



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Glenn A. Youngkin
Governor

March 9, 2023

G. Bryan Slater
Secretary of Labor

Demetrios J. Melis
Director

Complainant: Robert Navin
Association: Edgemoore Homeowners Association, Inc.
File Number: 2023-01963

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 November 28, 2022. The Association provided a response to the association complaints dated January 26, 2023. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated February 2, 2023 and received February 10, 2023.

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 alleged that the Association was in violation of §55.1-1815¹ of the Property Owners' Association Act when it failed to provide access to a financial review that he stated was two years overdue. The Complainant wrote that the Bylaws of the Association require such a review every five years. The Complainant also alleged that the Association failed to provide access to the annual compilation report that he said was supposedly completed in 2022. He notes that under the Bylaws, the Treasurer is responsible for having this report completed by a third party.

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.

The Complainant also alleges a violation of §55.1-1826² of the Property Owners' Association Act, as he believes that the Association has failed to carry out a Reserve Study in the past five years and if it has completed such a study, did not use it when preparing the current budget.

Finally, the Complainant alleges a violation of §55.1-1815(B)(2)³ because the Association did not fully respond to certain information requests (addressed in this determination) and failed to respond to an email requesting a copy of the association complaint form.

² A. Except to the extent provided in the declaration, the board of directors shall, prior to the commencement of the fiscal year, make available to lot owners either (i) the annual budget of the association or (ii) a summary of such annual budget.

B. Except to the extent otherwise provided in the declaration and unless the declaration imposes more stringent requirements, the board of directors shall:

1. Conduct at least once every five years a study to determine the necessity and amount of reserves required to repair, replace, and restore the capital components as defined in § 55.1-1800;
2. Review the results of that study at least annually to determine if reserves are sufficient; and
3. Make any adjustments the board of directors deems necessary to maintain reserves, as appropriate.

C. To the extent that the reserve study conducted in accordance with this section indicates a need to budget for reserves, the association budget shall include:

1. The current estimated replacement cost, estimated remaining life, and estimated useful life of the capital components as defined in § 55.1-1800;
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 capital components and the amount of the expected contribution to the reserve fund for that 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.

³ 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.

The Association's final decision stated that the Complainant, in reference to the complaints alleging a failure to provide access to the books and records of the Association, failed to adhere to the record request requirements set forth in the Property Owners' Association Act. Specifically, the Association wrote that the Complainant did not request an opportunity to inspect or copy the records and did not specify a proper purpose for his request. The Association did note that it had engaged a CPA firm to conduct a five-year financial review and that report will be available for inspection once it is finalized.

As to the failure to carry out a reserve study in the past five years, the Association wrote that a reserve study had been conducted in November 2022, and a copy of that document is available upon request. The Association said that the Treasurer did refer to the reserve study each year when proposing the annual budget. It also wrote that the Complainant had provided insufficient information to support the allegation that the Association failed to review the reserve study annually. The Association asked that the Complainant submit additional information supporting this allegation within 14 days. The Complainant did submit this information in a letter dated February 4, 2023. He wrote that the minutes for the December 2022 meeting did not reflect a review and approval of a reserve study or its use in preparing the new budget. The Association did not provide a response to this additional information.

The Complainant's initial request for information, which included asking for a copy of a financial review and a financial compilation did not contain a purpose, which is a requirement under §55.1-1815 of the Property Owners' Association Act. While the Association also believed the request failed because the Complainant did not request an opportunity to inspect or copy records, I believe the request would have been sufficient to obtain copies of the records, had the Complainant provided a proper purpose. The Complainant did state in his association complaint (but not in the original request) that the requests "are only for purposes related to my interests..." but I do not believe this provides a proper purpose, instead it provides only general information about the purposes without any specificity as to what the purpose actually is.

Based on the response from the Association, it appears that there is a Reserve Study in place that has been completed within the past five years. No information was provided by the Association or the Complainant that demonstrated whether that reserve study had or had not been used when drafting the annual budget. As a result, this office cannot determine if the Association is in violation of §55.1-1826 of the Property Owners' Association Act.

The allegation that the Association was in violation of the Property Owners' Association Act when it failed to provide a copy of the association complaint procedure upon request is really a potential violation of the Common Interest Community Ombudsman Regulations. 18VAC 48-70-60(1)⁴ of those regulations requires that the association complaint procedure be readily available upon request. I believe this possible violation was resolved, in light of the fact that the Complainant was able to submit a complaint through the association complaint procedure.

⁴ A. The association complaint procedure must be readily available upon request to all members of the association and citizens.

It is not clear whether the Association responded to the Complainant's additional information that he submitted regarding his allegation that the Association failed to use the reserve study when it prepared the annual budget.

Required Actions

If the Association has not responded to the additional information regarding the annual budget and use of the reserve study that it allowed as part of its final decision, it does need to review and consider the Complainant's additional submission. However, because there was a good amount of additional information other than what was related to the budget and reserve study, the Association does not have to respond to the entirety of the Complainant's response letter dated February 4, 2023.

The Association must also ensure that the complaint process is readily available upon request, as required by the Common Interest Community Ombudsman Regulations.

Please contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Edgemoore Homeowners Association, Inc.