



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Terence R. McAuliffe
Governor

January 4, 2016

Maurice Jones
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Irwin Flashman
Association: Reston Association
File Number: 2016-01382

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 his complaint to the Association on September 13, 2015. The Association provided a final determination to the Complainant dated October 28, 2015. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated November 23, 2015 and received November 30, 2015.

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 that the Association failed to provide copies of books and records that he had requested in accordance with §55-510 of the Property Owners' Association Act. Specifically, the Complainant requested a copy of the "Election Household Voting List" for a referendum and for a board election. The Association, via its manager, responded to the initial request, notifying the Complainant that the board of directors would review the request at its next meeting. Prior to that meeting, counsel for the Association responded to the request for copies of the lists by letter dated August 14, 2015. In that letter the Association advised the Complainant that the records he requested were not within the books and records of the Association. The Complainant was offered cumulative information related to the referendum and election since his specific request could not be met.

There was a later telephone conversation between the Complainant and the Association's attorney, which was followed by an email from the Association's attorney to the Complainant. In that email, the attorney responded to two additional questions, namely why there are no books and records that meet the Complainant's request and whether a third party may hold such books and records. The attorney stated in the email that "the Association does not have any list of individual households with addresses of households which actually voted in the 2015 Board of Directors election or in the... Referendum." In addition, he wrote that "[n]o third-party has Association books and records or is keeping Association books and records which would be or are responsive to your request."

The Complainant believes that the Association has an obligation, under §55-510 of the Virginia Code, and under several Association Resolutions that pertain to board elections and record retention, to provide the copies he has requested and to maintain books and records that would meet the description of the books and records he has requested.

There appear to be two separate issues here. The first issue is related to adherence to the Property Owners' Association Act, specifically §55-510, and the second issue is whether the Association is required by its own governing documents to create and maintain records that would meet the description of the records requested by the Complainant (the "election household voting lists"). The only issue this office can address is whether the Association, based on the Notice of Final Adverse Decision and its accompanying documentation, has complied with the Property Owners' Association Act, and specifically §55-510(A) and (B) of that Act which state

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...

The Association has stated that it does not have the documents that were requested and that no third party has those documents and therefore it cannot provide copies of those documents. If the Association does not keep the requested records and those records are not kept elsewhere on behalf of the Association, the Association is not required to create those documents nor can it provide copies of those documents. Based on the information contained in the Notice of Final Adverse Decision, and without consideration of the governing documents which would be outside the jurisdiction of this office, the Association does not appear to be in violation of the applicable provisions of the Property Owners' Association Act.

The question as to whether the Association is required by its own governing documents to create and maintain the requested documents as part of its election process and record retention policy is not a question that this office can answer and therefore a determination cannot be provided in relation to this issue.

Required Actions

No action is required.

Sincerely,

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

Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Reston Association