



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Glenn A. Youngkin
Governor

April 12, 2023

G. Bryan Slater
Secretary of Labor

Demetrios J. Melis
Director

Complainant: Edward Halstead
Association: Lake of the Woods Association, Inc.
File Number: 2023-02397

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 February 8, 2023. The Association provided a response to the association complaints dated March 13, 2023. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated March 11, 2023 and received March 23, 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 violated §55.1-1807(4)¹ and §55.1-1819² of the Property Owners' Association Act. The Complainant stated that the

¹ Every lot owner who is a member in good standing of a property owners' association shall have the following rights:

4. The right to have (i) notice of any proceeding conducted by the board of directors or other tribunal specified in the declaration against the lot owner to enforce any rule or regulation of the association and (ii) the opportunity to be heard and represented by counsel at such proceeding, as provided in § 55.1-1819, and the right of due process in the conduct of that hearing...

² A. Except as otherwise provided in this chapter, the board of directors shall have the power to establish, adopt, and enforce rules and regulations with respect to use of the common areas and with respect to such other areas of responsibility assigned to the association by the declaration, except where expressly reserved by the declaration to the members. Rules and regulations may be adopted by resolution and shall be reasonably published or distributed throughout the development. At a special meeting of the association convened in accordance with the provisions of the association's bylaws, a majority of votes cast at such meeting may repeal or amend any rule or regulation adopted by the board of directors. Rules and regulations may be enforced by any method normally available to the owner of private property in Virginia, including application for injunctive relief or actual damages, during which the court shall award to the prevailing party court costs and reasonable attorney fees.

B. The board of directors shall also have the power, to the extent the declaration or rules and regulations duly adopted pursuant to such declaration expressly so provide, to (i) suspend a member's right to use facilities or services, including utility services, provided directly through the association for nonpayment of assessments that are more than 60 days past due, to the extent that access to the lot through the common areas is not precluded and provided that such suspension shall not endanger the health, safety, or property of any owner, tenant, or occupant, and (ii) assess charges against any member for any violation of the declaration or rules and regulations for which the member or his family members, tenants, guests, or other invitees are responsible.

C. Before any action authorized in this section is taken, the member shall be given a reasonable opportunity to correct the alleged violation after written notice of the alleged violation to the member at

Association, by issuing a no trespass notice on January 18, 2023, failed to provide him notice of the trespass violation and an opportunity to be heard and represented by counsel.

In its response, the Association wrote that it "voted to deny and dismiss your Complaint Form because:

1. The Board's determination to bar you from...common areas was NOT based on your delinquency in assessments, which is the sole basis for doing so under §55.1-1819 of the Act; and
2. The Board's determination to issue the No Trespass letter on January 18, 2023 was solely based on the safety of its personnel and, therefore, no hearing is required."

I agree with the Association that it did not have an obligation to provide due process (notice and an opportunity to be heard and represented by counsel) prior to issuing its "No Trespass and Cease and Desist" letter. Nowhere in the letter was there an allegation that the Complainant was in violation of the declaration or any rule or regulation of the Association. Instead, the Association wrote that the Board and

the address required for notices of meetings pursuant to § 55.1-1815. If the violation remains uncorrected, the member shall be given an opportunity to be heard and to be represented by counsel before the board of directors or other tribunal specified in the documents.

Notice of a hearing, including the actions that may be taken by the association in accordance with this section, shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the member at the address of record with the association at least 14 days prior to the hearing. Within seven days of the hearing, the hearing result shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the member at the address of record with the association.

D. The amount of any charges so assessed shall not be limited to the expense or damage to the association caused by the violation, but shall not exceed \$50 for a single offense or \$10 per day for any offense of a continuing nature, and shall be treated as an assessment against the member's lot for the purposes of § 55.1-1833. However, the total charges for any offense of a continuing nature shall not be assessed for a period exceeding 90 days.

E. The board of directors may file or defend legal action in general district or circuit court that seeks relief, including injunctive relief arising from any violation of the declaration or duly adopted rules and regulations.

F. After the date an action is filed in the general district or circuit court by (i) the association, by and through its counsel, to collect the charges or obtain injunctive relief and correct the violation or (ii) the lot owner challenging any such charges, no additional charges shall accrue. If the court rules in favor of the association, the association shall be entitled to collect such charges from the date the action was filed as well as all other charges assessed pursuant to this section against the lot owner prior to the action. In addition, if the court finds that the violation remains uncorrected, the court may order the lot owner to abate or remedy the violation.

G. In any action filed in general district court pursuant to this section, the court may enter default judgment against the lot owner on the association's sworn affidavit.

management team had concluded that the Complainant was a "potential dangerous threat to the health and safety of [him]self and others," which is why it banned him from certain common areas for 30 days and limited any meeting attendance to virtual attendance.

Under §55.1-1819 of the Property Owners' Association Act, if an association intends to either suspend services or the use of facilities for nonpayment of assessments more than 60 days past due or assess charges against an owner for a violation of the declaration or rules and regulations, an association must provide notice of the violation and a reasonable opportunity for correction, as well as an opportunity to be heard and represented by counsel if the violation is not corrected, before an association can take action against the owner.

In the present situation, no suspension of services or use of facilities has taken place for nonpayment of assessments nor has the association assessed charges against the Complainant for a violation of the declaration or rules and regulations. As a result, there is no legal requirement, under the Property Owners' Association Act for the Association to provide due process.

As to the possible violation of §55.1-1807(4) of the Property Owners' Association Act, again, I do not find the Association to be in violation of this statute. The statute provides a right to any owner to have notice of any proceeding to enforce any rule or regulation and the opportunity to be heard and represented by counsel. This statute is not applicable since there was no proceeding to enforce a rule or regulation and therefore no requirement that the Association provide an opportunity to be heard and represented by counsel.

I understand the Complainant's concerns and his reliance upon the Property Owners' Association Act, but I do not find it applicable in this situation. Instead, I believe this is a legal issue outside the scope of this office.

Required Actions

No action is required of the Association. Please contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Lake of the Woods Association, Inc.