



COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

February 4, 2019

Brian Ball
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Thomas G. Luckman
Association: West Neck Community Association
File Number: 2019-01768

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 a complaint to the Association dated October 19, 2018. The Association provided a response to the Complainant dated December 3, 2018. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated December 27, 2018 and received January 3, 2019.

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 alleges that the Association failed to properly enter an executive session after a May 16, 2018 Board of Directors meeting. The Complainant further alleges that the Board “met for over two hours and conducted Association business.” The Complainant believes the Association violated §55-510.1(C)¹ of the Property Owners’ Association Act as well as the Association’s own bylaws.

In support of his allegations, the Complainant provided a copy of a transcript from the meeting that appears to have been typed by a professional Court Reporter who certified that the transcription was a true record of the audio file she had taken. The transcript ended with a motion to adjourn and agreement to adjourn followed by the President saying they will take a five-minute break. There did not appear to be any motion to move into executive session, which is required by the Property Owners’ Association Act. Minutes that were provided with the NFAD stated that a motion to convene in executive session was made after the five-minute break and a purpose for convening in executive session was provided at that time

The Association responded to the Complaint by stating that it denied the Complaint and that “[t]he Board of Directors was in compliance with Virginia Property Owners [sic] Association Act.”

If the transcript that was included with the complaint accurately reflected the meeting, it would appear that the meeting was adjourned and no motion was made to go into executive session. However, the minutes for the meeting indicate that a motion was made to go into executive session, but it does not seem possible to make such a motion in an open meeting, as required by law, if the open meeting has already been adjourned. The Association provided no information that assisted this office in determining why it denied the Complaint or believed it (the Association) was in compliance with the Property Owners’ Association Act. Based on the information provided in the Complaint and Notice of Final Adverse Decision, it does appear that a meeting was adjourned without giving notice of a subsequent executive session and thus that subsequent executive session was in violation of §55-510.1(C). This office cannot provide a determination regarding whether the Association was in violation of its own bylaws.

¹ C. The board of directors or any subcommittee or other committee thereof may convene in executive session to consider personnel matters; consult with legal counsel; discuss and consider contracts, pending or probable litigation and matters involving violations of the declaration or rules and regulations adopted pursuant thereto for which a member, his family members, tenants, guests or other invitees are responsible; or discuss and consider the personal liability of members to the 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 board of directors 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 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.

Required Actions

The Association must ensure that it adheres to the requirements of §55-510.1(C) of the Property Owners' Association Act when convening in executive session. Any future violations of this statute may result in a referral of the matter to the Common Interest Community Board for whatever action it may deem appropriate.

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