



# COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Glenn A. Youngkin  
Governor

February 18, 2022

G. Bryan Slater  
Secretary of Labor

Complainant: Carol L. Keith  
Association: Overlook Condominium  
File Number: 2022-01310

Demetrios J. Melis  
Director

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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 September 17, 2021. The Association provided a response to the association complaint dated November 29, 2021. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated December 22, 2021 and received December 23, 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.

Pursuant to the Regulations (18 VAC 48-70-90), the only documents that will be considered when reviewing a NFAD are the association complaint submitted by a complainant to the association (and any documents included with that original complaint), the final adverse decision from the association, and any supporting documentation related to that final adverse decision. Other documents submitted with the Notice of Final Adverse Decision cannot be reviewed or considered.

This Determination is final and not subject to further review.

### Determination

The Complainant has alleged multiple violations of the Condominium Act as well as violations of the condominium instruments. Only the alleged violations of the Condominium Act and other common interest community law will be addressed and reviewed. Additional information was included with the NFAD that was not part of the original complaint submitted through the association complaint procedure. That additional information will not be considered in this determination.

The first complaint alleged a violation of §55.-2354.4 of the Condominium Act, which is the statute that requires all associations to adopt an association complaint procedure. The Complainant wrote that she had attempted to obtain a copy of the Association's complaint procedure in April 2021, and did not receive a copy of the procedure until June. She believes the complaint procedure contains outdated information and that the Association should have had the procedure readily available. The Complainant also noted that the procedure was not included in a resale disclosure packet for Unit 1619 in January 2021.

The second complaint alleges that the Association failed to have a process in place to ensure compliance with §55.1-1931(A)<sup>1</sup> of the Condominium Act. The Complainant referenced sagging floors and other structural issues and believes the Association should conduct a structural review, adequately fund reserves, and ensure compliance with the law by creating a procedure to obtain board review and approval for unit changes.

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<sup>1</sup> A. Except to the extent prohibited, restricted, or limited by the condominium instruments, any unit owner may make any improvements or alterations within his unit that do not impair the structural integrity of any structure or otherwise lessen the support of any portion of the condominium. However, no unit owner shall do anything that would change the exterior appearance of his unit or of any other portion of the condominium except to such extent and subject to such conditions as the condominium instruments may specify.

The third complaint alleged a violation of §55.1-1939(3)<sup>2</sup> which states that owners have a right to have notice of any meeting, among other things. The referenced Attachment 4 did not contain any information about meetings or lack of notice, but instead was related to general concerns the Complainant had about the association and its management company.

The fourth complaint alleged a violation of §55.1-1944.<sup>3</sup> The Complainant referenced a remeasurement of recently built decks and the subsequent changes in cost allocated per unit. In some cases, owners were due a refund and in others, they owed additional money to the Association. The Complainant believes that these funds were not handled in a "fiduciary capacity" since prior unit owners, not current owners, received refunds.

In her fifth complaint, the Complainant alleged a violation of §55.1-1945(A).<sup>4</sup> The Complainant stated that the Association failed to document financial matters and there was no evidence of approvals of assessments and refunds. She also asked whether the Association maintains the books and records in accordance with GAAP, noting that it does not carry out an annual audit. The Complainant also wrote that there is a lack of documented board meetings that are open to unit owners.

The sixth complaint alleged a failure to provide notice of meetings to the unit owners and to permit owner to attend any meeting other than annual meetings. The Complainant alleges a violation of §55.1-1949(B)<sup>5</sup> of the Condominium Act.

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<sup>2</sup> 3. The right to have notice of any meeting of the executive board, to make a record of such meetings by audio or visual means, and to participate in such meeting in accordance with the provisions of § 55.1-1949;

<sup>3</sup> All funds deposited with a managing agent shall be handled in a fiduciary capacity and shall be kept in a fiduciary trust account in a federally insured financial institution separate from other assets of the managing agent. The funds shall be the property of the unit owners' association and shall be segregated for each account in the records of the managing agent in a manner that permits the funds to be identified on an individual unit owners' association basis.

<sup>4</sup> A. The declarant, managing agent, unit owners' association, or person specified in the bylaws of the association shall keep detailed records of the receipts and expenditures affecting the operation and administration of the condominium and specifying the maintenance and repair expenses of the common elements and any other expenses incurred by or on behalf of the association. Subject to the provisions of subsections B, C, and E, upon request, any unit owner shall be provided a copy of such records and minutes. All financial books and records shall be kept in accordance with generally accepted accounting practices.

<sup>5</sup> B. 1. Except as otherwise provided in the condominium instruments, the provisions of this subsection shall apply to executive board meetings at which business of the unit owners' association is transacted or discussed. All meetings of the unit owners' association or the executive board, including any subcommittee or other committee of such association or board, shall be open to all unit owners of record. The executive board shall not use work sessions or other informal gatherings of the executive board to circumvent the open meeting requirements of this section. Minutes of the meetings of the executive board shall be recorded and shall be available as provided in § 55.1-1945. 2. Notice of the time, date, and place of each meeting of the executive board or of any subcommittee or other committee of the executive board, and of each meeting of a subcommittee or other committee of the unit owners' association, shall be published where it is reasonably calculated to be available to a majority of the unit owners.

In her seventh complaint, the Complainant alleges a violation of §55.1-1949(B)(1) due to the board's failure to hold official board meetings. The Complainant stated that the President said there had been no official board meetings other than organizational meetings since June 2019. The Complainant also alleged a violation of §55.1-1949(C),<sup>6</sup> noting that the board has informal communications via phone or email to conduct business and make decisions. She wrote that these interactions were not documented and were not communicated to owners. The Complainant also questioned how the board could oversee management of the association, make decisions, and perform annual reviews of insurance policies and reserve funding without meetings. The Complainant said that no documentation of board decisions relative to her questions was made available to her upon request.

In her eighth complaint, the Complainant stated that unit owners are not permitted time during any meeting (annual, regular, organizational) to comment on association matters, a violation of §55.1-1949(D).<sup>7</sup>

The ninth complaint alleges a failure to provide a reasonable or effective method of communication, as required by §55.1-1950(A)<sup>8</sup> of the Condominium Act. She asserts that the Association has failed to post the names and phone numbers and email addresses of unit owners, and she believes the Facebook account being used does not meet the statutory requirements since only 65% of the owners utilize it and the manager has stated she will shut down any communication that gets out of hand. In addition, the Complainant wrote that she had not received an emergency number to report after hour issues and does not know who her neighbors are if she needed to communicate with them in an emergency.

The Complainant stated that she has not received requested information regarding the main water valve. She believes that communications are intentionally

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<sup>6</sup> C. The executive board or any subcommittee or other committee of the executive board may convene in executive session to consider personnel matters; consult with legal counsel; discuss and consider contracts, probable or pending litigation, and matters involving violations of the condominium instruments or rules and regulations promulgated pursuant to such condominium instruments for which a unit owner, his family members, tenants, guests, or other invitees are responsible; or discuss and consider the personal liability of unit owners to the unit owners' association, upon the affirmative vote in an open meeting to assemble in executive session. The motion shall state specifically the purpose for the executive session. Reference to the motion and the stated purpose for the executive session shall be included in the minutes. The executive board shall restrict the consideration of matters during such portions of meetings to only those purposes specifically exempted and stated in the motion. No contract, motion, or other action adopted, passed, or agreed to in executive session shall become effective unless the executive board or subcommittee or other committee of the executive board, following the executive session, reconvenes in open meeting and takes a vote on such contract, motion, or other action, which shall have its substance reasonably identified in the open meeting. The requirements of this section do not require the disclosure of information in violation of law.

<sup>7</sup> D. Subject to reasonable rules adopted by the executive board, the executive board shall provide a designated period during each meeting to allow unit owners an opportunity to comment on any matter relating to the unit owners' association. During a meeting at which the agenda is limited to specific topics or at a special meeting, the executive board may limit the comments of unit owners to the topics listed on the meeting agenda.

<sup>8</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.

stified and that there is no interactive group communication where all owners can hear the same message. She notes that only two members of the board respond to questions and that an open position on the board should have been filled per the Bylaws.

Complaints 10 and 11 are related to insurance, and specifically §55.1-1963 of the Condominium Act. Complaint 10 asked several questions related to the insurance coverage of the Association, and expressed concern that insufficient information was provided in the statement and insurance policy to comply with the Bylaws of the Association. Because there were no specific allegations of a violation of the Condominium Act in this complaint, no determination will be provided.

Complaint number 11 alleges a violation of §55.1-1963(C).<sup>9</sup> The Complainant wrote that there has been no evidence that the Association has communicated any information about the insurance policy to owners over the past two years. She also asserts that there is no evidence insurance coverage is discussed, reviewed or approved by the board on an annual basis. In addition, the Complainant could find no evidence that the coverage had been increased to cover the new decks. The Complainant asked questions regarding the coverage, but did not allege further violations.

The final complaints, numbered 12 and 13, pertain to reserves and the annual budget. In complaint 12, the Complainant alleges that the Association has provided no evidence that the Board reviews the reserve study annually, or that there have been any board meetings that have included this review in the minutes since 2019. The Complainant also said that there is no evidence that any adjustments have been made to the study in the past four years. The Complainant believes these matters would be a violation of §55.1-1965(B)(2) and (3).<sup>10</sup>

Finally, in Complaint 13, the Complainant alleges a violation of §55.1-1965(C).<sup>11</sup> The Complainant stated that the Association is in violation of the law by failing to include statutorily required information in the annual budget.

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<sup>9</sup> C. When any policy of insurance has been obtained by or on behalf of the unit owners' association, written notice of such obtainment and of any subsequent changes in or termination of the policy shall be promptly furnished to each unit owner by the officer required to send notices of meetings of the unit owners' association. Such notices shall be sent in accordance with the provisions of subsection A of § 55.1-1949.

<sup>10</sup> B. Except to the extent otherwise provided in the condominium instruments, the executive board shall:

2. Review the results of that study at least annually to determine if reserves are sufficient; and
3. Make any adjustments the executive board deems necessary to maintain reserves, as appropriate.

<sup>11</sup> C. To the extent that the reserve study conducted in accordance with this section indicates a need to budget for reserves, the unit owners' association budget shall include:

1. The current estimated replacement cost, estimated remaining life, and estimated useful life of the capital components as defined in § 55.1-1900;

The Association responded to the Complainant's allegations by writing that it had concluded, "that our association is, or will be, in compliance with the guidelines for all 13 of the specific complaints you filed." The Association further wrote that owners will be invited to future board meetings and they will be provided the opportunity to speak. The Association also stated that they have confirmed the insurance policy provides adequate coverage for catastrophic loss. The Association has asked its insurance agent to provide a summary of coverage and the Association will post that on the association website.

I could not find any documentation of requests for the association complaint procedure prior to June of 2021 in the documents included with the NFAD. As such, I cannot make a determination that the Association failed to have the complaint procedure readily available. While the resolution to change the manager contact information in the complaint procedure was not as artful as it could have been, I do not find that the complaint procedure failed to have accurate contact information. The failure to include a resale certificate for Unit 1619 would be a violation of the Common Interest Community Ombudsman Regulations. I would suggest, in light of the potential confusion when submitting a complaint, that the association update the actual complaint procedure to include the current contact information for submission, rather than relying on a separate resolution that may be overlooked.

In reference to the second complaint, alleging that the Association failed to have a process in place to ensure compliance with §55.1-1931; there is nothing in that statute that requires an association to adopt a process to ensure compliance. In addition, the referenced statute applies to an owner's responsibility not the association or its board of directors. As for conducting a structural review or adequately funding reserves, neither is required under this statute, but a reserve study is required every five years and the Association has completed one within the past five years. The matter of funding reserves is addressed elsewhere in this determination.

The allegation that the Association failed to provide notice of meetings was supported by minutes from two organizational meetings held immediately after two separate annual meetings. Other than the organizational meeting after the annual meeting, the Association said that it had not had any meetings over the last year. The Association also said that business was not discussed in the organizational meetings, as the only action was to appoint directors. Upon review of the two sets of minutes for these organization meetings, however, it appears the Association, in addition to appointing officers, also approved minutes and the annual budget. These meetings

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2. As of the beginning of the fiscal year for which the budget is prepared, the current amount of accumulated cash reserves set aside to repair, replace, or restore the capital components and the amount of the expected contribution to the reserve fund for that fiscal year;

3. A statement describing the procedures used for estimation and accumulation of cash reserves pursuant to this section; and

4. A statement of the amount of reserves recommended in the study and the amount of current cash for replacement reserves.

should have been open to the membership and notice should have been provided. Importantly, the Association wrote in an email and in its final decision that owners will be invited to meetings and will be given the opportunity to comment. I would remind the Association of its obligation to provide notice of ANY meeting, whether it is a work session, sub-committee meeting, committee meeting, board meeting, or unit owner meeting.

The fourth complaint alleging a failure by the Association to handle funds in a fiduciary capacity was, the Complainant believed, a violation of §55.1-1944. This is a misapplication of the statute as that statute addresses funds deposited with a managing agent. It does not address the manner in which those funds will be disbursed, nor does it provide any guidance regarding the association's decision to assess additional monies for the deck project or refund monies for the project.

The fifth complaint alleging a failure to document financial matters provided no evidence to support these allegations, and no requests were included demonstrating that the Complainant had requested financial documents and not been provided them. While part of this complaint asked questions rather than make allegations, and thus no determination can be provided regarding those questions, I will note that associations, unless it is mandated under their governing documents, are not required to perform audits nor must they adhere to GAAP (Generally Accepted Accounting Principles). Instead, the language in the statute requires they follow generally accepted accounting *practices*, which is not a specific method of accounting, nor is it defined.

In her sixth complaint, the Complainant alleged a failure to give notice of meetings, and specifically, that the owners do not receive the required meeting notice. In addition, the Complainant wrote that owners were only permitted to attend annual (unit owner) meetings and not board meetings. This complaint also ties into complaint seven, where the Complainant said that there had been no official board meetings since 2019, other than annual meeting organizational meetings. She also noted that the President stated the board does have informal communication via phone and email as needed.

Associations are not required to send out notice of board meetings unless the governing documents require that it do so. Instead, they must post notice (§55.1-1945(B)(2)<sup>12</sup>) of meetings. The Association should make ALL meetings open to owners and should provide the appropriate notice depending upon whether it is a board meeting or a unit owners meeting. Board member communication by phone or email is not a violation of common interest community law, and is often necessary for a volunteer board to handle the sometimes-pressing business of the association. However, such communication should not take the place of regular board meetings. Decisions made via such communications may not be binding unless the governing documents permit such decision-making or an incorporated association has the authority to do so under the Nonstock Corporation Act.

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<sup>12</sup> 2. Notice of the time, date, and place of each meeting of the executive board or of any subcommittee or other committee of the executive board, and of each meeting of a subcommittee or other committee of the unit owners' association, shall be published where it is reasonably calculated to be available to a majority of the unit owners.

The Complainant alleged in her eighth complaint that owners were not permitted time during board meetings to comment on matters relating to the association. No evidence was provided to support this allegation, and if no board meetings have been held in the past year or attended by owners, it would be difficult to prove this. However, it is important to note that associations must provide an opportunity for owners to comment at board meetings per §55.1-1949(D). The Association did note in its final decision that they intended to provide a discussion period for all future board meetings.

The ninth complaint alleged a failure to adopt a method of communication that was reasonable and effective. The Complainant wrote that the current method, a Facebook account, is used only by 31 of 48 units and that comments do not always receive a response from the board. She also noted that the Association does not distribute email addresses and phone numbers of owners. The Complainant provided several instances where she believes the method of communication failed to assist her in obtaining information. The statute (§55.1-1945) that addresses communication does not state what percentage must actively use a method of communication. Only that it must be free, reasonable, effective, and appropriate to the size and nature of the condominium. While this office cannot determine what is reasonable and effective since those terms are not defined in the Virginia Code, the Facebook account does appear to allow owners to communicate among themselves, and to communicate with the board. There is nothing in the statute that requires the board to respond to such communications. Whether the Association has provided an emergency number for after-hours problems is not governed by common interest community law.

While the question regarding emails and phone numbers really does not pertain to this statute, I will note that in many associations, emails and phone numbers are not distributed due to their private nature. Associations do have to provide access to their association member list if requested in accordance with §55.1-1945, but under that statute, "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" can be withheld from examination or copying. Emails and phone numbers are often considered part of an individual owner's file.

The allegations related to Complaint 10 were not violations of the referenced statute. While the law does require an association to provide notice when it obtains insurance or changes its policy, there was no evidence in the complaint that any changes had taken place in the policy, thus demonstrating the Association was derelict in its duty to provide notice of such changes to the owners.

The Complainant also alleged in Complaint 11 that there is no evidence the Association has reviewed insurance coverage to make certain it has adequate coverage, but this is not a specific requirement under the law. It might be logical that they would do so, but it is not a requirement set forth in the statute. The Complainant also stated that there is not enough information in the policy to determine adequate coverage, but the Condominium Act does not specify what information must be contained in an insurance policy so this office cannot determine the sufficiency of the information in the policy. In response to these allegations, the Association stated in its final decision that they have confirmed the insurance policy provides adequate



coverage for catastrophic loss and that the Association has asked its insurance agent to provide a summary of coverage and the Association will post that on the association website.

It is difficult to determine if the Association has reviewed its reserve study annually and made any adjustments it considers necessary, based on that review. While the Complainant believes the Association has failed to follow these requirements (Complaint 12), I am not certain there is a way to prove that they have not done so. However, I would suggest that there should be some evidence of such a review, as part of minutes from a board meeting, or similar. The statute does require that an association carry out an annual review of the reserve study and adjust the annual budget as needed.

The Complainant included a copy of the 2022 budget and it appears that the Association has not, as alleged in Complaint 13, included the required budget items in its annual budget as outlined in §55.1-1965(C). These required items are current estimated life, estimated remaining life, and estimated useful life of the capital components, the current amount of accumulated cash reserves, and the expected contribution to those reserves, a statement describing the procedures used for estimation and accumulation of the reserves, and a statement of the amount of reserves recommended in the study and the amount of current case for the reserves.

#### Required Actions

The Association needs to ensure that it includes a copy of the association complaint procedure in any resale certificate that it issues. It must also provide notice to owners of all meetings, whether board meetings or annual meetings. The Association also needs to make certain that it reviews its reserve study on an annual basis and adjusts as needed, and that it follows §55.1-1965(D) to the letter, which would require a significant change to its existing budget.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie  
Common Interest Community Ombudsman

cc: Board of Directors  
Overlook Condominium