



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Glenn A. Youngkin
Governor

Kishore S. Thota
Director

G. Bryan Slater
Secretary of Labor

December 26, 2023

Complainant: Alan Kennedy
Association: Burgesses Quarters Owners Association
File Number: 2024-01336

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 October 5, 2023. The Association provided a response to the association complaint dated November 28, 2023. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated November 29, 2023 and received December 7, 2023.

Authority

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 §54.1-2354.4 (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 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.

Pursuant to the Regulations (18 VAC 48-70-90), the only documents that will be considered when reviewing a NFAD 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.

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 §54.1-2351 or §54.1-2352 as deemed appropriate by the Board.

This Determination is final and not subject to further review.

Determination

The Complainant alleges that the Association applied pesticide/vegetation killer on his private property without notice or consent. He wrote that the chemicals killed his grass and poisoned his children, pets, and plants. He said that the property manager admitted that "Round Off" (I believe the Complainant meant Round Up) had been applied and that notice had not been provided. The Complainant believes this failure to provide notice is a violation of §55.1-1818¹ of the Property Owners' Association Act.

In addition to the above allegation, the Complainant also wrote that the Association failed to provide him the list of chemicals applied and the lawn care contract upon request. A failure to provide access to the books and records of an association would be a violation of §55.1-1815 of the Property Owners' Association Act.

The Association's final decision noted that the applicable statute only addresses the application of pesticide on common areas, not personal property. However, the Association did write that while the statutory requirement for posting notice is only for common areas, it will post notice in the future when any pesticide is to be applied on any lot or common area. It also stated that this issue has been brought to the attention of the landscaping company.

¹ The association shall post notice of all pesticide applications in or upon the common areas. Such notice shall consist of conspicuous signs placed in or upon the common areas where the pesticide will be applied at least 48 hours prior to the application.

In reference to the contract, the Association stated that it had previously been posted on the website and has been available for some time. As for the request for a list of pesticides applied, either the Association obtained a Safety Data Sheet on the herbicide, and provided it to the Complainant, or the Complainant obtained a copy from the website to which they had directed him. It was unclear from the NFAD whether the Association ever had a copy of this list as part of its books and records.

This was a very unfortunate situation and I understand the Complainant's concerns. It also seems, based on the emails included in the NFAD, that this was something that was done by mistake and both the association and the landscape company are working toward ensuring it does not happen again. Because §55.1-1818 only addresses the application of pesticides on common areas, I cannot find the association to be in violation of that statute. It appears the Association has provided the Complainant a list of chemicals that were applied, in the form of a Safety Data Sheet, or provided direction to where such list could be found. It is not clear to me if the landscape contract was provided or if the Complainant was able to access it online.

Required Actions

If the Complainant has not been able to obtain a copy of the landscape contract, the Association, as required under §55.1-1815, must make a copy available to the Complainant for examination and copying within 14 days of the date of this determination. A failure to do so will result in a referral of this matter to the Common Interest Community Board. The Association can simply provide the Complainant a copy of the contract, or it can set up a time for the Complainant to come to the office and examine and copy the contract.

Please contact me if you have any questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Burgesses Quarters Owners Association