



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Robert F. McDonnell
Governor

September 25, 2013

James S. Cheng
Secretary of
Commerce and Trade

Gordon N. Dixon
Director

Complainant: Natalie Clark
Association: Channelwalk Estates Homeowners Association
File Number: 2014-00400

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 May 22, 2013. On June 5, 2013, the Association responded with an acknowledgement of the Complaint, notification that the Association was preparing the books and records for review, and that because of certain allegations contained in the Complaint, the Association's attorney would be the future point of contact for the Complainant and would be providing a response as well. The Association's attorney did respond, with a Cease and Desist – Warning letter dated June 6, 2013. The Association Manager followed that letter with a letter dated July 12, 2013 that stated the June 6 letter from the Association's attorney was the formal response to the Complainant's complaint.

As required by the Common Interest Community Ombudsman Regulations (Regulations), a copy of the submitted Notice of Final Adverse Decision (NFAD) was forwarded by this office to the Association with a cover letter dated August 20, 2013. The Association was asked to review the NFAD and provide feedback to this office as to whether the packet accurately depicted the Complaint that had originally been submitted to the Association. The Association responded by letter dated September 13, 2013 and provided additional information that had not been part of the Complainant's packet but had been part of the original Complaint to the Association and the Association's response.

While some of the additional documents provided by the Association have no bearing on the matter at hand, a copy of a letter designated as Notice of Final Determination was included. The letter was dated August 21, 2013 which was eleven days after the Complainant signed her NFAD and eight days after this office received it. Another letter was included, dated June 18, 2013 that notified the Complainant of the estimated cost for copies of requested books and records.

Determination

The Office of the Common Interest Ombudsman (OCICO) has reviewed the NFAD in its entirety. Any additional information submitted by Complainant that was not part of the original Complaint submitted to the Association was reviewed but not utilized in the Ombudsman's Determination. Letters sent to Complainant by the Association or its attorney prior to the Final Determination were reviewed and the information contained therein was considered as part of this Determination.

The Complainant has alleged that the Association does not have the authority, under the Property Owners Association (POA) Act to assess her for past due assessments. She bases her argument on §55-509.3 of the POA Act. The Complainant also believes that the Association's charges are arbitrary and capricious. Complainant also refers to possible embezzlement in her complaint, which, if true (there were no facts provided to support such a contention), would be a violation of criminal law not common interest community law. Complainant also references a possible breach of "fiducial responsibility" which is also not a matter that would fall under common interest community law or regulations.

The Complainant asked the Association to substantiate the amount she owes, and requested that they do so by providing copies of all bank statements bills, receipts for services provided, income tax returns, real estate taxes paid, and payments made by Complainant. Other documents were also requested but they are not pertinent to this Determination. In its Cease and Desist letter of June 6, the Association's attorney acknowledged Complainant's right to access the books and records and further noted that the Complainant needed to contact the Association to schedule a time to review the books and records, at a mutually convenient time and location as required by the POA Act. In addition, the Association, in its June 18, 2013 letter, provided Complainant with a cost schedule for copies of the requested books and records. The Association agreed to process the request for copies of books and records once a check was received to pay for the cost of doing so.

Other allegations contained in the Complaint to the Association were not appropriate for the complaint procedure as they were not related to possible conflicts or violations of common interest community law or regulations.

This NFAD was confusing and difficult to follow for several reasons. Many of the allegations in the original Complaint to the Association were not appropriate for the Complaint Process and muddied the waters. The Association never defined any of its responses, prior to the August 21 response as a Final Determination, yet it could be reasonably concluded that the July 12 letter was intended as a Final Determination, even though it did not contain any language indicating it was a Final Determination, merely that it was the formal response to the Complaint, nor did it contain information relating to the Complainant's right to file a NFAD with this office.

Ultimately, the crux of the original Complaint, as it pertains to the jurisdiction of this

office, was that the Association did not have the legal right under the POA Act to assess the Complainant for past due assessments. No factual support for this contention was provided by the Complainant and therefore it is impossible for this office to determine if there is merit to the allegation. Without any proof of a violation of common interest community law or regulation, this office cannot come to a conclusion that there has been a violation or conflict with common interest community laws or regulations.

Required Actions

The Association appears to have failed to follow the Common Interest Community Ombudsman Regulations when it responded to the Complaint submitted by Complainant. It is not entirely clear if there was a response from the Association within seven days of receipt of the Complaint, as required by the Regulations. In addition, the Association did not make clear which of its letters was actually the Final Determination in response to the May 22 Complaint. While the August 21 letter was specifically identified as a Final Determination, it dealt more with several other complaints that had been submitted by Complainant and reiterated the fact that the June 6 letter had fully addressed the May 22 Complaint. None of the letters sent to Complainant prior to August 21 included the necessary contact information for the Office of the Common Interest Community Ombudsman (OCICO) nor did they include information regarding the Complainant's right to file a NFAD with the OCICO.

While I do not believe that the failure to provide a Final Determination in a manner that adhered to the Regulations impacted the outcome of this Determination, I am troubled that the Association did not take more care in responding to the Complainant and ensuring that its responses were in line with the requirements of the Regulations. I would suggest that the Association thoroughly review the Regulations, paying particular attention to 18 VAC 48-70-50 and ensure that it follows the requirements precisely in its response to all future complaints. The Association is hereby on notice that any future failure to follow the Regulations may be referred to the Common Interest Community Board for whatever action it deems appropriate.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Channelwalk Estate Homeowners Association