



# COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

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July 8, 2024

Complainant: Frank Capone  
Association: Potomac Yard Homeowners' Association, Inc.  
File Number: 2024-02464

## **DETERMINATION - NOTICE OF FINAL ADVERSE DECISION**

### Introduction

The Complainant, Frank Capone ("Capone"), submitted a complaint to the Potomac Yard Homeowners' Association, Inc. ("Potomac Yard") dated December 22, 2023. Potomac Yard provided a response to Capone's complaint dated January 17, 2024. Capone then submitted a Notice of Final Adverse Decision ("NFAD") to the Office of the Common Interest Community Ombudsman dated February 1, 2024, and the NFAD was received by our Office that same day.

### 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 the association complaint 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.

### Factual Summary

This matter centers on a single issue. Capone, who stated he was a member of the Board of Directors, noted that another member of Potomac Yard's board of directors, Mr. Franken, received a check from the association in the amount of \$893. Capone questioned whether the reimbursement was for expenses that were not covered by their HOA, particularly expenses he believed were associated with a social event not sponsored by Potomac Yard. Capone subsequently submitted a records request for the invoice he believed was related to Potomac Yard's check to Mr. Franken. Capone asserted that the immediate response from Potomac Yard, through its manager, was that he must pay \$50 in order to obtain a copy of the check issued to Mr. Franken. In its written response to Capone's complaint on January 17, 2024, Potomac Yards informed Capone that the check identified in his request did not pertain to an Association event and that the invoice he requested did not exist. The \$50 fee to obtain the records was not mentioned in the letter.

### Determination

Capone presents a single issue – whether Potomac Yards has complied with the statutory provisions that govern a homeowners' association's obligations to produce records both unit owners and members of the board of directors. Specifically, the Virginia Property Owners' Association Act ("POAA"), provides that, "all books and records kept by or on behalf of the association shall be available for examination and copying by a member in good standing," subject to certain provisions.<sup>1</sup> And members of the board of directors for an association may examine and/or copy "all books and records of the association, including individual salary information for all employees and payments to independent contractors, ... in the discharge of his duties as a director."<sup>2</sup> Capone asserts that Potomac Yard is violating the POAA, specifically Va. Code § 55.1-1815 by not producing the requested invoice to him.

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<sup>1</sup> Va. Code § 55.1-1815(B) and provisions set forth in subsection (C).

<sup>2</sup> Va. Code § 55.1-1815(F).

### *1. Access of Records by a Member of the Board of Directors.*

There were no documents in the NFAD submission by Capone that confirmed that he is a member of the Potomac Yard Board of Directors. When a copy of his NFAD packet was submitted to the Potomac Yard to confirm that the information before the Ombudsman was the same as Capone presented to its Board of Directors, Potomac Yard did not contest the representation. Therefore, the Office must proceed only on the proceeds under the premise that Capone is a member of its Board of Directors.

Capone's request for the invoice related to the check that Potomac Yard issued to Mr. Franken falls under the provisions of Va. Code § 55.1-1815(F). As a member of the Potomac Yard Board of Directors, Capone is entitled to inspect and copy records, particularly records regarding payments and associated documents held by Potomac Yard, as long as such request is in furtherance of the discharge of his duties as a board member. Here, it appears Capone's request is in furtherance of his duties as a board member, as he questioned and sought records about an expense paid by Potomac Yards. Accordingly, given that board members typically have a fiduciary duty to the Association, Potomac Yards is obligated to provide Capone the records he requested, if the record(s) exist. Potomac Yards, though, in its response to Capone, stated that the invoice he sought does not exist. Further, it stated that the check that Capone identified in his records request "did not pertain to an Association event." Thus, it appears that the record Capone sought does not exist, and so, it cannot be produced.

While the issue of the fee charge did not appear in Potomac Yards' January 17, 2024, response, we do note that the POAA allows associations, "impose and collect a charge, reflecting the reasonable costs of materials and labor, not to exceed the actual costs of such materials and labor" upon certain conditions.<sup>3</sup> Indeed, it is unclear whether the assertion of a \$50 fee to receive a copy of the aforementioned check was part of the complaint since it was not addressed to the Board.<sup>4</sup> We further note that when an association is compelled to impose a fee to produce records, such fee must be reasonable, not exceed the actual costs of materials and labor, and be imposed only in accordance with a cost schedule adopted by the board of directors."<sup>5</sup> The POAA likewise requires the cost schedule to adhere to the following conditions: (1) specify the charges for materials and labor, (2) apply equally to all members in good standing, and (3) be provided to such requesting member at the time the request is made.<sup>6</sup> While Capone's complaint seemed to raise an issue with the apparent \$50 fee, it failed to state whether Potomac Yard complied with this statutory provision, thus we cannot find that Potomac Yard acted inconsistent with the POAA's provisions for assessing a charge when asked to produce records.

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<sup>3</sup> Va. Code § 55.1-1815(E).

<sup>4</sup> This is, in large part, due to the fact that the document Capone presented to the CICO as his complaint to Potomac Yard also contains what are clearly statements of facts that occurred after the board's consideration of his complaint.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

### Conclusion

Given the above, Potomac Yard's response to Capone's request for an invoice related to the Association check in question is not in violation of the POAA's provisions regarding access to records because if such record or document does not exist, then Potomac Yards cannot produce it. As a result, there is no action is required of the Association.

Please contact me if you have any questions.

Respectfully,



R. Thomas Payne II, Esquire,  
Acting CIC Ombudsman & Deputy Director,  
Compliance & Investigation Division

cc: Board of Directors  
Potomac Yard Homeowners' Association, Inc.