



# COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Ralph S. Northam  
Governor

February 25, 2020

Brian Ball  
Secretary of  
Commerce and Trade

Mary Broz-Vaughan  
Director

Complainant: Karen Pilkerton  
Association: Malvern Club, Inc.  
File Number: 2020-01824

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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

The Complainant submitted a complaint to the Association dated December 4, 2019. The Association provided a final decision dated January 14, 2020. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated January 22, 2020 and received January 28, 2020.

## Authority

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..." (18 VAC 48-70-120 and §54.1-2354.4) 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 (Code of Virginia) and 18 VAC 48-70-90 (Common Interest Community Ombudsman 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 Common Interest Community Ombudsman Regulations (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.

## Determination

The Complainant has alleged that the Association, in violation of the Property Owners' Association Act, statutes §55.1-1808 through §55.1-1814, charged an improper amount for disclosure packets. In addition, the Complainant alleges that the Association has also violated §55.1-1805<sup>1</sup> of the Property Owners' Association Act. According to the NFAD, the Association charges \$65.00 for a disclosure packet and the Complainant questions whether this is in compliance with the applicable statutes. The statute that specifically addresses disclosure packet fees for associations that are not professionally managed is §55.1-1811.A<sup>2</sup>.

The Association's final decision referenced an email from 2013, where it appears a member of the board of directors at that time decided that \$65.00 was a proper amount to charge for disclosure packet fees, based on ten cents per page copying costs (at that time the packet was 150 pages, it is now 172) and \$25 per hour for two hours of work. The current board of directors voted unanimously to retain the current fee structure.

In addressing the fee structure for a disclosure packet for an association that is not professionally managed, the sole consideration under the law is the actual cost to prepare the packet. Under §55.1-1811.A an association can charge no more than ten cents per page for copies. In addition, the Association can charge for actual costs required for preparing the disclosure packet up to a total of \$100 for the entire packet (which amount would include copying costs). In addition to a ten cent per page charge for copying, the Association is also charging \$25 per hour for coordinating, compiling and delivering a disclosure packet for a total of \$65.00. I am not certain how the Association arrived at \$25 per hour since the board members are volunteers and therefore should not charge for their time.

Based on the information provided in the NFAD, I cannot determine if the disclosure packet was prepared by someone who was paid to do the work, or if it was prepared

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<sup>1</sup> Except as expressly authorized in this chapter, in the declaration, or otherwise provided by law, no association shall (i) make an assessment or impose a charge against a lot or a lot owner unless the charge is a fee for services provided or related to use of the common area or (ii) charge a fee related to the provisions set out in § 55.1-1810 or 55.1-1811 that is not expressly authorized in those sections. Nothing in this chapter shall be construed to authorize an association or common interest community manager to charge an inspection fee for an unimproved or improved lot except as provided in § 55.1-1810 or 55.1-1811. The Common Interest Community Board may assess a monetary penalty for a violation of this section against any (a) association pursuant to § 54.1-2351 or (b) common interest community manager pursuant to § 54.1-2349, and may issue a cease and desist order against the violator pursuant to § 54.1-2349 or 54.1-2352, as applicable.

<sup>2</sup> A. An association that is not professionally managed may charge a fee for the preparation and issuance of the association disclosure packet required by § 55.1-1809. Any fee shall reflect the actual cost of the preparation of the association disclosure packet, but shall not exceed \$0.10 per page of copying costs or a total of \$100 for all costs incurred in preparing the association disclosure packet. The seller or his authorized agent shall specify whether the association disclosure packet shall be delivered electronically or in hard copy and shall specify the complete contact information of the parties to whom the disclosure packet shall be delivered. If the seller or his authorized agent specifies that delivery shall be made to the purchaser or his authorized agent, the preparer shall provide the disclosure packet directly to the designated persons at the same time it is delivered to the seller or his authorized agent. The association shall advise the requester if electronic delivery of the disclosure packet or the disclosure packet update or financial update is not available, if electronic delivery has been requested by the seller or his authorized agent.

by a member of the board of directors. If the board of directors is preparing the disclosure packets, there should not be an hourly charge applied, since the board members are volunteers and therefore no actual cost for preparation is incurred. However, if someone is actually paid to do the work and that payment is actually \$25 per hour that may represent an actual cost for preparing the packet.

An issue raised in the NFAD, but not in the Complaint to the Association, was that the complaint procedure used by the Association did not comply with the Common Interest Community Ombudsman Regulations. While this office does not typically address any complaints or additional information included in a NFAD that were not part of the original complaint, in this instance it is appropriate for us to do so, since the complaint procedure is always reviewed by this office as part of our review of the NFAD and we would likely have found any discrepancies, even if the Complainant had not raised them in her submission.

Upon review, I found that the Complaint Procedure simply does not comply with the requirements set forth in the Common Interest Community Ombudsman Regulations. Of the gravest concern is the fact that the complaint procedure appears to be intended for complaints between owners or violations of the governing documents of the association. The complaint procedure required by the Regulations does not and cannot address violations related to neighbor disputes or any possible violation of the governing document of an association. There are other errors contained in the Complaint Procedure, but they will not be detailed here.

Finally, the Association failed to follow the requirements for a final decision as written in the Regulations. While the Association did provide the Complainant notice that she could file a NFAD with this office, it failed to provide the contact information for this office in the final decision (18 VAC 48-70-50.10)<sup>3</sup>. In addition, the Association did not include its Registration Number as issued by the Common Interest Community Board, which is also required by the Regulations (18 VAC 48-70-50.9).<sup>4</sup>

### Required Actions

The Association needs to further clarify its cost basis for the disclosure packets in light of my findings in this Determination. I ask the Association to provide me a letter or email detailing its disclosure packet charges and providing any substantiation that it has for those charges. Or, if the Association decides to alter its cost basis for the disclosure packets, please provide me the new cost for your disclosure packets and your reasoning for the new cost. I ask that you provide me this information within 30 days of the date of this Determination (March 26, 2020).

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<sup>3</sup> 10. The notice of final determination shall include the complainant's right to file a Notice of Final Adverse Decision with the Common Interest Community Board via the Common Interest Community Ombudsman and the applicable contact information.

<sup>4</sup> 9. The notice of final determination shall be dated as of the date of issuance and include specific citations to applicable association governing documents, laws, or regulations that led to the final determination, as well as the registration number of the association. If applicable, the name and license number of the common interest community manager shall also be provided.

If the cost basis you provide this office is valid, meaning that it properly reflects actual costs and can be substantiated, no further action on this issue will be necessary. If it does not reflect actual costs, the matter may be referred to the Common Interest Community Board for whatever action it may deem appropriate.


The Association must also address its complaint procedure and redraft as appropriate. The first step in doing this is a thorough reading of the Common Interest Community Ombudsman Regulations which can be found on our website. The Association may wish to consult with an attorney to obtain assistance in redrafting its complaint procedure, but is not required to do so. I ask the Association to provide me a draft of its new complaint procedure within 45 days (April 10, 2020). This office will be happy to provide guidance, but not legal advice, to help the Association come into compliance.

The Association must also ensure that any future final decisions contain the required information as noted in this Determination.

If any of the Required Actions are not met, this matter may be referred to the Common Interest Community Board for enforcement action. Once these matters have been addressed, the Association must ensure that it adheres to the applicable laws and regulations going forward.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie  
Common Interest Community Ombudsman

cc: Board of Directors  
The Malvern Club, Inc.