



COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

February 22, 2019

Brian Ball
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Len Blasiol
Association: Lake Caroline Property Owners' Association
File Number: 2019-01803

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 a complaint to the Association with no discernible date. The Association provided a response to the Complainant dated December 19, 2018. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated January 11, 2019 and received January 14, 2019.

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 filed a complaint with the Association alleging that the Association did not comply with §55-510 of the Property Owners' Association Act. Specifically, the Complainant alleges that the Association failed, upon his written request, to provide a copy of a settlement agreement between the Association and a contractor. The Complainant stated in his Complaint that the Association is required to provide the information he requested since the exceptions listed under the statute are not implicated by the settlement agreement. The Association provided the Complainant a letter in response to his request for the settlement agreement, and in that letter, the Association said that the information he had requested was protected from disclosure because the Association Board of Directors voted to make the agreement subject to non-disclosure provisions. The Complainant also alleged that the Association failed to provide the documents he requested within ten days, which would constitute another violation of §55-510 of the Property Owners' Association Act.

The Association responded to the Complaint by referencing two portions of §55-510(C) of the Property Owners' Association Act. The first provision referenced was §55-510(C)(3)¹ which allows an association to exclude documents from inspection or copying if they pertain to pending or probable litigation. The Association believes that since the settlement agreement was entered into at the time litigation was pending it can continue to be excluded from examination or copying. The second reference was to §55-510(C)(6)² which permits an association to withhold documents from inspection or copying if such disclosure would be a violation of the law.

While I am not certain I can agree that §55-510(C)(3) is applicable in the present case, it is because I am not certain that the exclusion allowed for books and records that concern pending or probable litigation continues after the litigation is no longer pending. Because the Association provided two reasons for excluding the settlement agreement from review, my ambivalence as to the applicability of §55-510(C)(3) is moot. This is because this office does not have the authority or jurisdiction to determine if §55-510(C)(6) is applicable in this matter. The Association stated that it believes the settlement agreement concerns a matter that if disclosed would be a violation of law and therefore the settlement agreement can be excluded from inspection and copying pursuant to §55-510(C)(6). The only way to determine whether a violation of law would occur if the settlement agreement was disclosed would be through some form of legal assessment, unrelated to common interest community law, and outside the scope of jurisdiction of this office. Because this office has no authority to review the settlement agreement, or decide

¹ C. Books and records kept by or on behalf of an association may be withheld from inspection and copying to the extent that they concern:

3. Pending or probable litigation. Probable litigation means those instances where there has been a specific threat of litigation from a party or the legal counsel of a party;

² C. Books and records kept by or on behalf of an association may be withheld from inspection and copying to the extent that they concern:

6. Disclosure of information in violation of law;

if disclosure of the settlement agreement would be in violation of law, no determination can be provided.

Required Actions

Nothing is required of the Association at this time.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Lake Caroline Property Owners' Association