



COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

April 13, 2021

Mary Broz-Vaughan
Director

Complainant: James D. Patton, IV
Association: Monument Square Condominium Unit Owners Association
File Number: 2021-01780

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 a complaint to the Association dated December 7, 2020 and another dated December 9, 2020. The Association provided a response to the complaint dated January 11, 2021. The Complainant than submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated January 31, 2021 and received February 10, 2021.

Authority

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 §54.1-2354.4 (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.

Determination

Both the Association and the Complainant provided additional written information related to the NFAD. As is always the case, this additional information cannot be considered since neither party has been provided an opportunity to review or respond to the information. Instead, this determination will focus on the complaints submitted to the association and the association's final decision on those complaints.

The Complainant has alleged a violation of §55.1-1815 of the Property Owners Association Act in the first of his complaints (I will substitute the proper Code Section since this is a condominium and therefore §55.1-1945¹ would be the applicable law).

¹ B. Subject to the provisions of subsection C, all books and records kept by or on behalf of the unit owners' association, including the unit owners' association membership list, and addresses and aggregate salary information of unit owners' association employees, shall be available for examination and copying by a unit owner in good standing or his authorized agent so long as the request is for a proper purpose related to his membership in the unit owners' association and not for pecuniary gain or commercial solicitation. Notwithstanding any provision of law to the contrary, this right of examination shall exist without reference to the duration of membership and may be exercised (i) only during reasonable business hours or at a mutually convenient time and location and (ii) upon five business days' written notice for a unit owner association managed by a common interest community manager and 10 business days' written notice for a self-managed unit owners' association, which notice shall reasonably identify the purpose for the request and the specific books and records of the unit owners' association requested.

C. Books and records kept by or on behalf of a unit owners' association may be withheld from examination or copying by unit owners and contract purchasers to the extent that they are drafts not yet incorporated into the books and records of the unit owners' association or if such books and records concern:

1. Personnel matters relating to specific, identified persons or a person's medical records;
2. Contracts, leases, and other commercial transactions to purchase or provide goods or services, currently in or under negotiation;
3. Pending or probable litigation. For purposes of this subdivision, "probable litigation" means those instances where there has been a specific threat of litigation from a person or the legal counsel of such person;
4. Matters involving state or local administrative or other formal proceedings before a government tribunal for enforcement of the condominium instruments or rules and regulations promulgated by the executive board;
5. Communications with legal counsel that relate to subdivisions 1 through 4 or that are protected by the attorney-client privilege or the attorney work product doctrine;
6. Disclosure of information in violation of law;
7. Meeting minutes or other confidential records of an executive session of the executive board held pursuant to subsection C of § 55.1-1949;
8. Documentation, correspondence or management or executive board reports compiled for or on behalf of the unit owners' association or the executive board by its agents or committees for consideration by the executive board in executive session; or
9. Individual unit owner or member files, other than those of the requesting unit owner, including any individual unit owner's files kept by or on behalf of the unit owners' association.

Specifically, the Complainant had requested that the Association provide him access to the records related to actions taken against him as a result of alleged violations of the governing documents. These records consisted of six grievances that had been filed with the Association's Compliance Committee. The Complainant stated that he had been denied access to the records due to confidentiality but needed access in order to prepare a rebuttal to the alleged offenses.

In his second complaint, the Complainant alleged that the Association failed to follow the procedures of its Rules and Regulations. Because this allegation is related to the governing documents of the association and not to common interest community law, as explained above, we have no authority to address this allegation.

In its response to the complaints, the Association wrote that it amended its prior action regarding the pet rule and that the owners are on notice that this is a warning notice, per the Association's compliance procedure and that the Complainant may be subject to fines for any future violations. The Association also noted that it will be reviewing its policies and adherence to regulation procedures and updated processes as needed. With a goal of ensuring processes are documented, consistent and transparent.

There are instances where association records can be withheld from copying or examination by a unit owner. The statute that governs association records provides a list of nine possible exclusions. In its initial email response to the Complainant's request for documents, the Association stated that the requested documents were confidential. It did not, however, specify why these documents were confidential and whether that confidentiality was based on the applicable statute or dependent upon some other reason. Because there was no specific information as to why the association considered the records confidential, I cannot determine if there has been a violation of §55.1-1945. If the records were withheld because they fell under one of the exclusions contained in the statute, it would not appear that the association was in violation of the statute. If, however, the records were withheld for some other reason, it is possible that a violation of the law may have occurred.

I will note that the Association failed to provide a final decision that complied with the Common Interest Community Ombudsman Regulations. As required by those regulations (specifically 18 VAC 48-70-50), the Common Interest Community Board Registration Number of the association was missing, the name and license number of the Common Interest Community Manager was missing, and the Complainant's right to file a Notice of Final Adverse Decision with this office, along with the necessary contact information was also missing.

Required Actions

The Association needs to ensure that it fully complies with the requirements of the Common Interest Community Ombudsman Regulations when providing any future final decisions. Specifically, it must meet the requirements of 18 VAC 48-70-50. A failure to do so may result in a referral to the Common Interest Community Board for any action it may deem appropriate.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Monument Square Condominium Unit Owners Association