



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

July 26, 2021

Mary Broz-Vaughan
Director

Complainant: Constantino Panayides
Association: Lafayette Park Condominium
File Number: 2022-00066

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 April 21, 2021. The Association provided a response to the complaint dated June 16, 2021. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman which was received on July 12, 2021.

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.

This Determination is final and not subject to further review.

Determination

The Complainant has alleged that the Association, by holding a fully virtual meeting for its April board meeting, violated §55.1-1949(B)(4)¹ of the Condominium Act. The Complainant believes that the Association should have had at least two board members physically present at a meeting place as outlined in the law. Because he believes the Association held the meeting improperly, the Complainant also believes that the April meeting was not a proper meeting and was instead a work session or informal gathering of the board to circumvent the open meeting requirements of the Association.

The Association responded to the Complainant’s concerns by stating that it believes that Budget Bill HB 5005, Item 4-0.01(g)² “allows the Board to make the business judgment rule regarding whether conditions make it ‘impracticable or unsafe for the...governing board to assemble in a single location’ while the COVID emergency

¹ If a meeting of the executive board is conducted by telephone conference or video conference or similar electronic means, at least two board members shall be physically present at the meeting place included in the notice. The audio equipment shall be sufficient for any member in attendance to hear what is said by any board member participating in the meeting who is not physically present.

² g. 1. Notwithstanding any other provision of law, any public body, including any state, local, regional, or regulatory body, or a governing board as defined in § 54.1-2345 of the Code of Virginia, *or any joint meeting of such entities*, may meet by electronic communication means without a quorum of the public body or any member of the governing board physically assembled at one location when the Governor has declared a state of emergency in accordance with § 44-146.17, provided that (i) the nature of the declared emergency makes it impracticable or unsafe for the public body or governing board to assemble in a single location; (ii) the purpose of meeting is to discuss or transact the business statutorily required or necessary to continue operations of the public body or common interest community association as defined in § 54.1-2345 of the Code of Virginia and the discharge of its lawful purposes, duties, and responsibilities; (iii) a public body shall make available a recording or transcript of the meeting on its website in accordance with the timeframes established in §§ 2.2-3707 and 2.2-3707.1 of the Code of Virginia; and (iv) the governing board shall distribute minutes of a meeting held pursuant to this subdivision to common interest community association members by the same method used to provide notice of the meeting.

2. A public body or governing board convening a meeting in accordance with this subdivision shall:

a) Give notice to the public or common interest community association members using the best available method given the nature of the emergency, which notice shall be given contemporaneously with the notice provided to members of the public body or governing board conducting the meeting;

b) Make arrangements for public access or common interest community association members access to such meeting through electronic means including, to the extent practicable, videoconferencing technology. If the means of communication allows, provide the public or common interest community association members with an opportunity to comment; and

3. Public bodies must otherwise comply with the provisions of § 2.2-3708.2 of the Code of Virginia. The nature of the emergency, the fact that the meeting was held by electronic communication means, and the type of electronic communication means by which the meeting was held shall be stated in the minutes of the public body or governing board.

declared by Governor Northam...continues.” The Association noted that they had not received objections to their decision, other than from the Complainant. The Association further noted that there is nothing in §55.1-1949 that would invalidate the actions of the board if it fails to follow each of the requirements of that Section. The Association stated that the decision to hold the meeting virtually was not intended to ‘circumvent the open meeting requirements’ of §55.1-1949.

The determination as to whether or not at least two board members needed to be present at the April board meeting is contingent upon whether Budget Bill HB5005, Item 4-0.01(g) was applicable and if it was, whether the nature of the declared emergency made “it impracticable or unsafe for the...governing board to assemble in a single location...” The Governor’s State of Emergency was in effect until June 30, 2021, which means that Budget Bill HB5005, Item 4-0.01(g) was applicable at the time of the complaint. This office cannot determine, however, if it was impracticable or unsafe for the governing board to assemble in a single location and as a result, cannot determine if the Association was in violation of the Condominium Act when it failed to have two board members present at the meeting place included in the notice of the meeting. Determining the impracticability and safety of a situation is well outside the scope of this office. In addition, this office cannot enforce or interpret any laws other than common interest community laws (in this case the Condominium Act). The Governor’s Budget Bill is not common interest community law and therefore this office cannot determine its particular applicability in this matter.

The code section ((55.1-1949)(B)(4)) that requires two board members to be physically present for a fully or partially electronic meeting also requires that the audio equipment at the meeting place be “sufficient for any member in attendance to hear what is said by any board member participating in the meeting who is not physically present.” This language implies that not just the two board members would potentially be present at the meeting, but also, that owners are expected at the meeting, even if it is being held electronically. As such, it seems it is not merely a matter of whether two board members would have been present at the April board meeting, but also whether some larger number of owners might wish to attend the meeting in person as well, which could certainly increase the number of attendees and possibly impact the safety of all who were there.

As a side note, effective July 1, 2021, the requirement that two board members be present at the meeting place included in the notice is no longer valid, and the law (§55.1-1935(F))³ has been amended to allow for fully virtual meetings if certain requirements set forth under the Condominium Act are met.

³ F. Any meeting of the unit owners’ association, the executive board, or any committee may be held entirely or partially by electronic means, provided that the executive board has adopted guidelines for the use of electronic means for such meetings. Such guidelines shall ensure that persons accessing such meetings are authorized to do so and that persons entitled to participate in such meetings have an opportunity to do so. The executive board shall determine whether any such meeting may be held entirely or partially by electronic means.

Required Actions

No action is required of the Association.

Sincerely,

A handwritten signature in black ink, appearing to read "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
Lafayette Park Condominium