



# COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Terence R. McAuliffe  
Governor

September 21, 2017

Todd Haymore  
Secretary of  
Commerce and Trade

Jay W. DeBoer  
Director

Complainant: Mathias Neumann  
Association: Bluewater Property Owners Association  
File Number: 2018-00772

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*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.*

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## Complaint

Complainant submitted a Complaint to the Association dated June 16, 2017. The Association provided a final determination to the Complainant dated August 11, 2017 and the Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated August 31, 2017 and received September 1, 2017.

## 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 Complainant has alleged a violation of §55-514.1 of the Property Owners Association Act which is a statute that requires an association to perform a reserve study every five years, and outlines the information that must be included in the annual budget regarding any reserves.

Specifically, the Complainant believes that a marina that was included in the reserve study should be removed from the study. The Complainant argues that the marina is “in essence a private amenity that is only used and accessed by a small portion of the community.” He believes that because it was intended to be self-funding, the marina capital components should not be commingled with the common areas included in the reserve study. The Complainant further states that “the marina is not part of the POA common area because the marina is not available to be used by the entire membership.”

The Association responded to the Complaint by noting that the marina is a capital component of the association, is managed by the association and is for the enjoyment of the association members and licensees. The Association also wrote that the marina is a capital component as stated in the bylaws and covenants of the association.

The Complainant included additional information in support of his allegations, but because they were not part of the original complaint to the association and thus the association has not had, nor will it be provided, an opportunity to respond, the additional information will have no bearing on this Determination.

The definition of a common area, as set forth in the Property Owners' Association Act under §55-509 is “property within a development which is owned, leased or required by the declaration to be maintained or operated by a property owners' association for the use of its members and designated as common area in the declaration.” The designation of common area is generally set forth in an association's governing documents and the responsibility of an association to maintain or operate such common areas is also contained in the governing documents. Without reviewing the governing documents of the Association, which this office cannot do, there is no way to determine if the marina was designated a common area in those governing documents and therefore whether it is appropriate for the marina to be included in the reserve study.

The reserve study, as required by §55-514.1, must be conducted at least once every five years and is intended to determine the reserves (if necessary) to repair, replace and restore the capital components of an association. §55-509 of the POA Act defines capital components as “items, whether or not a part of the common area, for which the association has the obligation for repair, replacement or restoration and for which the board of directors determines funding is necessary. Again, the issue is whether the association is obligated, under its governing documents, to repair, replace or restore the

structures and other items contained in the marina. As with the definition of common areas in an association, the only true test for determining the responsibilities of the association to repair, replace or restore would be by reviewing the governing documents.

Because this office has no authority to review the governing documents of the Association, and therefore cannot determine what comprises a common area or a capital component in this particular association, we cannot issue a determination on this matter.

Required Actions

No action is required.

You are welcome to contact me if you have any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Heather Gillespie".

Heather S. Gillespie  
Common Interest Community Ombudsman

cc: Board of Directors  
Bluewater Property Owners Association