



COMMONWEALTH of VIRGINIA  
Department of Professional and Occupational Regulation

Terence R. McAuliffe  
Governor

December 2, 2014

Maurice Jones  
Secretary of  
Commerce and Trade

Jay W. DeBoer  
Director

Complainant: Ileane Kenney  
Association: Heatherlea of Arlington, A Condominium  
File Number: 2015-01355

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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 four complaints to the Association, but only two of those complaints were submitted as part of a Notice of Final Adverse Decision. One of those complaints was submitted to the Association dated May 9, 2014 and another dated May 16, 2014. The Association provided a final determination to the Complainant dated October 7, 2014 and the Complainant then submitted her NFAD to the Office of the Common Interest Community Ombudsman dated November 3, 2014 and it was received November 5, 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.

In this NFAD, two complaints were included, one pertaining to the application of pesticides and the other to the reallocation of common elements. The Complainant alleged that landscapers for the Association applied pesticides to the property on May 9, 2014, and that the Association failed to post notice of the application of the pesticides 48 hours in advance. Such a failure would be a violation of §55-79.80:01 of the Condominium Act. In addition, the Complainant alleged that the Association, by allowing "several unit owners to commandeer adjacent grounds for personal use" has reallocated common area in violation of the Condominium Act (§55-79.56).

In its Final Decision, the Association acknowledged that herbicides had been improperly applied to the common elements without the required notice. The Association did provide the Complainant information regarding the materials that had been applied, as well as MSDS sheets, on May 12, 2014. The Association stated that it had no part in the application of the herbicides and has notified the landscaping company of its obligation to provide proper notice under the Virginia Condominium Act.

In response to the Complaint alleging a reallocation of common area, the Association responded that common elements have not been reallocated and that instead, owners may have additional plantings in common elements adjacent to their own units if the owners "assume all responsibility for maintaining these plantings." The Association noted that these owners are also aware that the plantings may be removed at any time by the Board of Directors or the Association and each owner is "solely responsible for all risks associated with these plant materials."

The Association has recognized that there was a failure in providing notice of pesticide application, and has notified the company responsible that it must abide by the requirements for notification under the Condominium Act. I agree that there was a violation of the Condominium Act, and that the Association did fail to provide appropriate notice to the owners. While it is clear that there was a violation of the Condominium Act, it also appears that the Association has done what it can to address the violation and attempt to ensure that a reoccurrence does not happen.

§55-79.56 of the Condominium Act applies to specific situations involving convertible land, additional land, convertible space and leasehold condominiums, none of which are applicable in the present situation. While I understand the Complainant's concerns, the actions alleged would not fall under this portion of the Condominium Act, or any other portion of the Condominium Act. Instead, allowing owners to utilize portions of the common elements for planting is an issue that is internal to the Association and results from the condominium instruments and/or a decision by the Board of Directors. As a result, this use of the common elements by owners is not something for which this office can provide a Determination.

Required Actions

The Association is on notice that it must make every effort to ensure that pesticides are only applied in a manner that fully complies with the provisions of the Condominium Act. A failure to do so may result in a referral of the matter to the Common Interest Community Board for whatever action it may deem appropriate.

Sincerely,

A handwritten signature in cursive script, appearing to read "Heather S. Gillespie".

Heather S. Gillespie  
Common Interest Community Ombudsman

cc: Board of Directors  
Heatherlea of Arlington, A Condominium