



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

April 12, 2016

Terence R. McAuliffe
Governor

Maurice Jones
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Stephanie Hill
Association: Potomac Hills Homeowners' Association, Inc.
File Number: 2016-02154

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 November 2, 2015. The Association provided a final determination to the Complainant dated February 10, 2016 and the Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman which was received on March 8, 2016.

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 submitted a Complaint containing five separate complaints and three additional matters. The bulk of the Complaint is not related to violations of common

interest community law or regulations, which, as noted in the preceding paragraphs, are the only types of complaints over which this office has jurisdiction. The primary complaints contained in the Complaint over which we do have jurisdiction pertain to a failure to provide copies of association records. Among the allegations is a claim that the Association failed to provide proof it properly noticed owners regarding a special assessment, which would constitute a violation of §55-514¹ of the Property Owners' Association Act. The Complainant also alleges a failure to provide documentation that the Association properly obtained a loan for roadwork, and that such failure violates §55-514 and §55-510 of the Property Owners' Association Act.

The Complainant further alleges that the Association failed to provide books and records to her in her capacity as a board member, in violation of §55-510(E)² of the Property Owners' Association Act. The list of requested items numbered twelve, and ranged from meeting minutes to reserve studies to contracts.

Additional complaints that do not fall under our jurisdiction included claims that the Association violated §13.1-932, §13.1841 and §13.1-865, §13.1-855 and §13.1-860 all of the Virginia Nonstock Corporation Act. Other allegations were that the Association has the incorrect number of positions open for election, that the Complainant was not provided a certain financial report that included charges from the Association's attorney (no specific information was provided about this allegation), and that the Complainant was defamed by certain comments made at a meeting.

The Association's Final Hearing Result provided several general responses to the Complaint, raising the issue of pending or probable litigation as well as threatened litigation, and the failure to define a proper purpose for the request for books and records. The Association then went on to respond to each specific complaint, and agreed, notwithstanding its objections laid out in the earlier portion of its letter, to make all the requested records available to the Complainant, by placing the records in the manager's conference room within 30 days of the date of the Final Hearing Result. The Complainant will be given the opportunity to review the documents, designate which documents she wishes to copy and the Association will copy the documents, with the Complainant paying the reasonable costs for copying. The Association also requested the execution of a Confidentiality Agreement in conjunction with this access to the books and records.

¹ In addition to all other assessments which are authorized in the declaration, the board of directors shall have the power to levy a special assessment against its members if the purpose in so doing is found by the board to be in the best interests of the association and the proceeds of the assessment are used primarily for the maintenance and upkeep of the common area and such other areas of association responsibility expressly provided for in the declaration, including capital expenditures. A majority of votes cast, in person or by proxy, at a meeting of the membership convened in accordance with the provisions of the association's bylaws within 60 days of promulgation of the notice of the assessment shall rescind or reduce the special assessment. No director or officer of the association shall be liable for failure to perform his fiduciary duty if a special assessment for the funds necessary for the director or officer to perform his fiduciary duty is rescinded by the owners pursuant to this section, and the association shall indemnify such director or officer against any damage resulting from any claimed breach of fiduciary duty arising therefrom.

² Notwithstanding the provisions of subsections B and C, all books and records of the association, including individual salary information for all employees and payments to independent contractors, shall be available for examination and copying upon request by a member of the board of directors *in the discharge of his duties as a director.*(emphasis added)

Nowhere in the Complaint or in any of the numerous documents included could I find any evidence that the Complainant provided either a proper purpose for her request for access to the books and records or, if she was requesting these documents as a member of the board of directors, proof that her request was "in the discharge of his [her] duties as a director." (§55-510(E)) In addition, the Association has agreed to provide access to the books and records requested. I do not find that the Association is in violation of §55-510 of the Property Owners' Association Act.

The allegations that the Association violated §55-514 of the Property Owners' Association Act were without substantiation and vague in nature. There was no evidence provided that a violation of this provision had occurred, and §55-514 does not require approval by the owners in order to levy a special assessment. I do not find that a violation of §55-514 of the Property Owners' Association Act occurred.

No determination can be provided for any other portion of the Notice of Final Adverse Decision, as all other allegations pertained to areas outside common interest community laws and regulations.

Required Actions

No action required.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Potomac Hills Homeowners' Association, Inc.