



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Terence R. McAuliffe
Governor

January 6, 2017

Todd Haymore
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Thomas Luckman
Association: West Neck Community Association
File Number: 2017-01395

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 his complaint to the Association dated August 29, 2016. The Association provided its response to the Complainant dated November 23, 2016. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated December 9, 2016 and received December 12, 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 the Association had violated §55-510.1¹ of the Property Owners' Association Act by transacting routine business of the association outside open meetings. The Complainant further stated that the Association bases its actions on its Bylaws which allow for action without a formal meeting. The Complainant finds such action without a meeting to be in violation of the open meeting requirements found in the Property Owners' Association Act. The Complainant asks the Association to conduct business of the association during open meetings and to repeal the provision set forth in the Bylaws permitting action without a formal meeting.

The Association responded to the Complainant by stating in its Notice of Final Determination that the Board denied the Complaint. The Association wrote that it was in compliance with §13.1- 865 of the Virginia Nonstock Corporation Act and its own Bylaws and therefore would not be repealing the portion of the Bylaws requested by the Complainant.

The Virginia Nonstock Corporation Act is not an Act that falls under the jurisdiction of this office. Complaints alleging a violation of the Virginia Nonstock Corporation Act do not "concern a matter regarding the action, inaction, or decision by the governing board, managing agent, or association inconsistent with *applicable laws and regulations*," (emphasis added) which is the regulatory definition of an association complaint. As noted in the prefatory paragraphs of this Determination, applicable laws and regulations are only those laws and regulations that are considered to be common interest community laws or regulations. In addition, we have no authority to review the Bylaws to determine if they are accurate and enforceable, as this office cannot review any governing documents of an association. Finally, actions without meetings do not constitute a meeting and therefore do not fall under the provisions of the Property Owners' Association Act. The definition of a meeting under that Act clearly requires a formal gathering. There was no evidence of a formal gathering contained in the Complaint, instead unanimous consents were obtained via email and ratified in an open meeting.

Required Actions

No action is required of the Association.

¹ A. All meetings of the board of directors, including any subcommittee or other committee thereof, shall be open to all members of record. The board of directors shall not use work sessions or other informal gatherings of the board of directors to circumvent the open meeting requirements of this section. Minutes of the meetings of the board of directors shall be recorded and shall be available as provided in subsection B of § 55-510.

B. Notice of the time, date and place of each meeting of the board of directors or of any subcommittee or other committee thereof shall be published where it is reasonably calculated to be available to a majority of the lot owners.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
West Neck Community Association