COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

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September 17, 2024

Complainant: Andrew Melhuish and Cheryl Kast
Association: Eclipse on Center Park Condominium Homeowners Association
File Number: 2024-02149

DETERMINATION - NOTICE OF FINAL ADVERSE DECISION

Introduction

This matter came before the Office of Common Interest Community Ombudsman ("Office") for review on March 28, 2024, as a result of the Notice of Final Adverse Decision ("NFAD") submitted by Andrew Melhuish and Cheryl Kast ("Complainants"). The Complainants initially submitted a complaint to the Eclipse on Center Park Condominium Homeowners Association Board of Directors ("Board") on December 29, 2023. The Board issued a final decision regarding their complaint on March 1, 2024. Therefore, the NFAD was timely filed and within the jurisdiction of this Office, which has been designated to review final adverse decisions and determine if the decisions conflict with laws or regulations governing common interest communities.

Issues to be Decided

The Complainants raise a single allegation - whether the Board is properly allocating the costs of common elements in accordance with the provisions of Va. Code §§ 55.1-1917 and 1918. This is quite a complicated issue, and the Office is limited to the information before it. As explained below, the Office finds that, based on the limitations of the information presented with this NFAD complaint, it cannot determine whether the Association's reallocation based on par value was consistent with the provisions of the Virginia Condominium Act.

Authority

In accordance with its regulations, the Common Interest Community Ombudsman (CICO), as designee of the Agency Director, is responsible for determining whether a "final adverse decision may be in conflict with laws or regulations governing common interest communities." (18 Va. Admin. Code ("VAC") § 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 of the Code of Virginia of 1950, as amended ("Va. Code") 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 our procedure, and we cannot provide a determination on such a complaint. Common interest community law is limited to the Virginia Condominium Act, the Property Owners' Association Act, and the Virginia Real Estate Cooperative Act.

The only documents that will be considered when reviewing a NFAD, in accordance with Regulation 18 VAC 48-70-90, are the association complaint submitted by a complainant to the association (and any documents included with that original complaint), the final adverse decision from the association, and any supporting documentation related to that final adverse decision. Other documents submitted with the Notice of Final Adverse Decision cannot be reviewed or considered. Further, this Determination is final and not subject to further review or appeal pursuant to Va. Code § 54.1-2354.4(C).

If, within 365 days of issuing a determination that an adverse decision is in conflict with laws or regulations governing common interest communities we receive a subsequent NFAD for the same violation, the matter will be referred to the Common Interest Community Board to take action in accordance with Va. Code §54.1-2351 or §54.1-2352 as deemed appropriate by the Board.

Determination:

The issue to be determined here is whether the allocation imposed on the complainant's condominium unit, #1150 which they describe as a 1,287 square foot, two-bedroom unit, is consistent with the statutory provisions for allocations and reallocation of interest in the common elements among unit owners based on par value. The information provided with this complaint includes an amendment to the Eclipse on Center Park Condominium's Instruments, including at Exhibit B the Common Element Interest Schedule (the "Schedule") that assigns par value and percent interest in common elements for the units in Phases 1 and 2.[1] The Schedule assigns Unit #1150, the complainant's unit, a par value of 1462 and a 0.0030% interest in common elements. The complainants assert this is inequitable since their unit is much smaller than similarly assessed units. In particular, the complainants point to Unit #1148, which they assert is a 2,058 square foot unit. In the Schedule, Unit #1148 also has a par value of 1462 and a 0.0030% common element interest. The schedule refers to both Unit #1150 and Unit #1148 as "Penthouse – Large" in the Unit Type column.

The Virginia Condominium Act provides that associations my allocate each unit an undivided interest in the common elements in proportion to either the size or par value of each

[1] We note that this document and its exhibits were recorded with the Arlington County Circuit Court Clerk's Office on June 20, 2007, and as such, are publicly available through that office.

unit. *See,* Va. Code § 55.1-1917.A. For condominiums that have convertible land or can be expanded, however, the condominium declaration cannot allocate the undivided interests in the common elements based on par value "unless the declaration:

> 1. Prohibits the creation of any units not ***substantially identical*** to the units depicted on the plats and plans recorded pursuant to subsections A and B of § 55.1-1920; or
>
> 2. Prohibits the creation of any units not described pursuant to subdivision B 6 of § 55.1-1916, in the case of convertible lands, and subdivision C 12 of § 55.1-1916, in the case of additional land, and contains from the outset a statement of the par value that shall be assigned to every such unit that may be created."

See, Va. Code § 55.1-1918.A (Emphasis added).

The statutory definition of "par value" requires "substantially identical" units to be assigned the same par value, but it further allows that "units located at substantially different heights above the ground, or having substantially different views, or having substantially different amenities or other characteristics that might result in differences in market value may be considered substantially identical within the meaning of §§ 55.1-1917 and 55.1-1918." *See,* Va. Code § 55.1-1900.

In light of the above statutory provisions, it is clear that one cannot determine whether units are "substantially identical" based on square footage measurements alone. Unit height, views, and other amenities or characteristics can vary between units that are deemed "substantially identical." The information provided with this NFAD complaint, though, is almost exclusively based on unit square footage to support the allegation that the par value for units were not determined in accordance with the above statutory framework. In "Schedule 1" of the complaint, at pages 3-4, Complainants discuss in paragraph 2 the differences in square footage between Unit #1148, Unit #1119, and Unit #1150. Similarly, on page 5 of Schedule 1, there is a chart that compares the par value and square footage of various units. But neither there nor elsewhere in this complaint is there information regarding any other characteristics of the units that could determine whether the units are "substantially identical" despite some significant differences in square footage.[2] Therefore, the Office cannot determine whether the par value assessment is consistent with the provisions of the Virginia Condominium Act.

Notwithstanding the above, the Office noticed language in the original condominium declaration that appears inconsistent with the statutory provisions regarding reallocations. Specifically, the original declaration uses the phrase "reasonably compatible" in language for expanding the condominium found in paragraph XXIII(j) on page 17. This is significant because Va. Code § 55.1-1918 prohibits reallocation based on par value unless units are "substantially identical." As noted above, though, the statutory definition clearly states that units may have

[2] The Office further notes that the actual determination of whether differing units are nonetheless "substantially identical" under the Virginia Condominium Act is a highly fact-specific determination that is best suited for civil court and is beyond the purview of this Office.

"substantially different amenities or characteristics" than other units in the condominium but nonetheless still be "substantially identical" within the meaning of that term for purposes of the application of Va. Code §§ 55.1-1917 and 1918.

Ultimately, we cannot determine, based on the little information presented here, whether the association has acted inconsistently with the provisions of Va. Code §§ 55.1-1917 and 1918. In fact, such a determination is most likely one that should be conducted by a civil court through a complete presentation of evidence that is beyond the statutory authority bestowed upon this Office.

Conclusion

As to the Complainant's allegations, based upon the information in the record, including the original complaint, its accompanying documents, as well as the NFAD, this Office cannot conclude that the Board violated the applicable law. Specifically, while we note that the language in the Association's declaration – "reasonably compatible" – is likely not synonymous with the term used in Va. Code § 55.1-1918 – "substantially identical", we cannot determine whether the association's reallocation included units in Phase 2 that were "not substantially identical" to the units in Phase 1 given the statutory definition of "substantially identical." In fact, such a determination should be made by a civil court, not through the NFAD process.

If the Complainant is dissatisfied with this determination, or part thereof, the Complainant could seek remedies in civil court.

R. Thomas Payne II, Esquire
Acting CIC Ombudsman

cc: Board of Directors
Eclipse on Center Park Condominium Homeowners' Association