



# COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Terence R. McAuliffe  
Governor

November 25, 2014

Maurice Jones  
Secretary of  
Commerce and Trade

Jay W. DeBoer  
Director

Complainant: Medina T. Zellner  
Association: St. Andrews Place Homeowners Association  
File Number: 2015-01319

---

*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

Complainant submitted a complaint to the Association dated September 24, 2014. The Association provided a final determination to the Complainant dated October 1, 2014 and the Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated October 24, 2014.

## Determination

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.

The Complainant submitted a Complaint to the Association that alleged numerous violations, by the Association, of the Property Owners Association (POA) Act. The allegations, along with the responses from the Association are outlined below. A determination by this office, when appropriate, is also included below.

1. The Complainant alleged a failure to provide minutes, proxies and meeting notices of the association related to the decision by the association to self-manage.
  - a. The Association responded that it was unreasonable to request minutes dating back six or more years.

There is no limit on the number of years for which a member of an association can request documents. Nor is there any provision in the POA Act that a request can be denied because it is unreasonable. As long as the request is in writing, for a proper purpose and the requestor has been specific, the Association must provide access to or copies of the requested records (unless the records requested fall under one of the exclusions set forth in §55-510 of the POA Act).

2. The Complainant alleged a failure to adopt a Policy for Review of Association Records.
  - a. The Association responded that a specific request and proper purpose must be stated for a request, and also noted that the records are held in storage.

It is not clear what is intended by "Policy for Review of Association Records." There is no such phrase in the POA Act, nor is there a requirement for a Policy for Review of Association Records, as such, this office cannot make any kind of assumption as to what was intended by the Complainant when using this phrase. As a result, no Determination can be provided in relation to this allegation.

3. The Complainant alleged a failure to provide a copy of the end of year audit (to be prepared under the direction of a CPA per the bylaws of the Association).
  - a. This is not a matter that falls under common interest community law, as no allegation of common interest community law or regulations has been made. The Association's response is irrelevant and no Determination can be provided for this allegation.
4. The Complainant alleged the existence of budget discrepancies as contained in the minutes of the 2013 annual meeting.
  - a. This is not a matter that falls under common interest community law, as no allegation of common interest community law or regulations has been made. The Association's response is irrelevant and no Determination can be provided for this allegation.

5. The Complainant alleged a conflict of interest resulting from the board acting as the management company and being paid for its work.
  - a. This is not a matter that falls under common interest community law, as no allegation of common interest community law or regulations has been made. The Association's response is irrelevant and no Determination can be provided for this allegation.
6. The Complainant alleged non-compliance with tax laws.
  - a. This is not a matter that falls under common interest community law, as no allegation of common interest community law or regulations has been made. The Association's response is irrelevant and no Determination can be provided for this allegation.
7. The Complainant discussed the meeting minutes but did not allege a violation of common interest community law or regulations.
  - a. This is not a matter that falls under common interest community law, as no allegation of common interest community law or regulations has been made. The Association's response is irrelevant and no Determination can be provided for this allegation.
8. The Complainant alleged a failure to permit the recording of meetings.
  - a. The Association responded that HOA/POA allows board discretion regarding the recording of meetings.

§55-510.1 is quite clear regarding the recording of meetings. **"Any member may record any portion of a meeting required to be open** (emphasis added). 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." The language contained in this provision from the POA Act allows for any form of recording, including audio recording or video recording.

9. The Complainant requested the name and contact information of the company that holds the master insurance policy and fidelity bond, as well as the name and contact information for the registered agent information. But no actual allegation was made in regard to the request for information.
  - a. This is not a matter that falls under common interest community law, as no allegation of common interest community law or regulations has been made. The Association's response is irrelevant and no Determination can be provided for this allegation.
10. The Complainant alleged a failure to appoint a nominating committee and hold an annual meeting.
  - a. The Association responded that for 6 years there has been no quorum to vote for a change, and that it is the Board's fiduciary duty to act in the best

interest of the community. The Association also noted that 65% of the members are not eligible to vote.

While this office has no jurisdiction over the requirements for an annual meeting under the bylaws of the association, nor can we address the issue of a nominating committee, the POA Act also requires associations to hold meetings of the association on an annual basis. Under §55-510,(F) "Meetings of the association shall be held in accordance with the provisions of the bylaws at least once each year after the formation of the association." The POA Act provides a clear requirement that an annual meeting be held and if quorum cannot be obtained, the Board of Directors needs to determine how to address that problem.

11. The Complainant alleged inconsistent use of quorum for meetings, an unannounced meeting, misuse of executive session, a failure to conduct business at meetings, and a failure to provide a designated comment period during a meeting.

a. The Association responded that meetings are informational only since quorum is never met.

The Association should not be holding meetings without notice, it should not be carrying out business in executive sessions that are carried out in a manner that is contrary to the POA Act, and it should be providing opportunity for comments at board meetings.

12. The Complainant alleged an unfair time period for reviewing and responding to association complaints since the association now meets on a quarterly basis.

a. The Association stated that complaints must be reasonable to respond to them, and the quarterly meeting schedule was voted on in 2009.

The reasonableness of a complaint is absolutely not the determining factor as to whether the Association is required to respond. Any complaint that is submitted to the Association through its complaint procedure alleging a violation of common interest community law or regulations must receive a response that complies with the Regulations. As to whether the quarterly meeting is sufficient for the review and resolution of complaints, this is an issue that needs to be addressed on a case-by-case basis.

13. The Complainant alleged that a quarterly meeting schedule is not sufficient to meet the needs of the community.

a. This is not a matter that falls under common interest community law, as no allegation of common interest community law or regulations has been made. The Association's response is irrelevant and no Determination can be provided for this allegation.

14. The Complainant alleged that liens have been placed improperly on homes without due process.

a. The Association responded that it is aware of state rules for assessments on violators and will enforce them.

No proof was provided that showed that the Association had failed to carry out its due process obligation under the POA Act. However, I would note that if, as was alleged in the Complaint, the Association is, in fact, failing to provide due process for consideration of violations of the governing documents, the Association it would be in direct violation of the POA Act. The POA Act provides very specific information regarding rule enforcement, as can be found in §55-513:

Before any action authorized in this section is taken, the member shall be given a reasonable opportunity to correct the alleged violation after written notice of the alleged violation to the member at the address required for notices of meetings pursuant to § 55-510. If the violation remains uncorrected, the member shall be given an opportunity to be heard and to be represented by counsel before the board of directors or other tribunal specified in the documents.

Notice of a hearing, including the actions that may be taken by the association in accordance with this section, shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the member at the address of record with the association at least 14 days prior to the hearing. Within seven days of the hearing, the hearing result shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the member at the address of record with the association.

15. The Complainant alleged an unreasonable restriction on rentals, without a vote of the owners, as well as a requirement that owners with more than one unit sell any additional unit.
  - a. This is not a matter that falls under common interest community law, as no allegation of common interest community law or regulations has been made. The Association's response is irrelevant and no Determination can be provided for this allegation.
  
16. The Complainant requested a current reserve study.
  - a. The Association responded that the board will review and provide a copy of reserve study upon request.

While the Complainant did not specifically allege a violation of common interest community law here, a failure to carry out a reserve study was a topic in a prior Determination. At that time, the Association was required to provide this office a copy of the signed contract indicating that it intended to move forward with its legal responsibility to have a reserve study completed every five years. While the Association's response was that it will provide a copy of the reserve study upon request, the Complainant has requested a copy and no copy was provided in the Association's decision. Since the receipt of this NFAD, the Association has provided this office a copy of an email from the company responsible for providing a reserve

study to the Association. In that email, the company lays out the reasons the reserve study has taken over eight months to complete. It also provided a draft of the reserve study to the Association for its review.

17. The Complainant alleged the association board has abused its power and harassed the Complainant by contacting her employer.
  - a. This is not a matter that falls under common interest community law, as no allegation of common interest community law or regulations has been made. The Association's response is irrelevant and no Determination can be provided for this allegation.

### Required Actions

There were numerous allegations in the Complaint that were not appropriate for submission through the Association Complaint Procedure, as they alleged violations of the Association's governing documents, civil law issues, or general behavior of board members. These are allegations over which this office has no jurisdiction and cannot provide a Determination.

The Association, through its Board must ensure the following, in relation to the violations set forth in this Determination:

1. The Association Board must be responsive to requests for access to the books and records and it must comply with the POA Act when responding to such requests. As noted in the Determination, there is no limit on how many years worth of information a member can request. If the request complies with the POA Act, and the books or records requested are available, the Association must respond appropriately.
2. The Association Board must allow members to record meetings.
3. The Association Board must hold an annual meeting of the membership, and if quorum cannot be established it must determine a method by which it can obtain quorum.
4. The Association Board must hold all meetings in compliance with the POA Act. It must provide notice of all meetings, it must make all meetings open to the members, it must not enter into executive sessions unless it has done so in accordance with the POA Act, and it must provide a designated time period at meetings to allow for comments by the members.
5. The Association Board must respond to all complaints that are submitted in accordance with the Association's Complaint Procedure and the Regulations. The reasonableness of a complaint can in no way be the determining factor as to whether the Association Board responds.

6. The Association Board must ensure that any alleged violations of association rules or its governing documents be dealt with in a way that unequivocally follows the requirements in the POA Act, with specific attention to be paid to the necessity for due process.
7. As a result of the prior Determination, the Association is already on notice that the reserve study is required and long overdue. The Association must provide a copy of the draft Reserve Study to this office by December 8, 2014.

Because this Association is already on notice that it must abide by the requirements of the POA Act, any future failure to do so will result in an immediate referral to the Common Interest Community Board for enforcement action.

Sincerely,



Heather S. Gillespie  
Common Interest Community Ombudsman

cc: Board of Directors  
St. Andrews Place Homeowners Association