



COMMONWEALTH of VIRGINIA  
Department of Professional and Occupational Regulation

Terence R. McAuliffe  
Governor

May 18, 2015

Maurice Jones  
Secretary of  
Commerce and Trade

Jay W. DeBoer  
Director

Complainant: Andrew Lloyd-Williams  
Association: Kingsmill Community Service Association  
File Number: 2015-02567

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*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.*

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### Complaint

Complainant submitted a complaint to the Association dated January 23, 2015. The Association provided a response to the Complainant dated March 18, 2015 and the Complainant then submitted his Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated April 12, 2015 and received April 15, 2015. Additional information was provided by the Association after it received its copy of the NFAD, as required by the regulations. This information was reviewed but not used in making this Determination.

### 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 has alleged that the Association Board met in executive session on August 7, 2014 and during the time it was in executive session, a Declaratory Judgment against five members of the association was filed at the local courthouse on behalf of the Association. The Complainant believes that this demonstrates that the Association carried out an action that was never voted upon in an open meeting since they reconvened in the open meeting after the Declaratory Judgment had been filed, as evidenced by the time stamp on the filing.

The Complainant references §55-510.1(C) which states, "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 Complainant further states that is clear the Declaratory Judgment had been drafted before the executive session and filed during the executive session.

The Association responded by noting that the submitted Complaint is related to "matters that are clearly protected under Virginia law by attorney-client privilege and attorney-client work product and thus, the substance of such matters is exempt from disclosure pursuant to §55-510.1, Subparagraph C, which states that 'the requirements of this section shall not require the disclosure of information in violation of law.'" The Association also stated that the Complainant was assuming that the "direction/instruction to prepare and file the Complaint for Declaratory Judgment was provided to legal counsel during the meeting of August 7, 2014" and went on to state that "you do not provide any basis for that assumption..."

The difficulty in addressing an alleged violation of the use of an executive session is that there is no way of establishing exactly what was discussed in an executive session. In the situation at hand, this office cannot determine when the decision was made to file the Declaratory Judgment and there was no proof provided in the NFAD that the decision to file was made during the August 7, 2015 executive session. Based on both the Complaint and the Final Adverse Decision from the Association, it appears that the Association made a proper motion to go into executive session and returned to the open meeting after they had completed their business in executive session. In the open meeting, according to the parties, the Board stated that they consulted with legal counsel.

The only information provided about the executive session was that the Association Board had consulted with legal counsel, and the Board subsequently voted in the open session to postpone the annual membership meeting "to allow time for KCSA legal counsel to pursue the resolution of certain issues that have arisen..." KCSA also directed

legal counsel "to pursue the resolution of the legal issues in the manner discussed with legal counsel in executive session."

The key question is whether the Association Board agreed to file the Declaratory Judgment during the August 7, 2014 executive session and if it violated the Property Owners' Association Act by failing to vote on the issue in open session. Based on the information provided to this office, I cannot find proof that the decision to file the Declaratory Judgment was made during the August 7, 2014 executive session and as a result, I do not find that there has been a violation of common interest community law or regulations.

Required Actions

No action required.

Sincerely,



Heather S. Gillespie  
Common Interest Community Ombudsman

cc: Board of Directors  
Kingsmill Community Service Association