



# COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

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June 27, 2024

Complainant: Gerald Denney  
Association: Eagle Pointe Shores Homeowners' Association  
File Number: 2024-02517

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

### Introduction

This matter came before the Office of Common Interest Community Ombudsman ("Office") for review on May 16, 2024, as a result of the Notice of Final Adverse Decision ("NFAD") submitted by Gerald Denney ("Complainant"). The Complainant initially submitted a complaint to the Eagle Pointe Shores Homeowners Association Board of Directors ("Board") on or about January 29, 2024, and the Board issued a final decision on or about April 19, 2024. 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 raised four claims in his NFAD. Specifically, he alleged that the Association Board: (1) did not provide proper notice of board meetings; (2) falsified the minutes of certain meetings; (3) illegally sold association property; and (4) made an improper appropriation of funds to a vendor. As explained below, the Office finds that the Board failed to comply with the applicable law regarding the notice of meetings. The Office further finds that it lacks the jurisdiction to address the remaining three issues presented.

### Factual Summary

#### *Complainant's Contentions*

The Complainant states that the Association Board of Directors frequently held meetings either through email, over the telephone, or in-person without proper notice to the membership. The Complainant cites an example of a meeting that was not publicized which the Board categorized as a training session with the attorney to address proper Board procedures. The Complainant asserts that during that alleged training session, the Board undertook extensive discussions regarding ongoing issues that should have been scheduled for open meetings. The

Complainant points out that string of emails among the Board members show that the Board was discussing and transacting the Association's business as a means of bypassing the open meeting forum requirements. (P. 1 of the Complaint's Original Complaint, dated January 29, 2024, ("Original Complaint")).

Furthermore, the Complainant alleges that there has ongoing falsification of Minutes of Meetings ("Minutes") by the Board. The Complainant states that the Board falsified Minutes by adding commentary, which the Complainant thinks is an attempt to justify a sale of property which was not properly authorized by the members. The Complainant gives instances of what he considers egregious acts stating that January Minutes reported that the Board was ratifying electronic resolution authorizing the sale of the property, and that the attorney to the Association also claimed that there was an electronic resolution authorizing the Board to complete the sale for the 21 acres; however, there was no electronic resolution in any of the email strings that was provided to him. The Complainant claims that there were illegal communications among the Board members regarding the selling of the 21 acres, but not an outright resolution or proposal. The Complainant cites the Minutes from January 19, 2023, and June 6, 2023, to show that the Minutes reported issues that were raise during those meetings but were not fully discussed, as matters that were discussed and resolved. The Complainant further asserts that the Board falsified Minutes by omission. The Complainant cites an example of January 19, 2023, Minutes which omitted most of the discussion about the payment in the amount of \$60,000.00 for the Community project. (Pp. 1 -3 of the Original Complaint).

In addition, the Complainant alleges that the Board engaged in an illegal sale of the Association property. The Complainant asserts that the Board sold 21 acres of property owned by the Association without the approval of the members. The Complainant states that the Association Covenants requires the selling of property to be voted upon and approved by the membership, and that in this case, the Board, specifically, the President and the Secretary circumvented the Covenants and sold the 21 acres without providing members the opportunity to vote on and approve the sale. (Pp. 3-4 of the Original Complaint).

Finally, the Complainant alleges improper request and appropriation of funds by the Board President. The Complainant states that the Board President through the President's company known as QCPI ("QCPI"), obtained a contract with the Association to build/modify an existing boat ramp. The Complainant asserts that QCPI won the bid for the contract not only because its bid was substantially lower, but it also promised to start work immediately not withstanding water level and to complete it in a relatively short time. The Complainant also points out that per the contract, no partial payment was to be made until work was completed. The Complainant states that not only was the project delayed, but the President was able to manipulate the Board for partial payment in the amount of \$60,000.00, without the proper approval of QCPI work prior to payment. The Complainant also alleges that the quality of the finished work is questionable. (p. 5 of the Original Complaint).

## *Board's Responses*

The Board denies conducting meetings without providing notices to members. The Board asserts that a third party, a management company, orchestrated every meeting conducted by the Board. The Board claims that the referenced training session was discussed/advertised during the March 20, 2023, regular Board Meeting, and that the training took place on June 6, 2023, and that the Board did not conduct regular Association business nor make decisions. (P. 1 of the Notice of Final Board Decision, dated April 19, 2024).

As to the falsification of Minutes, the Board states that the Minutes of meetings does not have to be verbatim transcription of discussions had and that it is only required that Minutes contain a record of the Board attendance, and the decisions made during the meeting. (P. 1 of the Notice of Final Board Decision, dated April 19, 2024).

Furthermore, the Board states that it was the Complainant who, on August 1, 2022, meeting made the initial motion to proceed with the sale of the 21 acres, and that during the October 3, 2022, meeting, the Board announced that it would proceed with the sale of the 21 acres. The Board further asserts that on November 21, 2022, meeting, the Board announced that it received advice from its attorney to proceed with the sale, and the matter was taken up and discussed again during its January 16, 2023, meeting. The Board posits that a resolution was executed by all Board members to sell the 21 acres on March 31, 2023, and the resolution as well as the verbiage within the Deed were ratified during the June 6, 2023, meeting. (Pp. 1-2 of the Notice of Final Board Decision, dated April 19, 2024).

Finally, as to the allegation of improper request and appropriation of funds by Board President, the Board claims that the Board President as the President of QPCI submitted OPCI's invoices not to the Board but to the management company as it was customary. The Board also claims that it inspected and approved the boat launch repairs. (P. 3 of the Notice of Final Board Decision, dated April 19, 2024).

## 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 described more fully below, the Office has determined, upon a review of the materials submitted with the NFAD, that the Board failed to properly notice meetings. The Office further determined that the remaining allegations are outside of its jurisdiction. This determination will address each separately.

*1. Improper Notice of Board Meetings.*

The applicable law, Va. Code §55.1-1816, states in pertinent part:

A. All meetings 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. Va. Code §55.1-1816 (A).

B. Notice of the time, date, and place of each meeting of the board of directors ... shall be published where it is reasonably calculated to be available to a majority of the landowners.

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. Va. Code §55.1-1816 (B).

In this case, the Complainant states that the Association Board of Directors frequently held meetings either through email, over the telephones or in-person without proper notice to the membership. (P.1 of Original Complaint). The Board denies having any meeting without the proper notice, and states that the training session it had was announced to the members in a previous meeting and that there was no discussion or transaction of the Association's business during the training session. The Board also states that all of its meetings were orchestrated by the management company. (P. 1 of the Notice of Final Board Decision, dated April 19, 2024).

The Reviewer finds that the string of emails among the Board members discussed and transacted Association business in contradiction of the applicable law that: "The board of directors shall not use work sessions or other informal gatherings of the board of directors to circumvent the open meeting requirements." Va. Code §55.1-1816 (A). The Board seems to acknowledge this when it states in its response that "in the future, all electronic resolutions will be raised at the next board meeting and made the subject of a ratifying vote." (P. 1 of the Notice of Final Board Decision, dated April 19, 2024).

While the Office realizes it is common for boards to rely on their property managers to provide notice and prepare for meetings, associations, nevertheless, should ensure that its management company complies with the required notice: "Notice of the time, date and place of each meeting of the board of directors ... shall be published where it is reasonably calculated to be available to a majority of the landowners." Va. Code §55.1-1816 (A).

This Office, therefore, recommends that Board refrain from using informal gatherings, such as emails, from discussing and transacting Association business unless all the safeguards are in place to prevent circumventing the requirement of open meeting notice. Also, the Board needs to make sure the third-party management company complies with providing reasonable notice of meeting time, date, and place to the members.

## *2. Falsification of Minutes of Meetings.*

The Complainant further alleges that there is ongoing falsification of Minutes by the Board. The Complaint claims that the falsification takes the form of adding commentaries, inserting issues not discussed, and omitting issues/part of issues discussed. The Board, in its response states that the Minutes of meetings does not have to be verbatim transcription of discussions had, and that it is only required that Minutes contain a record of the Board attendance, and the decisions made during the meeting. (Pp. 1-3 of the Original Complaint).

It is not within the Office's jurisdiction to ascertain whether material information was left out of the Minutes, or whether the Minutes were altered. (See, CIC Ombudsman Authority and Limitations: 18 VAC 48-70-130; Virginia Code § 54.1-2354). Even if there were, the Office notes that there is no specific requirement as to what Minutes of the Board should contain under the applicable law and regulations. The old version of the Property Owners' Association Act ("Act") requires that: "Minutes of the meetings of the board of directors shall be recorded..." Va. Code §55-510.1. But the new version of the Act does not even contain that requirement. An informative statute in Virginia regarding the content of Minutes prepared by a body is the Virginia

Freedom of Information Act ("VFOIA"), § 2.2-3707. While the VFOIA only applies to public bodies, i.e., state and local government bodies, it is nonetheless a relevant resource on this topic. In pertinent part, the VFOIA advises public bodies that:

Minutes shall be taken at all open meetings.

Minutes shall be in writing and shall include (a) the date, time and location of the meeting; (b) the members of the public body recorded as present and absent; and (c) a summary of the discussion on the matters proposed, deliberated, or decided, and a record of any votes taken. In addition, for electronic communications meetings conducted in accordance with § 2.2-3708.2 or 2.2-37.3, minutes shall include (1) the identity of the members of the public body who participated in the meeting through electronic communication means, (2) the identity of the members of the public body who were physically assembled at one physical location, and (3) the identity of the members of the public body who were not present at the location identified in the clause (2) but who monitored such meeting through electronic communication means. Va. Code § 2.2-3707 H(I).

The Office agrees with the Board that there is no requirement that the Minutes should be word-for-word transcription of the discussions. The Office further posits that the VFOIA provisions are helpful and, if complied with in the absence of other authority, provide an objective measure of "completeness."

### *3. Illegal Sale of Association Property.*

This Office lacks the jurisdiction to determine whether the sale of the Association's property violates its Covenants. (See, CIC Ombudsman Authority and Limitations: 18 VAC 48-70-130; Virginia Code § 54.1-2354). As discussed above, the CIC Ombudsman's authority is to determine whether an association violated the laws or regulations applicable to it when reviewing a NFAD. As the Complainant acknowledges, this issue involves an interpretation of the Board's covenants, as he alleges that the Association Covenants requires the selling of property to be voted upon and approved by the membership, and that in this case, the Board, specifically, the President and the Secretary circumvent the Covenants and sold the 21 acres without providing members the opportunity to vote on and approve the sale. (Pp. 3-4 of the Original Complaint). Thus, this issue cannot be addressed through the NFAD complaint process.

### *4. Improper Appropriation of Funds by Board President.*

Similar to the issue above, this issue asks the Office to make a determination outside of its authority. (See, CIC Ombudsman Authority and Limitations: 18 VAC 48-70-130; Virginia Code § 54.1-2354). Specifically, the Complainant asks this Office to determine whether the Board acted properly with regard to the payment of a contract. This issue does not present a statutory or regulatory compliance issue. Instead, it raises questions that appear civil in nature.

### Conclusion

Based upon the information in the record, including the original complaint, its accompanying documents, as well as the NFAD, this Office finds that the Board failed to give proper notice to the Association members, in at least some of its meetings. As to the other allegations, they do not fall within the scope of this Office. (See, CIC Ombudsman Authority and Limitations: 18 VAC 48-70-130; Virginia Code § 54.1-2354).

### Required Actions

This Office, therefore, recommends that the Board ensures that the members of the Association are made aware of the date, time, and place of each of the meetings of the Board of Directors; and the Board should refrain from using emails to discuss and/or transact the Association business unless proper notice is provided to the interested members. As to the other allegations by the Complainant, this Office does not have jurisdiction over the resolution of those matters. This determination is final and not subject to review or appeal. If the Complainant is dissatisfied with this determination, or part thereof, the Complainant could seek remedies in civil or criminal court.

Please contact me if you have any questions.

Respectfully,



Justina Ehiawaguan, Esquire,  
CIC Ombudsman

cc: Board of Directors  
Eagle Pointe Shores Homeowners Association