

Tuesday, February 8, 2022  
Ralph Begleiter (with review by Billy Scott)

## Take-aways from committee conversation with attorney Billy Scott on February 3, 2022

1. QPHA does not qualify for any of the “exceptions” to the state law (based on amount of “common expense liability” charges to owners)
2. Although only certain provisions of the 2009 state law apply to pre-existing homeowner associations like QPHA, a recent change in the law (October, 2021) “made clear” that the existing governance documents of pre-existing “common interest communities” including homeowner associations such as QPHA take precedence over those provisions of the law applicable to pre-existing common interest communities in the event of a direct conflict. Care must be exercised in determining whether such a provision of DUCIOA conflicts, or merely supplements, existing governance documents (e.g., budget ratification process). See §81-119 for list of provisions of DUCIOA that apply to pre-existing common interest communities such as QPHA.
  - “We’ve got to comply,” advises attorney Scott.
  - Other state laws in addition to DUCIOA hold QPHA (through its directors) to a legally-enforceable “*fiduciary responsibility and duty*” for the “*maintenance, repair, replacement, and modification of common elements*” and other operations of the QPHA.
3. Annual owner “ratification” of QPHA’s budget is required. But that ratification vote requirement is oddly written, providing only that a *simple majority of the owners* (in QPHA’s case, 50 lots) must vote to “reject” the budget. Without 50 votes of “rejection,” the budget is automatically considered “ratified.” But a ratification vote must be conducted annually. See §81-324 of DUCIOA for required process, including mailing budget approved by the Board out to owners in advance of ratification meeting (which can occur at annual meeting).
4. The law requires QPHA to formally adopt a “dispute resolution process.” A template “process” is available from the state Common Interest Community Ombudsperson’s office, and in the absence of a QPHA process, that template is the legal default. Scott advises that there is no special reason to modify the state’s template (and that the further any template that is developed deviates from the state template to the benefit of the QPHA, may be subject to challenge), but a process should be formally “adopted” by QPHA’s Board.
5. Reserves, reserve studies and audits/financial reviews
  - QPHA is *not required by DUCIOA* to conduct such studies and reviews, but QPHA would be subject to accusations of *breach of fiduciary duty* if QPHA does not undertake these standard financial procedures, which are good financial practice even if not legally mandated by DUCIOA.
  - A reserve study *should* be conducted periodically. “*Once is not enough,*” says Scott, who specifically suggests *every five years, covering all common areas*. Scott has worked with Miller-Dodson, an experienced (and less expensive) firm which performs such studies for other similarly-sized homeowner associations.
  - The reserve percentages referred to in DUCIOA, though not specifically required for QPHA, are “good standards” to use as guidelines for a QPHA reserve.
  - Formal financial “audits” are not required of QPHA by DUCIOA, but Scott recommends a formal “audit” every 5-10 years, with less formal “financial reviews” conducted “every couple or three years.”

6. QPHA's Covenants document (the "Declaration") filed officially with Sussex County land records differs (in some way) from the version circulating at QP. Scott will guide us to correct that procedural issue.
7. QPHA's By-laws, as amended, apparently have not been properly filed in the land records of Sussex County. Scott will guide us to correct that procedural issue.
8. QPHA should continue to retain its files and records, and should not purge them.
9. Scott advises that obtaining legal counsel for successfully revising and gaining community approval for QPHA's Covenants to increase the annual assessment amount could cost around \$2,000, depending on how much assistance is needed by the Board.
10. The committee reviewed with Scott the following sequence of procedural steps:
  - A. QPHA should recognize its legal "*fiduciary responsibility*" for the "*maintenance, repair and replacement of common elements.*" *This is the legal basis for undertaking changes to QPHA's governance documents, procedures and assessments.*
  - B. Conduct a reserve study to develop projections of QPHA's "common elements" costs.
  - C. In accordance with the results of the reserve study, QPHA should *increase its annual assessment* to realistically represent the actual costs of maintaining QPHA's "common elements." Such an increase requires amendment of the Covenants (the "Declaration"), which requires a 2/3 approval vote. Other revisions to the Covenants should not be considered at the same time; the vote should be strictly limited to the increase of the assessment.
  - D. After the Covenants (including the assessment) are revised, QPHA must revise its By-laws to conform to the revised Covenants.
  - E. After the Covenants and By-laws revisions regarding the assessment are complete, QPHA *may* consider other revisions to both documents affecting other governance issues. Scott advises that since QPHA's documents prevail over DUCIOA in the event of a direct conflict, they need not incorporate specific language from the law. But he advises that QPHA's documents might be revised to take into account the kinds of "best practices" procedures detailed in DUCIOA.