



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Robert F. McDonnell
Governor

December 2, 2013

James S. Cheng
Secretary of
Commerce and Trade

Gordon N. Dixon
Director

Complainant: Janice Lienhart
Association: Newberry Towne Association
File Number: 2014-01393, 01394, 01395

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

Complainant submitted three separate complaints to the association dated September 23, 24, and 29, 2013. The Association met on October 8, 2013 and in both open session and executive session determined its response to the complaints. A memorandum or letter, signed by the President of the Association appears to be the Final Decision from the Association. This response is not in compliance with the Common Interest Community Regulations (Regulations) and will be addressed later in this Determination.

The memorandum was not dated, but the Notices of Final Adverse Decision (NFAD) were received by this office October 29, 2013, which is fewer than 30 days after the meeting was held to review the complaints. While we can only guess as to what the date of the Final Decision may have been, clearly it would have been dated after the meeting, and should have been dated no more than seven days later. The assumed date of the Final Decision, for the purposes of ensuring the NFADs were submitted in a timely manner, would be somewhere between October 8, 2013 and October 15, 2013. Our receipt of the NFADs was, therefore, certainly within the required 30 day time period for filing a NFAD.

Determination

The Office of the Common Interest Ombudsman (OCICO) has reviewed the NFAD in its entirety. Any additional information submitted by Complainant that was not part of the original Complaint submitted to the Association was reviewed but not utilized in the Ombudsman's Determination.

One complaint alleged that the association failed to provide certain documents in the member agenda packet that had been included in the agenda packets for the directors at a board meeting. The Complainant alleged that draft minutes had not been included in the member agenda packet and that other documents had also been excluded from the member agenda packet but included in the director's packets. The Association stated in its response that the complaint was "unfounded and dismissed." It also noted that "draft minutes of monthly Board meetings will not be open to public until approved as long as approved within 60 days, if not then open for inspection."

There was no actual evidence as to what was in the member agenda packet materials and what was in the packet of materials provided to directors. For this reason, I cannot provide a definitive determination as to whether the Association properly followed the Property Owners Association (POA) Act in relation to copies of draft minutes (§55-510(F)) and/or agenda packets for review by members (§55-510.1(B)). In addition, it is not clear which draft minutes were allegedly omitted from the member packet – minutes from the prior board meeting or minutes from some other meeting that had been previously held.

The Association's response, however, does seem problematic, as it seems to imply that 60 days is an acceptable timeframe for making draft minutes available for inspection by members. While this is true to some extent, it is only true if there has been no subsequent board meeting within 60 days of the board meeting at which the minutes were taken. §55-510(F) has a "whichever occurs first" clause, which means one of two possible actions must take place.

Either the draft minutes of a board meeting must be made available for inspection within 60 days of the meeting "to which such minutes appertain," or they must be made available when distributed to the board in an agenda package at the next board of directors meeting, *whichever comes first*.¹ The next board meeting could be held much sooner than 60 days, which would result in the draft minutes being available for inspection and copying in less than 60 days. §55-510.1 would further require that such draft minutes, if made part of the agenda packet for directors, also be available for inspection by the membership.²

A second complaint submitted to the association contained allegations that the manager for the association had acted improperly when he responded to an inquiry from the Complainant regarding the failure of a committee to provide her notice of a meeting. The manager stated that he was certain the omission was unintentional and he will remind

¹"... 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." §55-510 of the *Code of Virginia*

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." §55-510.1 of the *Code of Virginia*

the board that it must provide notice of all meetings. The Association found the complaint unfounded and dismissed it.

Actions of a manager are not dealt with through the association complaint procedure mandated by the Regulations. In the event that a manager is violating the Common Interest Community Manager (CICM) Regulations, such a complaint should be submitted directly to the Common Interest Community Board through the Department of Professional and Occupational Regulation's customary complaint procedure. In this instance, it did not appear that the issues raised in relation to the Manager provided any evidence that the manager had violated any of the provisions contained in the CICM Regulations.

The third complaint was related to a "records request form" that was created by the association board and must be submitted before a member can access the books and records. The Complainant alleged that the request form had an inappropriate tone and may lead members to not fully understand their rights. In addition, the Complainant believed it was not proper to reference the statutorily mandated cost schedule (§55-510(D)) in the same resolution as it references access to records. In its response, the Association found the complaint unfounded and dismissed it.

The complaint related to access to books and records does not allege an actual conflict with applicable laws or regulations. In the event that a request is made to obtain access to the books and records and that request is denied in a way that would be inconsistent with common interest community law or regulations, an association complaint (and subsequent NFAD if applicable) would be appropriate. No portion of the Property Owners Association Act addresses association resolutions or forms created by associations. As a result, this office has no authority to determine if there has been a violation or conflict with common interest community laws or regulations in relation to the Association's decision to implement a records request form, and to address both the cost schedule and general access to records in a single resolution.

Required Actions

The Association's Final Decision has provided none of the information required by the Regulations. The Association must immediately assess its method of providing a Final Decision and ensure that it complies with the Regulations. 18VAC48-70-50 of the *Administrative Code of Virginia* requires the following:

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.

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.

I would suggest the Association assess the manner in which it makes draft minutes available to association members. While it is not clear from the NFAD submitted to this office if there was a conflict with common interest community laws or regulations, it appears that there could be such a conflict in the future. Therefore I believe this is an area the Association should review and ensure that it complies with the requirements under the POA Act.

The Association is on notice that all future Final Decisions must be in compliance with the Regulations. If this office receives any future Final Decisions written after receipt of this Determination that do not comply with the Regulations, the matter will be referred to the Common Interest Community Board for whatever action it deems appropriate.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Newberry Towne Association