



COMMONWEALTH of VIRGINIA  
Department of Professional and Occupational Regulation

Terence R. McAuliffe  
Governor

Maurice Jones  
Secretary of  
Commerce and Trade

Jay W. DeBoer  
Director

August 12, 2016

Complainant: Mark S. Borkowski  
Association: Daventry Community Association  
File Number: 2017-00020

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*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.*

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### Complaint

Complainant submitted a Complaint to the Association dated April 17, 2016. The Association provided a final determination to the Complainant dated June 6, 2016 and the Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated June 20, 2016 and received June 21, 2016.

### Preamble

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 §55-530(F) (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. In the event that such a complaint is submitted to this office as part of a NFAD, a determination cannot be provided.

### Determination

The Complainant has alleged in his complaint that the Association has violated provisions of the Property Owners Association Act related to open meeting requirements and specifically, executive sessions of the Board of Directors. The statute that addresses executive sessions is §55-510.1(C).<sup>1</sup> The Complainant has stated that the Association violated §55-510.1 by failing to accurately announce the purpose for moving into executive session on four occasions.

The Complainant alleges that in December 2015 and January 2016, “members were told to to leave the room because the Board was moving to Executive Session.” The Complainant stated that no explanation or motion was provided. He further stated that minutes of the January meeting indicated that the purpose for the meeting was to discuss collections, and that after reconvening, the manager was directed, in the open portion of the meeting, to include certain reports with the minutes each month and the board also approved photography of the exteriors of all homes in the association. The Complainant wrote “[i]t seems pretty obvious, therefore, that the Board discussed the issue of the committee reports and of the exterior photography during its Executive Session.” The Complainant further states that neither topic was authorized by the motion to discuss collections, nor would they have been authorized by the Property Owners’ Association Act.

A spreadsheet showing the length of executive sessions from January 2012 through December 2015 was included with the Complaint, to provide additional documentation of the unusual nature of the January 2016 executive session which

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<sup>1</sup> The board of directors or any subcommittee or other committee thereof may convene in executive session to consider personnel matters; consult with legal counsel; discuss and consider contracts, pending or probable litigation and matters involving violations of the declaration or rules and regulations adopted pursuant thereto for which a member, his family members, tenants, guests or other invitees are responsible; or 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 thereof, 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.

lasted 50 minutes long, a meeting length that was much longer than prior executive sessions.

The Complainant further alleged that the minutes of the February 2016 meeting were inaccurate as they ascribed the motion to go into executive session to the wrong board member and did not accurately reflect exactly what had been stated in the motion prior to convening in executive session. According to the Complainant, the reason reflected in the minutes would have been improper under the provisions of the Property Owners' Association Act.

The Complainant also noted that the March 2016 board meeting minutes showed that a draft policy resolution was presented to the board for review during executive session. The Complainant stated that such review is not authorized by the Property Owners' Association Act. The Complainant also wrote that the board of directors made a motion during the March board meeting to go into executive session "to consult with legal counsel; to discuss and consider matters involving violations of the Declaration..." The Complainant was concerned that the language used for the motion mimicked §55-510.1(C) of the Property Owners' Association Act and was not specific enough to fully outline the particular reasons for convening in executive session. This executive session was also particularly long and when the board returned to the open meeting, it moved and approved three motions. The third of these motions was to approve Policy Resolution 2016-1. The Complainant alleges that this policy resolution must be the draft policy provided to the board per the minutes of the meeting, and that copies were not provided to members at the meeting. He also noted that the Association's attorney was present at the executive session and that this appeared to be "an attempt by the Board to circumvent the provisions of the law by arguing that it was "consult[ing] with counsel."

The Association responded to the Complaint by referencing "the significance of corporate meeting minutes" and providing several citations to case law in support of its contention that meeting minutes are "records of the corporation and admissible evidence of corporate acts." The Association went on to say that the minutes for the December 2015 and January 2016 meetings indicated that motions had been made to go into executive session and that the motions identified the purpose for executive session. The Association also stated that the Complainant was speculating when he stated that two other subjects had been discussed during the executive session based on the subsequent vote on several topics after the executive session. The Association stated that "the Board is free to take up and resume work upon any pending matters, or old or new business before the Board."

As to the allegation that the association was merely mimicking the statutory provision related to executive sessions rather than being specific about what would be discussed in the executive session, the Association responded by stating that "a motion to convene in executive session requires no more specificity than that which was expressed in the March 2016 motion. Requiring more specificity than citing the statutorily-approved purposes would defeat the very reason for an executive session – maintaining confidentiality with respect to the subject matter discussed

therein.” The Association also addresses the allegation that counsel was present at the March meeting in an attempt to circumvent the law by noting that the Complainant had no way of knowing the reason for counsel’s presence at the executive session and that the board had properly convened in executive session by stating that one of the purposes for the executive session was to consult with counsel.

The allegations that the Association did not make a motion to go into executive session in December 2015 and January 2016 cannot be proven. The minutes of both meetings state that a motion was made and seconded to “adjourn” to executive session to discuss collections. Clearly the word adjourn was used mistakenly, but otherwise, based on the minutes, it appears that the Association did properly move to convene in executive session. If the minutes are inaccurate, the matter would have to be addressed through other methods as this office has no authority to determine the veracity and accuracy of meeting minutes.

As to whether there were discussions other than those related to collections during the December and January executive sessions, there is no way for this office to make that determination. One of the difficulties of addressing alleged violations of the use of executive sessions is that we have no ability to determine what was actually discussed during an executive session. I do agree with the Association, however, that voting on other matters after an executive session does not definitively prove that those matters were part of the executive session. I would also note that the length of an executive session does not really provide guidance as to what specific topics were discussed in executive session.

The Complainant’s allegation that the February meeting minutes were inaccurate is not an allegation for which a determination can be provided. No specific violation of the Property Owners’ Association Act was provided, and there is no language in that Act that speaks to the accuracy of meeting minutes. It also appears that the inaccuracy may simply have been, as suggested by the Association, a mistake.

Finally, the allegation that the Association mimicked the statutory language of the Property Owners’ Association Act prior to convening in executive session, rather than providing its own version of what was going to be discussed in executive session appears to be without merit. As the Association posited, the language of the Act is sufficient to announce the purpose of an executive session and anything further could render the need for an executive session moot, since the purpose of an executive session is to allow for the discussion of certain topics set forth in the Property Owners’ Association Act that may be too sensitive for an open meeting or may require confidentiality.

Required Actions

It does not appear that the Association has violated the provisions of the Property Owners' Association Act as it relates to executive sessions. I would encourage the Association to continue to adhere to the statutory requirements contained in the Act.

Sincerely,

A handwritten signature in black ink, appearing to read "Heather Gillespie". The signature is written in a cursive style with a large, looped initial "H".

Heather S. Gillespie  
Common Interest Community Ombudsman

cc: Board of Directors  
Daventry Community Association