



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Robert F. McDonnell
Governor

May 13, 2013

James S. Cheng
Secretary of
Commerce and Trade

Gordon N. Dixon
Director

Complainant: Martha Lambert
Association: Sea Oats Condominium Unit Owners Association
File Number: 2013-02881

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 April 1, 2013. The complaint contained three allegations. The allegations were that the Association had denied a request to review/examine records, that the Association had denied repairs to what Complainant believed to be common elements, and that the Association failed to meet open meeting requirements. The Association manager responded on behalf of Association on April 8, 2013 and denied all three allegations. The Notice of Final Adverse Decision was received by this office on April 25, 2013.

Determination

The Office of the Common Interest Ombudsman (OCICO) has reviewed the Notice of Final Adverse Decision (NFAD).

The first allegation is that the Association was improperly assessing charges for the examination of the association books and records in conflict with the Condominium Act. This issue raises an interesting point as many associations currently charge fees for the examination of books and records as well as for copies of books and records. Based on the language of Virginia Code Section 55-79.74:1(B), "all books and records... 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."

Under Paragraph D of §55-79.74:1, there is additional language that states "Prior to providing copies of any books and records, the unit owners' association may impose and

collect a charge, reflecting the reasonable costs of materials and labor, not to exceed actual costs thereof.”

The language in Paragraph B of the code section makes clear that books and records shall be available for examination and copying by a unit owner. There is no mention of a cost involved for such examination or copying. However, it is clear that Paragraph D does allow associations to charge for providing *copies* of any books or records. There appears to be a disconnect as to what constitutes a “copy.” Is a “copy” only something that has been reproduced, i.e. placed on a copy machine for one or multiple copies? Or, is the phrase “providing copies” intended to encompass any hard copy, whether an original or a reproduction, of any book or record that the association may keep as part of its books and records?

From my perspective, the statute is not clear as to the definition of the word copy or copies, and therefore it is not appropriate for me to interpret the statute. Such interpretation is more appropriate for a court and would need to be obtained through some form of legal action.

The second allegation is that the Association is required to pay for repairs to a gate/fence that the Complainant believes is a common element. The Association responded by noting that the original definition of what constituted common elements within the community had been changed when an amendment and restatement to the Declaration was approved and recorded. In this instance, the definition of common elements and limited common elements is defined by the condominium instruments, and therefore this office has no jurisdiction over the matter. No determination will be provided in relation to this allegation.

The third allegation is that the Association held a special meeting without notice to the unit owners. The special meeting, according to the documents provided in the Notice of Final Adverse Decision was to allow the association board the opportunity to adopt a cost schedule for records inspection, as required by law. The Association denied the allegation and stated that in accordance with the Virginia Nonstock Corporation Act (VNCA), the Board can vote by unanimous consent in lieu of meeting as long as the action is ratified at the next Board of Directors meeting. While I agree that the VNCA does provide for such action, the Condominium Act and all common interest community law is very clear in the requirement that meetings be held with notice.

It appears the Association was making every effort to ensure that it had complied with the law in relation to the requirement in the Condominium Act that it must have a Cost Schedule in place prior to providing copies of any books and records. At the same time, I would note that the Condominium Act, §55-79.75 states, “Notice, reasonable under the circumstances, of special or emergency meetings shall be given contemporaneously with the notice provided members of the (i) executive organ or any subcommittee or other committee thereof or (ii) subcommittee or other committee of the unit owners' association conducting the meeting.”

It is my belief that associations should provide notice of all meetings and that they are legally required to provide notice of all meetings. And it does appear that no notice was provided in this case. However, it is not possible to turn back the clock and start over, and in this instance, the Association held a meeting without notice in order to come into compliance with the law rather than for nefarious purposes. My expectation for any future meetings of the Association, whether it is the annual meeting, a board of directors meeting or a special meeting is that all owners be provided notice.

Required Actions

Because the statute related to assessing charges for the examination of books and records is unclear, no action is required of the association and I can only suggest that if the Complainant wishes to pursue further action, she will have to do so through legal channels.

The matter of defining limited common elements and common elements is one that is based on the guidelines provided in the Association declaration and therefore this office has no jurisdiction over this matter.

It does appear that a special meeting was held without notice, and the Condominium Act requires notice for all meetings. While this requirement cannot be applied retroactively, and the purpose of the unnoticed meeting was for the purpose of compliance, the Association must ensure that going forward it provides notice of all meetings to the owners. Any further complaints received by this office that are related to a lack of notice by the Association may be referred to the Common Interest Community Board for whatever action it deems appropriate.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Sea Oats Condominium Unit Owners Association