



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

July 31, 2023

Glenn A. Youngkin
Governor

G. Bryan Slater
Secretary of Labor

Demetrios J. Melis
Director

Complainant: Karen Gordon
Association: Wexford Hills Homeowners Association
File Number: 2024-00071

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 February 1, 2023. The Association provided a response to the association complaint dated June 15, 2023. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated July 7, 2023 and received July 10, 2023.

Authority

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 §54.1-2354.4 (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 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.

Pursuant to the Regulations (18 VAC 48-70-90), the only documents that will be considered when reviewing a NFAD 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.

This Determination is final and not subject to further review.

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 §54.1-2351 or §54.1-2352 as deemed appropriate by the Board.

Determination

The Complainant submitted five complaints to the Association. They all stemmed from her review of monthly meeting minutes for 2021 and 2022.

The first complaint alleges that the Association has failed to comply with the requirements set forth in §55.1-1816¹ of the Property Owners' Association Act regarding

¹ A. All meetings of the board of directors, including any subcommittee or other committee of the board of directors, where the business of the association is discussed or transacted 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 § 55.1-1815.
B. Notice of the time, date, and place of each meeting of the board of directors or of any subcommittee or other committee of the board of directors shall be published where it is reasonably calculated to be available to a majority of the lot owners.

A lot owner may make a request to be notified on a continual basis of any such meetings. Such request shall be made at least once a year in writing and include the lot owner's name, address, zip code, and any email address as appropriate. Notice of the time, date, and place shall be sent to any lot owner requesting notice (i) by first-class mail or email in the case of meetings of the board of directors or (ii) by email in the case of meetings of any subcommittee or other committee of the board of directors.

Notice, reasonable under the circumstances, of special or emergency meetings shall be given contemporaneously with the notice provided to members of the association's board of directors or any subcommittee or other committee of the board of directors conducting the meeting.

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

executive sessions. The Complainant stated that the board fails to state the reason for entering executive session, does not make a motion to enter executive session, does not ratify decisions made in executive session, and enters executive session for improper reasons. The Complainant provided many examples based on minutes of meetings where she said the board did not make a motion or state the reason for entering executive session, did not return to an open meeting, and did not vote on the subject matter of the executive session in an open meeting.

In her second complaint, the Complainant alleged that the Association repeatedly held meetings without advising owners that they were open meetings and owners could attend. The Complainant alleged that the Association failed to publish the date, time or location of meetings and they do not maintain minutes of meetings that have been held. The Complainant alleged that notice had not been given of a special meeting held January 21, 2021, and that despite the numerous committees in the association, none has provided notes or feedback or posted minutes online.

subcommittee or other committee of the board of directors 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 of the board of directors.

Any member may record any portion of a meeting that is required to be open. The board of directors or subcommittee or other committee of the board of directors conducting the meeting may adopt rules (a) governing the placement and use of equipment necessary for recording a meeting to prevent interference with the proceedings and (b) requiring the member recording the meeting to provide notice that the meeting is being recorded.

Except for the election of officers, voting by secret or written ballot in an open meeting shall be a violation of this chapter.

C. The board of directors or any subcommittee or other committee of the board of directors may (i) convene in executive session to consider personnel matters; (ii) consult with legal counsel; (iii) discuss and consider contracts, pending or probable litigation, and matters involving violations of the declaration or rules and regulations; or (iv) 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 of the board of directors, 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.

D. Subject to reasonable rules adopted by the board of directors, the board of directors shall provide a designated period during each meeting to allow members an opportunity to comment on any matter relating to the association. During a meeting at which the agenda is limited to specific topics or at a special meeting, the board of directors may limit the comments of members to the topics listed on the meeting agenda.

In her third complaint, the Complainant alleges that the Association is not providing the agenda, drafts of minutes, financial reports, or other information at the time they are provided to the board. The Complainant asserts that all materials disseminated to the Board of Directors for monthly meetings must also be furnished to the owners simultaneously. She further states that the materials should be available to owners on the association website.

The fourth complaint was also related to executive session and alleged that the board repeatedly failed to allow owners back into open session after completing an executive session. These meetings are electronic meetings and owners are asked to leave when the board goes into executive session and according to the Complainant, not permitted to return afterwards.

The Complainant alleges in her fifth complaint that the Association is not in compliance with §55.1-1816, §55.1-1819, and several of its governing documents. The Complainant believes that the Architectural Guidelines were improperly amended, contrary to the Association's governing documents. She does not specify, however, how the Association is in violation of the two statutes that she referenced, nor do they seem to be applicable in the present case. As set forth in the prefatory language of this determination, we cannot address alleged violations of the governing documents of an association, which would include improper amendment of the document. Instead, such allegations may have to be addressed through legal channels.

In response to the first complaint, the Association wrote that it would continue to state the reasons for entering executive session as required by statute and will reconvene in open meeting per the statute. It noted that there are times an executive session is listed on the agenda merely as a placeholder and no executive session actually takes place.

In response to the second complaint, the Association stated that there are no committee meetings conducted within the Association and therefore no reports to issue or minutes to reference. The Association did not address the allegation that a special meeting was held without notice.

The Association's response to the third complaint was that it has already corrected that item and will provide timely distributions of such information going forward.

The Association addressed the fourth complaint in its response to the first complaint.

As for complaint number five, the Association acknowledged that it did modify the Architectural and Neighborhood Guidelines but only to remove the contact information of the ARC Director who had died, and to include contact information for future needs of the Association. The Association said that no substantive changes were made to the document.

It is difficult to determine the validity of the allegations in this Notice of Final Adverse Decision. No documents supporting the allegations were provided and the allegations were based on the Complainant's interpretation of minutes of meetings rather than actual attendance at meetings or being present when the allegations took place.

Based on the information provided, there is simply no way for me to determine if executive sessions complied with the requirements set forth in the Property Owners' Association Act. The Complainant alleges multiple violations of the applicable statute and the Association states that it is not in violation. Without evidence I cannot determine whether the Association was in violation of the statute that governs executive sessions.

We also have no way of determining whether the Association held a special meeting without notice. The fact that it was not mentioned in minutes does not necessarily mean that no notice was provided. As for notice and minutes of committee meetings, if there were no such meetings, as the Association states, it is not required to provide notice or take minutes.

The Complainant misunderstands the obligations of the Association in her third complaint. The Association is not required to distribute agenda materials at the same time it provides them to the board. Instead, it must simply make them available, meaning that if an owner asks to review them, they would be available for review. The Association is not required to post agenda packets on its website either.

As with Complaint one, we cannot determine if the Association did or did not reconvene in open session after holding an executive session. No evidence was provided to support this allegation and the Association stated that it reconvenes in open meeting following each executive session.

Regarding the fifth complaint, this office cannot interpret governing documents or determine whether they have been properly amended. That is a legal matter outside the scope of our authority.

Required Actions

As noted above, it is extremely difficult to determine whether violations of §55.1-1816 have taken place. I would encourage the Association to ensure that it provides notice to all owners of all future meetings, including committee and sub-committee meetings.

I would also encourage the Association to reference the executive session requirements set forth in the Property Owners' Association Act and footnoted in this determination to make certain that it holds executive sessions in accordance with the statute. This would include only meeting in executive session for the reasons delineated in the law, making the proper motions to enter executive session, and

identifying your reason for entering executive session and then ensuring you return to the open meeting to vote as necessary.

Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, reading "Heather Gillespie". The signature is written in a cursive style with a large initial 'H' and 'G'.

Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Wexford Hills Homeowners Association, Inc.