



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Terence R. McAuliffe
Governor

June 29, 2016

Maurice Jones
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Greg Mathieson
Association: Virginia Run Community Association
File Number: 2016-02791

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 two complaints to the Association both dated February 19, 2016. The Association provided responses to the Complainant dated May 13, 2016. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated May 18, 2016 with additional required information received June 1, 2016.

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 first Complaint alleged that the Association had withheld requested documents in order to further clarify the purpose provided by the Complainant. The Complainant alleged a violation of §55-510¹ of the Property Owners' Association Act. The Complainant had stated in his written request for access to the books and records that "The purpose is to develop a better understanding of the HOA's activities, management, actions, legal changes and concerns of the Board of Trustees and related committees, groups and advisory staff along with how they may effect the financial effects and expenditures surrounding the operations of the HOA. And to share in meetings with other HOA members and those in the HOA who may not be privy to having online services or means by which to see or discuss these documents when we should meet."

The Association responded to this request via letter dated February 16, 2016 and asked for clarification of the Complainant's intentions and asked the Complainant to resubmit the request or download the requested information from the website. Ultimately the Association did provide the requested document. In its Final Decision, the Association stated that "The Board of Trustees was well within its right to request a clarification of the stated purpose."

This is a somewhat unique situation in that the documents that were requested could also be obtained on the Association's website, without any requirement for a purpose. The only requirement is that the individual have the online credentials necessary to enter the portion of the website reserved for such documents. In addition, there is no definition in the Property Owners' Association Act as to what constitutes a proper purpose. Ultimately, the Association provided the Complainant the requested documents.

If the Association's request for clarification was a request based on a lack of understanding as to the Complainant's purpose and intended to obtain enough information to ensure that the document was going to be used for a purpose that would comport with the requirements of the Property Owners' Association Act, I cannot find fault with the Association. Requesting clarification of a purpose is not a violation of §55-510. Had the Association refused to provide the documents, based on the purpose provided, a violation of the Property Owners' Association Act may have been found.

The Complainant's second complaint alleged a different violation of §55-510, namely that the Association failed to provide a copy of a draft declaration document that had been part of a recent Board of Trustees agenda packet upon the Complainant's written request.

The Association responded to the request in the letter referenced above dated February 16, 2016. It stated that the declaration was still in draft form and "as of this past month, it has been edited in various particulars." The Association further stated that it would not provide a copy of the proposed declaration until it was in its final form and approved by the Board of Trustees for presentation to the membership for a vote.

¹ B. Subject to the provisions of subsection C and so long as the request is for a proper purpose related to his membership in the association, all books and records kept by or on behalf of the association, shall be available for examination and copying by a member in good standing or his authorized agent including...

In its Final Decision, the Association wrote that “various changes to the working draft were in progress.” It also noted that “the Board unanimously agreed that the document would not be available until it was in its final form.”

Under the Property Owners’ Association Act, there are certain instances where documents do not have to be provided to a member of the association, even if requested in accordance with that Act. These instances are outlined in §55-510(C) and include documents related to personnel matters, pending contracts, communications with legal counsel, and minutes or other confidential records of executive sessions, to name a few. In its Final Decision, the Association has not referenced any of the acceptable reasons for denying access to, or copies of, a document. While I understand that confusion may ensue if a draft copy is provided to owners, especially if additional versions may be forthcoming, the Association did not deny the Complainant a copy based on any of the acceptable reasons outlined in the applicable portion of the Property Owners’ Association Act.

Required Actions

While the Association does have the right, under the Property Owners’ Association Act to deny access to certain documents, it can only do so based on the enumerated exclusions set forth in §55-510(C) of the Property Owners’ Association Act. The Association needs to ensure that in the future, it complies with §55-510(C) of the Property Owners’ Association Act at all times and does not improperly deny access to, or copies of, books and records of the Association.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Virginia Run Community Association