



# COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Robert F. McDonnell  
Governor

June 4, 2013

James S. Cheng  
Secretary of  
Commerce and Trade

Gordon N. Dixon  
Director

Complainant: Richard D. Smith  
Association: Nandua Bay Association, Inc.  
File Number: 2013-02928

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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 9, 2013. The Association provided a response to the Complaint dated April 25, 2013. The Association's response was that it found "no basis for the complaint and will take no action." Complainant submitted his Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman and it was received on April 30, 2013.

## Determination

The Office of the Common Interest Ombudsman (OCICO) has reviewed the NFAD in its entirety. Any additional information submitted by Complainant that was not part of the original Complaint submitted to the Association was reviewed but not utilized in the Ombudsman's determination.

The Complainant has alleged that the Association is assessing him (and all lot owners) for the maintenance of certain areas within the Association that may not be common areas. Specifically, these areas are drainage easements that are located on individual lots. Complainant alleges that the Association may be making such assessments in violation of §55-509.3 of the Property Owners' Association Act and in violation of its own governing documents.

The Property Owners' Association Act, §55-509.3 provides that "except as expressly authorized in this chapter, in the declaration, or otherwise provided by law, no association may (i) make an assessment or impose a charge against a lot owner unless the charge is a fee for services provided or related to use of the common area..." Thus, if the declaration allows for an assessment, it may be levied against a lot owner, as can an assessment if it is a fee for services provided or related to use of the common area. This office does not have jurisdiction over the governing documents of associations, and cannot provide interpretations of those documents. A brief review of the declaration and

subsequent amendment that was provided with the NFAD does not provide an obvious answer as to whether the association can assess for the maintenance of the drainage easements and even if such an answer were found, such an interpretation of the Declaration is outside the jurisdiction of this office. It is not clear who the owner of the easement is, which would have a substantial impact on the questions contained in this NFAD.

While it appears that at some point in time the association asked lot owners upon whose land the drainage easements were located to maintain those ditches, I believe that it could be argued that if the owners are not doing an adequate job or if the drainage easement maintenance or lack thereof impacts portions of the Association's common areas, the Association may be acting appropriately by resuming the maintenance of those easements and assessing all owners for such maintenance. In addition, if the lots are subject to drainage easements, and the Association has ownership of those easements, the Association may be the proper entity to maintain the drainage easement and can subsequently assess the membership for such maintenance.

As far as a violation of §55-509.3, maintenance of the drainage assessments could be viewed as a fee for services provided, which is valid under the POA Act. It would not appear that this is a fee related to the use of common area, as the issue does not appear to be about the *use* of common area. It is about maintenance of what may or may not be interpreted as common area of the association. The question of whether these drainage easements are part of the common area is purely a legal question and stems from property law. This office cannot make such a determination as it well outside the confines of common interest community law that falls under the jurisdiction of this office.

#### Required Actions

No action is required of either party. If either party has any questions regarding this determination, you are welcome to contact me. This Determination is final and there will be no further review.

Sincerely,



Heather S. Gillespie  
Common Interest Community Ombudsman

cc: Board of Directors  
Nandua Bay Association, Inc.