



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

June 22, 2021

Brian Ball
Secretary of
Commerce and Trade

Mary Broz-Vaughan
Director

Complainant: Michael Robins
Association: Swift Run Trails Homes Association
File Number: 2021-02516

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 dated April 9, 2021. The Association provided a response to the complaint dated April 28, 2021. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman which was received on May 14, 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 and we cannot provide a determination.

Determination

The Complainant has alleged several violations of common interest community law in the complaint he submitted to the Association. The primary allegation is related to a document that the Complainant has requested to which the Association has denied him access. The Complainant believes the Association is in violation of §55.1-1815(B)¹ of the Property Owners' Association Act as a result of this failure to provide a copy of an agreement between the Complainant's neighbor and the association related to the neighbor's improvements on his own property. The Complainant noted that the neighbor has or will submit plans to the locality and as such, no privacy issues will be in play since those records will be subject to public review.

In addition, the Complainant wrote that "[w]e are unaware of previously posted open meetings of the Board and the ARC to consider and act upon the submission of 7143...and were thus denied our rightful opportunity to observe and comment." The Complainant believes that the Association has failed to abide by §55.1-1816² of the Property Owners' Association Act by not providing notice of meetings other than the Association's annual member meeting.

The Association's response to the allegations focused primarily on its belief that the agreement requested by the Complainant is not a document that must be provided to the Complainant as the Association considers it to be part of the individual neighbor's file.

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:

1. The association's membership list and addresses, which shall not be used for purposes of pecuniary gain or commercial solicitation; and
2. The actual salary of the six highest compensated employees of the association earning over \$75,000 and aggregate salary information of all other employees of the association; however, individual salary information shall not be available for examination and copying during the declarant control period.

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 an association managed by a common interest community manager and 10 business days' written notice for a self-managed association, which notice reasonably identifies the purpose for the request and the specific books and records of the association requested.

² A. All meetings of the board of directors, including any subcommittee or other committee of the board of directors, where the business of the association is discussed or transacted shall be open to all members of record. The board of directors shall not use work sessions or other informal gatherings of the board of directors to circumvent the open meeting requirements of this section. Minutes of the meetings of the board of directors shall be recorded and shall be available as provided in subsection B of § 55.1-1815.

The Association wrote that under §55.1-1815(C)(9),³ individual lot owner or member files may be withheld from inspection. The Association included several other reasons why they believed the document should not be made available to the Complainant but those reasons were not based on common interest community law and are therefore not pertinent to this determination.

As for the allegation that the Association failed to provide notice of meetings, the Association responded that such criticism contains some validity but did not go into detail regarding whether it has or has not violated §55.1-1816.

If the Association has designated the agreement it entered into with the neighbor as being part of that member's file, the Association is correct that under §55.1-1815(C)(9), it is not obligated to provide that document to anyone that requests it. The Property Owners' Association Act does not specify what documents should be included in member files nor does it provide any clarification as to how an association may determine what documents to include in those files. As such, the determination is largely at the discretion of an association's board of directors. The Association did state that its decision to include the agreement in the member's file was based on a consistent practice of "placing all documents related to a matter involving an individual owner in the owner's lot file and...[of] considering those documents private."

The allegation that the Association had not provided notice of meetings and therefore was in violation of §55.1-1816 did not have sufficient evidence or specific examples of when meetings were held without notice. Being unaware of a meeting does not necessarily translate to an association failing to provide notice of a meeting. The Complainant did reference two comments in emails that may prove applicable, one being a comment by the Association that "the board by democratic vote feels that distribution to you is prohibited by at least section §55.1-1815(C)(9)." The other email, dated January 23, 2021 did not appear to have been included in the NFAD. While it is not preferred, there are situations where an incorporated association can make decisions outside of meetings, as permitted under the Nonstock Corporation Act. There was simply not enough information in the complaint, nor was there sufficient information in the Association's response to determine if there was a violation of §55.1-1816.

We do not consider additional information submitted with a NFAD that was not included with the original complaint submitted through the association complaint procedure. The only time we will, which is the case here, is if the Complainant alleges that the Association failed to respond to a complaint in accordance with the Common Interest Community Ombudsman Regulations. The Complainant alleged that the Association did not provide acknowledgement of receipt of the complaint within seven

³ 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:

9. Individual lot owner or member files, other than those of the requesting lot owner, including any individual lot owner's or member's files kept by or on behalf of the association.

days, a violation of 18 VAC 48-70-50(4);⁴ that it did not provide notice of the time, date and location of consideration, a violation of 18 VAC 47-70-50(7);⁵ and that the final determination was sent by regular mail and not one of the methods required under 18 VAC 47-70-50(8).⁶ It does appear that the Association did not acknowledge receipt of the complaint in a timely manner. I cannot determine if the Association failed to provide notice of the time, date and location of the consideration since there was no evidence that directly addressed this issue and the Association was not provided an opportunity to respond. The Complainant is correct, once the Association chose to send the final determination by mail, it should have mailed the final determination by registered or certified mail, return receipt requested as required by the Regulations.

Required Actions

No action is required of the Association as it pertains to the alleged violation of Code Section 55.1-1815(B). While there was not sufficient evidence to prove a violation of §55.1-1816, I will note that if meetings are not open and owners are not being provided notice of all meetings, the Association does need to address this issue immediately.

The Association did not appear to be in full compliance with the Common Interest Community Ombudsman Regulations in its response to the Complaint. It did not acknowledge receipt of the complaint in a timely manner, it failed to mail the final determination correctly, and it left out key information, including the Complainant's right to file a Notice of Final Adverse Decision with this office (and the necessary contact information) (18 VAC 48-70-50(9)⁷) and the Common Interest Community Board Registration Number (18 VAC 48-70-50(9)⁸).

⁴ 4. The association shall provide written acknowledgment of receipt of the association complaint to the complainant within seven days of receipt. Such acknowledgment shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the complainant at the address provided, or if consistent with established association procedure, by electronic means provided the sender retains sufficient proof of the electronic delivery.

⁵ 7. Notice of the date, time, and location that the matter will be considered shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the complainant at the address provided or, if consistent with established association procedure, delivered by electronic means, provided the sender retains sufficient proof of the electronic delivery, within a reasonable time prior to consideration as established by the association complaint procedure.

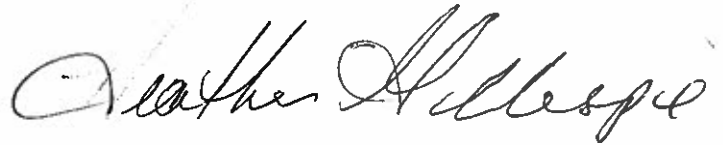
⁶ 8. After the final determination is made, the written notice of final determination shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the complainant at the address provided or, if consistent with established association procedure, delivered by electronic means, provided the sender retains sufficient proof of the electronic delivery, within seven days.

⁷ 10. The notice of final determination shall include the complainant's right to file a Notice of Final Adverse Decision with the Common Interest Community Board via the Common Interest Community Ombudsman and the applicable contact information.

⁸ 9. The notice of final determination shall be dated as of the date of issuance and include specific citations to applicable association governing documents, laws, or regulations that led to the final determination, as well as the registration number of the association. If applicable, the name and license number of the common interest community manager shall also be provided.

The Association must ensure that it fully adheres to the requirements set forth in the Common Interest Community Ombudsman Regulations when it responds to an association complaint. A failure to do so in the future may result in a referral of the matter to the Common Interest Community Board for enforcement action if it deems it appropriate. My office is happy to assist you if you have questions about the Regulations or the complaint process in general.

Sincerely,

A handwritten signature in cursive script that reads "Heather S. Gillespie". The signature is written in black ink and is positioned above the printed name.

Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Swift Run Trails Homes Association