COMMON INTERESTS

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SEGANMASON.COM | 703.354.9170 | FIRM@SEGANMASON.COM | ANNANDALE, VA

"Reserve-ations" Required... The Budget just got BIGGER

by ROBERT J. SEGAN

When your budget for the upcoming year is completed, both the Virginia Condominium Act and the Virginia Property Owners Association Act not only require that you make it available to the owners but now with some additional disclosures. Some association governing documents require that you actually send it to each owner. Whether you make the budget available to the owners or mail it, it is important to remember some additional provisions the General Assembly requires of associations regarding reserve disclosures in the budget. This means that the disclosures below need to be adopted by the Board as a part of your budget and not merely included in the cover letter when it is sent to the owners.

The following information must be incorporated as part of the budget:

1. The current estimated replacement cost, estimated remaining life, and estimated useful life of the Association's capital components.

You can obtain this information from the most recent reserve study. For some associations that have many capital components, attempting to attach all relevant pages may not be practical. In that instance, providing the link to the most recent reserve study on the association's website as well as making a full copy available for review by contacting the community manager should satisfy this requirement.

2. As of the beginning of the fiscal year for which the budget is prepared,
   - The current amount of accumulated cash reserves set aside to repair, replace, or restore the capital components and
   - The amount of the expected contribution to the reserve fund for that fiscal year.

   If you provide the budget to owners before the fiscal year begins (as most associations do), you will of course not know for sure the "current amount" of accumulated reserves as of the beginning of the budget's fiscal year. You may have an unanticipated expenditure from reserves between the time the budget document is completed and the beginning of the fiscal year. Therefore, you should note what you expect the amount to be at the beginning of the next fiscal year.

   The amount of expected contribution to the reserve fund should be a line item in your budget.

3. A statement describing the procedures used for estimation and accumulation of cash reserves pursuant to this section.

   The reserve study provides a financial analysis that outlines the procedures and assumptions used to recommend the amount necessary to deposit into reserves each year. The relevant

sections from the reserve study should be summarized and included as part of the budget.

4. A statement of the amount of reserves recommended in the study and the amount of current cash for replacement reserves

This should be fairly easy to disclose. The amount of reserves recommended in your reserve study for the beginning of the upcoming fiscal year can be easily obtained from the study. The actual amount of the "current" cash reserves for replacements depends upon what is meant by "current." For those associations without crystal balls to forecast the future, the amount inserted will be the balances obtained as of the date the budget is issued. Make sure to disclose that the balance is as of "x" date. Additionally, if an estimate can be made as to what the expected balance will be on the date the fiscal year begins, include that figure as well with the added caveat that it is an estimate based on the assumption that there will be no further withdrawals from the reserve fund prior to the beginning of the next fiscal year.

When preparing these disclosures, keep in mind the spirit of the statutory changes. The intention is to provide relevant information needed to determine if an association is financially healthy. To give an example, if the reserve fund has a balance of $1,000,000 but next year, the association needs to replace the roof that will cost $2,000,000, an owner or future owner needs to understand that a special assessment is probably coming to a neighborhood near them. It is advisable to contact your association's legal counsel to ensure that the statutory requirements are satisfied before finalizing the budget.

LAST YEAR / TODAY

Time for a Quick Re-Cap of the Latest Ombudsman Determinations

by WILLIAM B. MASON, JR.

We start this review with resale disclosures. The complaint charged that the association failed to disclose any outstanding loans owed by the association in the budget. The Common Interest Community Ombudsman (CICO) concluded that only one loan for approximately $44,400.00 had been detailed in the "President's Message." The Condominium Act requires the disclosure of all outstanding loans and the association was urged to follow these disclosure requirements in the future and was warned to respond to any future complaints by following the procedures set forth in the Common Interest Community Ombudsman Regulations.

Associations are statutorily required to conduct a reserve study every five years. But, the Condominium Act, for example, does not "address how one must determine when the five years between reserve studies begins and ends," notes the CICO. In this particular complaint, the reserve study began in one year but was completed the following year. The CICO opined that "until a final version of a reserve study is received, I do not think we can consider the five-year clock to have started ticking." (There is much more on reserve studies and budget disclosures in our firm newsletter so please refer to our related article).

And now this…two toilets. The association was alleged to have violated the Condominium Act when it spent association funds to repair two faulty—but private—toilets. It was a given that these two toilets were responsible for a disproportionate of the condominium project's water usage and common expense. However, the association promptly wiped the slate clean by removing the charges from the association's books and shifting the repair costs back to the owners. The association was merely issued a "warning ticket" by the Ombudsman and cautioned against the future misuse of association funds.

And now. Books and records. Is this still a thing? Yes…it will always be a "thing" and now there is the "Karyn Variant"—may I see (all) your books and records for my "internal audit." One complainant argued that the association was hiding all the books and records specifically related to an agreement between the association and neighbor regarding lot improvements. The CICO acknowledged that by law the association was not obligated to provide documents that were part of an owner's file and also noted that the statute does not "provide any clarification" on how this determination is made. Therefore, the CICO added, the decision is "largely at the discretion of an association's board of directors."

In another case…Upon remedying an owner complaint registered with the CICO, the association apparently decided it could then ignore the Ombudsman Regulations requiring a written response. The CICO

admonished the association and suggested that the association familiarize itself with the state law governing associations…or be transferred to the Common Interest Community Board ("CICB") in the future. This is the equivalent of the Middle Ages' Tower of London. It's not a nice place to visit and bad things can happen there, including investigations, injunctions, and monetary penalties.

Following a national trend; there were complaints about allegedly stolen elections. The owner declared that the association failed to appoint an elections committee as required by the governing documents, thus "depriving" the owner of the right to serve on the board, and further asserted that the existing directors "were not properly elected." The CICO refused to debate the issues since the CICO's enabling law did not vest it with authority to review potential violations of the governing documents and the Virginia Nonstock Corporation Act.

The CICO, acting in harmony with the statutes and the apparent wishes of the Virginia General Assembly, does not provide interpretations of a particular association's governing documents, such as the declaration or bylaws. The CICO only has the authority to require that community associations comply with laws or regulations related to common interest communities.

Pedaling right along…it was uncontested that this owner's bicycle was stolen. The owner requested to examine the association's security video surveillance over a four-day time frame in hopes that the thief might be identified. The parties went "round and round" about the proper request form and the payment of upfront inspection fees—which is unremarkable—but the CICO's comments about the scope of those costs is not. The books and records statute, the CICO noted, specifically its cost provisions, is limited to charging for providing copies of books and records and does not allow "for charging hourly fees to supervise the review" of those books and records.

The same association also allegedly "stifled" unit owner dialogue on its Building Link website by blocking comments it considered defamatory or that shared "misstatements." The CICO noted that Building Link was the association's "chosen" method for complying with the statutory requirement to provide a means for owners to communication among themselves without prior approval. The CICO was "unconvinced" that the association could block communications deemed to be defamatory or misstatements. The "required action" by the CICO was to effectively block prior association approval, or in short, stifle yourself!

It's like this at the CICO's office; you can't just skate by and dismiss the CICO's non-binding determination (remember, there is still a possible referral to the Tower). Sometimes, various complaints resulted in homework being assigned by the CICO to one party. For example, "make me a list of documents the association failed to provide." And, back to our statutes requiring associations establish a free, effective, and reasonable means of communication, "I ask the association to consider its options and provide this office with a written plan for meeting the [statutory] requirements" within thirty days. That's right, there are due dates too.

And now, the complainant, who was also a member of the board of directors, alleged seven separate issues ranging from (1) violations of the architectural guidelines and a leaning tree, (2) that the office manager failed to provide complaint forms to the board, (3) that the owner had not been provided with books and records to complete the owner's "internal audit," (4) an updated board meeting agenda was not provided, (5) that the nomination committee did not make any mail it received from candidates available for owner review and failed to have a meeting, (6) that the nominations committee did not provide responses to questions about the nominations, including candidate bios or their given reason for running for the board and (7) and the board did not respond to an information request regarding a loan that was obtained for a building.

Just a big "YII S!" about everything going on there! It was not clear from the response what documents had been provided by the association and so

the CICO asked the complaint to create a list of documents that had not been received or examined. As to the complainant's several questions, the CICO observed: "Certainly, it is always polite to respond to questions, but it is not legally required."

And now, board agenda packets. Noting that the association maintained that its board agenda packets had been made available for inspection by the members—rather than "sent" or "posted" - the CICO acknowledged that the association "is correct that there is no requirement under the law to disseminate the agenda packets and other meeting material." In the not too distant future—or yesterday—associations may be able to "post" the board agenda packets on the community website to avoid these inquiries, or make an electronic copy, and simply click "send." It is not required by law but is may be the "polite" thing to do.

The main complaints this past year concern "secret meetings." If it feels like there have been more complaints posted than usual lately, there have! While things are bad now, they could get a lot worse in the future. The days of secret candlelight meetings at the community center are being slowly snuffed out. Virginia now has an electronic meeting statute. And yes, there is an opportunity for a lot of good things there, but if you're thinking this automatically means more member participation and more transparency, just maybe you should think again, because it's a lot easier to be secret in cyber space. Recent (real) example: "We can skip the "membership comment period?" Why? Because we didn't "invite" anyone but board members. Just because a meeting is in cyberspace instead of a meeting place doesn't mean the legal requirements can be dodged This trend—if it is one— is not good.

One owner complained that the board failed to provide notice of a meeting where owners could comment on the funding of a proposal for community benches, to which the association responded that it already had authority to fund the benches. The CICO noted that it was not clear if the association took action based on its existing bylaws—one of the governing documents which is outside the CICO's bailiwick—or an action

based on its existing bylaws—one of the governing documents which is outside the CICO's bailiwick—or an action without a meeting under the Virginia Nonstock Corporation Act—which is also not within the CICO's jurisdiction. "Without evidence of a meeting taking place, this office cannot find the Association failed to provide notice of a meeting."

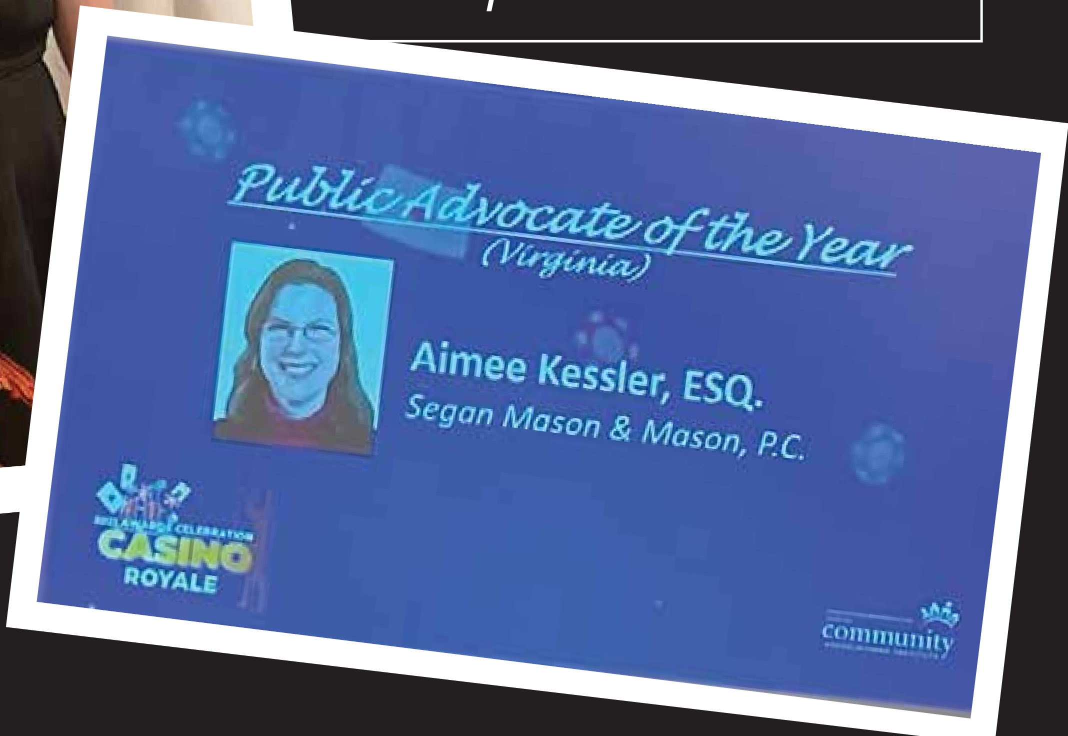
This complaint – failure to provide notice of a meeting which may or may not have taken place – does appear to be a trend. One complaint claimed that notice of board meetings and committee meetings had been requested under the statute. The association argued that there had been no committee meetings and there was no evidence to the contrary. Again, the CICO wrote that "there is no way for me to determine if any committee or subcommittee meetings have been held and whether the Complainant was not provided notice of such meetings."

And you have to love this…an owner alleged that there were several meetings but did not produce any evidence of specific examples of when or what meetings were held to establish that they failed to receive notice. Replied the CICO, "being unaware of a meeting does not necessarily translate to an association failing to provide notice of a meeting."

Well folks…that's our recap of the Ombudsman's decisions for late 2020 through 2021. Stay tuned for our next review of our favorite Final Determinations.

Congrats Aimée!

Public Advocate *of the* Year



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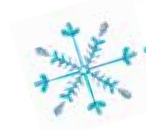

Wishing you and your family a Peaceful & Beautiful

Holiday Season!