



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Terence R. McAuliffe
Governor

March 24, 2017

Todd Haymore
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainants: Robert and Allison Williams
Association: Governor's Land Foundation
File Number: 2017-02043

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 Complainants submitted a complaint to the Association, dated October 6, 2016. The Association provided a response to the Complainants dated January 25, 2017. The Complainants then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated February 23, 2017 and received February 24, 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 Complainants have alleged two violations of §55-513(C)¹ of the Property Owners' Association Act and several violations of the Association's "Procedures for Solving Pet Problems." The only allegations that will be reviewed here are those pertaining to the Property Owners' Association Act, as governing documents of an association are not considered to fall under the definition of what constitutes an association complaint as set forth in the Common Interest Community Ombudsman Regulations.

The first alleged violation is that the Association failed to give the Complainant "a reasonable opportunity to correct the alleged violation of the 'General Pet Guidelines' prior to scheduling a hearing before the Board." The Complainant further stated that "the Board merely proceeded to hearing without ever clearly or specifically identifying the full factual basis for the complaint or grievance." The Complainants said that they never learned who had submitted a complaint about their dog until after the Board reached its determination on the matter.

The Complainant also alleged that insufficient notice of the hearing was provided, since notice was received ten days prior to the date of the due process hearing which violated the provision in the statute requiring fourteen days' notice.

The Association provided a final decision where it outlined the circumstances that lead to the due process hearing and noted that the key reason for the due process hearing was a failure by the Complainants to comply with a provision contained in the Association's declaration. As to the allegation that the Association failed to abide by the requirements under §55-513(C), the Association stated "your reliance on Va. Code 55-513.C is mistaken. That Code section requires notice and a hearing '[b]efore any action authorized in this section is taken.' The Board of Directors did not take action authorized by Code §55-513.C...[i]nstead, it took action authorized by the Declaration which you were contractually obligated to follow."

The Association addressed the allegation that insufficient notice was given by stating that notice was provided "[b]ut no action was taken... for which the hearing was noticed." Additionally, it stated, the allegation that less than 14 days' notice was provided was incorrect as the Complainants were initially provided notice on August 29, 2016 for a September 12, 2016 hearing. The Complainant requested a different date for the hearing and the Association complied by moving the date of the hearing to September 19, 2016. The Association wrote that "nothing in the Declaration or the Code obligated the Board of Directors to re-issue notice and give you another 14 days."

¹ Before any action authorized in this section is taken, the member shall be given a reasonable opportunity to correct the alleged violation after written notice of the alleged violation to the member at the address required for notices of meetings pursuant to § 55-510. If the violation remains uncorrected, the member shall be given an opportunity to be heard and to be represented by counsel before the board of directors or other tribunal specified in the documents.

Notice of a hearing, including the actions that may be taken by the association in accordance with this section, shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the member at the address of record with the association at least 14 days prior to the hearing. Within seven days of the hearing, the hearing result shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the member at the address of record with the association.

A copy of the written notice of the hearing was included in the Notice of Final Adverse Decision. The notice laid out the reason for the due process hearing; "the Grievance Committee has determined that this animal is 'causing or creating a nuisance' and has recommended to the Board that a due process hearing be scheduled so the Board may determine the best course of action to protect the residents of the Association." The notice also stated that there had been multiple complaints received by the Association about the Complainant's dog, its dangerous tendencies and a recent incident where a member was attacked by the dog.

Also included were emails and letters discussing a new date for the due process hearing so that the Complainant's attorney could be present. While there may have been some misunderstanding or miscommunication between the parties as to the ideal date for the rescheduling of the hearing, it is very clear from the correspondence that a new date had been requested by the Complainants and that the Complainants were aware of the new date once it was set.

I cannot find, based on the information provided, that the Association has violated §55-513(C) of the Property Owners' Association Act. The original notice provided to the Complainants contained sufficient information to inform them as to the nature of the due process hearing. It was clear that the hearing was being held to discuss complaints about their dog, and that a recent attack by that dog lead to this action. While the Complainants are correct that had the Association taken any action authorized by §55-513 it would have had to permit a reasonable opportunity to correct the alleged violation, no such action was taken by the Association and therefore the opportunity to correct was not required prior to the hearing.

As to the failure to provide the statutory notice, the Association did mail the original notice on August 29, 2016 which was 14 days prior to the originally scheduled September 12, 2016 hearing. The statute requires hand delivery or mailing of the notice at least 14 days prior to the hearing. It does not require the individual to receive the notice 14 days prior to the hearing. The Complainant requested what amounts to a continuation of the original hearing to a date that would allow their attorney to attend the hearing. An association is under no obligation to reschedule a due process hearing to accommodate such a request, but in this case it did reschedule. All parties were aware that a hearing was pending, that it had originally been scheduled for September 12 and would be rescheduled for some date after the 12th. Notice of the hearing had already been provided in compliance with the statute and any rescheduling was at the request of the Complainants. There was no new or different hearing held, instead it was merely postponed to accommodate the Complainants and their counsel and as such did not require a new, 14-day notice.

Required Actions

No action is required of the Association.

Please feel free to contact me if you have questions.

Sincerely,

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

Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Governor's Land Foundation