Fairlington Villages
A Condominium Association

April 3, 2020

To Fairlington Village Unit Owners
to Each Unit via USPS April 2020
Arlington, VA 22206

Re: Egress Window Legal Opinions

Dear Unit Owner:

During the past few years Fairlington Villages' Board of Directors (Board) has received requests to install "egress windows" in the basement rooms of town homes and multi-unit buildings. Many of these rooms, which are legally characterized as "dens" at Fairlington Villages, are being used instead as "bedrooms." Arlington County and the City of Alexandria require bedrooms to meet Building Code Safety Specifications, including an egress window of specified dimensions that allows occupants in the room an avenue of escape other than the door in the event of an emergency.

Recognizing the serious implications of modifying existing structures to accommodate "egress windows," the Board established a consultative decision-making process. At the October 2, 2019 meeting of the Board, President Terry Placek announced the formation of the "Egress Window Working Group" (EWWG) to assist the Board in developing a formal policy on egress windows. She also announced the Board's consensus to table two (2) "egress window" requests that were pending before it and to put a hold on any further requests until the Board approved and published a formal egress window policy.

A list of actions to be completed under the EWWG Charter included obtaining formal Opinion from Legal Counsel. Management requested the Opinion from Fairlington Villages' Legal Counsel, Mr. Peter K. Stackhouse, Esq., on whether the Board had the requisite authority to change a portion of the Condominium's common elements by: 1) recharacterization (e.g. converting portions of the common elements of the condominium to a limited common element for the exclusive use of a unit), 2) through an easement giving possessory rights, or 3) a license authorizing rights of use.

Mr. Stackhouse's Opinion (Attachment A) was received on January 14, 2020. In it, Mr. Stackhouse advised that "as a basic rule of condominium law, general common area cannot be converted into limited common area and all unit owners have the right to use general common area while limited common area may be used exclusively by an individual unit owner [for example] as a back yard, patio, etc." Based on his review of the Virginia Condominium Act, judicial precedent, and Fairlington Villages' By-Laws and Declaration, he concluded that the Board does not have legal authority to grant a variance to a limited number of unit owners who want to expand their existing window wells into the [general] common area of the Association. Because the EWWG was scheduled to meet January 27, and that meeting would occur before the Board had any opportunity to discuss the Opinion, Management recommended the Working Group's activities be *temporarily* suspended so it could be taken up at the February Board meeting.

The Board discussed Mr. Stackhouse's Opinion at its February 5 meeting. Because Mr. Stackhouse concluded that the Board did not have the authority required to adopt a policy favorable to egress window installation and because of the importance of this subject to the community and unit owners, the Board requested second opinions from two well-established common interest community lawyers.

The first Opinion (Attachment B), was received on March 4 from Mr. Wil Washington, Esq., a Principal at Chadwick Washington Moriarty Elmore & Bunn, PC. Mr. Washington concluded that "Pursuant to a careful review of the Declaration [Master Deed] and Bylaws of the Association, it is our opinion that the Board of Directors lacks authority to create limited common elements, reserved common elements or to grant easements to unit owners over the general common elements for the benefit of unit owners who seek to have egress routes created from their units through the expansion of their basement windows."

The second Opinion (Attachment C) was received on March 12 from Ms. Lucia Anna Trigiani of MercerTrigiani. It is Ms. Trigiani's professional opinion that an argument could be made to defend the Board should it conclude it had authority to adopt a policy favorable to the installation of egress windows, but that it would be expensive to the Association. It is also Ms. Trigiani's opinion that because the vetting required for a policy of this magnitude and for a community Fairlington Village's size would necessarily include multiple, additional reviews and consultations with one or more structural engineers, the Association's certified public accountant, and attorneys, the cumulative costs would, under a cost-benefit analysis, in all probability be cost-prohibitive.

Given the advice of these three (3) seasoned, experienced and established lawyers in the common interest community field, the Board concludes that its only viable option is to establish a policy disallowing requests to modify the common elements of the Condominium (e.g., a building's foundation and the land outside the building around existing and proposed windows) or requests to allow exclusive use by a unit for the installation of egress windows because it does not appear that the Board has the authority to grant such requests under the Association's Declaration and Bylaws, the Virginia Condominium Act, and Virginia judicial precedent. In addition, both the costs to defend against a challenge to a Board decision to adopt a favorable policy and the costs required by the complexities of a favorable policy, including research, consulting, and all other elements of vetting, are equally prohibitive.

The Board further concludes, upon review of the legal advice, that the ***safest and least expensive*** avenue toward a policy favorable to the installation of egress windows at Fairlington Villages requires formal amendment to the Association's Bylaws, pursuant to Article XIV, Section 1:

(a) "By a vote of the owners of sixty six and two thirds (66-2/3%) Percent of the Undivided Interest in the Common Elements at any regular or special meeting, provided that notice of the proposed amendment shall have been given to each Unit Owner at least twenty one (21) days in advance of such meeting; or
(b) Pursuant to a written instrument duly executed by the owners of at least sixty-six and two thirds (66-2/3%) of the Undivided Interest in the Common Elements."

The process for such amendments is lengthy and dependent upon many variables. *It requires the agreement of at least two-thirds of Unit Owners, calculated using each individual unit's percentage interest (par value) in the Condominium, to proceed.* Because two thirds of the total par value in the Association must agree to changes, the Board does not believe the time and extraordinary expense of attempting to amend the Bylaws is warranted or justifiable at this time.

Sincerely,

S/

Terry L. Placek, President
Fairlington Villages Board of Directors

Attachments: 3 Legal Opinions

PETER K. STACKHOUSE, ESQ.
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January 13, 2019

Unit Owners Association of Fairlington Villages
c/o Greg Roby
General Manager
3001 S. Abington Street
Arlington, Virginia, 22206

Dear Board of Directors of the Association:

Greg Roby recently asked me for a legal opinion concerting whether the Board of Directors of the Association has the legal right to convert general common area within the condominium complex into limited common area for the purpose of allowing egress windows that require window wells that are larger than the existing window wells and which would encroach on to the common area of the Association.

As a basic rule of condominium law, general common area cannot be converted into limited common area and all unit owners have the right to use general common area while limited common area may be used exclusively by an individual unit owner as a back yard or a patio, etc.

While there may be some situations where the Association Board of Directors can convert general common areas to limited common areas, it would be rare and certainly not available to the limited number of individuals who might want to convert general common area to limited common area in order to expand the size of their window wells for the purpose of meeting the code requirements for egress windows.

Therefore, based on the circumstance of whether the Board has the legal authority to grant a variance to a limited number of unit owners who want to expand their existing window wells into the common area of the Association, it is my legal opinion based on the Condominium Act, judicial precedent and a review of the Fairlington By-Laws and Declaration that the Association Board does not have such authority.

If there are questions concerning this opinion letter, please contact me.

Sincerely,

Peter K. Stackhouse

Wilbert Washington II
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March 4, 2020

Via Email

Board of Directors
Fairlington Villages Condominium
c/o Gregory D. Roby, JD, CMCA,® PCAM®
Senior Vice President - Field, Legum & Norman
General Manager
3001 S. Abingdon Street
Arlington, VA 22206

Re: Board Authority - Window Egress Routes

Dear Directors:

Chadwick, Washington, Moriarty, Elmore & Bunn, P.C. has been asked to offer its opinion concerning whether the Board of Directors is authorized to create limited common elements for the benefit of unit owners who wish to install egress windows in lower level units. As explained more fully below, the Board of Directors does not have authority to facilitate the installation of egress windows by converting general common element property into limited common elements for the benefit of select unit owners.

The Board derives its authority from the language in the Declaration and Bylaws of Fairlington Villages, a Condominium Unit Owners Association and the Condominium Act. We have reviewed of the scope of the Board's authority in the Association's governing documents, the Condominium Act and applicable decisions of the Virginia courts. As you have likely heard, the Virginia Supreme Court has taken a markedly conservative and narrow view of the scope of a Board of Directors' authority lately. The Virginia Supreme Court has repeatedly ruled that an association's authority is as stated in its governing documents without embellishment or generous inferences. *See, e.g.*, *Shadowood Condominium Association v. Fairfax County*

Redevelopment and Housing Authority.

There are many tools available in some associations to provide a Board of Directors with authority to convert general common element property into property for the exclusive use of a unit owner. Some associations provide express authority to designate general common elements as reserved common elements. Some associations have governing documents that authorize the Board to grant easements to owners over portions of the common elements. Other associations have documents that authorize the Board of Directors to designate portions of the general common elements as limited common elements. Fairlington Villages' governing documents do not provide authority for the Board of Directors to reserve common elements for owners, redesignate common elements for unit owners nor grant easements over the common elements for the exclusive use of unit owners.

All of the unit owners own an interest in all of the general common elements as tenants in common. When the Condominium was created, the Condominium Act requires that all limited common elements are to be referenced in the Declaration or shown on the plats. No other limited common elements are to be created absent express authority. All unit owners have a right to rely on the terms of the Declaration regarding the existence and location of all of the units, general common elements and limited common elements. The Board of Directors cannot strip the unit owners of their property interest in the general common elements absent express authority.

Pursuant to a careful review of the Declaration and Bylaws of the Association, it is our opinion that the Board of Directors lacks authority to create limited common elements, reserved common elements or to grant easements to unit owners over the general common elements for the benefit of unit owners who seek to have egress routes created from their units through the expansion of their basement windows. If you have any questions regarding this opinion, I will be happy to address them with you.

Sincerely,

Wilbert Washington II

MERCERTRIGIANI

Lucia Anna Trigiani
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March 12, 2020

VIA ELECTRONIC MAIL

Gregory D. Roby, JD, CMCA, PCAM
Senior Vice President – Field
General Manager
3001 South Abingdon Street
Arlington, Virginia 22206

CONFIDENTIAL
Attorney/Client
Privileged Information

Re: Fairlington Villages, A Condominium Unit Owners Association -- Exterior Alterations to Den Windows

Dear Mr. Roby:

On behalf of the Board of Directors ("Board") of Fairlington Villages, A Condominium Unit Owners Association ("Association"), you ask whether the Board has authority to permit unit owners to make modifications to units which would result in encroachment into the common elements of Fairlington Villages, A Condominium.

In preparing this response, we reviewed the Declaration of Fairlington Village, A Condominium ("Declaration") recorded in Deed Book 848 at Page 621 among the Arlington County, Virginia land records ("Land Records") and exhibits, including the Association By-Laws ("Bylaws"), as amended. We also considered relevant provisions of the Virginia Condominium Act[1] ("Act"), which governs the Association.

BACKGROUND

The context is pertinent to this analysis. You advise that the Board has received requests from owners to modify the windows in dens located on the lower level of certain units in a manner that would allow a person to exit from those windows. The work would require the foundation wall or window well where the window is located to be enlarged and involve ground excavation to accommodate this enlarged area as well as an egress path. The work and associated improvements would occur and be installed in the common elements, but would serve only the unit involved. The modification, along with potentially other interior changes, would permit the den to qualify as a bedroom, for marketing and sales purposes.

On behalf of the Board, you ask a series of questions related to the modifications, many of which we suspect may have been developed in response to other legal opinions the Association has secured related to the topic. These questions focus on the authority of the Association to "recharacterize" the common elements in a way which permits owners to utilize

[1] Following recodification of Title 55, which includes the Act, by the Virginia General Assembly effective October 1, 2019, all references to the Act must be cross-referenced to new provisions of the Act beginning with Section 55.1-1900.

portions of the common elements exclusively – in this case, an expanded area outside of the den windows for egress and associated improvements.

We do not recite those questions in this letter because the questions insinuate that ***recharacterization*** of the common elements is required to accommodate these specific modification requests. But, recharacterization of the common elements – into limited common elements, or otherwise, is not necessary. Rather, the question is whether the Association or the Board has authority to grant rights in the common elements to unit owners to the exclusion of other unit owners.

DISCUSSION

A. WHAT THE ACT PROVIDES

Unlike a homeowner's association where the community association owns the common area, in a condominium such as Fairlington Villages, all of the *unit owners* own an undivided interest in the common elements as tenants in common. **Notwithstanding**, Section 55.1-1956.B of the Act provides, in part, that

> *Except to the extent prohibited, restricted, or limited by the condominium instruments*, the executive board of the unit owners' association...*has the irrevocable power as attorney-in-fact on behalf of all the unit owners* and their successors in title with respect to the common elements, including the right, in the name of the unit owners' association, to (i) *grant easements through the common elements*...[Emphasis added]

In other words, although unit owners own the common elements, the Board has authority to act on behalf of the owners with respect to the common elements, unless the condominium instruments provide otherwise. Said another way, express authority for the Board to act with respect to the common elements need not be included in the condominium instruments because Section 55-.1-1956.B of the Act grants the Board statutory authority to do so, *subject to restrictions contained in the condominium instruments*.

Granting an easement or other right in the common elements (when the condominium instruments do not prohibit such a grant) does not recharacterize the common elements into limited common elements or other classification. *The common elements remain common elements*.

B. WHAT THE CONDOMINIUM INSTRUMENTS PROVIDE

Consequently, in determining the scope of Board authority to grant easements or other rights to owners to utilize the common elements to the exclusion of others, any limitations established by the condominium instruments must be considered. The condominium instruments contain the following provisions which warrant consideration:

- **Article VI, Section 6 of the Bylaws** provides, in part, that unit owners, tenants, guests and invitees may not place furniture, packages or objects of any kind in the common elements (referred to as the Common Areas) which would "tend to unreasonably obstruct or interfere with the proper use of such Common Areas or common facilities by other Unit Owners."

- **Article XI, Section 3(b) of the Bylaws** provides, in part, that "There shall be no obstruction of any common elements. Nothing shall be stored upon any common elements…without the approval of the Board of Directors."

- **Article XI, Section 3(d) of the Bylaws** provides that "No structural alteration, construction, addition or removal of any unit or common elements shall be commence or conducted except in strict accordance with the provisions of these Bylaws."

- **Article XI, Section 3(j) of the Bylaws** provides, in part, that "No structure of a temporary character, trailer, tent, shack, barn or other outbuilding shall be maintained upon any common elements at any time."

- **Article XV, Section 1 of the Bylaws** prohibits the installation of any improvements on the common elements until complete plans have been submitted to and approved by the Board of Directors.

Read together, these provisions must be interpreted as, among other things, 1) requiring unit owners to secure Board approval to modify or place improvements on – either temporarily or permanently, any portion of the common elements and 2) prohibiting the installation of any improvements in the common elements which would unreasonably obstruct or interfere with the intended use of such areas by unit owners or residents. So, for instance, the Board cannot approve a unit owner's request to install a grill on a common element sidewalk if doing so would impede pedestrian ingress and egress.

The foregoing document provisions should not be interpreted to curtail the Board's statutory authority - under Section 55.1-1956.B of the Act, to grant easements – or other rights, in the common elements, ***except*** in instances where granting such a right would unreasonably interfere with the intended use of such area by other unit owners or residents.

Oftentimes condominium unit owners associations exercise this statutory authority when granting easements to, for instance, utility companies to install conduit in the common elements (to serve the condominium or even other properties). However, a condominium association also can exercise this statutory authority to grant easements or lesser property rights – such as licenses, in the common elements to unit owners. This approach can be utilized in instances where an owner, for instance, unwittingly constructs a patio which encroaches into the common elements by a couple of inches. Rather than requiring the owner to pull up the patio, the Board may opt to grant an easement or license to that owner to permit the two-inch encroachment.

CONCLUSION AND OTHER CONSIDERATIONS

A compelling argument can be made that Section 55.1-1956.B of the Act provides statutory authority for the Board to grant an easement - or lesser right (such as a lease or license) to an owner to utilize a portion of the common elements to accommodate a converted den window. However, the modification cannot unreasonably interfere with any intended use of that area by others. We do not know the extent of modification necessary to convert windows as proposed and, so cannot advise whether the modification to the common elements creates an unreasonable interference. The circumstances may differ for the individual units. If so, this consideration may need to made on a case-by-case basis.

But, counterarguments can be made. Virginia courts are being called upon to review community association actions and authority with increasing scrutiny. The prevailing trend has been to construe authority of association boards of directors very narrowly, especially in the absence of express authority in recorded documents. A brief summary of pertinent case law follows.

A. SHADOWOOD CONDOMINIUM ASSOCIATION V. FAIRFAX COUNTY

In the pivotal case, *Shadowood Condominium Association v. Fairfax County Redevelopment and Housing Authority*, a unit owner (Fairfax County Redevelopment and Housing Authority) challenged a Fairfax County condominium association's authority to impose and collect charges for rule violations. The association relied upon provisions of the Act in imposing charges. The Fairfax Circuit Court ruled that, absent specific authority in the recorded condominium instruments, the association did not have authority to impose and collect charges.

On appeal, the Virginia Supreme Court heard the *Shadowood* case and subsequently issued an order – an unpublished decision – affirming the ruling of the Fairfax Circuit Court. In a footnote in the ruling – the Court offered the following - "by its plain terms, the statute is permissive in nature; it does not confer authority to an association beyond that in the association's governing documents." The Virginia Supreme Court affirmed the lower court's decision.

The current circumstances are distinguishable from those in *Shadowood*. Mainly, Section 55.1-1956B of the Act provides express authority for the Board to act on behalf of the unit owners with respect to the common elements, subject to any limitations contained in the condominium instruments. In other words, this section of the Act ***does*** confer authority to the Association, unlike the provision of the Act the Virginia Supreme Court considered in *Shadowood*.

B. SULLY STATION II COMMUNITY ASSOCIATION, INC. V. REGINALD W. DYE, ET AL.

A fairly recent line of Virginia cases addressing parking space designations, including *Sully Station Community Association, Inc. v. Reginald W. Dye, et al.*, support a conclusion that

owners must be treated uniformly in practice and procedure for use of common area. This line of cases establish that association authority to designate parking spaces for exclusive use of some, but not all owners, must be based on clear, express authority in the recorded governing documents.

The *Sully Station* line of cases is distinguishable from the current circumstances on a number of levels, including that the cases addressed parking in homeowners associations where *neither* the governing documents *nor* applicable law (the Virginia Property Owners' Association Act and the Virginia Nonstock Corporation Act) established express authority for the associations to designate parking on a non-uniform basis. Also, it is difficult to draw a parallel between the *Sully Station* facts and the current circumstances. Presumably, only Fairlington Village owners who own units with lower level dens would apply to modify the windows as proposed, whereas in the *Sully Station* line of cases, most residents owned vehicles and would want a designated parking space.

OTHER CONSIDERATIONS

Two considerations merit special note.

First, despite the Board's statutory authority discussed above, the Board **is not required** to consider or grant requests from owners to install egress windows and related improvements in the common elements.

It is a policy decision of the Board whether or not to entertain unit owner requests. In determining whether to entertain window modification requests, a number of considerations are warranted, including without limitation, impacts on Association insurance and reserves, if modifications are permitted under applicable zoning, the level of Association involvement required for requisite permits to be secured, and the effects modifications may have on other owners, surrounding areas and existing improvements. We are certain many additional considerations would be necessary. The Board may need to engage outside professionals to assist in performing due diligence, including the Association insurance carrier, auditor, and civil engineers.

Second, if the Board does decide to consider such requests, in light of the *Sully Station* cases, it is critical that the Board consider requests and make determinations on a uniform and equal basis for unit owners who are similarly situated. To ensure uniform application, we recommend that the Board adopt a policy for the consideration of such requests. The policy would include, among other things, a requirement that the owner enter into a written agreement with the Association outlining rights and responsibilities – *including maintenance responsibilities*, and which would include critical insurance and indemnification provisions. Special care must be taken when preparing the agreement to ensure the Association is protected and the rights and obligations of the owner and Association are clear.

We would be remiss if we did not acknowledge that Association consideration of these types of requests would require thoughtful planning and application, which ultimately – at least

at the onset, would be at the expense of all the unit owners, but arguably would only benefit owners of units containing dens. Consequently, while the Board may have requisite authority to consider such requests (again, provided that the modification does not unreasonably interfere with the intended use), doing so may create friction in the community, especially if the Association incurs substantial expense in the process. The Board should consider political ramifications as well.

This letter is a privileged communication between attorney and client. It should be kept separate and apart from the books and records of the Association normally made available for public view.

Once the Board has considered this guidance, we are happy to answer any questions the Board may have. If the Board is interested in considering window modification requests from owners, we recommend a telephone call or meeting to discuss options and other considerations in additional detail.

Very truly yours,

Lucia Anna Trigiani

LAT/jlr
#181914