



COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

Terence R. McAuliffe
Governor

November 16, 2016

Todd Haymore
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Lawrence Hertzberg
Association: Vista Pointe Condominium Owners Association
File Number: 2017-00945

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 August 31, 2016. The Association provided a final determination to the Complainant dated September 8, 2016 and the Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated September 28, 2016 and received October 5, 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 Complaint submitted by the Complainant was somewhat unusual in that it was actually a request for access to books and records, with an additional request that if the requests could not be met, that the request be forwarded to the Board of Directors for their consideration. The Association ultimately forwarded the request to their attorney, who provided a written response to the original complaint.

The Complainant had requested copies of the minutes for every board meeting that has taken place since July 31, 2012, a copy of the current reserve study, a copy of all insurance policies, and a copy of the financial report for July 31, 2016 if completed. The Complainant has cited §55-79.74:1, §55-79.75 and §55-79.83:1 of the Condominium Act as his lawful basis for requesting these documents.

The Association, in its response, noted that the Complainant had been provided copies of the minutes from 2012 through 2014 and that minutes from the 2015 meeting had been provided to the Complainant in August of 2016. The Association stated that there was no reserve study and that the Board evaluates reserves on an annual basis. The Association also said that the insurance policies would be made available to the Complainant at the manager's office at a mutually convenient time and location if the Complainant provides a proper purpose for the request. The Association provided its fee schedule for the copies. Finally, the Association stated that the requested financial income information was not yet available.

There is no way for this office to determine if the Complainant received "all" the minutes from the past four years. §55-79.74:1¹ of the Condominium Act requires an association to provide unit owners access to all books and records of the association with certain exclusions that are laid out in the statute. We do not subpoena records, and can only trust the Association to have delivered copies of all minutes of all board meetings since July 2012. As to the request for copies of the insurance policies, the Association is within its right to require a proper purpose for any request for access to the books and records of the Association. Assuming a proper purpose is provided to the Association, copies of the policies should be made available to the Complainant.

¹ [A]ll books and records kept by or on behalf of the unit owners' association, including, but not limited to, the unit owners' association membership list, addresses and aggregate salary information of unit owners' association employees, shall be available for examination and copying by a unit owner in good standing or his authorized agent so long as the request is for a proper purpose related to his membership in the unit owners' association, and not for pecuniary gain or commercial solicitation.

All associations are required, under §55-79.83:1² of the Condominium Act, to conduct a reserve study every five years, unless there is contrary language in the condominium instruments, which did not appear to be the case based on the Association's written response to the Complainant.

Because the Association has not yet completed the financial documents that were requested, they cannot provide them, nor are they obligated to create them in response to a request for them. Once they are complete, the Complainant should be able to obtain copies.

Required Actions

The Association does need to ensure that it has provided all the copies of board meeting minutes that were requested by the Complainant. In addition, unless the Association can show that the condominium instruments provide otherwise, it will need to carry out a reserve study in the very near future. I am hesitant to create a timeframe for doing so, but I will request, minimally, that the Association provides my office with an outline as to when it intends to carry out the reserve study and how it intends to do so, i.e. working with a reserve study specialist, on its own, etc. I will need to receive that outline within thirty (30) days of the date of this Determination. Finally, assuming the Complainant has provided, or will provide you with a proper purpose for requesting the insurance policies, the Association and the Complainant need to work together to determine a mutually agreeable time and location for the inspection and/or copying of the insurance policies.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Vista Pointe Condominium Owners Association, Inc.

² A. Except to the extent otherwise provided in the condominium instruments and unless the condominium instruments impose more stringent requirements, the executive organ shall:

1. Conduct at least once every five years a study to determine the necessity and amount of reserves required to repair, replace and restore the capital components;
2. Review the results of that study at least annually to determine if reserves are sufficient; and
3. Make any adjustments the executive organ deems necessary to maintain reserves, as appropriate.