

# **What Every Liz Moore Buyer Should Know About the Virginia Property Owner's Association Act**

*by Brian D. Lytle, Esq.*

The property you are considering purchasing may be located in a development subject to the provisions of the Virginia Property Owner's Association Act. If it is subject to the Act then the seller is obligated to disclose that fact to you in the contract and to provide you with what is known as an association disclosure packet, which contains a significant amount of information and documents. Most importantly, under this law you have the unilateral right to terminate the contract, but termination must be timely and done correctly.



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The Act and the disclosure packet can be very confusing, and many buyers do not know what to look for in the packet. This primer is intended to provide Liz Moore and Associates' buyers with some guidance and help in evaluating the disclosure packet, and to answer many frequently asked questions. Of course, there is no substitute for specific legal advice when needed, and so this primer is not intended to supplant having a lawyer represent you. Lastly, it is based on the law in effect as of September 1, 2020 (a copy of the relevant parts of the Act is provided at the end of this article).

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- **What is the Property Owner’s Association Act?** The Virginia Property Owners Association Act (“the Act”) is a series of laws that regulate associations that manage real estate developments that have certain characteristics, notably a subdivision declaration, restrictive covenants, dues, assessments, etc. The Act also requires a seller and the association to make certain disclosures to buyers. A copy of the relevant part of the Act is attached.
  - **What is a property owner’s association (POA)?** Real estate developments often have restrictive covenants, common areas to own and maintain, architectural review boards, dues, assessments, etc. The tasks and duties associated with these subdivision characteristics are managed by an association of the owners. The association, often incorporated, may be self-managed or professionally managed.
  - **What is an association disclosure packet?** The Act obligates a seller to obtain and provide to prospective purchasers a packet of information about the association, the contents of which are specified by law, in order for a buyer to evaluate the association and the obligations, financial and otherwise, incidental to owning property subject to the association.
  - **What should the disclosure packet contain?** The Act specifies the contents of the packet. For example, the name of the association, pending assessments or expenditures of funds, a statement of fees including assessments, a current reserve, study report, current budget, notice as to any pending law suits against the association, insurance coverage information, a statement whether the lot and house are in violation of association rules, copy of the declaration, bylaws, and rules and regulations, minutes from any board of directors or association meetings for six months preceding, etc. Please see the statute for a complete list (a copy of the statute is provided at the end).
  - **Will I get the packet first, or will my agent?** You and your agent should determine who will receive the packet. That should be stated in writing to the seller.
  - **What if I am out of town when the packet arrives?** There are no provisions that extend the three-day right of cancellation because you are out of town, so make sure you let your agent know if you will be out of town while your contract is pending so the two of you can make arrangements to handle the disclosure packet if you are not available.

- **Can I extend the three-day review period?** The statute was recently amended to provide that “(iii) the purchaser may cancel the contract within three days, *or up to seven days if extended by the ratified real estate contract*, after receiving the association disclosure packet or being notified that the association disclosure packet will not be available.” (emphasis added) “Ratified real estate contract” includes “any addendum to such contract” so the three days must be extended by an addendum, and that addendum needs to be signed by all parties before the three days expires.
- **What if the packet is not complete?** There is a Virginia case that holds even an incomplete packet starts the three-day review period, and this is implied by the language of the statute itself (purchaser may cancel within three days if the purchaser “receives an association disclosure packet that is not in conformity [with the requirements]”). So, if the packet is not complete you will need to cancel and re-start the process in order to get a complete packet, or seek an attorney’s advice regarding a mutual extension to the three day review period so a complete packet can be obtained.
- **What if the packet is old?** Unfortunately the law is not clear regarding how current the disclosure packet must be. The Act simply provides that it must be current as of the date noted on the packet itself. If you receive an old packet (in my view more than six months old or not year current) then I would recommend you immediately cancel and re-start the process unless you have a contractual provision permitting you not only to request an update (you always have a right to request an update) *but to terminate based on that update* (you do not have this right unless it is agreed in the contract).
- **What are a seller’s obligations under the Act?** The seller is obligated to disclose whether the property is subject to the Act, and if so, to obtain the association disclosure packet, at the seller’s expense, and to provide it to you, the buyer.
- **Can I cancel the contract if I do not approve?** Yes! The Act permits a purchaser to cancel within three days of the date of receipt of the disclosure packet (or up to seven days if by agreement in an addendum to the contract). Bear in mind that unless the contract specifies to the contrary, the receipt of the packet by your agent or your agent’s firm may trigger the three-day window – this should be specified.
- **Do I have to have a reason to cancel?** No, you do not have to have a reason. You may cancel and state no reason whatsoever.
- **Can I cancel based on the POA docs, then write a contract in the same POA?** Yes.
- **When can I cancel?** During the three-day (or seven day if extended per the above) review period. You may also terminate the contract any time prior to settlement if you have not been notified that the association disclosure packet will not be available, and the association disclosure packet has not been delivered to you. In addition, you may cancel within three days after receiving the association disclosure packet if the association disclosure packet or notice that

the association disclosure packet will not be available is hand delivered or delivered by electronic means and a receipt obtained; or within six days after the postmark date if the association disclosure packet or notice that the association disclosure packet will not be available is sent to you by United States mail.

- **Can I cancel before I get the packet?** Yes (as long as you did not get notice the packet was not available).
- **How do I cancel?** You should have your real estate agent or your attorney assist you with cancellation, but briefly you need to provide written notice of the termination and send it to the seller in the statutorily prescribed manner (a copy of the statute is provided).
- **Will my agent review the packet for me?** Buyer's agents do not review Property Owner's Association Act Disclosure packets for their client. This is something you need to do on your own or with the assistance of an attorney.
- **What should I be looking for?** Obviously I cannot provide an exhaustive list in a short answer, but at least review the monetary aspects of the packet; dues, assessments (private roads, common area repair, etc.), discussions about future assessments, etc. Also, ask yourself whether you have any special needs or uses of the property that might be barred by the development documents: for example, do you need to park a commercial work truck? In addition, look for whether the property is in compliance with any architectural guidelines or requirements that might require you to spend money after closing to fix them.
- **What happens if the contract does not have the required disclosure?** If the property is subject to the Act and the contract does not contain the required disclosure and disclosure language then you may cancel the contract at any time prior to closing.
- **Can I waive getting the packet?** No, you may not waive your rights under the Act. You may, however, close without having received the packet. If you do close you are bound by the provisions of the association whether you get the packet or not; you may not rescind the transaction after it closes under the Act.
- **Who pays for the packet?** The seller pays for the disclosure packet. You, as the buyer, will pay for any requested update and you may well have to pay what amounts to a processing fee for changing the records of the association in connection with the transaction.
- **Can I get an update, and can I cancel based on the update?** You have a statutory right to request an update to the packet. You may not, however, cancel based on that update unless your contract with the seller grants you that right. In other words, the law does not grant a right to cancel based on the update.
- **What is a declaration?** A declaration is simply a document recorded in the land records by which the property is subjected to maintenance or operational responsibilities for common

areas, creates authority in an association to impose dues or assessments against the lots, easements are declared, etc.

- **What are restrictive covenants?** Restrictive covenants are simply obligations imposed on the property that prevent or restrict its use. For example, a provision in the declaration that says commercial trucks may not be parked at the property is a restrictive covenant.
- **What are bylaws?** Typically associations are incorporated, and like any other corporation it will have bylaws, which are the written rules that govern its operation.
- **What is a compliance inspection?** Many real estate developments have architectural guidelines and a review board. The guidelines may be as detailed as specifying the type of shingles and paint, or very broad and only specify the size of the house. Regardless, the association in such developments has the right to determine whether the house is in compliance with its restrictions and guidelines and it will inspect and issue a compliance inspection report. This report is very important and you should pay attention to it. In addition the disclosure packet must contain copies of any non-compliance notices previously provided to the seller.
- **Is the seller obligated to fix POA non-compliant items?** There is some dispute regarding whether sellers are obligated to fix items an association deems to be in non-compliance with its architectural restrictions and guidelines unless the contract requires it (most do not). I believe that most such items are in fact a title problem and thus the seller must fix them, but others disagree and that result is highly dependent upon the exact item, how the declaration and restrictive covenants read, and of course what your contract says. The best solution is to have the contract explicitly require the seller to fix them. You should consult an attorney if there is any question or dispute. If in doubt cancel get an agreement from the seller to resolve them at seller expense or terminate within your three days.
- **What are special assessments?** Many real estate developments have private roads or common areas that need to be maintained. Often monthly dues are insufficient to cover these expenses so most associations have the right to impose special assessments against the lots to collect the money. These assessments will be mandatory and must be paid. If not paid the association can file a lien against the property and potentially force a sale in order to satisfy the obligation.

## About Brian & Lytle Law

Brian is a practicing Virginia lawyer with 36 years of experience. He is the owner of Lytle Law, P.C., a general practice law firm ([www.lytlelaw.com](http://www.lytlelaw.com)), Lytle Title and Escrow, LLC, a Virginia licensed settlement agent ([www.lytletitle.com](http://www.lytletitle.com)), and a part owner of, and general counsel to, Liz Moore & Associates, a Virginia real estate brokerage firm..

Brian's law practice emphasizes real estate closings, real estate related litigation, and the representation of real estate brokers, and agents, including Code of Ethics, procuring cause, malpractice, VREB and Fair Housing disciplinary actions, and commission collection cases in local courts. He is admitted to practice before all Virginia state courts, including the Virginia Supreme Court, before the United States District Court, the U.S. Bankruptcy Court, and the United States Court of Appeals for the 4th Circuit. Brian is a noted speaker on real estate matters: a VREB licensed instructor (license no. 0230 000596), he regularly speaks before local Realtor® associations (VPAR, WAAR, HRRA, etc.) and brokerage firms, has presented at the VAR annual convention, has twice presented (once as a featured speaker) before the National Association of Realtors® at its annual mid-year (Washington DC 2007) and national conventions (New Orleans 2006), has been a featured speaker on Real Law Central Radio (Real Estate Law 101: Fiduciary Duty and Dual Agency), a nationally syndicated educational program for agents, and has written over fifty Legal Corner articles for the Virginia Peninsula Association of Realtors® periodical *Realtor Update*.



**Va. Code § § 55.1-1808. Contract disclosure statement; right of cancellation (as of September 1, 2020).**

*A. For purposes of this article, unless the context requires a different meaning:*

*"Delivery" means that the disclosure packet is delivered to the purchaser or purchaser's authorized agent by one of the methods specified in this section.*

*"Purchaser's authorized agent" means any person designated by such purchaser in a ratified real estate contract for purchase and sale of residential real property or other writing designating such agent.*

*"Ratified real estate contract" includes any addendum to such contract.*

*"Receives," "received," or "receiving" the disclosure packet means that the purchaser or purchaser's authorized agent has received the disclosure packet by one of the methods specified in this section.*

*"Seller's authorized agent" means a person designated by such seller in a ratified real estate contract for purchase and sale of residential real property or other writing designating such agent.*

*B. Subject to the provisions of subsection A of § 55.1-1814, an owner selling a lot shall disclose in the contract that (i) the lot is located within a development that is subject to the Property Owners' Association Act (§ 55.1-1800 et seq.); (ii) the Property Owners' Association Act (§ 55.1-1800 et seq.) requires the seller to obtain from the property owners' association an association disclosure packet and provide it to the purchaser; (iii) the purchaser may cancel the contract within three days, or up to seven days if extended by the ratified real estate contract, after receiving the association disclosure packet or being notified that the association disclosure packet will not be available; (iv) if the purchaser has received the association disclosure packet, the purchaser has a right to request an update of such disclosure packet in accordance with subsection G of § 55.1-1810 or subsection D of § 55.1-1811, as appropriate; and (v) the right to receive the association disclosure packet and the right to cancel the contract are waived conclusively if not exercised before settlement.*

*For purposes of clause (iii), the association disclosure packet shall be deemed not to be available if (a) a current annual report has not been filed by the association with either the State Corporation Commission pursuant to § 13.1-936 or the Common Interest Community Board pursuant to § 55.1-1835, (b) the seller has made a written request to the association that the packet be provided and no such packet has been received within 14 days in accordance with subsection A of § 55.1-1809, or (c) written notice has been provided by the association that a packet is not available.*

*C. If the contract does not contain the disclosure required by subsection B, the purchaser's sole remedy is to cancel the contract prior to settlement.*

*D. The information contained in the association disclosure packet shall be current as of a date specified on the association disclosure packet prepared in accordance with this section; however, a disclosure packet update or financial update may be requested in accordance with subsection G or H of § 55.1-1810 or subsection D or E of § 55.1-1811, as appropriate. The purchaser may cancel the contract (i) within three days, or up to seven days if extended by the ratified real estate contract, after the date of the contract if, on or before the date that the purchaser signs the contract, the purchaser receives the association disclosure packet, is notified that the association disclosure packet will not be available, or receives an association disclosure packet that is not in conformity with the provisions of § 55.1-1809; (ii) within three days, or up to seven days if extended by the ratified real estate contract, after receiving the association disclosure packet if the association disclosure packet, notice that the association disclosure packet will not be available, or an association disclosure packet that is not in conformity with the provisions of § 55.1-1809 is hand delivered, delivered by electronic means, or delivered by a commercial overnight delivery service or the United States Postal Service, and a receipt is obtained; or (iii) within six days, or up to 10 days if extended by the ratified real estate contract, after the postmark date if the association disclosure packet, notice that the association disclosure packet will not be available, or an association disclosure packet that is not in conformity with the provisions of § 55.1-1809 is sent to the purchaser by United States mail. The purchaser also may cancel the contract at any time prior to settlement if the purchaser has not been notified that the association disclosure packet will not be available and the association disclosure packet is not delivered to the purchaser.*

*Notice of cancellation shall be provided to the lot owner or his agent by one of the following methods:*

- 1. Hand delivery;*
- 2. United States mail, postage prepaid, provided that the sender retains sufficient proof of mailing in the form of a certificate of service prepared by the sender confirming such mailing;*
- 3. Electronic means, provided that the sender retains sufficient proof of the electronic delivery, which may be in the form of an electronic receipt of delivery, a confirmation that the notice was sent by facsimile, or a certificate of service prepared by the sender confirming the electronic delivery; or*
- 4. Overnight delivery using a commercial service or the United States Postal Service.*

*In the event of a dispute, the sender shall have the burden to demonstrate delivery of the notice of cancellation. Such cancellation shall be without penalty, and the seller shall cause any deposit to be returned promptly to the purchaser.*

*E. Whenever any contract is canceled based on a failure to comply with subsection B or D or pursuant to subsection C, any deposit or escrowed funds shall be returned within 30 days of the cancellation, unless the parties to the contract specify in writing a shorter period.*

*F. Any rights of the purchaser to cancel the contract provided by this chapter are waived if not exercised prior to settlement.*

*G. Except as expressly provided in this chapter, the provisions of this section and § 55.1-1809 may not be varied by agreement, and the rights conferred by this section and § 55.1-1809 may not be waived.*

*H. Unless otherwise provided in the ratified real estate contract or other writing, delivery to the purchaser's authorized agent shall require delivery to such agent and not to a person other than such agent. Delivery of the disclosure packet may be made by the lot owner or the lot owner's authorized agent.*

*I. If the lot is governed by more than one association, the purchaser's right of cancellation may be exercised within the required time frames following delivery of the last disclosure packet or resale certificate.*

*2008, cc. 851, 871, § 55-509.4; 2010, c. 165; 2014, c. 216; 2016, c. 471; 2017, cc. 387, 405; 2018, c. 226; 2019, cc. 364, 513, 712; 2020, cc. 121, 592, 605.*

**Va. Code § 55.1-1809. Contents of association disclosure packet; delivery of packet (as of September 1, 2020).**

*A. Within 14 days after receipt of a written request and instructions by a seller or the seller's authorized agent, the association shall deliver an association disclosure packet as directed in the written request. The information contained in the association disclosure packet shall be current as of a date specified on the association disclosure packet. If hand or electronically delivered, the written request is deemed received on the date of delivery. If sent by United States mail, the request is deemed received six days after the postmark date. An association disclosure packet shall contain the following:*

- 1. The name of the association and, if incorporated, the state in which the association is incorporated and the name and address of its registered agent in the Commonwealth;*
- 2. A statement of any expenditure of funds approved by the association or the board of directors that requires an assessment in addition to the regular assessment during the current year or the immediately succeeding fiscal year;*
- 3. A statement, including the amount of all assessments and any other mandatory fees or charges currently imposed by the association, together with any post-closing fee charged by the common interest community manager, if any, and associated with the purchase, disposition, and maintenance of the lot and to the right of use of common areas, and the status of the account;*
- 4. A statement of whether there is any other entity or facility to which the lot owner may be liable for fees or other charges;*

5. *The current reserve study report or summary of such report, a statement of the status and amount of any reserve or replacement fund, and any portion of the fund allocated by the board of directors for a specified project;*
6. *A copy of the association's current budget or a summary of such budget, prepared by the association, and a copy of its statement of income and expenses or statement of its financial position (balance sheet) for the last fiscal year for which such statement is available, including a statement of the balance due of any outstanding loans of the association;*
7. *A statement of the nature and status of any pending action or unpaid judgment (i) to which the association is a party and (ii) that could or would have a material impact on the association or its members or that relates to the lot being purchased;*
8. *A statement setting forth the insurance coverage that is provided for all lot owners by the association, including the fidelity coverage maintained by the association, and any additional insurance that is required or recommended for each lot owner;*
9. *A statement that any improvement or alteration made to the lot, or uses made of the lot or common area assigned to such lot, is or is not in violation of the declaration, bylaws, rules and regulations, architectural guidelines, and articles of incorporation, if any, of the association;*
10. *A statement setting forth any restriction, limitation, or prohibition on the right of a lot owner to place a sign on the owner's lot advertising the lot for sale;*
11. *A statement setting forth any restriction, limitation, or prohibition on the right of a lot owner to display any flag on the owner's lot, including reasonable restrictions as to the size, place, and manner of placement or display of such flag and the installation of any flagpole or similar structure necessary to display such flag;*
12. *A statement setting forth any restrictions as to the size, place, duration, or manner of placement or display of political signs by a lot owner on his lot;*
13. *A statement setting forth any restriction, limitation, or prohibition on the right of a lot owner to install or use solar energy collection devices on the owner's property;*
14. *A copy of the current declaration, the association's articles of incorporation and bylaws, and any rules and regulations or architectural guidelines adopted by the association;*
15. *A copy of any approved minutes of the board of directors and association meetings for the six calendar months preceding the request for the disclosure packet;*
16. *A copy of the notice given to the lot owner by the association of any current or pending rule or architectural violation;*
17. *A copy of the fully completed form developed by the Common Interest Community Board pursuant to § 54.1-2350;*
18. *Certification that the association has filed with the Common Interest Community Board the annual report required by § 55.1-1835. Such certification shall indicate the filing number assigned by the Common Interest Community Board and the expiration date of such filing; and*

19. A statement indicating any known project approvals currently in effect issued by secondary mortgage market agencies.

B. Failure to receive copies of an association disclosure packet shall not excuse any failure to comply with the provisions of the declaration, articles of incorporation, bylaws, or rules or regulations.

C. The disclosure packet shall be delivered in accordance with the written request and instructions of the seller or the seller's authorized agent, including whether the disclosure packet shall be delivered electronically or in hard copy, and shall specify the complete contact information for the parties to whom the disclosure packet shall be delivered. The disclosure packet required by this section shall not, in and of itself, be deemed a security as defined in § 13.1-501.

D. The seller or the seller's authorized agent may request that the disclosure packet be provided in hard copy or in electronic form. An association or common interest community manager may provide the disclosure packet electronically; however, the seller or the seller's authorized agent shall have the right to request that the association disclosure packet be provided in hard copy. The seller or the seller's authorized agent shall continue to have the right to request a hard copy of the disclosure packet in person at the principal place of business of the association. If the seller or the seller's authorized agent requests that the disclosure packet be provided in electronic format, neither the association nor its common interest community manager may require the seller or the seller's authorized agent to pay any fees to use the provider's electronic network or system. The disclosure packet shall not be delivered in hard copy if the requester has requested delivery of such disclosure packet electronically. If the disclosure packet is provided electronically by a website link, the preparer shall not cause the website link to expire within the subsequent 90-day period. The preparer shall not charge another fee during the subsequent 12-month period, except that the preparer may charge an update fee for a financial update or for an inspection as provided in § 55.1-1810. If the seller or the seller's authorized agent asks that the disclosure packet be provided in electronic format, the seller or the seller's authorized agent may request that an electronic copy be provided to each of the following named in the request: the seller, the seller's authorized agent, the purchaser, the purchaser's authorized agent, and not more than one other person designated by the requester. If so requested, the property owners' association or its common interest community manager may require the seller or the seller's authorized agent to pay the fee specified in § 55.1-1810. Regardless of whether the disclosure packet is delivered in paper form or electronically, the preparer of the disclosure packet shall provide such disclosure packet directly to the persons designated by the requester to the addresses or, if applicable, the email addresses provided by the requester.

2008, cc. 851, 871, § 55-509.5; 2013, cc. 357, 492; 2015, c. 277; 2016, c. 471; 2018, c. 70; 2019, c. 712; 2020, c. 441.