



COMMONWEALTH of VIRGINIA  
Department of Professional and Occupational Regulation

Ralph S. Northam  
Governor

Mary Broz-Vaughan  
Director

July 19, 2021

Complainant: Nadedge Massou  
Association: Woodbury Heights Condominium  
File Number: 2021-02585

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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

The Complainant submitted a complaint to the Association dated March 29, 2021. The Association provided a response to the complaint dated April 27, 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 20, 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.

Determinations issued by this office are final and not subject to further review.

### Determination

Numerous allegations were included in the Association Complaint that were not appropriate for the complaint procedure since they do not concern common interest community law and will not be addressed in this determination. These topics include allegations related to criminal law violations, Executive Orders, laws other than the Condominium Act (which is the only applicable common interest community law in this matter), fiduciary duties of board members, any implied duty of the executive board, condominium instruments, discrimination, and any other allegations not related to common interest community law. Because individual members of the executive board are not governed by common interest community law, this determination will not apply to any allegations against an individual board member; it will only apply to the executive organ as a whole. Allegations against management companies are addressed as allegations against the association since it is ultimately the responsibility of an association and its executive board to adhere to common interest community law and regulations.

The first complaint submitted by the Complainant alleges “gross violations of Complainant’s rights as a victim of crime.” This is not something that would fall under our authority, but this specific complaint was also accompanied by allegations that the Association was in violation of §55.1-1939 and §55.1-1945 of the Condominium Act. These allegations were related to the theft of a bicycle and Complainant’s efforts to review four days’ of video surveillance to see if the culprit could be found and to obtain a copy of the video footage. §55.1-1939<sup>1</sup> sets forth five rights every owner in good standing is provided under the law. This law further states “[t]he rights enumerated in this section shall be enforceable by any unit owner pursuant to the provisions of §55.1-1915,”<sup>2</sup>

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<sup>1</sup> Every unit owner who is a member in good standing of a unit owners' association shall have the following rights:

1. The right of access to all books and records kept by or on behalf of the unit owners' association according to and subject to the provisions of § 55.1-1945, including records of all financial transactions;

The rights enumerated in this section shall be enforceable by any unit owner pursuant to the provisions of § 55.1-1915.

<sup>2</sup> A. The declarant, every unit owner, and all those entitled to occupy a unit shall comply with all lawful provisions of this chapter and all provisions of the condominium instruments. **Any lack of such compliance shall be grounds for an action to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the unit owners' association or by its executive board or any managing agent on behalf of such association or, in any proper case, by one or more aggrieved unit owners on their own behalf or as a class action.** A unit owners' association shall have standing to sue in its own name for any claims or actions related to the common elements as provided in subsection B of § 55.1-1956. Except as provided in subsection B, the prevailing party shall be entitled to recover reasonable attorney fees, costs expended in the matter, and interest on the judgment as provided in § 8.01-382. This section does not preclude an action against the unit owners' association and authorizes

meaning legal action would be required to enforce this particular statute. Because the rights afforded under §55.1-1939 are enforceable only by legal action, we cannot address such violations in a determination.

Virginia Code Section 55.1-1945 also addresses the right of an owner in good standing to access the books and records of the association. The Complainant alleges the Association denied her the right to examine the books and records of the Association, specifically the security video of the four-day timeframe in which her bicycle may have been stolen, without imposing unreasonable or any fees. She also alleges a failure to provide access in a timely manner. The Complainant further alleges a denial of her right to continue an inspection of the video, and the right to take copies of the video. She believes the Association attempted to enforce a resolution for the imposition of fees that was unlawful and that the Condominium Act allows for fees for copying but not for inspection of the books and records. The Complainant also alleged that the Records Policy was never properly brought to the attention of her or other association members.

In response to these allegations, the Association wrote that the Complainant failed to use the required association form to request to inspect the Association's books and records, which the Association considers a prerequisite for inspection of the records. The Association advised the Complainant of the requirement that she utilize the document request form via a letter dated February 9, 2021 that was included in the NFAD. The Association also stated that the Complainant had failed to consent to pay the costs of time and labor necessary to review four days' worth of video footage, which is another prerequisite under the Association's Records Resolution and §55.1-1945(E) and that she had been asked to narrow the scope of the records request but failed to do so. The Association also expressed concern about privacy issues related to the video and chain of custody and authenticity issues if it released the video to the Complainant rather than the police. The Association believes the resolution was properly adopted and posted.

Many associations require owners to utilize a form if the owner wishes to examine or copy the books and records of the association. Such a form would not appear to be in violation of §55.1-1945, which requires requests to be in writing, since it is not denying a member in good standing his or her right to examine the books and records. Because the Complainant did not submit the required form to the Association, I do not find that the Association failed to provide access to the books and records. As for the Association's charges for viewing the video footage, I do not believe that the Condominium Act, and specifically §55.1-1945(E)<sup>3</sup> provide for charging hourly fees to supervise the review of association books and records. Such a review would not appear to be "providing copies of any books and records," which are the only instances where an association can collect

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the recovery, by the prevailing party in any such action, of reasonable attorney fees, costs expended in the matter, and interest on the judgment as provided in § 8.01-382 in such actions. (emphasis added)

<sup>3</sup> E. Prior to providing copies of any books and records, the unit owners' association may impose and collect a charge, not to exceed the reasonable costs of materials and labor, incurred to provide such copies. Charges may be imposed only in accordance with a cost schedule adopted by the executive board in accordance with this subsection. The cost schedule shall (i) specify the charges for materials and labor, (ii) apply equally to all unit owners in good standing, and (iii) be provided to such requesting unit owner at the time the request is made.

a charge under the statute. Whether an association can charge such fees based on language in its condominium instruments is a question outside the scope of this office.

This office cannot address whether the records can be withheld due to chain of custody or authenticity issues. That is a legal issue outside the scope of our authority. We are also unable to determine if the resolution was properly adopted, as that, too, at the time, was a legal issue. Effective July 1, 2021, new language was added to the Condominium Act that will provide guidance regarding the adoption of resolutions, but that law was not in place at the time the alleged improper adoption took place.

The second Complaint alleged “abuses and threats of abuse of the board and management’s powers.” Again, this is not something that falls under our authority, but the Complainant supplemented this allegation with references to §55.1-1955 and §55.1-1957 of the Condominium Act. The primary allegation is that a pest control policy resolution drafted by the Association was overreaching because it allowed access to units without the consent of owners, which the Complainant believes is a violation of §55.1-1955.<sup>4</sup> This office cannot determine if the resolution is overreaching since it is a governing document of the association and thus it pertains to a legal issue outside the scope of our authority. The Complainant also alleged that the resolution had not been properly published or distributed but did not provide a reference to any violations of common interest community law, only references to the fiduciary duty of the Association. The Complainant also alleged that the Association failed to offer her the same options for pest control it had offered to other unit owners. The Complainant did not specify how these actions resulted in a violation of the Condominium Act.

The Complainant’s allegation that the Association violated §55.1-1957<sup>5</sup> was based on her belief that the Association only has authority to apply pesticide on common elements, and not in units. While the Condominium Act only addresses pesticide application on common elements, that does not preclude an association from creating its own rules or policies for pest control. It would be a legal matter to determine if such rules or policies were appropriate under the condominium instruments of the association.

In response to the second Complaint, the Association wrote that the pest control policy resolution had been adopted at a November 2020 meeting of the Board and uploaded to Building Link a few days later with notice of the upload sent to the owners shortly thereafter. The Association does not consider the allegations related to accessing

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<sup>4</sup> A. Except to the extent otherwise provided by the condominium instruments, all powers and responsibilities, including financial responsibility, with regard to maintenance, repair, renovation, restoration, and replacement of the condominium shall belong (i) to the unit owners' association in the case of the common elements and (ii) to the individual unit owner in the case of any unit or any part of such unit, except to the extent that the need for repairs, renovation, restoration, or replacement arises from a condition originating in or through the common elements or any apparatus located within the common elements, in which case the unit owners' association shall have such powers and responsibilities. **Each unit owner shall afford to the other unit owners and to the unit owners' association and to any agents or employees of either such access through his unit as may be reasonably necessary to enable them to exercise and discharge their respective powers and responsibilities.** To the extent that damage is inflicted on the common elements or any unit through which access is taken, the unit owner causing the same, or the unit owners' association if it caused the damage, shall be liable for the prompt repair of such damage. (emphasis added)

<sup>5</sup> The unit owners' association shall post notice of all pesticide applications in or upon the common elements. Such notice shall consist of conspicuous signs placed in or upon the common elements where the pesticide will be applied at least 48 hours prior to the application.

units for pest control to be something that would fall under the complaint process, as it is dependent upon the Bylaws of the association and not common interest community law. Effective July 1, 2021, the Condominium Act requires the distribution or publishing of rules and regulations adopted by resolution, but prior to July 1, such language was not included in the Condominium Act so is not applicable here.

The third Complaint alleges that the Association has “stifled communication among residents.” Specifically, the Complainant alleges a violation of §55.1-1950<sup>6</sup> of the Condominium Act. This allegation was based on the Association blocking certain of the Complainant’s communications on the Association’s Building Link website.

In response to the allegations that the Association had blocked the Complainant from communication on the Building Link website, the Association wrote that a communication dated February 19, 2021 was blocked because it contained defamatory language. The Association believed that the post contained misstatements about the law and the way in which the Association had responded to the Complainant’s initial request. The Association also wrote that under the terms of service for Building Link, the Association “reserves the right to delete or edit postings whose content is inappropriate or inconsistent with the topic of this posting category.”

I am not convinced that the Association can block communication that it considers defamatory or that it believes contains misstatements. While I fully understand the Association’s concern about the posting of any type of misinformation, if Building Link is the chosen method of communication for owners as required by §55.1-1950 of the Condominium Act, “the executive board shall not require prior approval of the dissemination or content of any material regarding any matter concerning the unit owners’ association.” And while Building Link may contain terms of service that allow for editing of postings, it is unlikely those terms of service would trump common interest community law. §55.1-1950 does rely upon the condominium instruments, stating “except as otherwise provided in the condominium instruments...” If the Association has language in its condominium instruments that defines what content is suitable for posting on the website, that may be sufficient to address this issue. Without such language, I do not believe the Association has the authority to approve what is posted on Building Link.

In a fourth Complaint, the Complainant alleged that there was a lack of board transparency, but did not specify what common interest community laws or regulations she believed the Association had violated. As such, no determination can be provided. In a fifth Complaint, the Complainant alleged discriminatory treatment, which, as noted earlier, cannot be addressed through this determination. Instead, that may be a Fair Housing issue or a legal issue. The Complainant also referenced §55.-1939 and §55.1-

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<sup>6</sup> A. The executive board shall establish a reasonable, effective, and free method, appropriate to the size and nature of the condominium, for unit owners to communicate among themselves and with the executive board regarding any matter concerning the unit owners' association.

B. Except as otherwise provided in the condominium instruments, the executive board shall not require prior approval of the dissemination or content of any material regarding any matter concerning the unit owners' association.

1945 of the Condominium Act, but did not specify how the Association may be in violation of those statutes.

### Required Actions

If the Complainant submits a properly executed request for the examination of books and records, which may include the Association's own form, and if the video that is the topic of this determination is part of the books and records of the Association, the Association will need to ensure full compliance with §55.1-1945 in its response to such request. As noted above, however, this office cannot determine if chain of custody or authenticity issues would apply in this scenario.

The Association will also need to ensure that it does not require prior approval of communications submitted through its designated method of communication (§55.1-1950).

You are welcome to contact my office if you have any questions.

Sincerely,

A handwritten signature in blue ink that reads "Heather Gillespie". The signature is fluid and cursive, with the first name being more prominent.

Heather S. Gillespie  
Common Interest Community Ombudsman

cc: Board of Directors  
Woodbury Heights Condominium