



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Terence R. McAuliffe
Governor

January 21, 2016

Maurice Jones
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Greg Mathieson
Association: Virginia Run Community Association
File Number: 2016-01527

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 two complaints to the Association, one dated August 28, 2015 and the other dated October 2, 2015. The Association provided responses to the Complainant dated November 20, 2015. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated December 7, 2015 and received December 10, 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 submitted two Complaints to the Association that alleged violations of §55-510.1(B) and §55-509.3:2 of the Property Owners Association Act. These provisions of the Virginia Code outline a member's right to record open board meetings. In his first Complaint, the Complainant requested clarification regarding the placement of a camera during board meetings. In addition, he stated that he disagreed with the Association's requirements that the camera not be turned on prior to the meeting, and that he not touch the camera once a meeting begins. The Complainant's reasoning was that the camera needed to be prepared for recording prior to the start of the meeting, that light changes require adjustment to the camera, tapes need to be changed and that some of the presentations and discussions that occur are in other areas of the room and the camera needs to be moved to follow these presentations or discussions. The Complainant believes that the Association's requirements are in violation of §55-510(B) of the Property Owners' Association Act.

In its response to this Complaint, the Association further clarified its reason for requesting particular placement of the camera and referred the Complainant to a prior letter in which the Association had responded to an earlier question regarding placement of the camera. The Association stated that the Complainant was welcome to come in "as early as necessary to make adjustments, load the tape and prepare to record." "Upon the meeting being called to order, you can turn on your camera and have a seat." The Association noted that during the winter months the focusing of the camera due to changes in light would not be necessary due to the earlier sunset. In addition, the Association said that most meetings run for one and one-half hours with a recess of 20 minutes followed by an additional one and one-half hours. Thus there was no reason to change the tape during the meeting since there are tapes that run for two hours and they could be changed during the recess. Finally, the Association said that it believed the spirit of the law was to record the proceedings and not the attendees.

In his second Complaint, the Complainant alleges that the Association is in violation of §55-509.3:2 of the Property Owners' Association Act due to its decision to deny him his request to photograph board meetings. The Association stated in a letter received by the Complainant prior to his Complaint that such use would interfere with the meeting due to the clicking of the camera and that the camera would have to be operated throughout the meeting which would be in violation of the Association's resolution that requires "taping equipment" to be unattended during meetings.

In its response to these allegations, the Association stated that the Complainant could place the camera on a tripod and take photos of the meeting from a stationary position. The Association further stated that utilizing the tripod did not result in a denial of the Complainant's right to record a meeting. The Association did reiterate that the photos could not be taken "with equipment that makes a clicking noise" nor could the Complainant walk around the room taking photos.

The two portions of the Property Owners' Association Act that are cited in the Notice of Final Adverse Decision are §55-510.1(B), which states:

Any member may record any portion of a meeting required to be open. The board of directors 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 member recording the meeting to provide notice that the meeting is being recorded.

and §55-509.3:2(3), which provides a member in good standing

The right to have notice of any meeting of the board of directors, to make a record of such meetings by audio or visual means, and to participate in such meeting in accordance with the provisions of subsection F of § 55-510 and § 55-510.1.

Based on the information submitted in the Notice of Final Adverse Decision, it appears that the key disagreements are centered on interaction with a still camera or video camera during a meeting as well as the recording of anyone participating in the meeting other than a member of the board of directors.

Since the Property Owners' Association Act specifically permits recording of board meetings, an accompanying right to do what is reasonably necessary to create an accurate recording of the meeting, even if this means that a tape must to be replaced during the meeting, or the video camera must be adjusted, would follow. The interference caused by changing a tape during a meeting would be minimal, and most likely no more intrusive than countless other behaviors that may take place in the audience. For these reasons, I believe that a member does have the right to change tapes and is not required to utilize only two hour tapes. It is also my opinion that a member has the right to ensure that the recorder is functioning properly and picking up the meeting correctly. To that end, the member should be able to check the camera, and adjust as necessary. Finally, I find that anyone who attends the meeting and speaks to the board and is included on the agenda would be considered to be part of that board meeting. As such, a member may record all presentations, discussions, etc. that are part of an open board meeting.

As to the right to utilize a still camera and move around the room, the Association has the right to adopt rules regarding placement of equipment and thus can require that equipment remain stationary during a meeting. In addition, if the equipment being used emits a noise and such noise would be continuous throughout the meeting, this could be construed as interference and the Association could adopt rules to address such interference. Requiring that a still camera be placed on a tripod and that it not emit noise seems a reasonable method of compromise for the parties and within the rights of the Association under the Property Owners' Association Act. The member would still be able to take pictures, while the board would not be interrupted by the sound of a camera.

I would also note that in reviewing the documents provided, the Association appears to require prior notice of recording. This issue has been previously addressed in a Determination where I found that it was not appropriate to request prior notice due to the plain language of the statute which says, "[t]he board... may adopt rules... (ii) requiring the member recording the meeting to provide notice that the meeting is being recorded." Here, the present tense is indicated, and not a future tense. If this language were, instead, "provide notice that the meeting will be recorded" the person recording the meeting would need to provide advance notice. But, based on the plain language of the statute, the individual recording a meeting must simply provide notice that the meeting *is* being

recorded. Thus, it is inaccurate and inappropriate to require advance notice of recording, as there is no such requirement contained in the Property Owners' Association Act.

Required Actions

The Association must reassess its guidelines for recording board meetings, as well as its application of those guidelines. Members must be allowed to record meetings as permitted by the Property Owners' Association Act, which would include the right to change tapes during a meeting (if necessary), the right to focus or adjust the camera as necessary, and to record any portion of an open meeting.

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