



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

Brian Ball
Secretary of
Commerce and Trade
Mary Broz-Vaughan
Director

December 4, 2020

Complainant: Christopher O'Donnell and Edmund Willis
Association: Colecroft Station Condominium Unit Owners Association
File Number: 2021-00868

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 July 27, 2020. The Association provided a response the submitted complaint dated September 18, 2020. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated October 7, 2020 and received October 8, 2020.

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. In the event that such a complaint is submitted to this office as part of a NFAD, a determination cannot be provided.

Determination

The Complainant submitted four complaints to the Association. The first complaint alleged that the Association failed to include replacement and repair of common elements in the budget and also that the association had removed budget account codes addressing reserve account balances and planned repair and replacement of common elements from the budget. The Complainant alleges that this is a violation of §55.1-1965(C) (1), (2), and (3)¹ of the Condominium Act. The Complaint also references the bylaws of the Association but as outlined above, this office cannot provide determinations on possible violations of governing documents (condominium instruments).

The second Complaint alleged a failure by the Association to properly fund the reserves for commercial units thus resulting in overspending of reserves for the commercial units. The Complainant believes that the commercial units are not being assessed for their proportional share in the common elements of the condominium. The Complainant believes the underfunding has resulted from a failure by the Association to review the most recent reserve study to determine if reserves are sufficient and to assess commercial owners as appropriate. The Complainant believes the Association is again in violation of §55.1-1965(C) (2) and (3). Allegations related to the bylaws will not be addressed.

No violations of common interest community law were alleged in the third or fourth Complaint.

The Association responded to the first complaint by noting that the three budget codes referenced in the complaint, residential, common and commercial replacement reserves were funded in the 2013-2020 annual budgets and included under existing budget codes. The Association stated that the budget codes will be included for the 2021 annual budget. The Association also wrote that there are three budget codes for expenses for residential, commercial and common replacement reserves and that these codes are updated as expenses occur but are not included in the annual budget.

¹ C. To the extent that the reserve study conducted in accordance with this section indicates a need to budget for reserves, the unit owners' association budget shall include:

1. The current estimated replacement cost, estimated remaining life, and estimated useful life of the capital components as defined in § 55.1-1900;
2. As of the beginning of the fiscal year for which the budget is prepared, the current amount of accumulated cash reserves set aside to repair, replace, or restore the capital components and the amount of the expected contribution to the reserve fund for that fiscal year;
3. A statement describing the procedures used for estimation and accumulation of cash reserves pursuant to this section; and
4. A statement of the amount of reserves recommended in the study and the amount of current cash for replacement reserves.

The Association said that it could not include beginning replacement reserve account balances in the annual budget due to the timing of annual budget approval under the bylaws. The association does include these balances in the monthly financial statement at each board meeting. The Association also wrote that there is no requirement in Virginia law to include planned repair and replacement expenditures of common elements from reserves for each account in the annual budget.

In response to the second complaint, the Association agreed that it “will review the... most recent reserve study... and assess commercial owners appropriately for future repair and replacement of common elements... and that it “has no plans to use residential or common reserve funds to meet commercial reserve expenses.”

I cannot find that the Association is in violation of §55.1-1965(C) based on the information that was provided in the NFAD. The Complainants stated that the Association failed to include language required by §55.1-1964(C). However, there was no final budget included in the NFAD and the only budget materials included were draft documents. As a result, office cannot determine if the association has failed to include in its budget the necessary components set forth in §55.1-1965(C). In addition, the statute does not address funding for common elements but instead pertains solely to the funding of capital components.


As for the allegation that the Association is underfunding the commercial portion of the condominium, I cannot find that the NFAD has provided information that can demonstrate that this is a violation of common interest community law. The portion of the Condominium Act that addresses reserves does not address overfunding or underfunding. The request by the Complainant that the Association review the reserve study can be supported by the law, but there is no obligation under the law to address how the association must delegate its reserves between commercial and residential units. The Association did agree that it would review the reserve study and assess the commercial units properly.

Required Actions

No action is required.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Colecroft Station Condominium Association