



COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

Terence R. McAuliffe
Governor

June 23, 2017

Todd Haymore
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Ronald Graves
Association: Unit Owners Association of Lakeside Plaza Condominium
File Number: 2017-02914

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 a Complaint to the Association dated March 6, 2017. The Association provided a final determination to the Complainant dated May 9, 2017 and the Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated May 30, 2017 and received June 2, 2017.

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 included five separate groups of allegations in his Complaint to the Association. The focus of the allegations centered on an annual meeting where the Complainant was elected, along with others, to the executive organ, but the Association subsequently realized that improper notice of the meeting had been provided to the owners. A new annual meeting was scheduled, proper notice was provided, and the Complainant was not elected to the executive board at this second annual meeting.

The first allegation in the Complaint was that the Association violated §55-79.74:1ⁱ of the Condominium Act by failing to provide access to requested books and records of the Association. This request was for documents related to the October annual meeting, including minutes, notices, copies of resolutions or other actions taken by the Board in relation to that meeting, and there were also several questions asked including who raised the objection about the improper notice of the annual meeting and the actions of the Board as a result of the objection. The Complainant made this first request to inspect the records, in writing, on November 23, 2016. The Association responded to this request by outlining the application of the five business day deadline set forth in the Condominium Act and noting that it was not required to respond until December 2, 2016, due to the upcoming weekend and Thanksgiving holiday. The Association followed this letter with a second letter on December 1, 2016 stating that the Complainant had “failed to state the purpose of the request” and denied access to the books and records.

The Complainant provided a purpose through counsel and via email on December 5, 2016. The Association responded with a letter stating that it had five business days to respond, rather than five business days to allow access. Access was ultimately granted to the Complainant, but “did not include any minutes or records of the actions of the Board with regard to the Annual Meeting or election.” The Complainant believes the Association violated §55-79.74:1 “by delaying [the Complainant’s] right to review its records for a period of 11 eleven [*sic*] days.” The Complainant alleged that he was required to “‘reasonably identify the purpose’ for his request” pursuant to the statute and that his initial request met this requirement. The Complainant also contended that he had not been permitted to review “minutes of the 2016 Annual Meeting held on October 27, 2016; the minutes of all Board meetings, including any emergency meetings and/or executive sessions that occurred after the October 27, 2016 Annual Meeting, and any resolutions, votes or actions taken by the Board that invalidate or make a finding or determination that the election was void.”

The Complainant submitted a second request for access to the books and records on December 20, 2016, with a list of documents he wished to inspect. These documents again included minutes from the October annual meeting, the December annual meeting, minutes of all meetings occurring after the October annual meeting, any resolutions regarding the October annual meeting, as well as a host of other documents related to that October meeting. The Association provided a written response in which it permitted access to the records in part, and denied access to the extent that the requested records

were unapproved minutes, and therefore 'drafts' not yet incorporated into the books and records. The Association did not provide access to any records related to the decision to void the election results and hold a new annual meeting, nor did it provide access to records related to the actions of the Board after the October annual meeting.

The second Complaint alleged a violation of §55-79.75(B) and (C)ⁱⁱ of the Condominium Act. The Complainant stated that the Association "held a meeting without notice and without making it open to the unit owners..." This allegation stems from an announcement in the Association's weekly update on October 28, 2016 that an emergency meeting would be held. No notice was received of such a meeting, and the Complainant believes the Board took action that could only have taken place in a meeting, thus the allegation that "the Board either took action without an open meeting...or met through a work session or informally without properly noticing the meeting and without giving the unit owners proper notice or an opportunity to be present..."

The third allegation pertained to a further violation of §55-79.74:1, namely that minutes of meetings should be recorded and made available to the unit owners. The Complainant alleges that in relation to the October 27, 2016 annual meeting and any subsequent board meetings, there were either no minutes recorded or they were not made available to the unit owners. The Complainant argues that the Association's position that the minutes are drafts not yet incorporated into the records of the association fails since the failure to approve the minutes is not sufficient to make them retain draft status.

The fourth allegation was that the annual meeting was not held in accordance with the condominium instruments. Because this office cannot review or interpret the condominium instruments, no determination will be provided regarding this allegation.

The last allegation was of a violation of §55-79.72:3(1), (3) and (5)ⁱⁱⁱ of the Condominium Act. The Complainant alleges that the Association violated his right to access all books and records and to have notice of all meetings. The Complainant also alleges that the decision by the Board to hold a second Annual Meeting denied the Complainant "the right to serve on the Board when duly elected."

The Association's response to the multiple allegations follow.

The Association noted that it did not believe the initial request for inspection of the books and records contained a proper purpose. In addition it believed the request for access to books and records outlined in the Complainant's first allegation pertained to "drafts not yet incorporated into [the] Association's books and records and communications with legal counsel." The Association wrote that such drafts "need not be produced" pursuant to §55-79.74:1(C) of the Condominium Act. Requested minutes for board meetings after the annual meeting could not be provided as "[n]o known meeting of the Association's Board of Directors occurred after the October 27, 2016 annual meeting until...December 20, 2016. The Association did, however, offer the minutes of the December 20, 2016 meeting (which had not taken place at the time of the initial request).

In response to the Complainant's request in the first allegation to inspect all communication, records of board action, etc. relating to the annual meeting and election, the Association agreed to make additional correspondence available for inspection, but would not include correspondence with legal counsel as permitted under the statute. The Association noted that since the original annual meeting was not properly noticed, no resolutions, votes, or consent exist and therefore cannot be inspected. Finally, as to any invoices, communications or correspondence requested, the Association stated that the Association had previously made an agreement between a third party vendor and the Association available to the Complainant.

In response to the second allegation that the Association failed to provide notice of meetings or held a meeting that was not open to the unit owners, the Association responded that there was no evidence that the Association had held a meeting, work session or informal gathering. While the Association acknowledged that emails had been exchanged, it noted that "[t]o our knowledge, no Virginia case has held that the purely administrative task of selecting a date to re-notice a community association's voided annual meeting constitutes a transaction of the business of a community association for the purposes of falling within the statutory definition of 'meeting'."

The Association's response to the third allegation that unapproved minutes should have been included in the books and records and thus subject to inspection by the Complainant was based on both the statute itself and Robert's Rules of Order. Specifically, the Association stated that since the minutes had not been approved by the membership, "they were withheld as drafts in accordance with the Act."

As previously noted, this office cannot provide a determination in relation to the fourth allegation since it was dependent upon an interpretation of the condominium instruments.

The fifth and final allegation from the Complainant echoed several other prior allegations, and resulted in a response from the Association that confirmed that access to the books and records had been provided, including correspondence between board members that could be construed as books and records of the association. The Association also confirmed that no meeting, work session or other informal gathering had been held and therefore no notice of such was required, and finally that the Complainant was not duly elected since the annual meeting had been improperly noticed.

This was a lengthy and complicated Notice of Final Adverse Decision. Starting with the first allegation and following through to the last, I will address each issue that is appropriate for consideration by this office.

In relation to the first allegation, it does not appear that the Complainant initially provided an actual purpose for his request to inspect the books and records of the association. While he may have provided background information in his first request, upon review of the actual written request, it did not appear that a purpose was provided. Once this was addressed and a follow up request was made, the Association responded with a letter that answered each of the seven requests made, noting that some of the requests

were questions and therefore were not requests for access to the books and records, and other requests pertained to minutes that were in draft form and not yet part of the books and records. The Association did agree to make other records requested available to the Complainant.

I concur with the Association's position that without a purpose they were not required to provide access to the records. Not allowing the inspection of minutes the Association considered to be in draft form is permissible under the statute. The decision as to what constitutes a draft record is not one this office can make since no definition of a "draft" is contained in the Condominium Act. If the Association considers a set of minutes to be draft minutes, they are within their right, based solely on the Condominium Act, to withhold such minutes from an inspection request.

The Complainant's allegation that the Association failed to respond in an appropriate timeframe did not provide sufficient information for a determination to be made. Under §55-79.74:1(B) there are two different timeframes for response to a request to inspect the records; five business days if the association is managed by a professional common interest community manager and ten business days for a self-managed association. Without knowing whether this association is managed by a common interest community manager or is self-managed we cannot determine what timeframe is appropriate for response. Even if we were to assume professional management, the business day aspect of the response time would indicate that the Association did respond in a timely manner under, and did provide access on the 5th day, even if that access was not exercised by the Complainant until the 6th day.

The Association also argued that there were no meetings held, of any nature, after the October annual meeting and therefore there were no records to be inspected related to any such meetings. This office has no way of determining if any meetings were held, no proof was provided of such, and therefore I must agree with the Association that if no meetings were held, there would be no records available for inspection.

The Complainant's second allegation that the Association held a meeting or meetings without notice or that were not open to the owners is not one that was proven in the Complaint. While I understand the Complainant's position on this matter, without proof that such a meeting (or meetings) was held, no determination can be made that the Association violated §55-79.75 (B) or (C). Emails between board members are not sufficient to meet the definition of "meeting" contained in §55-79.41^{iv} and therefore it does not appear that any such emails constituted a meeting of the executive organ.

The third allegation related to the requirement that minutes be recorded and made available to the owners is based on the belief that either minutes were not recorded at meetings held after the first annual meeting and before the second annual meeting or that such minutes were not made available to owners. The Association has previously stated that it has no knowledge of any meetings taking place between annual meetings, and therefore it does not appear there was a violation of §55-79.74:1 since without a meeting there is no need to record minutes.

As previously discussed, the fourth allegation regarding compliance with the condominium instruments cannot be examined nor can a determination be provided.

The final allegation by the Complainant that the Association violated §55-79.72:3 (1), (3), and (5) by not providing access to the books and records and notice of all meetings fails based on the prior determinations. The Association did provide access to documents, but not to draft documents or correspondence between the Association and its attorney, both of which may be excluded under statute. The Association could not provide minutes of meetings that were never held, nor could it provide notice of meetings that were never held. The contention that the Complainant was not permitted his right to serve on the executive organ after being duly elected does not appear to have merit, since the annual meeting was not properly noticed, and therefore anyone elected at that meeting could not have been duly elected.

Required Actions

No action is required.

You are welcome to contact me if you have any questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Unit Owners Association of Lakeside Plaza Condominium

i § 55-79.74:1. Books, minutes and records; inspection.

A. The declarant, the managing agent, the unit owners' association, or the person specified in the bylaws of the association shall keep detailed records of the receipts and expenditures affecting the operation and administration of the condominium and specifying the maintenance and repair expenses of the common elements and any other expenses incurred by or on behalf of the association. Subject to the provisions of subsections B, C and D, upon request, any unit owner shall be provided a copy of such records and minutes. All financial books and records shall be kept in accordance with generally accepted accounting practices.

B. Subject to the provisions of subsection C, all books and records kept by or on behalf of the unit owners' association, including, but not limited to, the unit owners' association membership list, addresses and aggregate salary information of unit owners' association employees, shall be available for examination and copying by a unit owner in good standing or his authorized agent so long as the request is for a proper purpose related to his membership in the unit owners' association, and not for pecuniary gain or commercial solicitation. Notwithstanding any provision of law to the contrary, this right of examination shall exist without reference to the duration of membership and may be exercised (i) only during reasonable business hours or at a mutually convenient time and location and (ii) upon five business days' written notice for a unit owner association managed by a common interest community manager and 10 business days' written notice for

a self-managed unit owners' association, which notice shall reasonably identify the purpose for the request and the specific books and records of the unit owners' association requested.

C. Books and records kept by or on behalf of a unit owners' association may be withheld from examination or copying by unit owners and contract purchasers to the extent that they are drafts not yet incorporated into the unit owners' association's books and records or if such books and records concern:

1. Personnel matters relating to specific, identified persons or a person's medical records;
2. Contracts, leases, and other commercial transactions to purchase or provide goods or services, currently in or under negotiation;
3. Pending or probable litigation. Probable litigation means those instances where there has been a specific threat of litigation from a party or the legal counsel of a party;
4. Matters involving state or local administrative or other formal proceedings before a government tribunal for enforcement of the condominium instruments or rules and regulations promulgated by the executive organ;
5. Communications with legal counsel which relates to subdivisions 1 through 4 or which is protected by the attorney-client privilege or the attorney work product doctrine;
6. Disclosure of information in violation of law;
7. Meeting minutes or other confidential records of an executive session of the executive organ held pursuant to subsection C of § 55-79.75;
8. Documentation, correspondence or management or executive organ reports compiled for or on behalf of the unit owners' association or the executive organ by its agents or committees for consideration by the executive organ in executive session; or
9. Individual unit owner or member files, other than those of the requesting unit owner, including any individual unit owner's files kept by or on behalf of the unit owners' association.

D. Prior to providing copies of any books and records, the unit owners' association may impose and collect a charge, reflecting the reasonable costs of materials and labor, not to exceed the actual costs thereof. Charges may be imposed only in accordance with a cost schedule adopted by the executive organ in accordance with this subsection. The cost schedule shall (i) specify the charges for materials and labor, (ii) apply equally to all unit owners in good standing, and (iii) be provided to such requesting unit owner at the time the request is made.

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B. Except as otherwise provided in the condominium instruments, the provisions of this subsection shall apply to executive organ meetings. All meetings of the unit owners' association or the executive organ, including any subcommittee or other committee thereof, shall be open to all unit owners of record. The executive organ shall not use work sessions or other informal gatherings of the executive organ to circumvent the open meeting requirements of this section. The unit owners' association may, to the extent the condominium instruments or rules adopted thereto expressly so provide, send notice by electronic transmission consented to by the officer to whom the notice is given. Minutes of the meetings of the executive organ shall be recorded and shall be available as provided in § 55-79.74:1. Notice of the time, date and place of each meeting of the executive organ or of any subcommittee or other committee thereof, and of each meeting of a subcommittee or other committee of the unit owners' association, shall be published where it is reasonably calculated to be available to a majority of the unit owners.

A unit owner may make a request to be notified on a continual basis of any such meetings which request shall be made at least once a year in writing and include the unit owners' name, address, zip code, and any e-mail address as appropriate. Notice of the time, date, and place shall be sent to any unit owner requesting notice (i) by first-class mail or e-mail in the case of meetings of the executive organ or (ii) by e-mail in the case of meetings of any subcommittee or other committee of the executive organ, or of a subcommittee or other committee of the unit owners' association.

Notice, reasonable under the circumstances, of special or emergency meetings shall be given contemporaneously with the notice provided members of the (i) executive organ or any subcommittee or other committee thereof or (ii) subcommittee or other committee of the unit owners' association conducting the meeting.

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 the executive organ or subcommittee or other committee thereof for a meeting shall be made available for inspection by the membership of the unit owners' association at the same time such documents are furnished to the members of the executive organ.

Any unit owner may record any portion of a meeting required to be open. The executive organ or subcommittee or other committee thereof conducting the meeting may adopt rules (i) governing the placement and use of equipment necessary

for recording a meeting to prevent interference with the proceedings and (ii) requiring the unit owner recording the meeting to provide notice that the meeting is being recorded.

If a meeting of the executive organ is conducted by telephone conference or video conference or similar electronic means, at least two board members shall be physically present at the meeting place included in the notice. The audio equipment shall be sufficient for any member in attendance to hear what is said by any board member participating in the meeting who is not physically present.

Voting by secret or written ballot in an open meeting shall be a violation of this chapter except for the election of officers.

C. The executive organ or any subcommittee or other committee thereof may convene in executive session to consider personnel matters; consult with legal counsel; discuss and consider contracts, probable or pending litigation and matters involving violations of the condominium instruments or rules and regulations promulgated pursuant thereto for which a unit owner, his family members, tenants, guests or other invitees are responsible; or discuss and consider the personal liability of unit owners to the unit owners' 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 executive organ 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 executive organ 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.

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Every unit owner who is a member in good standing of a unit owners' association shall have the following rights:

1. The right of access to all books and records kept by or on behalf of the unit owners' association according to and subject to the provisions of § 55-79.74:1, including records of all financial transactions;
3. The right to have notice of any meeting of the executive organ, to make a record of such meetings by audio or visual means, and to participate in such meeting in accordance with the provisions of § 55-79.75;
5. The right to serve on the executive organ if duly elected and a member in good standing of the unit owners' association, except to the extent that the condominium instruments provide otherwise.

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"Meeting" or "meetings" means the formal gathering of the executive organ where the business of the unit owners' association is discussed or transacted.