



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Terence R. McAuliffe
Governor

February 6, 2018

Todd Haymore
Secretary of
Commerce and Trade

Jay W. DeBoer
Director

Complainant: Jeannette Soares
Association: The Belvedere Condominium Unit Owners' Association
File Number: 2018-01662

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, 2017. A second complaint was submitted November 12, 2017. The Association provided a response to the Complainant dated December 14, 2017. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated December 14, 2017 and received December 18, 2017.

Determination

The Complainant submitted seven complaints to the Association in October of 2017 and followed with three additional complaints submitted in November of 2017. The first three complaints pertained to two different Resolutions of the Association: R2017-03 and R2017-04. These resolutions are associated with a major project in the condominium that has required a "further assessment" of the owners and will remove and replace the water supply pipes. In order to carry out this project, the Association will need to enter individual units and remove and reinstall any fixtures that block access to the pipes. The Association has stated that it will remove and reinstall original equipment but not non-original equipment.

The Complainant believes that the Association violated §55-79.42:1(i)¹ by using a "further assessment" to pay to remove and replace fixtures in some but not all units in the Condominium. The Complainant also referenced §55-79.83(A), (B), (D), and (E)² in

¹ Except as expressly authorized in this chapter, in the condominium instruments, or as otherwise provided by law, no unit owners' association may make an assessment or impose a charge against a unit owner unless the charge is (i) authorized under § 55-79.83...

² A. Except to the extent that the condominium instruments provide otherwise, any common expenses associated with the maintenance, repair, renovation, restoration, or replacement of any limited common element shall be specially assessed against the

support of her argument, noting that none of these statutes supports the Association's further assessment. In addition, she referenced the bylaws of the Association and stated that there are no provisions in them that would authorize the assessment.

The Complainant alleged that the Association also violated §55-79.42:1(see footnote 1) when it announced that it would impose a fee or assess a charge against owners who caused delays of the pipe replacement project. In support of her allegations, the Complainant also referenced §55-79.79(A)³ a statute that permits the Association access to units.

The Complainant's allegations related to Complaints one, two and three hinge not only on the law but also on the condominium instruments of the Association. The Complaint itself references the bylaws on several occasions. In addition, §55-79.42:1 (see footnote 1), which is the primary statute referenced by the Complainant in support of her allegations, commences with "[e]xcept to the extent the condominium instruments provide

condominium unit to which that limited common element was assigned at the time such expenses were made or incurred. If the limited common element involved was assigned at that time to more than one condominium unit, however, such expenses shall be specially assessed against each such condominium unit equally so that the total of such special assessments equals the total of such expenses, except to the extent that the condominium instruments provide otherwise.

B. To the extent that the condominium instruments expressly so provide, any other common expenses benefiting less than all of the condominium units, or caused by the conduct of less than all those entitled to occupy the same or by their licensees or invitees, shall be specially assessed against the condominium unit or units involved, in accordance with such reasonable provisions as the condominium instruments may make for such cases. The executive organ may impose reasonable user fees.

D. The amount of all common expenses not specially assessed pursuant to subsection A, B, or C hereof shall be assessed against the condominium units in proportion to the number of votes in the unit owners' association appertaining to each such unit, or, if such votes were allocated as provided in subsection B of § 55-79.77, those common expense assessments shall be either in proportion to those votes or in proportion to the units' respective undivided interests in the common elements, whichever basis the condominium instruments specify. Such assessments shall be made by the unit owners' association annually, or more often if the condominium instruments so provide. No change in the number of votes in the unit owners' association appertaining to any condominium unit shall enlarge, diminish, or otherwise affect any liabilities arising from assessments made prior to such change.

E. Except to the extent otherwise provided in the condominium instruments, if the executive organ determines that the assessments levied by the unit owners' association are insufficient to cover the common expenses of the unit owners' association, the executive organ shall have the authority to levy an additional assessment against all of the units in proportion to their respective undivided interests in the common elements. The executive organ shall give written notice of any additional assessment to the unit owners stating the amount, reasons therefor, and the due date for payment of such assessment. If the additional assessment is to be paid in a lump sum, payment shall be due and payable no earlier than 90 days after delivery or mailing of the notice.

All unit owners shall be obligated to pay the additional assessment unless the unit owners by a majority of votes cast, in person or by proxy, at a meeting of the unit owners' association convened in accordance with the provisions of the condominium instruments within 60 days of the delivery or mailing of the notice required by this subsection, rescind or reduce the additional assessment. No director or officer of the unit owners' association shall be liable for failure to perform his fiduciary duty if an additional assessment for the funds necessary for the director or officer to perform his fiduciary duty is rescinded by the unit owners' association in accordance with this subsection. The unit owners' association shall indemnify such director or officer against any damage resulting from any claimed breach of fiduciary duty arising therefrom.

³ Except to the extent otherwise provided by the condominium instruments, all powers and responsibilities, including financial responsibility, with regard to maintenance, repair, renovation, restoration, and replacement of the condominium shall belong (i) to the unit owners' association in the case of the common elements, and (ii) to the individual unit owner in the case of any unit or any part thereof, except to the extent that the need for repairs, renovation, restoration or replacement arises from a condition originating in or through the common elements or any apparatus located within the common elements, in which case the unit owners' association shall have such powers and responsibilities. Each unit owner shall afford to the other unit owners and to the unit owners' association and to any agents or employees of either such access through his unit as may be reasonably necessary to enable them to exercise and discharge their respective powers and responsibilities. But to the extent that damage is inflicted on the common elements or any unit through which access is taken, the unit owner causing the same, or the unit owners' association if it caused the same, shall be liable for the prompt repair thereof.

otherwise,” and §55-79.83 (see footnote 2) which is referenced in §55-79.42:1(see footnote 1) also begins nearly all its paragraphs with language that requires a review of the condominium instruments; “[t]o the extent the condominium instruments expressly so provide” or “[e]xcept to the extent otherwise provided in the condominium instruments.” Any determination related to these statutes would require a review and interpretation of the condominium instruments which is outside the scope of this office’s authority. As such, no determination can be provided regarding Complaints one and two.

Part of the argument for Complaint number three pertains to the right of the Association to access units as outlined in §55-79.79(A) (see footnote 3) and to make any repairs that may result from damage as a result of such access. The Complainant believes that the Association’s letter stating that an owner may be assessed if he or she delays the pipe project is an unreasonable interpretation of the statute. However, it does not appear that any such assessment has been made against the Complainant and therefore no determination as to whether there has been a violation of common interest community law can be provided. In addition, the statutory language of §55-79.79(A) commences with “[e]xcept to the extent otherwise provided by the condominium instruments” which would preclude a determination by this office, even if an assessment was made due to a delay.

Under the fourth and fifth Complaints, the Complainant stated that an email was sent to owners notifying them that the contractor for the pipe project would remove and replace original fixtures but not non-original equipment. Thus, the owners of such non-original equipment would be responsible for such removal and replacement before and after the project. The Complainant alleged that this was a violation of §55-79.79(A) (see footnote 3) of the Condominium Act and that the Association’s interpretation of that provision was unreasonable and arbitrary. The Complainant also alleged that the Contractor, when removing cabinets and a dishwasher in her unit and failing to replace them inflicted damage on the unit since it is now missing cabinets and is incomplete resulting in a diminished value.

The Complainant alleges in her sixth Complaint that the contractor broke a piece of molding and damaged a toekick when removing two cabinets and a dishwasher. She also wrote that the contractor failed to turn off the shut off valve for the water supply to the dishwasher which caused flooding in the kitchen and damage resulted. The Complainant believes this also to be a violation of §55-79.79(A) (see footnote 3) since the Association failed to repair the damage.

The seventh Complaint was that the Manager of the Association failed to allow the Complainant to post to the virtual community bulletin board in violation of §55-79.75:1⁴. She wrote that she submitted a post to be displayed on the community forum/bulletin board maintained by the Association but the Association emailed her telling her that her post would not be displayed.

⁴ A. The executive organ shall establish a reasonable, effective, and free method, appropriate to the size and nature of the condominium, for unit owners to communicate among themselves and with the executive organ regarding any matter concerning the unit owners' association.

B. Except as otherwise provided in the condominium instruments, the executive organ shall not require prior approval of the dissemination or content of any material regarding any matter concerning the unit owners' association.

The eighth, ninth and tenth Complaints, which comprised the November 2017 Complaint, alleged that a resolution adopted by the Association violated three different provisions under the Condominium Act. As was previously stated in this Determination, this office has no authority to interpret condominium instruments, nor can it make a determination as to whether such documents are valid under common interest community law or regulations.

The Association provided a final determination on all ten complaints. It first addressed the allegations in Complaints one and four, by stating that cabinets had been removed by the contractor for all owners who so desired. In response to the Complaints numbered two and five, which were related to the reinstallation of the fixtures, the Association wrote that it had concluded that it was obligated only for the restoration of original fixtures, but would credit the Complainant \$400.00 to offset the cost of having the non-original cabinets reinstalled. The Association stated that it “believes this is an equitable and proper solution under the circumstances, and considers this solution to fully resolve your complaints in this regard.”

In response to Complaint three, which was related to the Association’s authority to assess charges when a delay in the pipe project is caused by an owner failing to provide access or to cooperate, the Association noted that the Complainant had not been assessed such a charge and therefore lacked standing to complain. The Association further noted that it has authority under the Bylaws to make such a charge against an owner.

In response to Complaint six, which was about damage to the toekick, molding and refrigerator surround, with the Complainant alleging that the Association refused to pay for the damage, the Association wrote that it has been trying to work with the Complainant to repair the molding and had ordered molding but it had been rejected by the Complainant. The Association also noted that it is not clear who caused the damage to the toekick and refrigerator surround and whether there is such damage, and if so, whether it may have pre-existed the fixture removal.

The Association responded to the seventh Complaint, which alleged a refusal to permit the Complainant to post on the Association’s BuildingLink system by noting that there is a communication policy in place for the Association and that posts by residents are to be placed on the physical bulletin board. The Association further noted that the Complainant is free to post on the bulletin board in compliance with the communication policy.

Complaints one, two, three, four, five, eight, nine, and ten are not appropriate for review by this office as they either require the review and interpretation of condominium instruments in order to provide a complete determination on the subject or they allege that a condominium instrument violates the common interest community law. This office can neither review nor interpret the condominium instruments of an association. I would note, however, that the Association appears to have removed the fixtures to gain access to the pipes, and therefore Complaint one and four are moot. The Association also provided the Complainant a sum of money for the reinstallation of her fixtures.

Complaint three, pertaining to assessments for delays appears to be moot. The Complainant does not allege that she was charged an assessment for a delay and thus there is no reason to review this issue further as we have no authority to review the Resolution that requires such an assessment, and we cannot interpret the Resolution since it is part of the condominium instruments.

Complaint six is one that we simply have no capacity to determine. The responsibility for damages in the unit, the extent of the damages, and the proper repairs to be made are outside the scope of what this office can provide. While §55-79.79(A) does require that any damages made by an association if it enters a unit be repaired, there is no way for this office to determine what damage may have been caused by the Association as a result of the contractors and what damage may have pre-existed. We also have no capacity to determine if the repairs are sufficient and appropriate. Based on the Association's response to the Complainant, it appears that it has been attempting to repair the damages it believes the contractor may have caused and there is disagreement as to several other repairs. Unfortunately, this is a civil law matter rather than one for which we can provide a determination.

The Association does not appear to have violated the Condominium Act in relation to Complaint seven. While it may not have posted the information requested by the Complainant, based on the information provided in the response, the Complainant failed to follow the Communication Policy but was told that she could place her post on the physical bulletin board of the Association.

Required Actions

No action is required of the Association.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
The Belvedere Condominium Unit Owners' Association