



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Robert F. McDonnell
Governor

April 18, 2013

James S. Cheng
Secretary of
Commerce and Trade

Gordon N. Dixon
Director

Complainant: John and Amy Kresse
Association: Mayfair of McLean Association
File Number: 2013-0499

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

Complainant submitted a complaint to the Association dated January 27, 2013. The Association provided a Final Decision to Complainant dated February 21, 2013. This office received the Notice of Final Adverse Decision on March 15, 2013.

Determination

The Office of the Common Interest Ombudsman (OCICO) has reviewed the Notice of Final Adverse Decision (NFAD). The Complainant submitted a cover letter with the Notice of Final Adverse Decision that was not part of the original complaint. This office does not utilize such additional information in its consideration of a submitted NFAD since the NFAD is intended to provide a review solely of the original complaint and the decision made by the Association. The Complaint submitted to the Association listed 36 different issues primarily related to obtaining access to the association records. For relief, Complainant requests production of the records to which Complainant has not been able to obtain access and asks that the Association create a central location to store all records of the Association.

Ultimately, the complaint submitted to the Association centered on Complainant's belief that the association records requested had not been provided. In particular, the Complainant requested access to the minute book, all landscaping committee records, all design review committee records, and all board correspondence, minutes, agenda packets and meeting notices. The Complainant also requested that the Association collect and maintain records in a central location in order to allow it to meet the five days written notice deadline contained in the Property Owners Association Act.

§55-510 of the Property Owners Association Act (POAA) states:

A. The association shall keep detailed records of receipts and expenditures affecting the operation and administration of the association. All financial books and records shall be kept in accordance with generally accepted accounting practices.

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 but not limited to:

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.

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 days' written notice reasonably identifying the purpose for the request and the specific books and records of the association requested.

The original request to see the records of the association, as submitted by the Complainant and dated September 2, 2012, did not contain a purpose for the request, which is a requirement under the POAA. The failure to provide a proper purpose could be a valid reason for the Association to deny access to the association records.

Based on the substantial volume of emails submitted as part of the NFAD it appears that the Association may not have responded in a timely manner to the request for access. However, the language of the POAA requires that the requestor provide five days' written notice reasonably identifying the purpose for the request, which does not appear to have been provided in the original request or any subsequent request.

The Association's Final Adverse Decision essentially stated that all books and records had been provided to the Complainant, or were available on the Association's web site. In addition, the Association noted that having a central

location for the storage of books and records would be impractical and inefficient. An addendum or attachment to the Final Adverse Decision, submitted by the legal advisor for the association, commented on the lack of a purpose in the request for access, and appeared to indicate that the Association had provided records of all the meetings of the membership and board electronically. A copy of an email was also attached that appeared to show a "zip" file that had been emailed to the Complainant that contained all minutes of meetings other than the minutes that were posted on the Association's web site.

The limitations of a NFAD are that it is the only source of information from which this office can make a determination. The Regulations do not provide for in depth research or investigation, nor do they provide for a review of information other than that contained in the NFAD. The review of the NFAD is solely to determine if "the final adverse decision may be in conflict with laws or regulations governing common interest communities..." Because Complainant does not appear to have provided a purpose for its request to examine the books and records, which is required under the POAA, and because the Association could have denied access to the books and records based on the failure to provide a purpose, I cannot find that the final adverse decision is in conflict with any law or regulation governing common interest communities.

Required Actions

While there does not appear to be a conflict with the laws or regulations governing common interest communities in the final adverse decision, I am troubled by what may be a lack of accurate record maintenance by the Association. Based on what I could glean from the many emails I reviewed, it appeared that there were virtually no documents available pertaining to certain committees and limited documents available in general. While the POAA does not specifically define what records must be kept (other than its specific language in relation to financial books and records) the Virginia Nonstock Corporation and the Association's own governing documents may provide guidance for the proper method of recordkeeping. I would suggest that the Association review both these to make certain it is maintaining the books and records of the Association in an appropriate manner.

The Association appeared to take an unreasonably long time to respond to the Complainant's requests for examination of the books and records. This indicates that the Association was either unaware of its timeframe obligations under the POAA or that its recordkeeping was not very precise or accurate. Whichever the case may be, the Association needs to fully examine its process of providing access to the books and records so that in the future, if it receives a request for access to those books and records that fully complies with the POAA, it will be in a position to provide such access in a timely manner.

The Association needs to ensure that it is accurately maintaining its books and records and all association documents in a manner that complies with the POAA, the Virginia Nonstock Corporation, and its own governing documents. In addition, the

Association should ensure that any future requests for access to the books and records are responded to in a timely manner and in accordance with the POAA.

If either party has any questions regarding this determination, you are welcome to contact me. This Determination is final and there will be no further review.

Sincerely,

A handwritten signature in cursive script, appearing to read "Heather Gillespie".

Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Mayfair of McLean Association, Inc.