



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Terence R. McAuliffe
Governor

September 5, 2017

Todd Haymore
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Stephen Ribble
Association: Riverland Vineyards Homeowners' Association, Inc.
File Number: 2018-00584

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 February 1, 2017. The Association provided a final determination to the Complainant dated August 9, 2017 and the Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated August 14, 2017 and received August 17, 2017.

Determination

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 §55-530(F) (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. In the event that such a complaint is submitted to this office as part of a NFAD, a determination cannot be provided.

The Complainant has alleged the Association is assessing homeowners “for expenses other than those related to common areas in violation of [§]55-509.3¹ of the Virginia Property Owners’ Association Act.” The Complainant believes that a storm water maintenance area in the Association is the only common area, and as a result, the only area where owners’ assessments should be used to pay for maintenance. The Complainant states in his Complaint that the Association has improperly used assessments to pay for the mowing of other lots and to pay for insurance. He also noted that there is no way to prove the mowing issue and therefore does not wish to include it as part of his NFAD.

The Association initially responded to the Complaint with a letter in which it stated that “the only area being maintained by the HOA is the retention pond area.” However, the Association failed to provide consideration of the Complaint and thus had to return to this matter at a later date in order to ensure that it followed the Common Interest Community Ombudsman Regulations and provided consideration as required under those regulations. In its first response, the Association also noted that county, state, and federal regulations require that the pond be kept free of accumulations of brush and small trees.

The final decision from the Association dated August 9, 2017 and drafted after it held consideration of the Complaint, confirmed its original letter and specifically confirmed that the Association only charges for mowing the retention area.

The Complainant included a letter with his NFAD that was not part of the original complaint to the Association. It contained additional information outlining the insurance payments that had been made and further stated the Complainant’s belief that the payments were improper since they did not fall under the acceptable expenses that could be paid by an association from assessments.

Pursuant to §55-514.2(B)², associations are required to obtain and maintain a blanket fidelity bond or employee dishonesty policy. Several pages from the insurance

¹ Except as expressly authorized in this chapter, in the declaration, or otherwise provided by law, no association may (i) make an assessment or impose a charge against a lot or a lot owner unless the charge is a fee for services provided or related to use of the common area or (ii) charge a fee related to the provisions set out in § 55-509.6 or 55-509.7 that is not expressly authorized in those sections.

² Any association collecting assessments for common expenses shall obtain and maintain a blanket fidelity bond or employee dishonesty insurance policy insuring the association against losses resulting from theft or dishonesty committed by the officers, directors, or persons employed by the association, or committed by any managing agent or employees of the managing agent. Such bond or insurance policy shall provide coverage in an amount equal to the lesser of \$1 million or the amount of the reserve balances of the association plus one-fourth of the aggregate annual assessment income of such association. The minimum coverage amount shall be \$10,000. The board of directors or managing agent may obtain such bond or insurance on behalf of the association.

policy were included with the NFAD but it is not clear to me precisely what coverage is in place. In addition, it is not the purview of this office to review insurance coverage unless a NFAD specifically related to an absence of a fidelity bond or dishonesty policy is submitted. Since there is a statute that requires at least a fidelity bond or dishonesty policy to be in place, it stands to reason that the association would pay for such a policy using assessments. As to any other type of insurance coverage, this office cannot determine if the Association is within its rights to use assessments to pay for such coverage, since such determination would be dependent upon whether such insurance coverage and payment is authorized under the declaration of the association.

If the Complainant believes he has cause for a civil action, he may wish to consult an attorney.

Required Actions

Because no determination can be made as to how the assessments are being used and whether they are being used in accordance with §55-509.3 and the Association's own declaration, no action is required of the Association in relation to this issue.

However, action is required as it relates to the Association's response to the Complaint. As was noted in this Determination, the Association failed to respond correctly to the initial Complaint by not providing consideration of the Complaint. Once consideration was scheduled and carried out, the final decision was not provided in a form that complied with the Common Interest Community Ombudsman Regulations. Under 18 VAC 48-70-50 (9) and (10)³ certain requirements must be met. There was no registration number for the Association included, and the Complainant was not notified of his right to file a Notice of Final Adverse Decision, nor was the applicable contact information included in the final decision.

The Association must ensure that any and all future final decisions are in compliance with the Common Interest Community Ombudsman Regulations. I would encourage the Association to review the Common Interest Community Ombudsman Regulations on our website in order to make certain it can fully comply with them in the future. A failure to ensure such compliance will result in the matter being referred to the Common Interest Community Board for whatever enforcement action it may deem appropriate.

³ 9. The notice of final determination shall be dated as of the date of issuance and include specific citations to applicable association governing documents, laws, or regulations that led to the final determination, as well as the registration number of the association. If applicable, the name and license number of the common interest community manager shall also be provided.

10. The notice of final determination shall include the complainant's right to file a Notice of Final Adverse Decision with the Common Interest Community Board via the Common Interest Community Ombudsman and the applicable contact information.

You are welcome to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Heather Gillespie". The signature is fluid and cursive, with a small flourish at the end.

Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Riverland Vineyards Homeowners' Association, Inc.