



COMMONWEALTH of VIRGINIA

Glenn A. Youngkin
Governor

Department of Professional and Occupational Regulation
August 29, 2022

G. Bryan Slater
Secretary of Labor

Demetrios J. Melis
Director

Complainant: John Shumate
Association: West Neck Community Association
File Number: 2023-00304

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 an association complaint to the Association dated May 25, 2022. The Association provided a response to the association complaint dated July 19, 2022. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated August 1, 2022 and received August 2, 2022.

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 that the Association was in violation of §55.1-1815 of the Property Owners' Association Act when it notified the Complainant that he had failed to provide a purpose for his document request and then denied him access to the requested documents because the Association said the documents could be excluded under §55.1-1815(C)(3)¹ and §55.1-1815(C)(4).²

According to the complaint, the Association made a decision to file a lawsuit against an entity to enforce provisions contained in the Declaration and subsequently filed a Warrant in Debt in the Virginia Beach District Court. The Complainant also wrote that the Association and its attorney had said it would be appropriate to obtain authorization from the members before taking such legal action, although the attorney noted that such approval might not be required. The Association ultimately nonsuited the action in March 2022 and it could be brought back to the court within six months.

The Complainant made an additional request for a document in the body of the complaint, and provided a purpose for his original request upon which the complaint was based. The purpose was self-education and an interest in better understanding the scope of the violations, the Association's efforts to resolve the violations, the Board's actions to sue, and then provide this information to the village as the Voting Member.

The Association responded to the complaint by stating that it did not violate the Property Owners' Association Act, and that the Complainant had not provided a proper

¹ 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:

3. Pending or probable litigation. For purposes of this subdivision, "probable litigation" means those instances where there has been a specific threat of litigation from a person or the legal counsel of such person:

² 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:

4. Matters involving state or local administrative or other formal proceedings before a government tribunal for enforcement of the association documents or rules and regulations promulgated pursuant to § 55.1-1819:

purpose in his initial requests for records. The Association acknowledged that the Complainant did provide a proper purpose in his association complaint and attached four letters (not included in the NFAD) to its final decision on the complaint.

Because the letters that the Complainant received were not included with the NFAD, I cannot, based on the NFAD, determine if he received the documents he initially requested from the Association. However, the Complainant included additional information as part of his NFAD that had not been submitted with the original complaint and thus would not normally be utilized as part of this Determination. In this case, however, that additional information confirmed that he had received the documents he requested.

While I understand the Complainant's concern that he may have been improperly denied access to the books and records, any request for documents must include a purpose, according to §55.1-1815 of the Property Owners' Association Act. As to whether these documents could have been excluded under §55.1-1815(C)(3) or (4), it appears the Association still held its option to return to court within six months after the nonsuit and there had been and might end up being, a formal proceeding related to the enforcement of association documents. Because the Complainant received the documents he requested, after providing a purpose in his complaint, we do not have to address the matter of whether the Association could have continued to withhold the documents under §55.1-1815(C)(3) or (4).

The Complainant's additional request for documents that was contained in the association complaint cannot be addressed here, since it was not an actual complaint, but instead, a request for documents. If he has not received the requested documents, the Complainant can file a complaint with the Association regarding this additional request.

Required Actions

No action is required of the Association.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
West Neck Community Association