



COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

February 26, 2018

Ralph S. Northam
Governor

Esther Lee
Secretary of
Commerce and Trade

Complainant: Janice Lienhart
Association: Newberry Towne Association, Inc.
File Number: 2018-02006

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 December 14, 2017. The Association provided a response to the Complainant dated December 27, 2017. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated January 19, 2018 and received the same day.

Determination

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 §55-530(F) (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.

The Complaint submitted to the Association focused on a failure by the Association to record minutes of meetings. Specifically, the Complainant alleged that the Association violated §55-510(F)¹ of the Property Owners' Association Act when it failed to take minutes at the May, August and October 2017 meetings of the Board of Directors. In addition, the Complainant alleged a violation of §55-510.1² as well as §55-509.5(A)(14)³. §55-510.1 requires that minutes be recorded for board of directors meetings and that those minutes be available as part of the books and records of the association. Va. Code §55-509.5 requires a copy of any approved minutes of the board of directors to be included in a disclosure packet. Based on the information provided by the Complainant, it appears that there may have been seven sales in the community from July through November 2017, resulting in seven possible violations related to incomplete disclosure packets.

The Association responded to the Complaint by noting that all approved minutes for the Board meetings had been posted on the website and that copies have been emailed to the Complainant. The Association also noted that some minutes had been inadvertently lost and the Manager's "Action Lists" were used instead. The "Action Lists in lieu of minutes" were included in disclosure packets for potential buyers, except for two instances where the sale was by foreclosure and a disclosure packet was not required. The final determination from the Association ended with a confirmation that the Board had been advised to make certain someone takes minutes at each meeting.

Based on the information provided in the NFAD, there was clearly a failure to take minutes at several meetings and/or a loss of minutes for those meetings. While I recognize the volunteer nature of association boards of directors, minutes are really the primary document by which actions taken at individual board meetings can be tracked and documented, and owners can determine what took place if they are unable to attend meetings. More importantly, the law requires that minutes be recorded for all board meetings.

It seems clear that the Association failed to record minutes for at least one meeting, which is a violation of the Property Owners' Association Act. The Association is also required to maintain the books and records of the association, and to make draft minutes available for inspection or copying in a designated time frame pursuant to §55-510(F). If no minutes were taken or if minutes were lost, an owner is denied the right to examine or copy such minutes. As to the allegation that the Association violated the disclosure packet provision that requires a copy of "any approved minutes of the board of directors and

¹ Except as provided in subdivision C 7, draft minutes of the board of directors shall be open for inspection and copying (i) within 60 days from the conclusion of the meeting to which such minutes appertain or (ii) when such minutes are distributed to board members as part of an agenda package for the next meeting of the board of directors, whichever occurs first.

² All meetings of the board of directors, including any subcommittee or other committee thereof, 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 § 55-510.

³ An association disclosure packet shall contain the following:

14. A copy of any approved minutes of the board of directors and association meetings for the six calendar months preceding the request for the disclosure packet;

association meetings for the six calendar months preceding the request for the disclosure packet," I cannot find such a violation owing to the "any approved minutes" language in this statute. Ideally there should be minutes for every meeting of the board that took place in the six months prior to the disclosure packet request, but the law only asks for any *approved* minutes. In the present scenario, there were three sets of minutes that apparently had never been approved, either because they were lost or they were never recorded and therefore those minutes could not be included in the disclosure packet.

Required Actions

The Association must determine how it will ensure that minutes will be recorded at all future meetings of the board of directors. I ask that a brief letter or email be provided to my office that outlines how the Association will address this issue going forward. Such letter must be submitted within thirty (30) days of the date of this Determination.

The Association failed to include certain requirements set forth in the Regulations when responding to the Complaint. Under 18 VAC 48-70-50(9)⁴ and (10)⁵ the final determination from an association must include the registration number of the association, the name and license number of the manager, if applicable, the complainant's right to file a Notice of Final Adverse Decision and the appropriate contact information for filing the Notice. The Association is now on notice that it must ensure compliance with the Regulations in their entirety, when responding to a Complaint. A failure to do so in the future may result in a referral of the matter to the Common Interest Community Board for enforcement.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Newberry Towne Association, Inc.

⁴ 9. The notice of final determination shall be dated as of the date of issuance and include specific citations to applicable association governing documents, laws, or regulations that led to the final determination, as well as the registration number of the association. If applicable, the name and license number of the common interest community manager shall also be provided.

⁵ 10. The notice of final determination shall include the complainant's right to file a Notice of Final Adverse Decision with the Common Interest Community Board via the Common Interest Community Ombudsman and the applicable contact information.