



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Glenn A. Youngkin
Governor

October 11, 2022

G. Bryan Slater
Secretary of Labor

Demetrios J. Melis
Director

Complainant: Emmaruth Bowles
Association: Bull Run Swim & Racquet Club, Inc.
File Number: 2023-00536

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 July 11, 2022. The Association provided a response to the association complaints dated August 17, 2022. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated August 23, 2022 and received August 29, 2022.

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.

Pursuant to the Regulations (18 VAC 48-70-90), the only documents that will be considered when reviewing a NFAD are the association complaint submitted by a complainant to the association (and any documents included with that original complaint), the final adverse decision from the association, and any supporting documentation related to that final adverse decision. Other documents submitted with the Notice of Final Adverse Decision cannot be reviewed or considered.

This Determination is final and not subject to further review.

Determination

The Complainant alleged that the Association was in violation of §55.1-1816¹ of the Property Owners' Association Act, when it took action that was not motioned, voted

¹ A. All meetings of the board of directors, including any subcommittee or other committee of the board of directors, where the business of the association is discussed or transacted 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 § 55.1-1815.

B. Notice of the time, date, and place of each meeting of the board of directors or of any subcommittee or other committee of the board of directors shall be published where it is reasonably calculated to be available to a majority of the lot owners.

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

Notice, reasonable under the circumstances, of special or emergency meetings shall be given contemporaneously with the notice provided to members of the association's board of directors or any subcommittee or other committee of the board of directors conducting the meeting.

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 an association's board of directors or subcommittee or other committee of the board of directors for a meeting shall be made available for inspection by the membership of the association at the same time such documents are furnished to the members of the board of directors or any subcommittee or committee of the board of directors.

Any member may record any portion of a meeting that is required to be open. The board of directors or subcommittee or other committee of the board of directors conducting the meeting may adopt rules (a) governing the

or passed during an open meeting. The Complainant provided a spreadsheet of payments made to the management company for the 2021 annual meeting, which she believes to be unauthorized since no vote was taken in open meeting to pay the management company. According to the Complainant, a motion was passed to establish a process and costs for services and mailing that were not to exceed \$2,000. The referenced process, upon review of the minutes, was for a meeting process but no additional information was available. The Complainant acknowledged that the bylaws of the association allow for action without a meeting if there is unanimous consent by all directors. She also stated that board members who breached their fiduciary duties should not be permitted to serve on the board.

The Complainant also alleged that the management company is engaging in dishonest conduct by disbursing payments to itself when those payments were not approved in an open meeting. She believes this would be a violation of 18 VAC 48-50-190 of the Common Interest Community Manager Regulations. The Complainant also alleges that the management staff and president walked the community to obtain proxies and that a conflict of interest and further dishonesty occurred regarding the posting of zoom meeting information. The Complainant stated that management companies who breached their fiduciary duties should not continue to provide management services.

The Complainant further alleged that the President of the Association is not consistent in stating the purpose for executive session. The Complainant believes this constitutes a violation of §55.1-1816 of the Property Owners Association Act.

The Association responded to the first complaint by acknowledging the need to approve actions in open meetings but noted that in this particular instance, "certain

placement and use of equipment necessary for recording a meeting to prevent interference with the proceedings and (b) requiring the member recording the meeting to provide notice that the meeting is being recorded.

Except for the election of officers, voting by secret or written ballot in an open meeting shall be a violation of this chapter.

C. The board of directors or any subcommittee or other committee of the board of directors may (i) convene in executive session to consider personnel matters; (ii) consult with legal counsel; (iii) discuss and consider contracts, pending or probable litigation, and matters involving violations of the declaration or rules and regulations adopted pursuant to such declaration for which a member or his family members, tenants, guests, or other invitees are responsible; or (iv) discuss and consider the personal liability of members to the 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 board of directors 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 board of directors or subcommittee or other committee of the board of directors, 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 shall not require the disclosure of information in violation of law.

D. Subject to reasonable rules adopted by the board of directors, the board of directors shall provide a designated period during each meeting to allow members an opportunity to comment on any matter relating to the association. During a meeting at which the agenda is limited to specific topics or at a special meeting, the board of directors may limit the comments of members to the topics listed on the meeting agenda.

actions and expenditures were executed on behalf of the Association between meetings.” Further, the Association stated that it retroactively approved all such actions and expenditures in an open meeting and such approval is part of the minutes of that meeting. The Association wrote that it “does not disagree with the gist of your complaint. It did approve the expenditures and actions complained of and it is committed to continuing to do so appropriately in the future.”

The Association does not believe the allegations against the management company are substantiated and may provide grounds for defamation and tortious interference. The Association said that the charges were unanimously approved and that there was no dishonest action by the management company. Further, the Association wrote that the management company did not violate its fiduciary duty to the Association. As for the posting of zoom meeting information, the Association does not believe this action constituted a breach of fiduciary duty or a level of dishonesty that would bar the individual from providing management services.

In response to the allegations that the board was not making specific motions when entering executive session, the Association acknowledged that the board has been lax in the past and has “focused on doing so correctly now and in the future.”

It is unclear if the Association made decisions via unanimous consent under its bylaws prior to the later approval in a meeting, or if it simply made decisions on the sidelines and failed to obtain unanimous consent. If the bylaws of an association allow for unanimous consent, the board has the power to make decisions outside of a meeting, however, misuse of this authority may serve to disenfranchise association owners. Ultimately, since the Association later approved its actions in an open meeting, the issue of making a decision outside of a meeting and possibly without unanimous consent is less troubling. However, going forward, the board must ensure that it adheres to the Property Owners Association Act when making decisions. This office cannot determine whether there has been a breach of fiduciary duty since such decision is a civil matter outside the scope of its authority.

Complaints regarding management companies must be submitted by boards of directors rather than owners. The board of directors is responsible for ensuring the management company carries out its responsibilities under the management agreement between the association and management company. In addition, it is only the association, through its board of directors, that has standing to file a complaint against a management company since owners, unlike the board, are not parties to the management agreement. If the management believes, which does not appear to be the case, that the management company is in violation of the Common Interest Community Manager Regulations or its management agreement, it can file a complaint directly with DPOR. Allegations related to conflicts of interest or fiduciary duty cannot be addressed, as they do not fall under our authority.

The Association has acknowledged that the board has not always provided a specific purpose for entering executive session, as required by §55.1-1816(C) of the Property Owners’ Association Act. It also stated that it is focused on entering executive sessions correctly going forward and did so at the August meeting. It appears the association may have been in violation of the statute in the past but appears to have mended its ways and will ensure compliance going forward.

Required Actions

The Association must be certain that it makes decisions in accordance with the Property Owners' Association Act going forward and that it fully follows the statutory requirements for entering executive session.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Bull Run Swim & Racquet Club, Inc.