



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Glenn A. Youngkin
Governor

January 17, 2023

G. Bryan Slater
Secretary of Labor

Demetrios J. Melis
Director

Complainant: James Gray
Association: Harbour Pointe Homeowners Association, Inc.
File Number: 2023-01344

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 28, 2022. The Association provided a response to the association complaints dated November 18, 2022. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated November 25, 2022 and received November 30, 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 alleges that the Association improperly approved an increase in assessments of more than 10%. The Complainant believes this is a violation of both the Association’s governing documents as well as §55.1-1807(2)¹ which allows for all members in good standing to have the right to cast a vote on any matter requiring a vote by the Association’s membership. According to the Complainant, the governing documents of the Association require a vote of the membership for any assessment increase over ten percent.

The Association appears to agree with the requirement for a membership vote, as it sent out a letter to association members alerting them to the increase and letting them know a vote would be required since the increase was over 10%. According to the Association’s response, a meeting was held in August and insufficient votes were obtained to either approve or disapprove the budget and a decision was made to keep the voting open and send out ballots to owners who did not attend the meeting. According to the Association’s decision, a board member went door-to-door after the meeting and obtained the votes necessary to pass the budget.

The Association stated that it believed sending out ballots would be an excess expense for the Association and since once they obtained more votes than necessary for approval of the budget (by going door-to-door), the opportunity for disapproval was moot.

I believe that the Complainant has a valid point, namely that §55.1-1807(2) does provide every owner the right to cast a vote and in this case, it appears the owners who did not receive a ballot were disenfranchised by not being provided that opportunity. Based on the Association’s response to the complaint, providing ballots to the members

¹ 2. The right to cast a vote on any matter requiring a vote by the association’s membership in proportion to the lot owner’s ownership interest, unless the declaration provides otherwise;

who did not vote would not have altered the outcome, but based on the law, it does appear they should have been given the opportunity to vote. I will note that it appears all owners had an opportunity to vote at the August meeting, but not all owners must have attended that meeting. Once the Association chose to continue the voting process, it should have provided the right to vote to all members, even if that vote may have proven to be of no consequence.

Required Actions

This office has no authority to go backwards in time and cannot require the Association to carry out the vote again. We can, however, ask that for future voting situations, the Association ensures that all owners have the opportunity to vote, as required under the Property Owners' Association Act.

On a separate note, it appears, based on the complaint and the Association's response, that the meeting to consider the complaint was held in executive session. This generally is not an appropriate method for holding consideration of an association complaint. Under 55.1-1816 of the Property Owners' Association Act, there are limited reasons why a board can meet in executive session. While an association can meet in executive session to consult with legal counsel, it cannot meet in executive session to determine if there are any legal issues in an association complaint. This is a common misunderstanding and I ask the Association to review the applicable statute and ensure that it carries out any future considerations in full compliance with the Property Owners' Association Act.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Harbour Pointe Homeowners Association, Inc.