



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Glenn A. Youngkin
Governor

September 5, 2023

G. Bryan Slater
Secretary of Labor

Demetrios J. Melis
Director

Complainant: Jeremy Wu
Association: Unit Owners Association of Regency at McLean, A Condominium
File Number: 2024-00372

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 March 16, 2023. The Association provided a response to the association complaint dated July 17, 2023. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated August 4, 2023 and received August 15, 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 alleged that the Association held a special meeting with an executive session to consult with insurance counsel. He stated that the board failed to return to open session after discussing its reason for entering executive session (to consult with insurance counsel) and instead continued to discuss a survey and a loan option before immediately returning to the open meeting.

The Complainant believes that the failure to return to the open meeting was a violation of §55.1-1816 of the Property Owners’ Association Act (in fact, the proper statute would be §55.1-1949(C)¹ of the Condominium Act since this is a condominium

¹ C. The executive board or any subcommittee or other committee of the executive board may convene in executive session to consider personnel matters; consult with legal counsel; discuss and consider contracts, probable or pending litigation, and matters involving violations of the condominium instruments or rules and regulations promulgated pursuant to such condominium instruments for which a unit owner, his family members, tenants, guests, or other invitees are responsible; or discuss and consider the personal liability of unit owners to the unit owners’ 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 executive board 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 executive board or subcommittee or other committee of the executive board, 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 do not require the disclosure of information in violation of law.

association and not a property owners association). The Complainant stated that three board members raised concerns about entering executive session and that the executive session took one and a half hours before the board returned to the open meeting.

The Complainant further alleges that the Association President acted knowingly, willfully, and fraudulently by misrepresenting himself as the Board President to conduct a personal survey and obtain support for a loan option. No reference was made to common interest community law in connection with this set of allegations and as such, it was not appropriate for the complaint process and this office cannot provide a determination on the President's actions.

The Complainant stated that 30 additional owners join in the complaint submitted to the Association, however, while a list of names was included in the complaint, there was no signature or other proof that they did wish to join in the complaint. As such, this determination is directed only to the Complainant.

The Association's response referenced the use by the Complainant of the incorrect statute and acknowledged that it did hold a special meeting that convened in an executive session to discuss litigation with insurance counsel. The Association noted in its response that the Complainant was not present at the executive session and therefore did not have direct knowledge of what took place in that meeting and what was discussed with counsel. The Association wrote that the Complainant's perception and representation of events was based on supposition and not firsthand knowledge.

Further, the Association stated that counsel consulted with the Board about pending litigation and that counsel was present and engaged throughout the executive session. The Association wrote that the "discussions of surveys and loans during the executive session... were directly relevant to, and part and parcel of, the consultation with insurance legal counsel in relation to working towards resolution of pending litigation and were in accordance with §55.1-1949(C) of the Code of Virginia..."

Complaints related to executive session are always very difficult to determine since the very nature of an executive session is that it is a private meeting of the board and only for the very specific reasons set forth in common interest community law. Based on the Association's response and in light of the fact that counsel remained in the meeting and was engaged throughout, it does appear that the meeting was very likely carried out appropriately and in compliance with the law.

If the survey and loan were part of the consultation with insurance counsel, the Association had the right to remain in executive session and continue its discussion. Short of being a fly on the wall during the executive session, there is no way for this office to fully determine whether the discussion that took place during the executive session was appropriate and in compliance with the law.

Required Actions

No action is required of the Association.

Please contact me if you have any questions.

Sincerely,

A handwritten signature in blue ink that reads "Heather S. Gillespie". The signature is fluid and cursive, with the first name being the most prominent.

Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Unit Owners Association of Regency at McLean, A Condominium