



# COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Glenn A. Youngkin  
Governor

November 1, 2024

Brian P. Wolford  
Interim Director

G. Bryan Slater  
Secretary of Labor

Complainant: David Unger  
Association: Water Oaks Condominium Association  
File Number: 2025-00801

## **DETERMINATION - NOTICE OF FINAL ADVERSE DECISION**

### **Introduction**

This matter came before the Office of Common Interest Community Ombudsman ("Office") for review on September 26, 2024, as a result of the Notice of Final Adverse Decision ("NFAD") submitted by David Unger ("Complainant"). The Complainant initially submitted a complaint to the Water Oaks Condominium Association Board of Directors ("Board") on June 10, 2024, and the Board issued a notice of final decision on August 26, 2024, on the complaint. Therefore, the NFAD was timely filed and within the jurisdiction of this Office, which has been designated to review final adverse decisions and determine if the decisions conflict with laws or regulations governing common interest communities.

### **Issues to be Decided**

In the Complaint, the Complainant raises two major issues: (1) the Board failed to count his vote casted using an absentee ballot; and (2) it failed to treat his absentee ballot as a secret vote. Each of these issues are addressed below.

### **Authority**

In accordance with its regulations, the Common Interest Community Ombudsman (CICO), as designee of the Agency Director, is responsible for determining whether a "final adverse decision may be in conflict with laws or regulations governing common interest communities." (18 Va. Admin. Code ("VAC") § 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 §54.1-2354.4 of the Code of Virginia of 1950, as amended ("Va. Code") 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, and we cannot provide a determination on such a complaint. Common interest community law is limited to the Virginia Condominium Act, the Property Owners' Association Act, and the Virginia Real Estate Cooperative Act.

The only documents that will be considered when reviewing a NFAD, in accordance with Regulation 18 VAC 48-70-90, are the association complaint submitted by a complainant to the association (and any documents included with that original complaint), the final adverse decision from the association, and any supporting documentation related to that final adverse decision. Other documents submitted with the Notice of Final Adverse Decision cannot be reviewed or considered. Further, this Determination is final and not subject to further review or appeal pursuant to Va. Code § 54.1-2354.4(C).

If, within 365 days of issuing a determination that an adverse decision is in conflict with laws or regulations governing common interest communities, we receive a subsequent NFAD for the same violation, the matter will be referred to the Common Interest Community Board to take action in accordance with Va. Code §54.1-2351 or §54.1-2352 as deemed appropriate by the Board.

### **Determination**

As explained more fully below, the Office has determined, upon a review of the materials submitted with the NFAD, that the Association violated the applicable law when it refused to count the Complainant's absentee ballot. As for the second issue, the Office finds that this matter is outside of its jurisdiction. This determination will address each separately.

#### *1. Failure to count the Complainant's absentee ballot:*

The Complainant alleges that he was disenfranchised when his absentee ballot was rejected without legal basis. The Complainant states that on May 21, 2024, he submitted an absentee ballot to the Association manager. He asserts that the form he used for the absentee ballot substantially followed the form and content of the absentee ballot adopted in the Association's March 2023 Resolution. The Complainant claimed that he used the same absentee ballot in 2023 and was told that it was valid and accepted.

The Association manager for the Association, on the same date, May 21, 2024, acknowledged receipt via email but stated that the Board had eliminated the option of voting by absentee ballot. The Association manager claimed that the Board had elected to use a proxy form rather than an absentee ballot form. The Association manager further stated that the absentee ballot form submitted by the Complainant was an unauthorized form, and that he attached a proxy form which the Board has approved and chosen as the election method. The Board, in its final decision, however, acknowledged that the Complainant was entitled to vote in person, by proxy, or by absentee ballot. The Board asserted, though, that the Complainant's absentee ballot was rejected because the absentee ballot form used by the Complainant did not conform with the form approved by the Board in its Meeting and Voting Resolution form. The Board also argued that the Complainant could have used any other methods available to vote.

The Virginia Condominium Act permits a unit owner to vote in person, by proxy, or by absentee ballot unless the condominium instructions prohibit it. It states in pertinent part that:

Unless expressly prohibited by the condominium instruments, a unit owner may vote at a meeting of the unit owners' association in person, by proxy, or by absentee ballot. Such voting may take place by electronic means, provided that the executive board has adopted guidelines for such voting by electronic means. Unit owners voting by absentee ballot or proxy shall be deemed to be present at the meeting for all purposes. Va. Code § 55.1-1953(E).

In this case, the Association governing instruments do not expressly prohibit voting by absentee ballot. As a matter of fact, the Association adopted a Resolution in 2023 that allows its unit owners to vote in-person, by proxy or absentee ballot. In citing its Bylaws and the Virginia Condominium Act, the Association Resolution states that under Voting Methods: “a unit owner may vote at a Meeting of the Association in person, by Proxy, by Absentee Ballot or electronically.” The Association governing documents as cited above, allows the Complainant to vote by absentee ballot, and the Board, in its final decision, acknowledged as much. The Board argues, however, that the absentee ballot form submitted by the Complainant did not contain submittal instructions. The Association Resolution states in pertinent part that “An absentee Ballot issued by the Association shall resemble *substantially* the Absentee Ballot form attached to this Resolution as Exhibit D. The Absentee Ballot can be amended for use....” (Emphasis added). In reviewing the sample absentee ballot, it appears to be adaptable for use in both director elections as well as adopting amendments, resolutions, etc. The absentee ballot form submitted by the Complainant does substantially resemble the sample absentee ballot attached as Exhibit D of the Resolution.

While the absentee ballot submitted by the Complainant was not identical to the sample form; it contains a substantial amount of the information in the Resolution’s sample ballot to identify the complainant, the persons he casted his vote for, his address, signature, etc. The Complainant did not include how he submitted the form; however, he emailed it to the Association manager, who immediately acknowledged receipt, and instead of pointing out any additional information required or sending the correct form, informed the Complainant that the absentee ballot form would not be accepted because the Board was not accepting absentee ballot for the meeting. That statement was clearly contrary to both the applicable statute and the Association’s own resolution. The Association manager insisted that the Complainant needed to fill out a proxy form, which he attached to the reply email. As the Complainant points out, the absentee ballot he submitted in 2024 was identical to the one he submitted in 2023 which was accepted and counted. Thus, the alleged discrepancy of omitting submittal instruction, especially given the fact that it was emailed, does not invalidate the Complainant’s absentee ballot.

Furthermore, the Complainant points out that he casted his vote by absentee ballot in 2023; and was informed that his vote was valid, accepted and counted; and that he used the same method to cast his 2024 vote. In response, the Board tries to distinguish between the 2023 votes in which the Complainant’s absentee ballot was accepted as valid and the 2024 votes in which the Board



rejected the Complainant's absentee ballot. Specifically, the Board states that the 2023 meeting was a special meeting to adopt an amendment and as such, it allowed voting by absentee ballot but the 2024 meeting was an annual meeting that only allows in-person and proxy votes. The sample absentee ballot attached to its Resolution, though, does not specify such a distinction. The Board acknowledged that it is not sure why two different methods were employed for two different meetings; but it has been advised to include both proxy and absentee ballot in voting moving forward. If the Board is uncertain as to why it changes its methods of vote, it certainly cannot reject a vote cast by a method of voting specified in and permitted by its Bylaws, Resolution and the Virginia Condominium Act. Thus, the Board violated the applicable law when it rejected the Complainant's absentee ballot.

*2. The Board failed to treat the Complainant's absentee ballot as secret vote:*

The Complainant alleges that the Board failed to maintain ballot secrecy in violation of his right to cast his secret ballot. He claims that he casts his vote for two candidates to replace two board members, and the Association manager forwarded his absentee ballot, without first redacting his preference, to the Board. The Board, in its response, reiterated that the Complainant could have used any other method to cast his secret ballot.

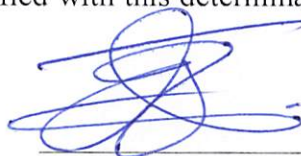
The applicable law states in pertinent part that: "Voting by secret or written ballot in an open meeting is a violation of this chapter except for the election of officers." Va. Code § 55.1-1949(B)(5). This case involved an open meeting, and it was also for the election of officers, therefore, voting by secret ballot would have been permitted. The Code, however, does not provide the method of keeping or maintaining a secret ballot. Va. Code § 55.1-1949. An association's governing documents usually provide the steps to maintain secret ballot. Thus, the way the Complainant's secret ballot was handled does not fall within the scope of this Office.

### **Conclusion**

Based upon the information in the record, including the original complaint, its accompanying documents, the NFAD, this Office finds that as to the first issue, the Board's rejection of the Complainant's absentee ballot is contrary to the applicable law. As to the second issue, however, this Office does not have jurisdiction over the method of maintaining secret ballots.

### **Decision**

This Office, therefore, recommends that the Board accept the Complainant's absentee ballot and count his vote. If any party is dissatisfied with this determination, or part thereof, the party could seek remedies in civil court.



Justina Ehiawaguan, Esquire  
CIC Ombudsman

cc: Board of Directors

Water Oaks Condominium Association