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April 30, 2025

Complainant: Cherese Jenks
Association: Cuckoo's Nest Association, Inc.
File Number: 2025-01650

OFFICE OF THE COMMON INTEREST COMMUNITY OMBUDSMAN
DETERMINATION - NOTICE OF FINAL ADVERSE DECISION

Introduction

This matter came before the Office of Common Interest Community Ombudsman ("Office") for review on December 30, 2024, as a result of the Notice of Final Adverse Decision ("NFAD") submitted by Cherese Jenks ("Jenks" or "Complainant"). The Complainant initially submitted a complaint to the Cuckoo's Nest Association, Inc.'s Board of Directors ("Board") on October 18, 2024, and a second complaint to the Board on October 28, 2024. The Board issued a final decision on December 2, 2024, that addressed three issues from her first complaint. Therefore, the NFAD was timely filed and within the jurisdiction of this Office, which has been designated to review final adverse decisions and determine if the decisions conflict with laws or regulations governing common interest communities.

Issues to be Decided

Jenks raises several issues in her complaints that are properly before this Office: (1) the Board's failure to provide requested records; (2) compliance with requirements for a complaint process; (3) improper meeting procedures; and (4) improper record keeping. In addition, Jenks raised issues about governing documents and budget compliance but cited no specific statutory provisions as required to be addressed through this process. Those complaints are not properly before this Office. Likewise, whether an association is complying with its fiduciary duty to its association members is an issue outside of this Office's jurisdiction. Finally, in reviewing this NFAD, the Office noted deficiencies in the Association's adverse decision to the Complainant. The Office's determination for the four issues enumerated above and the deficiencies in the Board's response are discussed below individually.

Authority

In accordance with its regulations, the Common Interest Community Ombudsman (CICO), as designee of the Agency Director, is responsible for determining whether a “final adverse decision may be in conflict with laws or regulations governing common interest communities.” (18 Va. Admin. Code (“VAC”) § 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 §54.1-2354.4 of the Code of Virginia of 1950, as amended (“Va. Code”) 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 specifically set forth in the CIC 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 CIC 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, and we cannot provide a determination on such a complaint. Common interest community law is limited to the Virginia Condominium Act, the Property Owners’ Association Act, and the Virginia Real Estate Cooperative Act.

The only documents that will be considered when reviewing a NFAD, in accordance with CIC regulation 18 VAC 48-70-90, are the association complaint submitted by a complainant to the association (and any documents included with that original complaint), the final adverse decision from the association, and any supporting documentation related to that final adverse decision. Other documents submitted with the Notice of Final Adverse Decision cannot be reviewed or considered. Further, this Determination is final and not subject to further review or appeal pursuant to Va. Code § 54.1-2354.4(C).

If within 365 days of issuing a determination that an adverse decision is in conflict with laws or regulations governing common interest communities, we receive a subsequent NFAD for the same violation, the matter will be referred to the Common Interest Community Board to take action in accordance with Va. Code §54.1-2351 or §54.1-2352 as deemed appropriate by the Board.

Determination

As noted above, the Complainant presented four issues, and the Office noted some deficiencies in the Board’s decision issued to the complainant. The findings of the Office are discussed more fully below and are based on a review of the materials submitted with the NFAD. Each section will address whether the Board’s actions were consistent with the applicable common interest laws or regulations.

1. The Board failed to provide the Complainant with the document requested.

In her first complaint on October 18, 2024, complaint (“10/18 Complaint”), Jenks alleged that the Board failed to provide her with a copy of a current list of association members with addresses and leases and other documents between the association and Dominion that “identify the terms, conditions, use, and restrictions related to water use, access, and structures allowed.” While her October 5, 2024, email did not expressly include a request for the association member list, an email response from Paul Rippeth, apparently on behalf of the Board, referenced this request by stating that “[s]ome board members are reluctant to give out their names and addresses.”

The Virginia Property Owners Association Act gives a homeowner the right to examine or obtain all the books, records and minutes of the association, subject to some exclusions and exceptions. *See*, Va. Code §§ 55.1-1807 and 55.1-1815. Specifically, lot owners in good standing shall have certain statutory rights, including the right of access to all books and records kept by or on behalf of the association. *See*, Va. Code § 55.1-1807. An association member’s right to access the association’s books and records expanded upon by Va. Code § 55.1-1815. The books and records available for inspection include financial books and records, records regarding maintenance repair expenses, membership lists with addresses, and contracts, leases, and other agreements not currently in negotiation. *See*, Va. Code §§ 55.1-1807 and 1815. There are restrictions, though, as the lot owner seeking these records must be a member in good standing and the request is for a proper purpose related to the owner’s membership in the association. *See*, Va. Code § 55.1-1807(B).

Here, Jenks sent an email to the Board on Thursday, October 3, 2024, about producing documents. It does not appear, though, that this is the initial email request. The Board responded the next morning to state that it did not “have an audit,” but it attached the “Common Area 1 pier info and Article of Incorporation” and identified the Dominion Lake Anna Coordinator with contact information. The Board further stated that “some board members are reluctant to give out their names and addresses. We don’t understand why you need this information for your assessment?” There is an undated follow-up in the Complainant’s materials submitted to the Office in which Jenks explains the reason for requesting the association membership list was to reach out to share information about “impacted slips, ... transparency, transparency, transparency ... and how informed owners make better supporters of Board decisions.”

There was no assertion in any materials that Jenks was not a member in good standing nor that she sought these records for an improper purpose. Thus, there was no apparent issue to cause the Board to withhold the association membership list. We note, however, that despite initially balking at the production of this information, Jenks acknowledged in her NFAD complaint materials that the Board provided her with a list of association members and their contact information on October 20, 2024, which was two days after Jenks filed her 10/18 Complaint. Thus, the records show that the Board’s initial withholding of the association

membership list was not consistent with the provisions of Va. Code §§ 55.1-1807 and 1815, but we note that the Board, perhaps upon review of the 10/18 Complaint, remediated this issue.

2. Outdated Formal Complaint Process.

The second issue raised by the Complainant in her 10/18 complaint was that the Association's complaint process and documentation, as presented on its website, were no longer in compliance with the applicable common interest community laws and regulations.¹ Virginia law requires homeowners' associations to establish reasonable procedures for the resolution of written complaints from members of the association and other citizens. *See*, Va. Code § 54.1-2354.4(A). The details of what is required for an association complaint procedure are laid out in the Common Interest Community Ombudsman's regulations at 18 Va. Admin. Code § 48-70-50.

The statutory and regulatory requirements are too lengthy to list here, so we will just highlight what appear to be deficiencies in the form submitted with this NFAD. In particular, the Board's final decision failed to include a phone number for the association; a specific description of any specific documents that must be included with the complaint; the date of final determination, the Board's citation(s) to governing documents, statutes, or regulations that were the basis for its decision(s); the association's registration number; a statement specifying the complainant's right to file an NFAD with the Office of the Common Interest Community Ombudsman along with the OCICO's contact information.²

The records relevant to this submission demonstrate that the Board's complaint documents were last updated in March 2013. Since then, the relevant CIC statutory references have changed, and the form's statutory references are now obsolete and incorrect. In her supporting information, the Complainant requested that the Board take action to update its complaint form. Jenks, though, complained that the Board "did not properly adopt an updated complaint procedure. They simply created a form and posted it online."

Associations are clearly required to develop and adopt complaint procedures.³ The provisions of the complaint process must conform to the provisions of Va. Code § 54.1-2354.4 and 18 Va. Admin. Code § 48-70-50. Associations are further required "to certify with each annual report filing that the association complaint procedure has been adopted and is in effect."⁴ These provisions should signify an association's responsibility to maintain and update those procedures for the benefit of its association members. As pointed out below, there are several deficiencies in the complaint process, and we strongly recommend that the Board address those deficiencies promptly.

¹ Complainant provided a supplemental document with her NFAD submission that raised issues with the Board's failure to comply with the statutory and regulatory provisions for issuing a Decision to an association member. This complaint, though, was not presented to the Board as a subsequent complaint to allow them to address this issue, so it is not properly before the Office. The Office, however, noticed these deficiencies as well and will address them accordingly in this determination.

² 18 Va. Admin. Code § 48-70-50.

³ 18 Va. Admin. Code § 48-70-40.

⁴ *Id.*, at subsection (C).

3. Improper Meeting Procedures.

The Complainant alleged that the Board improperly went into executive session during its November and December 2024 meetings. The applicable law, Va. Code §55.1-1816, states in pertinent part:

C. The board of directors or any subcommittee or other committee of the board of directors may (i) convene in executive session to consider personnel matters; (ii) consult with legal counsel; (iii) discuss and consider contracts, pending or probable litigation, and matters involving violations of the declaration or rules and regulations; or (iv) discuss and consider the personal liability of members to the association, upon the affirmative vote in an open meeting to assemble in executive session. The motion shall state specifically the purpose for the executive session. Reference to the motion and the stated purpose for the executive session shall be included in the minutes. The board of directors shall restrict the consideration of matters during such portions of meetings to only those purposes specifically exempted and stated in the motion. No contract, motion, or other action adopted, passed, or agreed to in executive session shall become effective unless the board of directors or subcommittee or other committee of the board of directors, following the executive session, reconvenes in open meeting and takes a vote on such contract, motion, or other action, which shall have its substance reasonably identified in the open meeting. The requirements of this section shall not require the disclosure of information in violation of law.

The only supporting documentation on this issue, which the Board did not address in its final decision, is a copy of the November 2024 meeting minutes and notes from the Complainant. The November 2024 minutes indicated that the Board did properly move to go into an executive session during the open Board meeting. Specifically, it appears, based on the times listed in the meeting minutes, that the executive session took place during the meeting and before adjournment. The minutes further reflect there was a motion to go into executive session, a second to that motion, the identification of items to be discussed, and a unanimous vote in the affirmative. The subjects of the meeting were covenants violations and delinquent dues reports. There are no meeting minutes for December 2024 to determine if an executive session was properly conducted. For this reason, we cannot find that the information here demonstrates that the Board failed to comply with the requirements for entering into an executive session. Thus, we cannot find, based on the records here, that the Board did not comply with the applicable CIC statute.

4. Improper Record Keeping.

The Complainant raised issues with record keeping, particularly with regard to the association's governing documents and budget information. In doing so, however, there are no specific statutory or regulatory citations for which she claims a violation. Further, she indicates in the supporting information for her NFAD that the Articles of Incorporation were updated in November 2024 and that an error on a budget item was corrected, though "proof has yet to be provided to the membership." Jenks, though, asserted that other budgetary items have not been

corrected or disseminated to association members. As noted above, though, without a specific statutory or regulatory citation that was allegedly violated, this issue is not properly before the Office.

5. Deficient Adverse Association Decision.

As noted in the discussion above, the Board's decision issued to the Complainant lacked information that is required to be in its decision to a complaint. The details of what is required for an association complaint procedure are laid out in the Common Interest Community Ombudsman's regulations at 18 Va. Admin. Code § 48-70-50 (8-10). Specifically, once the association makes a final determination, it must, within seven (7) days, either hand deliver or send via certified/registered mail with return receipt requested, the written notice. If the association has established procedures for delivery by electronic means, it can send the written notice electronically within seven days if the association retains sufficient proof of the electronic delivery. Also, the association's notice of final determination is required to 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. Further, the association's notice of final determination must clearly inform the association member of their right to file a Notice of Final Adverse Decision with the Common Interest Community Ombudsman and provide the CIC Ombudsman's applicable contact information.

Here, there is no indication that the Board's final decision was issued within seven days of the Board's decision. The final decision is undated, and it does not state when the Board made its decision. The Board's final decision did not address each of the complaints made by Jenks, and for the issues it did address, it did not include specific citations to the applicable governing documents, laws, or regulations that led to its decisions. Nor did it include the Association's registration number or the license number of the property manager, if applicable. Moreover, the Board's decision lacks a statement of the Complainant's right to file an NFAD with this Office. In sum, the Board's decision was incomplete and clearly failed to comply with this regulation. Moreover, the Board apparently has yet to issue a compliant decision as to the Complainant's complaint dated October 28, 2024.


Decision and Required Actions

As to the Complainant's complaints, based upon the information in the record, including the original complaint, its accompanying documents, as well as the NFAD, this Office makes the following findings and required actions:

- (1) The Board did not initially comply with the provisions of Va. Code §§ 55.1-1807 and 55.1-1815 regarding the Complainant's request for a list of the association membership. As noted above, however, the Board ultimately produced the association membership list to Jenks on or about October 20, 2024;

- (2) The Board's complaint process appears to be outdated and missing information required by the provisions of 18 Va. Admin. Code § 48-70-50. To correct this, the Board needs to review this regulation and ensure that its complaint process is fully compliant with the applicable CIC laws and regulations and correctly cites the current relevant statutes and regulations. This item should be completed within thirty (30) days from the date of receipt this decision;
- (3) There was no indication that the Board violated CIC statutes or regulations regarding the conduct of meetings with regard to entering an executive session. No further action is required for this item;
- (4) There was insufficient information to indicate that the Board engaged in improper record keeping. No further action is required for this item; and
- (5) The Board's final decision was deficient in several respects in terms of the regulatory requirements, as outlined above. We strongly encourage the Board to correct these deficiencies immediately to ensure that it is compliant with the regulation to meet its obligation to its association members.

If the Complainant is dissatisfied with this determination, or part thereof, the Complainant could seek remedies in civil court.


R. Thomas Payne II, Esquire
Interim CIC Ombudsman

RTP II/bt

cc: Board of Directors, Cuckoo's Nest Association