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COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

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January 10, 2025

Complainant: Troy D. Bowman
Association: Ashbriar Homeowners Association.
File Number: 2025-01618

DETERMINATION - NOTICE OF FINAL ADVERSE DECISION

Introduction

This matter came before the Office of Common Interest Community Ombudsman ("Office") for review on December 9, 2024, as a result of the Notice of Final Adverse Decision ("NFAD") submitted by Troy D. Bowman ("Complainant"). The Complainant initially submitted a complaint to the Ashbriar Homeowners Association Board of Directors ("Board") on October 24, 2024; and the Board issued a notice of final decision on all the complaints on November 18, 2024. Therefore, the NFAD was timely filed and within the jurisdiction of this Office, which has been designated to review final adverse decisions and determine if the decisions conflict with laws or regulations governing common interest communities.

Issues to be Decided

In the Complaints, the Complainant alleged five issues in which the Board failed to comply with applicable authorities. Specifically, it is alleged that the Board failed to: (1) provide adequate means of recording meetings; (2) maintain common area; (3) provide method of communication; (4) follow proper procedure for executive session; and (5) distribute policies and rules. As explained more fully below, this Office finds that the Board complied with the applicable law regarding issues 1, 2, and 5; but failed to do so as to issues 3 and 4.

Authority

In accordance with its regulations, the Common Interest Community Ombudsman (CICO), as designee of the Agency Director, is responsible for determining whether a "final adverse decision may be in conflict with laws or regulations governing common interest communities." (18 Va. Admin. Code ("VAC") § 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 of the Code of Virginia of 1950, as amended ("Va. Code") 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.

The only documents that will be considered when reviewing a NFAD, in accordance with Regulation 18 VAC 48-70-90, 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. Further, this Determination is final and not subject to further review or appeal pursuant to Va. Code § 54.1-2354.4(C).

If, within 365 days of issuing a determination that an adverse decision conflicts with laws or regulations governing common interest communities, we receive a subsequent NFAD for the same violation, the matter will be referred to the Common Interest Community Board to take action in accordance with Va. Code §54.1-2351 or §54.1-2352 as deemed appropriate by the Board.

Determination

The Office has determined, upon a review of the materials submitted with the NFAD, that there is insufficient evidence to conclude that the Board’s actions or lack thereof violated the applicable law as to issues 1, 2 and 5; but that the Board did act in conflict with the applicable law as to issues 3 and 4. This determination will address each issue raised by the Complainant separately.

1. The Board failed to provide adequate means of recording meetings:

The Complainant alleges that during the Association Board of Directors meeting on June 3, 2024, he was unable to record the meeting. The Complainant asserts that the use of virtual/online meetings restricts his ability to use his computer to record meetings while at the same time attending the meetings. The Complainant argues that the use of virtual meetings is an attempt by the management to prevent the meetings of the Board of Directors from being recorded. The Complainant admits that after the June 2024 meeting, he discovered a way to record on his computer but claims that the method does not capture certain activities.

The Board, in its response, points out that it has never objected to the Complainant’s recording of a meeting, and that when the Complainant announced that he was going to be recording meetings it was noted in the minutes. The Board concludes that the Complainant is welcome to continue to record meetings.

The Virginia Property Owners' Association (POA) Act does give a homeowner, like the Complainant, the right to record meetings. "Any member may record any portion of a meeting that is required to be open." Va. Code §§ 55.1-1816(B). In this case, the Board did not prevent the Complainant from exercising this right. The Complainant's issue is that recording virtual meetings is difficult. The POA also permits the Board to hold virtual meetings. It states in pertinent part that:

Any meeting of the association, the board of directors, or any committee may be held entirely or partially by electronic means, provided that the board of directors has adopted guidelines for the use of electronic means for such meetings. Such guidelines shall ensure that persons accessing such meetings are authorized to do so and that persons entitled to participate in such meetings have an opportunity to do so. The board of directors shall determine whether any such meeting may be held entirely or partially by electronic means. Va. Code §§ 55.1-1832(F).

The Board in this case, like the Complainant, decided to exercise the option of holding virtual meetings, and there is no requirement under the POA Act for the Board to make recording of such meetings more convenient for homeowners. If recording meetings is important to the Complainant, he may want to get a recording device, or make a request under Va. Code § 55.1-1815 for the record or minutes of meetings. Thus, this office cannot impose an obligation on the Board where the applicable law does not. Therefore, we find that the Board did not violate the applicable law in this matter.

2. The Board failed to maintain the common area:

The Complainant alleges that Association failed to repair Dominion Energy Light pole CA-01, a common area, located in the Association community and that the lack of repair creates safety issues. The Complainant states that the issue was first reported to the management on May 14, 2024, and as of December 20, 2024, the repair still has not be done.

The Board, in its response, admits that it has the responsibility to provide upkeep of the common area of the Association. The Board also admits that management was notified on May 14, 2024, of the issue. The Board, however, states that all Watchlights within the Association community are owned and maintained by Dominion Energy. The Board asserts that on the same day, May 14, 2024, that the issue was reported, the management made a request to Dominion Energy, and it was assigned a ticket number 34035080. The Board recounts the various attempts made in order to get Dominion Energy to repair the Watchlight. The Board points out that on November 12, 2024, the Association management filed a complaint against Dominion Energy with the Virginia State Corporation Commission (SCC) for failure to repair the Watchlight. The SCC complaint was assigned a case number 44569.

The Board has an obligation under the POA to repair and maintain the Association common area. It states:

In addition to all other assessments that are authorized in the declaration, the board of directors shall have the power to levy an additional assessment against its members if (i) the purpose in so doing is found by the board to be in the best interests of the association and (ii) the proceeds of the assessment are used primarily for the maintenance and upkeep of the common area and such other areas of association responsibility, including maintenance, repair, and replacement of capital components. Va. Code §§ 55.1-1825(A).

As apparent from the Code citation above, there is no time frame requirement to perform maintenance, repair, renovation, or restoration of common elements of the Association. Thus, this Office cannot read into the Code, where there is none, a specified time to make repairs. And assuming, *arguendo*, that the timeframe must be reasonable, this Office would still not be able to conclude that the Board violated the applicable law especially given the fact that the Association appears to have moved or attempted to address this issue upon receiving the complaint from day one, and the fact that a third party (Dominion Energy) is responsible for the delayed repair.

3. The Board failed to provide method of communication:

The Complainant asserts that there is no method of communication amongst homeowners. He states that there is no Facebook page run by the Association. The Board, in its response, claims that the homeowners can communicate amongst themselves by attending the monthly meetings, members can reach the Board via emailing, and that homeowner Directory is available on the Association Portal.

The applicable law in this case succinctly states: “The board of directors shall establish a reasonable, effective, and free method, appropriate to the size and nature of the association, for lot owners to communicate among themselves and with the board of directors regarding any matter concerning the association.” Va. Code §§ 55.1-1825(A).

This office does not agree with the Board that the options of attending monthly meetings, having an email address, and homeowners’ directory available is the type of reasonable, effective, and free methods of communication contemplated by the Code, especially in light of the various means from actually posting a physical bulletin board to the use of technological means of group communication, the latter of which is quite ubiquitous. Creating a simple platform or chat room in any of the media sites or on the Association website, could suffice. Even a traditional and simple bulletin board would still have been sufficient. Thus, the Board’s action or lack thereof in this regard is in conflict with the applicable law.

4. The Board failed to follow proper procedure for closed executive session:

The Complainant alleges that on August 13, 2024, the Board entered into an Executive Session without stating the cause and purpose. The Board, in its response, states that on August 13, 2024, it was unable to finish its executive session discussion prior to the start of the open session meeting, so at the conclusion of the open session, the Board entered the execution session to conclude its discussion. The Board states that the failure to state the reason for entering into executive motion was merely an oversight.

The applicable law allows for closed executive meetings in limited circumstances when certain conditions are satisfied.

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; 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. Va. Code §§ 55.1-1816(C).

The allegation in this case is that Board convened a closed executive session following the open annual meeting. There is no evidence that before convening the executive session, the Board made a motion and stated the purpose for the closed executive session. While the failure might have been an oversight, it still conflicts with the applicable law. In future instances like this, we believe a best practice would be for the Board to follow the above statutory provisions to note that it is reconvening in closed executive session to for the reasons it originally went into a closed session so that it can conclude those items.

5. The Board failed to distribute policies:

The Complainant alleges that the Board failed to distribute two policies to the community. The Complainant states that it has been the policy of the Association that resolutions be introduced then allow the community to offer feedback prior to moving forward. He adds that it has also been the prior policy of the Association to immediately publish and advise the homeowners of their responses through a certified mail for compliance.

The Board, in its response, agrees that it is the policy of the Association to share all draft policy resolutions with the community prior to a Board meeting in which the draft will be discussed. The Board points out that although there was a delay in the posting of two policy resolutions that were approved by the Board in June and July of 2024, both resolutions were posted on the Association Portal as of October 15, 2024.

It seems that the Board has its own policy to share all drafts of resolutions with the residents ahead of the meeting where the draft will be discussed, and it also seems that the policy was not followed in this case, and that there was also a delay in publishing the Board approved resolutions. In other words, the Board might have violated its own policy, which has nothing to do with the CIC law or POA Act. The applicable POA Code in this case states:

Except as otherwise provided in this chapter, the board of directors shall have the power to establish, adopt, and enforce rules and regulations with respect to use of the common areas and with respect to such other areas of responsibility assigned to the association by the declaration, except where expressly reserved by the declaration to the members. Rules and regulations may be adopted by resolution and shall be reasonably published or distributed throughout the development. Va. Code §§ 55.1-1819(A).

As shown in the Code citation above, there is no time frame requirement to publish or distribute the resolution. Thus, this Office cannot read into the Code, where there is none, a specified time to publish or distribute resolution adopted by an association. Therefore, this office cannot conclude that the Board violated applicable law.

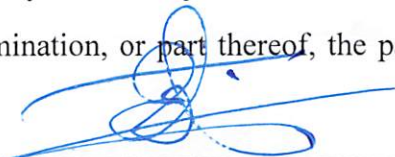
Conclusion

Based upon the information in the record, including the original complaint, its accompanying documents, as well as the NFAD, this Office concludes that the Board's actions are consistent with the applicable law as to issues 1, 2, and 5; but this Office finds that the Board's actions or lack thereof, violate the applicable laws regarding issues 3 and 4.

Decision

Since this Office finds no violation of the applicable laws as to the allegations that the Board failed to provide adequate means of recording meetings; maintain common area; and publish or distribute two policies; no action is required of the Board on those issues. However, this Office finds the Board did not act in compliance with the applicable law regarding providing communication methods; and following procedure for executive session. As a result, this Office recommends that the Board: (1) establish reasonable, effective, free method of communication amongst homeowners, and between homeowners and the Board; and (2) comply with the proper procedure for closed executive sessions as required by Va. Code § 55.1-1816.

If any party is dissatisfied with this determination, or part thereof, the party could seek remedies in civil court.



Justina Ehiawaguan, Esquire
CIC Ombudsman

cc: Board of Directors
Ashbriar Homeowners' Association