



COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

October 30, 2018

Brian Ball
Secretary of
Commerce and Trade

Complainant: David Siegler
Association: Gilmar Estates Homeowners' Association
File Number: 2019-00986

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 a complaint to the Association dated August 7, 2018. The Association provided a response to the Complainant dated September 23, 2018. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated September 28, 2018 and received October 1, 2018.

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 Complaint stems from a request by the Complainant for copies of association books and records. According to the Complainant, the request was submitted via email on February 2, 2018, and no response was provided. An additional request was made in May. While some of the documents requested were provided, the Complainant stated in his Complaint that the Association “provided no Bylaws, rules and regulations.” The Complainant believes the Association violated §55-510-1 and §55-509.3:2 of the Property Owners’ Association Act by failing to provide the requested documents. §55-510-1 is not a valid statute, and the statute that is most closely numbered would be §55-510.1 which pertains to Meetings of the Board of Directors. I believe there may have been a typographical error and the Complainant meant §55-510 which, in part, pertains to access to association records. The Complainant did not specify the specific provision of §55-509.3:2 to which he was referring, but I will assume he meant §55-509.3:2(1)¹ which addresses a member’s right to access the books and records of an association. The Complainant did not provide a purpose for his request for the books and records, which is a requirement under §55-510(B)(2)².

In its final decision, the Association wrote that on June 5, 2018 it had responded to the request for documents and provided the documents requested. The Association wrote that it did not include minutes from 2015 because they could not be found, and did not include any rules or regulations since there were none at the time of the request. It has since passed Resolution 1 and provided a copy via email to all owners on the day it was adopted, July 30, 2018.

If the Association did not have any rules or regulations, it cannot provide them upon request and is not in violation of the Property Owners’ Association Act by failing to do so. As to the allegation that the Association failed to provide the Bylaws, it appears that the current board of directors does not have a copy of any bylaws. It is unclear whether there ever were bylaws for the Association, but I would assume there were at some point in time, since it appears the Association was incorporated, per the State Corporation Commission web site. In an email from the President of the Association to the Complainant and included in the NFAD, the President wrote that the “documentation you requested was provided to the extent it was available.” The Association did provide the Complainant a copy of the Covenants and Restrictions.

The President confirmed upon request from my office pursuant to §55-530(G)³, that he was not aware of any bylaws for the Association. As with the rules and regulations, if a document does not exist or was not made part of the books and records of an association, the association does not have an obligation to provide such a document nor must it create such a document. In the present case, the Association may wish to review and consider whether it needs bylaws and may want to consider consulting with an attorney about this

¹ 1. The right of access to all books and records kept by or on behalf of the association according to and subject to the provisions of § 55-510, including records of all financial transactions;

² 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 an association managed by a common interest community manager and 10 business days' written notice for a self-managed association, *which notice reasonably identifies the purpose for the request and the specific books and records of the association requested.*(emphasis added)

³ G. The Director or his designee may request additional information concerning any notice of final adverse decision from the association that made the final adverse decision. The association shall provide such information to the Director within a reasonable time upon request.

attorney about this matter. Whether the Association should have a set of bylaws is outside the scope of this office.

As a side note to this NFAD, the Complainant included a lengthy cover letter with the NFAD that included multiple new allegations of common interest community law violations as well as new information and explanations not contained in the original Complaint submitted to the Association. 18 VAC 48-70-90(3)⁴, which governs the information that must be included with a NFAD does not include a cover letter in the list of documents that must be provided with a submitted NFAD and it has always been the policy of this office to not consider any additional submitted information that was not part of the original complaint considered by an association. In addition, any new allegations of common interest community law must first be submitted through the Association Complaint Procedure before this office can provide a determination as to whether or not an association may have violated common interest community law.

The cover letter also questioned the validity of the current board of directors. This office has no authority to determine whether a sitting board of directors was properly elected. That would be a matter that would be directly related to the governing documents of the association and potentially the Virginia Nonstock Corporation Act, neither of which would fall under the purview of this office.

Required Actions

No action is required of the Association as it pertains to the NFAD subject matter. However, the Association does need to ensure that for future final decisions, it provides the appropriate language from the Regulations (18 VAC 48-70-50) regarding the Complainant's right to file a Notice of Final Adverse Decision.⁵

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Gilmar Estates Homeowners' Association

⁴ 3. 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.

⁵ 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.