



COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

March 14, 2018

Ralph S. Northam
Governor

Esther Lee
Secretary of
Commerce and Trade

Complainant: Nicholas Kniska, Jr.
Association: Lansdowne Village Greens Homeowners' Association
File Number: 2018-02070

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 two complaints to the Association, dated November 9, 2017 and November 20, 2017. The Association provided two responses to the Complainant, both of which were dated January 16, 2018. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated February 6, 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 Complainant submitted two separate Complaints to the Association. The first alleged a violation of §55-510.2¹ of the Property Owners' Association Act. This statute requires an association to provide a reasonable, effective and free method of communication. The Complainant wrote that the Association responded to a request for information regarding the method of communication available to owners by stating that residents can "communicate with the Board via e-mail ...or attend the Board or other committee meetings." After receiving this response, the Complainant submitted a complaint to the Association alleging a failure to provide the required method of communication per §55-510.2. The Association responded by reviewing the matter at an October board meeting and establishing a method of communication utilizing a physical bulletin board to be placed in the clubhouse of the Association which it considers a high traffic area.

The Complainant considers the revised method of communication to be neither reasonable nor effective and filed the current complaint. He bases his reasoning on the fact that the bulletin board is locked, that the lock hinders owners from posting freely, and that multi-page documents are difficult to post or to be viewed in their entirety. The Complainant also stated that the Clubhouse is locked outside of regular business hours and he does not consider the Clubhouse to be a high traffic area. He argues that based on the other forms of communication available to communicate with the manager and board, which include emails and online forms, a similar method should be used for communication among owners.

The Association responded to the first complaint by stating that it believed the physical bulletin board to be more effective than an online portal might be, since "the daily traffic through the clubhouse, in the vicinity of the bulletin board, is greater than the daily traffic to the Association's website." The Association noted that only 18 users had logged into the website for the month of December, while the clubhouse was accessed by 168 users for the same time period. The Association believes that it is in compliance with the statute.

In his second complaint, the Complainant alleges that the Association failed to comply with §55-510.1² of the Property Owners' Association Act by failing to respond to requests for access to board meeting and committee meeting agenda packets. The Complainant also alleges the Association violated a portion of §55-510 by failing to provide draft minutes³ upon request. The Complainant further alleges that the Association has conducted improper executive sessions⁴ for more than a year. The Complainant provided copies of board meeting minutes to illustrate his concerns.

¹ 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.

² 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 thereof 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 thereof.

³ 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.

⁴ The board of directors or any subcommittee or other committee thereof may convene in executive session to consider personnel matters; consult with legal counsel; discuss and consider contracts, pending or probable litigation and matters involving violations of

The Association's response to the second complaint stated that it provided a copy of the Board Meeting agenda via an email blast to all owners, that agenda packets were available upon proper written request by any member in good standing, and that this access begins the same day the board members or committee members are provided their packets. The Association further notes that meeting minutes are included in the agenda packets and that any approved meetings can be obtained via the regular method of requesting an inspection or copy of such minutes, and that draft minutes are available via the same process if they have not yet been approved within 60 days after the meeting to which they pertain. The Association also writes that agendas and meeting packets are not required to be posted on a website or sent to all owners through electronic means.

As to the portion of the second complaint related to executive sessions, the Association stated that it acknowledged that the "motions reflected in the minutes do not accurately indicate a proper motion to enter 'ES'". The Association agreed to ensure that future motions to enter executive session will be made and properly entered in the minutes. The Association states that it is unaware of any motions made in executive session and that any consensus action is done in open meeting. The Association said that "ES minutes are rarely, if ever, taken/recorded." It also noted that if there were "ES" minutes, those minutes would not be subject to inspection or copying.

Finding an ideal method of communication that meets the requirements of §55-510.2 can be difficult for associations. There is no requirement in common interest community law that associations utilize technological solutions for communication, and in many instances, something as simple as a bulletin board or cubbyholes in a common area can be sufficient. In the present case, the Complainant does raise the point that a locked bulletin board does not make it a simple matter for someone to post information, and the Association, in its response, did not provide information as to how documents are posted on the bulletin board. As has been noted in a prior Determination (2017-03130), locked bulletin boards can also make it nearly impossible for someone to review a multi-page document that has been posted unless it is spread out page by page across the board. As for the physical location of the bulletin board, it does seem that it is in a location likely to garner attention, but there is really no way for this office to determine if the location is the best location, only that it sounds as though it is a reasonable location.

The allegations that the Association has failed to provide access to agenda packets does not seem to have merit, based on the Association's response. It appears that the Association sends out agendas via email, and that the packets are available the same day the board or committee members receive them. While the law does not require the association to obtain a written request to access these documents, I do not see such a requirement as being a violation of the law that governs access to the agenda packets. The Association was aware of the requirement that draft minutes must be available within

the declaration or rules and regulations adopted pursuant thereto for which a member, his family members, tenants, guests or other invitees are responsible; or 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 thereof, 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.

60 days of the applicable meeting or when distributed in agenda packets and the Association can, under §55-510 require a member to request access to minutes that are not included in the agenda packets.

It does appear upon review of several sets of minutes included in the NFAD that the Association has failed in the past to properly enter or exit executive sessions. Contrary to the requirements, the Association failed to state its purpose for entering executive session and upon reconvening in the open meeting, it failed to take votes and reasonably identify the substance of the matters for which it had entered executive session.

Required Actions

The Association does need to determine whether the bulletin board in the clubhouse meets all the requirements of §55-510.2 and whether the locked bulletin board door makes it difficult for owners to review all the documents that might be contained inside. I would appreciate a quick email or letter detailing any findings the Association may have regarding the bulletin board and its plan for addressing multi-page documents if someone wishes to post such documents. Please provide such a response within thirty (30) days of the date of this Determination.

The Association must ensure that it enters and exits executive sessions in a manner that fully comports with §55-510.1 of the Property Owners' Association Act. The Association must be sure to include the necessary information in the minutes of the meetings. Any continuing violation of the executive session provisions of the Property Owners' Association Act may result in a referral of the matter to the Common Interest Community Board for whatever enforcement action it may deem appropriate.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Lansdowne Village Greens Homeowners' Association