

**DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL REGULATION**



**OFFICE OF THE
COMMON INTEREST COMMUNITY
OMBUDSMAN**

**ANNUAL REPORT
2010-2011**



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COMMONWEALTH of VIRGINIA
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION

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December 1, 2011

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, 2010, through November 25, 2011.

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

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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, 2010, to November 25, 2011.

In 2011, the Board submitted Common Interest Community Ombudsman Regulations for executive branch review. The regulations govern the complaint process for associations and, once adopted, will shift the focus of the Office from reviewing complaints to determining outcomes of “final adverse decisions,” as required under Section 55-530 of the *Code of Virginia*.

As noted in the 2009-2010 Annual Report, constituent expectations are a source of misunderstanding and dissatisfaction, both for the Office and its stakeholders (including association boards and members, unit owners, and elected officials). In an effort to align those expectations more closely with the Office’s legal mandate in terms of service, assistance and advice, the Department is exploring legislation for the 2012 Session. Minor technical amendments may help the public better understand the nature of assistance the Office can provide, as well as its legal limitations.

INQUIRIES AND COMPLAINTS

During the 2010-11 reporting period, the Office received 1,232 telephone calls and 1,184 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 and time-shares.

The Office received 278 complaints during 2010-11 on the following topics:

- 28% related to Property Owners’ Associations;
- 13% related to Condominium Unit Owners’ Associations;
- 47% related to Time-Shares;
- 2% related to Cooperatives; and
- 10% related to Management Companies.

Notably, Condominium Unit Owners’ Association complaints decreased by more than 50 percent over last year, while the number of time-share complaints increased by 15 percentage points over the previous year. Although complaints concerning management companies are not substantial when compared with the total number of complaints received, management company complaints did double over the past year.

The Office resolved or closed 258 complaints in 2010-11, which includes resolution or closure of some 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 seven complaints currently under investigation.

Actions (or lack thereof) by association boards continue to account for the bulk of the association complaints received—however, this figure jumped dramatically from 53 percent last year to 83 percent this year. Perhaps the dramatic increase reflects a better understanding by the public as to how the Office can assist members. While many of these complaints fell outside the scope of the Office (because they relate to governing documents rather than state laws and regulations), in general it appears this year the Office received more complaints within its jurisdiction. The complaints related to board actions focused primarily on lack of access to books and records of the association, assessments, maintenance, disclosure packets, and general noncompliance with the governing documents or state law.

As noted above, time-share complaints increased considerably this year. Interestingly, the Office received nearly the same percentage of time-share complaints regarding misinformation at sales presentations this year as in 2009-2010. The total number of time-share complaints received was 130, with 62 percent focused on misinformation provided during sales presentations. The remaining complaints concerned mortgage fraud and rising maintenance fees.

Although time-shares are not considered common interest communities, regulation of the industry falls under the Common Interest Community Board, with the Office reviewing and responding to time-share-related complaints. Based on time-share complaints received by the Office over the past three years, sales practices of certain time-share developers clearly lead many individuals to feel misled or victimized. Under the existing Virginia Real Estate Time-Share Act, such complaints are purely civil in nature, and thus require the intervention of a court system to provide resolution. Upon a preliminary review by the Ombudsman of other state time-share legislation, it appears Virginia is one of only a few states in the nation that does not require some regulation of time-share salespersons.

OMBUDSMAN REGULATIONS

Pursuant to Section 55-530.E of the *Code*, in 2010 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. In 2011, the Board submitted Common Interest Community Ombudsman Regulations for 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 the annual 2010-2011 reporting period, the Ombudsman provided 17 presentations throughout the Commonwealth, including presentations for the Southeastern Virginia Chapter of CAI (Community Associations Institute) 2011 Legal & Legislative Update, the Property Owners' Association of Virginia, Inc., the Virginia Peninsula Association of REALTORS[®], and the 2011 CAI Community Association Day. The Office continued its participation as a member of the "Virginia Legislative Action Committee Panel," which presented a discussion forum and question-and-answer session in the fall of 2011.

In addition, the Ombudsman met upon request with members of the General Assembly and continued to serve on the Common Interest Communities workgroup of the Housing Commission. In conjunction with the *Common Interests* newsletter published by the Common Interest Community Board, the Ombudsman provided several articles focusing on some of the most common subjects of complaints. Finally, the Ombudsman appeared as a guest on the Fairfax County Department of Cable Communications and Consumer Protection television program "Your Community, Your Call" where she provided information to and answered questions from viewers regarding the pending regulations.

LEGAL DEVELOPMENTS

State Topics

Significant developments in state law related to common interest communities from the 2011 General Assembly Session are listed below.

Bill No.	Patron	Description
HB 1590 SB 774	Salvatore R. Iaquinto A. Donald McEachin	Increases from \$15,000 to \$25,000 the maximum civil jurisdictional limit of general district courts.
HB 1674	Brenda L. Pogge	Delays until July 2012 the time by which an employee of a common interest community manager must hold a certificate from the Common Interest Community Board.
HB 1741	David L. Bulova	Limits charges for access to association books and records to a cost schedule adopted by the association board.
HB 1975	Roxann Robinson	Provides that no banquet license shall be required for private meetings/parties limited to association members and their guests.

Bill No.	Patron	Description
HB 2188	Lynwood W. Lewis, Jr.	Decreases from 90 to 45 days, where settlement does not occur, the time when a seller of a condominium unit or lot will be responsible for the payment of all allowable fees related to the preparation of the disclosure packet provided by the association.
HB 2289 SB 1327	Mark D. Sickles Mark R. Herring	Provides that a court may order the owner of common interest community property who is in violation of such community's rules to abate or remedy the violation.
HB 2290	Mark D. Sickles	Requires Property Owners' Associations to post notice of all pesticide applications in or upon the common areas at least 48 hours prior to the application.
SB 841 HB 1877	J. Chapman Petersen Eileen Filler-Corn	Provides that the immunity from civil liability the directors and other officers of tax exempt organizations enjoy for acts taken in their official capacities shall survive the termination, cancellation, or other discontinuance of the organization.
SB 931	Ryan T. McDougale	Provides that a transfer fee covenant recorded in the Commonwealth on or after July 1, 2011, shall not run with the title to real property and is not binding on, or enforceable against, any subsequent owner, purchaser, or mortgagee of any interest in real property.
SB 983	Mary Margaret Whipple	Extends the expiration deadline for provisional CIC manager licenses from June 30, 2011, to June 30, 2012.
SB 1323	David W. Marsden	Decreases from 90 to 45 days, where settlement does not occur, the time when a seller of a condominium unit or lot will be responsible for the payment of all allowable fees related to the preparation of the disclosure packet provided by the association.

In addition to the new laws described above, a number of cases both in Circuit Court and in the Supreme Court of Virginia, as well as a decision by the Office of the Attorney General, may provide future guidance for associations. A brief summary of several of these cases is provided below. This list is by no means intended to be exhaustive.

- The Attorney General issued an official opinion (10-078) in January 2011 regarding the limitation of rental units within an association. The opinion stated: "if properly written, adopted and enforced, and authorized as to purpose and not in conflict with the association's declarations,

bylaws or rules and regulations, a homeowners' association may covenant to limit the number of housing units within the association that may be offered for rent by the owner to tenants.”

- Hubbard v. Stony Point Land, Inc. resulted in a decision by the U.S. District Court –Eastern Shore that even though the association was not incorporated at the time a disclosure packet was requested and received, the contract cannot be canceled as a result. “Under Virginia law, pre-incorporation actions of *de jure* corporations are valid and binding on the parties involved.”
- Fairfax County Redevelopment and Housing Authority v. Shadowood Condominium Association, et al. In his opinion letter, Judge Randy I. Bellows of the Fairfax County Circuit Court found:

“[T]he sums assessed against Plaintiff in this case were beyond Defendants’ authority as defined in the Master Deed, By-Laws, and amendments to the By-Laws. In other words, the amounts assessed were not for the purpose of maintaining, replacing, or improving any of the common elements of the property and, therefore, were improperly levied.”

The assessments in question were for \$20,000 and the court found them to be “more consistent with a punitive fine than then type of charges necessary for the operation of the Shadowood property.”

- Linzie Zinone v Lee’s Crossing Homeowners Association, et al. Several complaints were received by the Office regarding this association and all were related to the governing documents and thus did not fall under the Ombudsman’s jurisdiction. The Virginia Supreme Court upheld the Loudoun County Circuit Court’s conclusion and affirmed that “the plain language of the provisions of the POAA concerning the ability to amend a declaration are neither mandatory nor exclusive and, thus, can be controlled by the express provisions of a particular declaration.”

Federal Topics

Revised Federal Housing Finance Agency (FHA) guidelines for loan approval continue to generate concern and attention at the federal level. The ongoing revision of rules related to the approval of loans and certification of associations has created a highly charged atmosphere in many associations and for many community association professionals, with particular impact on condominium associations.

Many associations do not currently meet the requirements outlined in the revisions, which include requirements that no more than 15 percent of owners be delinquent in the payment of association dues, that no more than 50 percent of all units have FHA insurance, and that at least half of the units are owner-occupied. Association boards are also required to provide certification of a variety of facts, some of which may be well outside their scope of knowledge or expertise, and the penalty for providing inaccurate information can be as much as \$1 million and 30 years imprisonment.

It is believed that many associations in Virginia are not currently certified and those that are may have difficulty meeting the requirements when they re-certify. While other financing options are available to homebuyers, anything that limits the possible sources of financing for potential buyers can have a tremendous impact. Community association lobbyists, specifically Community Association Institute, continue to work with the FHA to attempt to find other options or ideas for the certification process that may be less onerous. Ultimately, it would appear that most condominium associations will require the services of an attorney in order to ensure that anything submitted by an association as part of its certification process meets the requirements of the FHA guidelines.

NEWS OF INTEREST

The Ombudsman tracks and collects articles related to common interest communities in an effort to learn of issues or concerns that may impact the Office or are generally noteworthy due to their subject matter. The following are some issues gleaned from the news which may be of interest to stakeholders.

- In Northern Virginia, exclusive easements granted to a carrier are being questioned as possible violations of FTC Anti-Trust laws. Several news articles indicated that cases have been or will be filed with the U.S. District Court.
- Foreclosures and unpaid assessments are an ongoing problem for associations and appear regularly in both Virginia and national news. Homes often remain vacant for substantial periods of time and can negatively affect the value of surrounding properties. While many associations have attempted to provide leniency for unpaid assessments in the form of payment plans and similar, this has not proven sufficient to ensure that assessments are paid in a timely manner. Associations therefore find themselves short of funds to take care of necessary maintenance.
- Electric cars and concerns regarding the availability of charging stations are beginning to appear in the news. Associations may need to find ways to accommodate requests for charging stations if market demand for electric cars proliferates among their association members.
- Smoking has appeared in the news and has been the subject of several inquiries to the Office. Some condominiums may not have HVAC systems capable of ensuring smoke from one unit does not enter another unit. The expense of retrofitting or replacing HVAC systems is shared among all unit owners, so associations struggle to balance environmental concerns with costs.
- The Office received several inquiries related to bedbugs within condominiums. Because of the incredible ability of bedbugs to spread, many associations have decided it is easier to take on the burden of exterminating themselves, rather than asking the individual owner who may have been responsible for the infestation.

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.