



COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

Mary Broz-Vaughan
Director

September 1, 2021

Complainant: Cheryl Merchant
Association: The Crossings Property Owners Association
File Number: 2022-00189

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 three complaints to the Association dated May 28, 2021. The Association provided a response to the complaint dated July 6, 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 August 4, 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 on such a complaint. Common interest community law is limited to the Virginia Condominium Act, the Property Owners' Association Act, and the Virginia Real Estate Cooperative Act.

This Determination is final and not subject to further review.

Determination

The Complainant included additional information in a cover letter that will not be included in this determination. Additional information not included in an original association complaint cannot be considered as part of a Notice of Final Adverse Decision since the Association has not been given the opportunity to respond to the new information that was not included in the original complaint.

The Complainant submitted three complaints to her association. The first complaint was that the Association failed to provide her the right to examine books and records she had requested on April 30, 2021. This would be a violation of §55.1-1815¹ of the Property Owners' Association Act. The Complainant requested the right to examine a letter, a meeting agenda, and board meeting minutes.

The Association stated that this complaint had been amended multiple times and it had been addressed by the Board in 2020. The Association also wrote that the Complainant had already reviewed the blueprints on two separate occasions. The Association further stated that the referenced letter was not kept as part of its files and that the Complainant did not provide sufficient information for them to identify the letter. The Association also wrote that since the Complainant had threatened litigation against the Association and had hired an attorney, the board would no longer continue to fulfill requests for records from the Complainant.

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.

There appears to be a disconnect with the Association's response to this complaint. While the Complainant did reference a prior request to access the blueprints, her real request, per the Request Form submitted to the Association, was for the right to examine a meeting agenda, board meeting minutes, a letter sent to the Complainant dated July 28, 2020 and the Association's final decision letter on a previous complaint. The Association did not address these allegations in its decision. As to the threat of litigation, the Complainant's attorney specifically stated that the Complainant had not retained him and that she had merely consulted with him. The Complainant also wrote the Association a letter in July 2021 denying the allegations that she had threatened litigation and hired an attorney.

The Association did not address the allegation that it failed to provide the Complainant the opportunity to examine the meeting agenda, minutes, and the final decision letter. The Association must provide the Complainant the right to examine the records she requested, unless there is a legitimate reason under the law not to do so.

The second complaint alleged another failure to provide access to the books and records of the association, in this case, the Complainant stated that she had asked to examine a letter or report from an engineering firm regarding stormwater runoff near her home. The Complainant also requested the right to examine any photographs that the engineer may have provided to the Association.

The Association said that it had provided copies of the documents that existed on May 29, 2021 but that some of the documents she requested did not exist and therefore access could not be provided. The Association again stated that because litigation had been threatened and the Complainant had hired an attorney it would no longer provide access to any books and records.

While the association has stated that it provided copies of the requested records, there is no way for this office to determine if this happened. In addition, I would note that the Complainant asked to examine the records, not receive copies of them.

The third complaint was also related to access to the books and records. The Complainant had requested that the Association respond to a list of questions, including questions about a reserve study. The Association provided a written response, but it was unsigned. The Complainant returned the document to the management office and asked that the Association sign it. The Complainant then requested the right to examine this unsigned document. She wrote that the document was not returned to her and she has not been given access to examine it.

The Association responded to the Complaint by stating that the document the Complainant had asked to be signed was likely not kept as a record of the association since it actually belonged to the Complainant and because they did not make it part of the books and records it was not available for examination.

I do not find that the Association is in violation of §55.1-1815 as it pertains to this third complaint. I cannot address whether the Association is obligated to sign the document the Complainant returned. I would think, however, that the Association would

have maintained its own copy of the document since they had sent it to the Complainant. Since the Complainant specifically requested the copy she left for the Association to sign, I do not believe the Association had an obligation to provide a different version, and I cannot determine if the Association had any legal obligation to keep the copy the Complainant had returned for signature.

Required Actions

Because the Association did not fully respond to the first complaint, it must provide the Complainant the right to examine the records she requested, unless there is a legitimate reason under the law not to do so. This must be done within two weeks of this determination unless the Complainant is unable to be available to examine the documents. If the Complainant agrees, the Association can provide copies of the records instead of scheduling examination of them.

As to the second complaint, I would ask the Complainant to email me and describe the documents she has not received or examined. If appropriate, I will contact the Association and ask it to provide access to those documents, or copies, if the Complainant agrees. This required action will not provide an opportunity to request new or additional documents – only those documents specifically set forth in the second complaint can be requested.

No action is required on the third complaint.

I would note that the Association has alleged that the Complainant threatened litigation and that she hired an attorney to represent her. The attorney has denied that he was retained to represent the Complainant and stated that the Complainant only consulted with him. The Complainant has also written to the Association to deny any threat of litigation. As such, it seems that there is no existing threat of litigation and the Association has a responsibility to provide the requested documents or examination of those documents.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
The Crossings Property Owners Association