1950, and stated that all owners and residents can communicate freely via email, telephone, and in person, both with other owners and residents and with the Board of Directors. The Association also said that it periodically prints a community directory and intends to resume publication of a newsletter. While it appears that there are several opportunities for owners to communicate within the association, I am not certain that the current methods meet the requirements set forth in the Condominium Act. The Act requires a board to "**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." (Emphasis added) Phone calls, emails and distributing a community directory do not appear to be established methods of communication, instead they are generic options available to anyone and do not constitute a method of communication established by the Association. The Association does need to establish a method of communication that will allow for communication among owners and communication with the board.

There is no requirement that the method of communication with the board be public or visible to all owners.

Required Actions

The Association needs to address its compliance with §55.1-1950 and establish a method of communication that meets the requirements of the statute. I ask the association to consider its options and provide this office a written outline of its plan for meeting the requirements of §55.1-1950. Please provide this document, which can be brief, within thirty days of the date of this determination. You are welcome to contact my office if you have questions or would like to discuss this further.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Hiddenbrooke Condominium UOA