



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

June 18, 2021

Mary Broz-Vaughan
Director

Complainant: Constantino Panayides
Association: Lafayette Park Condominium
File Number: 2021-02473

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 March 19, 2021. The Association provided a response to the complaint dated April 22, 2021. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman which was received on May 7, 2021.

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.

Determination

As is always the case, this office will not utilize the documents and additional information provided that were not part of the original complaint to the Association. This has always been the policy of this office since it is unfair to provide either party another bite of the proverbial apple. Only those documents included in the complaint, and reviewed and responded to by the Association, can be considered.

The Complainant has alleged that the Association is in violation of §55.1-1965(B)(1)¹ of the Condominium Act. Specifically, he alleges that the Association has failed to conduct a reserve study in over five years. The Complainant contends that while the Association did commission and obtain a reserve study in 2020, it has continued to utilize the 2015 reserve study for budgeting purposes and provides the 2015 reserve study in its resale documents.

The Complainant also stated that the Association has violated §55.1-1945(B)² of the Condominium Act by not allowing owners to review the reserve study and believes that most owners do not know the document exists. The Complainant does not agree with the Association's decision not to use the most recent reserve study because it found it to be significantly flawed. He believes the Association should have hired an engineer to conduct an additional reserve study before it determined that the present study was flawed. The Complainant does not believe the statute governing reserve studies provides the Association discretion as to its use of a reserve study and whether the reserve study should be considered flawed. According to the Complainant, the Association did tell the owners that it will address its concerns regarding the 2020 reserve study with the engineers who carried out the study or by obtaining a new reserve study. Until that happens, the Complainant believes the Association is obligated to "accept, implement, and utilize the most recent reserve study as is."

The Association responded to the complaint by outlining the reserve study scenario, and noting that it did obtain a new reserve study in August of 2020, which was five years after the prior study. The Association wrote that it reviewed the 2020 study and found it flawed and in need of substantial revision, or that even a new study was required. As a result of its findings, the Association determined that it was not appropriate to use the 2020 study for the 2021 budget. The Association said that it has

¹ B. Except to the extent otherwise provided in the condominium instruments, the executive board shall:

1. Conduct a study at least once every five years to determine the necessity and amount of reserves required to repair, replace, and restore the capital components as defined in § 55.1-1900;

² B. Subject to the provisions of subsection C, all books and records kept by or on behalf of the unit owners' association, including the unit owners' association membership list, and 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. 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 a unit owner association managed by a common interest community manager and 10 business days' written notice for a self-managed unit owners' association, which notice shall reasonably identify the purpose for the request and the specific books and records of the unit owners' association requested.

been transitioning to a new manager and intends to decide how to proceed on the reserve study issue so that it can determine proper reserve contributions for the 2022 budget.

The Association further stated that it followed the requirements under §55.1-1965 when preparing the 2021 budget and did not adjust the reserve contributions due to the flaws in the study. The Association does not believe that the statute requires reserve contributions to be based on a study that is flawed or deficient and considers the board to be “following the mandate of Section 55.1-1965 and its fiduciary duties when it defers adjustment to reserves until it has in hand a study it finds to be adequate.”

In response to the complaint, the Association determined that it will not adopt the 2020 study and will reevaluate this decision by holding discussions with the preparer of the study or it may order a new study. The Association wrote that the study is available to any owner who requests it, and it will include a copy of both the 2015 reserve study and the 2020 reserve study in resale disclosure documents along with a statement explaining the situation.

It seems clear that the Association did have a reserve study done in 2020. Thus I can find no violation of §55.1-1965(B)(1). However, it does appear that the Association has not abided by the requirements under §55.1-1965(B)(2) and (B)(3) since it did not review the results of that study (in this case the 2020 reserve study) and then make adjustments as necessary based on that study. However, this is a somewhat unusual situation in that the Association has said it finds the study it most recently received to be flawed and did not wish to utilize it for the purposes of calculating the 2021 budget. I can understand this concern, but do not find that the statute provides for such a situation since this office can only apply the plain language of the statute.

The allegation that the Association is in violation of §55.1-1945(B) has no merit as no evidence was provided that demonstrated anyone had requested and been denied access to the reserve study. Under common interest community law, the Association is not required to distribute the reserve study to owners and is not required to announce its existence to owners.

I do agree with the Complainant that the Association likely should have included the most recent reserve study in resale documents, but the Association has stated that it will now include both reserve studies along with a statement explaining the situation. I find that sufficient.

The Complainant also alleged that the NFAD had violated common interest community law and the Regulations. Some of the allegations have been addressed in the body of the determination and will not be addressed here. The remaining allegations included the belief that the Association had failed to hold an open meeting, a violation of §55.1-1949(B)³, to discuss the reserve study. No evidence of a meeting

³ B. 1. Except as otherwise provided in the condominium instruments, the provisions of this subsection shall apply to executive board meetings at which business of the unit owners' association is transacted or discussed. All meetings of the unit owners' association or the executive board, including any subcommittee or other committee of such association

was provided, which means this office cannot determine that such a violation occurred. The Complainant also alleges a violation of §55.1-1991(A)(5)⁴, and states that including both reserve studies in the disclosure packet will be confusing for buyers. The Complainant believes the Association should use only the 2020 version of the reserve study. While I can understand the Complainant's concern about including two reserve studies, I believe it is acceptable since the Association will include a statement explaining the reason for including both reserve studies, and at this point, it appears that the Association has no faith in the validity of the most recent reserve study. Including both versions with a statement regarding the reason for doing so seems to provide more disclosure than is technically asked for in the Condominium Act. Providing only the reserve study that the Association believes to be flawed seems disingenuous and would seem a willful choice to provide faulty information to a potential buyer. Clearly, when the Association has resolved the issues with the 2020 reserve study, they can then use only that study for inclusion in the disclosure packet.

Required Actions

I understand the Association is in the process of resolving the reserve study issue by either correcting it or obtaining a new one. It would be difficult for the Association to obtain a new reserve study in a short period of time, but the Association did suggest that it would resolve the reserve study issue prior to the preparation of the next annual budget. To that end, I would ask the Association, within 30 days of this determination, to provide my office a brief letter outlining the schedule for addressing the issues with the reserve study and when its upcoming annual budget will be prepared. Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Lafayette Park Condominium

or board, shall be open to all unit owners of record. The executive board shall not use work sessions or other informal gatherings of the executive board to circumvent the open meeting requirements of this section. The unit owners' association may, to the extent that the condominium instruments or adopted rules expressly provide, send notice by electronic means if consented to by the officer to whom the notice is given. Minutes of the meetings of the executive board shall be recorded and shall be available as provided in § 55.1-1945.

⁴ The current reserve study report or a summary of such report and a statement of the status and amount of any reserve or replacement fund and any portion of the fund designated for any specified project by the executive board;