



# COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Terence R. McAuliffe  
Governor

December 27, 2017

Todd Haymore  
Secretary of  
Commerce and Trade

Jay W. DeBoer  
Director

Complainant: Rita Knox  
Association: Wynd Crest Condominium  
File Number: 2018-01443

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*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.*

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## Complaint

The Complainant submitted a complaint to the Association, dated August 24, 2017. The Association provided a response to the Complainant dated October 25, 2017. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated November 7, 2017 and received November 20, 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 violations of the Condominium Act as well as violations of the condominium instruments and other laws that are not considered common interest community laws. This Determination will only address allegations related to a violation of common interest community law. In addition, additional information in the form of a letter that was provided with the filing of the NFAD but not included in the original Complaint to the Association will not be considered in the Determination. 18 VAC 48-70-90(C)<sup>1</sup>, which specifically states what must be included in the NFAD, does not provide for the submission of any additional information that was not part of the original Complaint filed with the Association.

The primary allegation by the Complainant is that the Association violated §55-79.76<sup>2</sup> of the Condominium Act. According to the Complainant, the Association has failed to hold elections for the Board of Directors, failed to petition the court in order to elect officers and has simply “rolled over” board members each year. The Complainant also alleged that the Association failed to provide access to the books and records, as required by §55-79.72.3<sup>3</sup> (and in more detail by §55-79.74:1) of the Condominium Act despite several requests, both before and after the Complainant purchased her unit. The Complainant wanted to review the books and records at the office of the association, and the Association denied this request and offered to email the requested books and records since they were largely maintained in electronic format. The Complainant stated that “the law does not require me to have you send the files electronically, it is an option that I elected not to use, instead I offered to view them at your facility to which you have failed to allow.”

According to the Association’s final decision, the Association has not been able to obtain quorum at its annual meeting for a number of years. It has chosen, as a result, to request volunteers willing to help run the association. As to the allegation that the Association failed to provide access to the books and records, the Association responded

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<sup>1</sup> The notice shall include a copy of the association complaint, the final adverse decision, reference to the laws and regulations the final adverse decision may have violated, any supporting documentation related to the final adverse decision, and a copy of the association complaint procedure.

<sup>2</sup> C. On petition of the unit owners' association or any unit owner entitled to vote, the circuit court of the city or county in which the condominium or the greater part thereof is located may order an annual meeting of the unit owners' association be held for the purpose of the election of members of the executive organ, provided that:

1. No annual meeting as required by § 55-79.75 has been held due to the failure to obtain a quorum of unit owners as specified in the condominium instruments; and
2. The unit owners' association has made good faith attempts to convene a duly called annual meeting of the unit owners' association in three successive years, which attempts have proven unsuccessful due to the failure to obtain a quorum.

The court may set the quorum for the meeting and enter other orders necessary to convene the meeting.

A unit owner filing a petition under this subsection shall provide a copy of the petition to the executive organ at least ten business days prior to filing.

<sup>3</sup> Every unit owner who is a member in good standing of a unit owners' association shall have the following rights:

1. The right of access to all books and records kept by or on behalf of the unit owners' association according to and subject to the provisions of § 55-79.74:1, including records of all financial transactions;

by stating that it had offered to provide the documents but the Complainant was unwilling to provide an email address so that they could be sent. The Association also noted that it provided a fee schedule for the cost of hard copies and the Complainant refused to pay the cost for the documents. The Association also wrote that the Complainant has chosen to escrow her assessments, but has declined to provide any information to prove that such an escrow account exists.

Obtaining quorum can be a difficult problem in many associations and often leads to the “rolling over” of boards of directors since a failure to obtain quorum for an annual meeting also means that an election cannot be carried out. The statute (§55-79.76) that the Complainant believes was violated does not *require* an association to petition the court if quorum cannot be obtained, instead it allows the unit owners’ association *or* an owner to petition the court. Based on the statute, the unit owners’ association is no more required to petition the court than any owner in the community is required to petition the court. Petitioning the court may certainly be a viable method of resolving the ongoing inability to obtain quorum, but it is not required under the Condominium Act.

The failure to provide access to the books and records is a bit confusing, but it appears that the Complainant was unwilling to receive hard copies and/or unwilling to pay for the hard copies when provided the costs pursuant to the Association’s required cost schedule. The Association stated in one of its response letters to the Complainant regarding her records request that the bulk of the records are maintained in electronic format and thus would need to be printed out. They also noted that a proper purpose had not been provided by the Complainant when requesting access to the books and records.

In my review of the documents provided as part of the NFAD, I found that the early requests to examine the books and records did not have a purpose, but a purpose was provided in April of 2017. §55-79.74:1<sup>4</sup> of the Condominium Act requires that the purpose for the request to examine or copy books and records be reasonable identified. Owners have an absolute right to examine the books and records of the association if they are in good standing and have provided a request that comports with the law. The difficulty here is that the Association claimed it keeps its records in electronic format and therefore must provide a hard copy or email copy in order to allow an owner to review the records. The Association would have charged for hard copies but was willing to email electronic versions for free. The Complainant preferred to review them in their electronic format at the office of the Association/Manager.

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<sup>4</sup> A. The declarant, the managing agent, the unit owners’ association, or the person specified in the bylaws of the association shall keep detailed records of the receipts and expenditures affecting the operation and administration of the condominium and specifying the maintenance and repair expenses of the common elements and any other expenses incurred by or on behalf of the association. Subject to the provisions of subsections B, C and D, upon request, any unit owner shall be provided a copy of such records and minutes. All financial books and records shall be kept in accordance with generally accepted accounting practices.

B. Subject to the provisions of subsection C, all books and records kept by or on behalf of the unit owners’ association, including, but not limited to, the unit owners’ association membership list, addresses and aggregate salary information of unit owners’ association employees, shall be available for examination and copying by a unit owner in good standing or his authorized agent so long as the request is for a proper purpose related to his membership in the unit owners’ association, and not for pecuniary gain or commercial solicitation. Notwithstanding any provision of law to the contrary, 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 business days’ written notice for a unit owner association managed by a common interest community manager and 10 business days’ written notice for a self-managed unit owners’ association, which notice shall reasonably identify the purpose for the request and the specific books and records of the unit owners’ association requested.

The statute (§55-79.74:1) related to accessing the books and records states that all books and records “shall be available for examination and copying.” Even if an association chooses to maintain only electronic copies of books and records, the language in the statute indicates that all books and records must be available for examination and copying. As such, it may be necessary for the association to permit an owner to examine the books and records on a computer in the office or find some other method to allow an owner to examine and copy the books and records, even those that are in electronic format.

Once the Complainant provided a proper purpose and officially owned the unit, the Association was obligated to provide her the right to examine or copy the books and records. Any request to access the books and records prior to ownership was improper, as it is only owners who have the right to examine books and records. In the present case, there is an additional intricacy in that the Complainant has chosen to escrow her assessments. Such escrows are not governed by common interest community law and therefore I can provide no determination as to whether the Complainant is considered to be in good standing and whether the Association is obligated to provide access to the books and records. That is a civil law matter over which this office has no jurisdiction. Because of this, I cannot make a determination as to whether the Association must provide the Complainant the right to examine and copy the records when her assessments are in escrow.

### Required Actions

I would suggest that the Association consider its method of maintaining the books and records so that it can be certain it can provide an owner the opportunity to examine or copy them if so requested. The Association may wish to consider whether petitioning the court is in its best interests in order to ensure that it has quorum to elect officers at its next meeting of the unit owners.

If the Association is satisfied with the escrow situation, I see no reason why it should refrain from providing the access to the books and records that the Complainant has requested. If it is not comfortable with the escrowing of assessments, the Association and Complainant will have to find another way to resolve the books and records issue.

For future reference, the Association needs to ensure that it complies with the Common Interest Community Ombudsman Regulations (18 VAC 48-70-50)<sup>5</sup> when providing a final determination. It must include its CICB registration number, and the name and license number of the common interest community manager. The final determination must also contain the contact information for the Office of the Common Interest

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<sup>5</sup> 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.

Community Ombudsman as well as the complainant's right to file a Notice of Final Adverse Decision.

I would suggest that the Association cease referring to the complaint procedure or complaint as the "DPOR complaint." The association complaint procedure is a requirement under common interest community laws and regulations and really has nothing to do with the Department of Professional and Occupational Regulation. Instead, the proper terminology, which would decrease any confusion, is to refer to these documents as the association complaint procedure or association complaint. The appeal to my office is a Notice of Final Adverse Decision.

Sincerely,

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

Heather S. Gillespie  
Common Interest Community Ombudsman

cc: Board of Directors  
Wynd Crest Condominium