



# COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Terence R. McAuliffe  
Governor

October 22, 2014

Maurice Jones  
Secretary of  
Commerce and Trade

Jay W. DeBoer  
Director

Complainant: Michael McGurk  
Association: Kingsmill Community Services Association  
File Number: 2015-01061

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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 August 4, 2014. The Association provided a final determination to the Complainant dated September 24, 2014 and the Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated September 27, 2014. A cover letter with a breakdown of the timeline for the complaint and subsequent submission to this office was included with the NFAD.

## Determination

The Office of the Common Interest Community Ombudsman (OCICO) is responsible for determining whether a "final adverse decision may be in conflict with laws or regulations governing common interest communities." The process of making such a determination begins when a NFAD has been filed with the OCICO in accordance with §55-530(F) (Code of Virginia) and the Common Interest Community Ombudsman Regulations (Regulations). In order to meet the requirements of both common interest community law and common interest community regulations, all NFADs must evolve from a complaint submitted through an association complaint procedure. The complaint must

be submitted in accordance with the 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, no determination can be provided.

The Complainant submitted a Complaint to the Association that alleged violations, by the Association, of §55-510.1 of the Property Owners Association (POA) Act. This section of the Virginia Code sets forth language that outlines a member’s right to record meetings that are required to be open. In his Complaint, the Complainant stated that the Board “does not have any authority to limit the type of recording or to require copies.” Complainant also stated that “notice must be provide(d) that the meeting **\*\*is\*\*** being recorded, not **\*will be\***.” The Complainant included a copy of the Association’s “Rules for Recording Meetings of the Association” (Rules) with the NFAD. Upon review, these Rules allow only audio recording of meetings. The Rules also require three business days written notice of an intent to record, an announcement at the start of a meeting and to all participants that the meeting will be recorded, and that the individual recording the meeting provide a copy of the recording to the Association within one business day of the meeting.

The Association, in its Final Determination, stated that its rules permit audio recording but not video recording in order to recognize a “member’s expectation of privacy” and to prevent “unlawful and unauthorized uses of members’ images and/or likenesses.” The Final Determination also noted that the Board believed videotaping would have a chilling effect on member participation. The Final Determination also stated that requiring the person recording a meeting to provide a copy of the recording to the association is not “unduly burdensome” based on “today’s digital recording capabilities.” The Final Determination did not address the Association’s requirement that notice of an intent to record be provided to the Association at least three days in advance.

The Property Owners’ Association Act, §55-510.1(B) states:

Any member may record any portion of a meeting required to be open. The board of directors or subcommittee or other committee thereof conducting the meeting may adopt rules (i) governing the placement and use of equipment necessary for recording a meeting to prevent interference with the proceedings and (ii) requiring the member recording the meeting to provide notice that the meeting is being recorded.

Nowhere in this provision is there any language that limits the type of recording. In fact, there was language in this code section many years ago that specifically allowed only

audio recording, but that language has since been stricken and as a result, we can only interpret this provision based on the plain language of the law, and there is nothing in that language that prohibits video recording or narrows the method of recording to audio recording only. Therefore, members have a right to record open meetings of the Association using any form of recording they may choose. Whether such recording may have a chilling effect or infringe on a member's privacy cannot be a consideration when applying this portion of the POA Act since the law provides no alternatives if privacy or member participation may be impacted.

The plain language of the statute also states that, "The board... may adopt rules...(ii) requiring the member recording the meeting to provide notice that the meeting is being recorded." This would indicate the present tense, and not a future tense. If this language were, instead, "provide notice that the meeting will be recorded" the person recording the meeting would need to provide advance notice. But, based on the plain language of the statute, the individual recording a meeting must simply provide notice that the meeting *is* being recorded. Thus, it is inaccurate and inappropriate to require advance notice of recording, as there is no such requirement contained in the POA Act.

Finally, there is no requirement in the POA Act that a copy of the recording be provided to the Association. Again, the language of this portion of the Act is straightforward, and allows the adoption of only two rules related to the recording of meetings; the placement and use of equipment, and notice that the meeting is being recorded. Nothing in this provision suggests that the Association has a right to require a member to provide a copy of his or her recording to the Association. If the Association wishes to record the meeting, it may do so itself.

### Required Actions

This office does not have jurisdiction over the governing documents of the Association. These governing documents would include the Kingsmill Community Services Association Rules for Recording Meetings of the Association, and therefore we cannot require the Association to alter or amend those documents. However, the document entitled "Rules for Recording Meetings of the Association" and the content of the Association's Final Determination demonstrate that the Association appears to be in direct conflict with common interest community law by permitting only audio recordings, requiring notice of recording in advance of meetings, and demanding a copy of any recording made by a member. Effective immediately, the Association must permit any type of recording of future meetings required to be open. In addition, the Association cannot require advance notice, but can only require notice that a meeting is being recorded. And finally, the Association can no longer require a member recording a meeting to provide a copy to the Association of that recording.

If the Association continues to violate the POA Act as it relates to the recordation of

meetings, the matter will be referred to the Common Interest Community Board for whatever enforcement action it may deem appropriate.

Sincerely,



Heather S. Gillespie  
Common Interest Community Ombudsman

cc: Board of Directors  
Kingsmill Community Services Association