

**DEPARTMENT OF PROFESSIONAL  
AND OCCUPATIONAL REGULATION**



**OFFICE OF THE  
COMMON INTEREST COMMUNITY  
OMBUDSMAN**

**ANNUAL REPORT  
2009-10**



9960 Mayland Drive  
Perimeter Center, Suite 400  
Richmond, Virginia 23233  
(804) 367-8500  
<http://www.dpor.virginia.gov>



COMMONWEALTH of VIRGINIA  
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION

GORDON N. DIXON  
DIRECTOR

DEPUTY DIRECTORS:

NICK A. CHRISTNER  
Compliance & Investigation

MARK N. COURTNEY  
Licensing & Regulation

STEVEN L. ARTHUR  
Administration & Finance

December 1, 2010

TO: The House Committee on General Laws  
The Senate Committee on General Laws  
The Virginia Housing Commission

The report contained herein has been prepared pursuant to § 55-530 of the *Code of Virginia*. This annual report documents the activities of the Office of the Common Interest Community Ombudsman for the reporting period covering November 26, 2009, through November 25, 2010.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Gordon N. Dixon".

Gordon N. Dixon  
Director

A handwritten signature in cursive script, appearing to read "Heather S. Gillespie".

Heather S. Gillespie  
Common Interest Community Ombudsman

# TABLE OF CONTENTS

Executive Summary .....	1
Inquiries and Complaints.....	1
Ombudsman Regulations .....	2
Education and Outreach .....	2
Constituent Expectations .....	3
Legal Developments .....	4
Statutory Authority.....	5

## Executive Summary

In 2008, the General Assembly created the Office of the Common Interest Community Ombudsman (the “Office”), and the Common Interest Community Board, at the Department of Professional and Occupational Regulation. In accordance with statutory requirements, this document reports on the activities of the Office for the period from November 26, 2009, to November 25, 2010.

In 2009, the Board developed Common Interest Community Ombudsman Regulations governing the complaint process for associations. Pending executive branch approval of the proposed regulations, the Office continues to process inquiries, investigate complaints, educate the public, and attempt to resolve association disputes. Upon adoption of final Ombudsman regulations, the primary focus of the Office will be to review “final adverse decisions,” as required under Section 55-530 of the *Code of Virginia*.

Constituent expectations continue to challenge the ability of the Office and the Ombudsman to provide the level of service and information demanded by stakeholders (including association boards and members, unit owners, and legislators). Existing statutory language may contribute to misconceptions about the role of the Office and the scope of services available from the Ombudsman, even as the Office increases its educational offerings.

## Inquiries and Complaints

During the 2009-10 reporting period, the Office received 1,551 telephone calls and 1,129 electronic mail messages (“e-mail”). Office representatives responded promptly to these phone calls and e-mails, which primarily concerned requests for information or questions related to common interest communities.

In addition, the Office received 276 complaints during 2009-10 on the following topics:

- 29% related to Property Owners’ Associations;
- 32% related to Condominium Unit Owners’ Associations;
- 32% related to Time-Shares;
- 0.4 % related to Cooperatives; and
- 5% related to Management Companies.

Compared with the 2008-09 reporting period, complaint volume regarding Property Owners’ Associations decreased notably (from 43% of total complaints), while those concerning Condominium Unit Owners’ Associations and Management Companies increased (from 22% and 3%, respectively).

The Office resolved or closed 271 complaints in 2009-10, which includes resolution or closure of complaints received during the prior reporting period. In accordance with departmental procedures for complaint processing, the Common Interest Community Board considered cases stemming from investigations, with 11 complaints currently under investigation.

The majority (53%) of condominium and property owners' association complaints relate to actions by the association board, including lack of notice for meetings, questionable election processes, lack of responsiveness, and inappropriate use of power by the board. Sixteen percent of CIC complaints are related to declarant (developer) control, most typically as a result of declarant unwillingness (or perceived unwillingness) to relinquish control of the association to owners.

Of time-share complaints, 64% focused on allegations that misinformation or deception provided during the sales presentation induced the complainant to purchase. Ten percent of time-share complaints concerned units that had not been built, but had been promised to and paid for by the complainants. The Office worked with the department's Compliance and Investigations Division to bring these longstanding cases before the Common Interest Community Board, which issued a cease-and-desist order against the respondent developer after a formal hearing.

## **Ombudsman Regulations**

Pursuant to Section 55-530.E of the *Code*, the Common Interest Community Board established a Regulatory Review Committee to draft regulations, in accordance with the Administrative Process Act (APA), to define "final adverse decision" and to determine requirements for the internal association complaint process. The Board's proposed regulations remain under executive branch review. Once the final regulations are approved, the Office will cease accepting general complaints (except for those related to manager licensure, association registration, and time-shares) and will receive only "Notices of Final Adverse Decision."

## **Education and Outreach**

During 2009-10, the Ombudsman provided 24 presentations throughout the Commonwealth, including presentations for the Southeastern Virginia Chapter of CAI (Community Associations Institute) 2010 Legal & Legislative Update, the Property Owners' Association of Virginia, Inc., the 2010 CAI Virginia Leadership Retreat, the Dulles Area Association of REALTORS<sup>®</sup>, and the 2010 CAI Community Association Day. The Office continued its participation as a member of

the “HB 516 Virginia Legislative Action Committee Panel,” which presented a discussion forum and question–and–answer session at multiple venues throughout northern Virginia. The Ombudsman also met upon request with members of the General Assembly and continued to serve on the Common Interest Communities workgroup of the Housing Commission.

## **Constituent Expectations**

After two years of full functioning, a major issue of constituent expectations continues to challenge the ability of the Office and the Ombudsman to provide the level of service and information demanded by stakeholders (including association members, unit owners, and legislators).

At issue is the public’s understanding of the duties performed by the Office, based on Sections 55-530(E) (1) and (7), which reference the bylaws and declaration of an association. These *Code* sections lead members and unit owners to believe the Ombudsman is able to interpret their governing documents. However, such service—the interpretation of legal documents—is typically reserved only to an attorney actively representing a client.

In order to clarify this issue, which constituents have raised on innumerable occasions, the Ombudsman—an attorney, as required by the enabling CIC statutes—contacted the Virginia State Bar regarding the potential conflict in providing an interpretation of association governing documents. Based on a lengthy conversation with an ethics professional at the Bar, it does appear that providing such information to a member or unit owner would, in fact, constitute an ethics violation.

In addition, Section 55-530(E) (7) states that the Ombudsman will provide nonbinding explanations of laws and regulations governing common interest communities. Unfortunately, the vast majority of the public contacting the Office assumes an explanation is identical to an interpretation. Therefore, constituents expect the Ombudsman to provide legal interpretations not only of their governing documents, but also of common interest community statutes.

The difficulty with the public’s misperception—which is understandable, based on the statutory language establishing the Office—is that it leaves constituents with the impression that the Office is not fully meeting its responsibilities and obligations. Although the Office operates well within appropriate legal confines, and provides tremendous service to association members and unit owners on a daily basis, constituent expectations are frustrated because the Ombudsman cannot provide an interpretation of the law or governing documents. The goal of the Office, and its statutory responsibility, is to educate the public, to provide direction to available common interest community resources, to review final adverse decisions, and to help members and unit

owners in whatever other ways possible to help avert or resolve conflict. The Office and the Ombudsman cannot, however, replace the services of an attorney.

## Legal Developments

### State Topics

Significant developments in state law related to common interest communities from the 2010 General Assembly Session are listed below.

<b>Bill No.</b>	<b>Patron</b>	<b>Description</b>
HB 191/ SB 270	John Cosgrove/ Mary Margaret Whipple	Clarifies the need for complaint procedures within associations and the requirement that associations adhere to such procedures.
HB 468	Vivian Watts	Provides a manager licensing exception for residents of associations who provide bookkeeping, billing or recordkeeping services for compensation, as long as the association maintains a fidelity bond to insure against losses related to that person.
HB 702	David Bulova	More clearly defines the timeframe in which fees for disclosure packets must be paid.
HB 956/ SB 151	Scott Lingamfelter/ Richard Stuart	Supports the display of the U.S. flag and requires any association that bars such display to prove its actions were necessary to protect a substantial interest.
HB 1058	Richard Bell	Allows associations—owners and board members—to use the most advanced technology available for sending or receiving notices, signatures, votes, consents, or approvals.
HB 1102	Mark D. Sickles	Allows POA boards of directors—within the confines of their governing documents—to create rules and regulations making parking spaces available to less than all owners.
SB 665	Mary Margaret Whipple	DPOR-requested technical amendments to statutes affecting the Common Interest Community Board.

## **Federal Topics**

The Federal Trade Commission (FTC) issued the “Red Flags Rule” in 2008, requiring many businesses and organizations to implement a written Identity Theft Prevention Program designed to detect the warning signs of identify theft in their day-to-day operations. The rule is of concern to association board members and organizations that work with associations, because it may apply to those associations using installment payments for assessments. While it remains unclear whether this rule is indeed applicable to associations, the FTC is delaying enforcement of the rule until December 31, 2010.

The Environmental Protection Agency (EPA) issued the Lead Renovation, Repair and Painting Rule in April 2010, which requires renovators, contractors, painters, etc. who disturb lead-based paint in pre-1978 homes to obtain licensure. Although the federal agency currently enforces the rule in the Commonwealth, Virginia is in the process of promulgating regulations to apply for approval to administer the regulatory program. The new rule impacts associations by requiring them to ensure the contractors and maintenance personnel they hire are properly licensed.

After expiration of the national flood insurance program in March 2010, Congress passed and the president signed the National Flood Insurance Program Re-extension Act of 2010, extending the program until September 30, 2011. The program was suspended for several months prior to its re-extension, leaving insurance providers unable to issue new policies, renew current policies or amend existing ones. While not every community association may carry an insurance policy, significant numbers do and were impacted by this temporary suspension.

The Federal Housing Finance Agency has proposed a regulation to ban deed-based or covenant-based transfer fees. The regulation would prohibit Fannie Mae, Freddie Mac and all federal home loan banks from purchasing mortgages in associations with deed-based or covenant-based transfer fees. Because these lenders provide the majority of mortgages, the impact would be substantial on community associations. The comment period for this proposed regulation closed on October 15, 2010.

## **Statutory Authority**

Section 55-530 of the *Code* provides the statutory authority for the Office of the Common Interest Community Ombudsman. The Office shall:

- 1. Assist members in understanding their rights and the processes available to them according to the declaration and bylaws of the association;*
- 2. Answer inquiries from members and other citizens by telephone, mail, electronic mail, and in person;*



3. *Provide to members and other citizens information concerning common interest communities upon request;*
4. *Make available, either separately or through an existing Internet website utilized by the Director, information as set forth in subdivision 3 and such additional information as may be deemed appropriate;*
5. *Receive the notices of complaint filed;*
6. *In conjunction with complaint and inquiry data maintained by the Director, maintain data on inquiries received, the types of assistance requested, notices of complaint received, any actions taken, and the disposition of each such matter;*
7. *Upon request, assist members in using the procedures and processes available to them in the association, including nonbinding explanations of laws or regulations governing common interest communities or interpretations thereof by the Board, and referrals to public and private agencies offering alternative dispute resolution services, with a goal of reducing and resolving conflicts among associations and their members. Such assistance may require the review of the declaration and other records of an association. An association shall provide such information to the Office of the Common Interest Community Ombudsman within a reasonable time upon request;*
8. *Ensure that members have access to the services provided through the Office of the Common Interest Community Ombudsman and that the members receive timely responses from the representatives of the Office of the Common Interest Community Ombudsman to the inquiries;*
9. *Upon request to the Director by (i) any of the standing committees of the General Assembly having jurisdiction over common interest communities or (ii) the Housing Commission, provide to the Director for dissemination to the requesting parties assessments of proposed and existing common interest community laws and other studies of common interest community issues;*
10. *Monitor changes in federal and state laws relating to common interest communities;*
11. *Provide information to the Director that will permit the Director to report annually on the activities of the Office of the Common Interest Community Ombudsman to the standing committees of the General Assembly having jurisdiction over common interest communities and to the Housing Commission. The Director's report shall be filed by December 1 of each year, and shall include a summary of significant new developments in federal and state laws relating to common interest communities each year; and*
12. *Carry out activities as the Board determines to be appropriate.*