



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Terence R. McAuliffe
Governor

December 10, 2015

Maurice Jones
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Donald Galaska
Association: Lakeside Woods Homeowners' Association, Inc.
File Number: 2016-01201

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 his complaint to the Association on August 8, 2015. The Association provided a final determination to the Complainant dated October 15, 2015 and the Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated November 5, 2015 and received November 9, 2015.

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 five complaints in his complaint to the Association. The first allegation is that the Association's board of directors conducted a meeting without notice when it voted on a snow removal contract via email. The Complainant provided a series of emails that demonstrated that the board had voted over a period of time via email to accept a snow removal contract. The Complainant further supported his allegation by noting that the method of voting was done in a manner that comported with parliamentary procedure. Holding a meeting without notice would be a violation of §55-510.1 of the Property Owners' Association Act.

The second allegation was that the association members "are not receiving the same agenda packets that the board receives before a meeting..." and that they are not receiving them at the same time as the board of directors. The Complainant alleges that this is a violation of §55-510(B) of the Property Owners' Association Act which states

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.

The third allegation is that by holding meetings via email, the Association's board of directors has failed to meet the requirements of §55-510.1(B) which provides for continual notice of meetings. The Complainant contends that the Association should include him in emails when discussions are taking place that should take place in an open board meeting.

The Complainant alleges in his fourth complaint that the Association is not providing notice of all meetings as required by §55-510.1(B) of the Property Owners' Association Act. The Complainant states that the Association's board demonstrated this failure by holding an email meeting and voting on the snow removal contract at that email meeting.

Finally, the fifth allegation is that the Association's board of directors is not always convening in an open session after finishing an executive session. In addition, the Complainant stated that the actions to be taken by the board as a result of the executive session are not always identified. The Complainant alleges that this is a violation of §55-510.1(C) of the Property Owners' Association Act.

The Association responded by stating generally that it abides by the requirements of the Virginia Code when conducting meetings and executive sessions, that meetings are announced in advance, and minutes provided to the membership, and that all matters discussed in meetings, other than exceptions permitted under the Virginia Code, are included in meeting minutes. The Association went on to further respond to the Complaint by noting that email communication is not a meeting, and is a legitimate way of conducting

business, that the bylaws permit the board of directors to conduct business without a formal meeting, and that all business actions are reported to the membership in minutes.

Email communication by a board of directors is often a source of contention in associations and has been the subject of prior complaints reviewed by this office as part of a Notice of Final Adverse Decision. A meeting, as defined by the Property Owners' Association Act, "means the formal gathering of the board of directors where the business of the association is discussed or transacted." (§55-509) While email would meet the requirement contained in this definition that business is being discussed or transacted, it does not meet the "gathering" requirement that completes the definition. In the present case, the emails covered a timeframe from 9:52 am to 9:55 pm on the 12th of December, 2014. If the emails had been continuous, and it was clear that the parties involved had all agreed to sit at their computers at a particular time to have a "meeting" via email, it is possible that such a situation could be called a formal gathering and therefore would fall under the definition of a meeting. In the present case, when the emails appear to have been answered over a period of twelve hours and there was no evidence that anything else was being discussed via email in the interim, no formal gathering appears to have taken place.

The allegation that members were not provided agenda packets is tied into a proposal package distributed to the board members via email prior to the email vote on snow removal. Because this email vote was not a meeting as defined by the Property Owners' Association Act, the requirement that the agenda packets be made available to owners is not applicable. In addition, because the email communication was not a meeting as defined by the Property Owners' Association Act, there has been no failure to provide notice to the membership or continual notice to an individual member that has requested it, and there is no requirement that any association member be included in any future emails among the board members.

The allegation that the board of directors failed to vote in open meeting after an executive session is difficult to prove. According to the minutes submitted to support this allegation, the board held an emergency meeting, no one other than the board was in attendance, and therefore they would have been unable to hold a vote in an open meeting, since there was no one else in attendance. The Property Owners' Association Act requires the board "following the executive session" to reconvene in open meeting and vote. Here, if there was no one other than the board at the meeting, I am not certain how it can be proven that the board did not reconvene in open meeting, nor is it clear to me that in that instance, it would matter one way or another, again, since no one other than the board was present. As to the contention that there was not sufficient identification of the matters discussed and decided in the executive session, the minutes appear to provide substantial information on the subject matter of the executive session, to include the reasons for executive session (potential litigation, covenant violations) and the actual lots that were being discussed regarding the covenant violations. I would also note that the phrase "reasonably identified" as set forth in §55-510.1(D) is not a defined term in the Property Owners' Association Act.

Required Actions

While I do not find that the association has violated §55-510 by voting via email, I would caution the association to be very careful in the future about such communications. As is clearly the case here, such email conversations can be construed as meetings and impact perceptions of transparency within the community.

Both the Complainant and the Association are welcome to contact me if they have any questions regarding this Determination or the requirements that have been set forth.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Lakeside Woods Homeowners' Association

¹ 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. (emphasis added)