



# COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

December 22, 2016

Terence R. McAuliffe  
Governor

Todd Haymore  
Secretary of  
Commerce and Trade

Jay W. DeBoer  
Director

Complainant: Greg Mathieson  
Association: Virginia Run Community Association  
File Number: 2017-01240

---

*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 September 2, 2016. The Association provided a response to the Complainant dated October 18, 2016. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated November 15, 2016 and received November 16, 2016.

## 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 a Complaint to the Association alleging that it had failed to comply with §55-510.1(C)<sup>1</sup> of the Property Owners' Association Act. In the Complaint, the Complainant said that the Association convened in executive session to determine which candidates they would choose to fill vacant positions. The vacant positions to which he was referring were on the Board of Trustees (Board) for the Association, and six candidates had been questioned earlier in the meeting by the Board in an open meeting. According to the Complainant, the Board stated its purpose for convening in executive session "was that of discussing 'personnel matters'." The Complainant did not believe that a discussion related to board member candidates met the definition of a "personnel matter."

The Association, in its Notice of Final Decision, noted that there was an inaccuracy in the Complaint related to dates of the events described. This does not appear to have any impact on the actual substance of the Complaint. The Association went on to further explain that it had reviewed its practices regarding executive session and determined from minutes of a prior meeting that the Board had previously convened in executive session for the purpose of considering the merits of candidates under §55-510.1(C) which permits convening in executive session for the purpose of "discussing personnel matters." In the present situation, the Association again convened in executive session to discuss candidates for vacant Board positions, pursuant to the right it believed it possessed under §55-510(C).

The Association acknowledged in its Decision that this office has previously provided a Determination (File Number 2016-01869) regarding this topic and in that Determination, we found that the phrase "personnel matters" relates only to employees and not board members or potential board members. The Association respectfully disagreed with this prior Determination, "believing it to be unsupported by the statutory language" and also noted that if a Notice of Final Adverse Decision is submitted to this office, the Association "will avail itself of the opportunity to present legal argument in support of its position."

This office stands by its prior Determination and finds that the common usage and definition of personnel is related only to employees and not to board members. Therefore, any discussion of "personnel matters" would have to pertain to employees of the association and not to members, or potential members, of a board of directors. As to the Association's intention to avail itself of a legal argument, please note the following language from §55-530(G) of the Code of Virginia:

The determination of whether the final adverse decision may be in conflict with laws or regulations governing common interest communities or interpretations thereof by the Board shall be a matter within the sole discretion of the Director, whose decision

---

<sup>1</sup> 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 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.

is final and not subject to further review. The determination of the Director shall not be binding upon the complainant or the association that made the final adverse decision.”

Required Actions

The Association can no longer convene in executive session under the justification that is it discussing personnel matters if the topic of discussion does not pertain to employees. If the Association chooses to continue this activity, the matter will be referred to the Common Interest Community Board for any 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  
Virginia Run Community Association