



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Glenn A. Youngkin
Governor

G. Bryan Slater
Secretary of Labor

Kishore S. Thota
Director

November 1, 2023

Complainant: Alison Cooke
Association: Ashbriar Homeowners Association
File Number: 2024-00852

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 August 17, 2023. The Association provided a response to the association complaint dated September 18, 2023. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated October 5, 2023 and received October 11, 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.

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.

This Determination is final and not subject to further review.

Determination

The Complainant has alleged that the Association has violated both its governing documents and common interest community law. As is always the case, we can only review and respond to allegations related to common interest community law, which in this case is the Property Owners' Association (POA) Act. The Complainant did allege two possible violations of common interest community law.

The first allegation was that the Association routinely misuses executive sessions, a violation of §55.1-1816(C)¹ of the POA Act. The Complainant did not provide specific examples of when these violations took place, nor did she provide details as to the specific times such misuse of executive session occurred.

¹ 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.

The second allegation of a violation of the POA Act was that the Association's minutes are often incomplete and sometimes non-existent. The Complainant said they are rarely available to members within sixty days, a violation of §55.1-1815(G),² and they do not contain enough detail to determine who attended the meeting, what was discussed, and what was decided.

The Association responded to all the allegations contained in the complaint. However, only that portion of the final decision that pertained to possible violations of common interest community law will be reviewed here. As to the allegation that the board misused executive sessions, the Association denies that this has happened, and provided the list of reasons from the Property Owner's Association Act that describes the acceptable reasons for entering executive session.

In response to the allegations that the Association was not making minutes available or including enough detail, the Association responded that no specific instances of wrongdoing were identified, but the Association agreed it will take steps to improve minutes by appointing a new Secretary, using a standardized template, and recording minutes to make it easier to produce minutes.

While I understand the Complainant's concerns, there was simply not enough information provided in the complaint submitted to the Association. Without specific examples and evidence of misuse of executive session, I cannot provide a determination that there has been a violation of the law. The same is true of the minutes, where no examples were provided that indicated a violation of the applicable law. In addition, the Property Owners' Association Act does not specify what information the minutes should contain, thus making it even more difficult to determine if they are incomplete or lacking detail. The law does require that minutes be recorded for meetings, but no examples of a failure to record minutes was provided, so no violation can be found.

Required Actions

No action is required of the Association.

Please contact me if you have any questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

² Except as provided in subdivision C 7, draft minutes of the board of directors shall be open for inspection and copying (a) within 60 days from the conclusion of the meeting to which such minutes appertain or (b) when such minutes are distributed to board members as part of an agenda package for the next meeting of the board of directors, whichever occurs first.

cc: Board of Directors
Ashbriar Homeowners Association

Doug Bowman, President