



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 15, 2016

Complainant: Mark S. Borkowski  
Association: Daventry Community Association  
File Number: 2017-00021

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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

Here, the Complainant alleges a violation of §55-510.1(B)<sup>1</sup> of the Property Owners' Association Act. The Complainant believes that the Association failed to meet the obligations of this statute by not making agenda packet material available to owners at the same time such material was made available to the board members. In addition, the Complainant stated that a specific draft policy resolution was not included as part of the distributed materials at the March 2016 board meeting. According to the Complainant, minutes of this meeting read “[m]anagement presented a draft policy resolution for the Board’s review during Executive Session.”

The Complainant alleges that this draft policy resolution was excluded from owner inspection and that owners should have had access to it. The Complainant wrote in his Complaint that “[t]he Board and the Community Manager violated the POA Act when they failed to provide a copy of a draft resolution for owner inspection at the March 2016 Board meeting.”

The Association responded to the allegations in the Complaint by saying that Association counsel was present at the board meeting and participated in the executive session. The Association further noted that it had no intention of waiving attorney-client privilege or confidentiality, but, “if the draft resolution in question was attorney work product which was discussed during the executive session of the meeting with counsel present, then the draft resolution was “exempt as relating to an executive session pursuant to subsection C,” regardless of the subject matter of the resolution.”

The statutory provisions related to agenda packets and materials allow an association to choose not to distribute certain agenda materials if they are related to an executive session. In the present case, the Association, through its manager, clearly stated that the draft policy resolution was related to an executive session. In fact, the minutes demonstrated this by stating “[m]anagement presented a draft policy resolution for the Board’s review during Executive session.” In addition, counsel was present at the

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<sup>1</sup> 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 subcommittee or other committee thereof 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 thereof.

executive session, and in its Final Decision, the Association alluded to attorney-client privilege and the possibility that the draft policy resolution was attorney work product. No evidence has been provided that proved the draft policy resolution was inappropriate for the executive session or that it was not part of a consultation with counsel (which is permitted under 55-510.1(C) of the Property Owners' Association Act). In addition, the Final Decision from the Association implies that the draft policy resolution was the subject of consultation with counsel. As such, I cannot provide a determination that the Association has violated 55-510.1(B) of the Property Owners' Association Act, nor can I determine if the Association was in compliance with that portion of the Code of Virginia.

Required Actions

No action is required of the Association in relation to this Determination.

Sincerely,



Heather S. Gillespie  
Common Interest Community Ombudsman

cc: Board of Directors  
Daventry Community Association