

**DEPARTMENT OF PROFESSIONAL  
AND OCCUPATIONAL REGULATION**



**OFFICE OF THE  
COMMON INTEREST COMMUNITY OMBUDSMAN**

Report to the  
**House Committee on General Laws  
Senate Committee on General Laws and Technology  
Housing Commission**

*Annual Report 2011-2012*



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## **PREFACE**

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The Office of the Common Interest Community Ombudsman prepared the report contained herein 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 period covering November 26, 2011, through November 25, 2012.

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## **EXECUTIVE SUMMARY**

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In 2008, the General Assembly created the Office of the Common Interest Community Ombudsman (“Office”), and the Common Interest Community Board (“CICB”), at the Department of Professional and Occupational Regulation (“DPOR”). In accordance with statutory requirements, this document reports on the activities of the Office for the period from November 26, 2011, to November 25, 2012.

Most notably, the Common Interest Community Ombudsman Regulations—which govern the complaint process for associations and guide the work of the Office—became effective July 1, 2012. As a result, the focus of the Office transitions from reviewing complaints to determining outcomes of “final adverse decisions,” as required under Section 55-530 of the *Code of Virginia*.

## **OMBUDSMAN REGULATIONS**

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In order to comply with the provisions of § 55-530, the CICB developed regulations to govern the requirement for associations to set rules for receiving and considering complaints. Executive branch review of the Common Interest Community Ombudsman Regulations was completed on April 30, 2012, and the regulations were published in the *Virginia Register of Regulations* on May 21, 2012. After the public comment period ended on June 20, 2012, the regulations became effective July 1, 2012.

Because the regulations require associations to create an internal complaint procedure, the CICB granted a 90-day grace period for all registered associations to provide sufficient time to draft and adopt an internal complaint procedure. As a result, associations registered with the CICB were officially required to adopt a complaint procedure by September 28, 2012. New associations or those not currently registered with the CICB must adopt a complaint procedure within 90 days of registration.

## **INQUIRIES & COMPLAINTS**

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### ***Statistics***

During the 2011-12 reporting period, the Office received 1,613 telephone calls (a 30.9% increase over last year) and 1,833 email messages (a 54.8% increase over last year).

Office representatives continued to respond promptly to these phone calls and e-mails, which primarily concerned requests for information or questions related to common interest communities and time-shares, as well as clarification and explanation of the new regulations.

The Office received 311 complaints during 2011-12 on the following topics:

- 30.8% related to Property Owners' Associations;
- 19.3% related to Condominium Unit Owners' Associations;
- 36.4% related to Time-Shares;
- 00.3% related to Cooperatives; and
- 13.1% related to Management Companies.

The percentages remained fairly close to those from 2010-11, with the exception of time-share complaints, which decreased by approximately 10 percent. The remaining complaint topic percentages were within several points of the previous reporting period.

The Office resolved or closed 345 complaints in 2011-12, which includes resolution or closure of some complaints received during the prior reporting period. At present, one complaint remains under investigation.

Actions (or lack thereof) by association boards remain the primary area of complaint (63%) related to common interest communities. These complaints include a lack of access to books and records on the part of a member or unit owner (9.3%), disagreement with methods of assessment and collections (6.2%), issues with maintenance in the association (8.2%), and perceived violations of governing documents or state law by the association board (12.9%). The remaining complaint topics run the gamut from embezzlement to neighbor conflicts to allegations of murder. Clearly, not all complaints received were appropriate for resolution by the Office.

### ***New Complaint Procedure***

The Common Interest Community Ombudsman Regulations—effective July 1, 2012—required existing associations to create an internal complaint procedure within a 90-day grace period (by September 28, 2012). New associations or those not currently registered with the CICB must adopt a complaint procedure within 90 days of registration.

Promulgation of the new Ombudsman Regulations resulted in a deluge of telephone calls and e-mail inquiries to the Office as to the applicability and scope of the regulatory requirements. Office staff spent the summer and early fall responding to inquiries from association board members, managers, and association members.

While the Ombudsman Regulations remained under executive branch review, the Office processed inquiries, investigated complaints, and attempted to resolve association disputes within its limited authority. However, as of September 28, 2012, the Office no longer accepts complaints from members of common interest communities. Instead, the Office now carries out its duties as originally prescribed by § 55-530.

Rather than receiving complaints from association members, the Office now only accepts and reviews “Notices of Final Adverse Decision.” Notices of Final Adverse Decision, as described in

§ 55-530 and the new regulations, are obtained after—and only after—an association member or owner submits a complaint to its association, through the newly required internal complaint procedure, alleging a violation of common interest community law or regulation (not association governing documents). Upon receipt of such a complaint, every association board must provide a final decision to the complainant, and if that final decision is adverse to whatever action or outcome the complainant sought, the complainant may then (along with the statutorily mandated \$25 fee or a fee waiver request) submit a Notice of Final Adverse Decision to the Office for review.

As a result of the new regulations, the Office updated its website ([www.dpor.virginia.gov/CIC-Ombudsman](http://www.dpor.virginia.gov/CIC-Ombudsman)) to provide the new forms and templates necessary for the creation of association complaint procedures. The Office intends to update the site further to provide additional means by which members and association boards can share information and perhaps learn from questions already asked of the Ombudsman.

### ***Time-Shares***

Another facet of the Office is its continued review of and response to complaints submitted by complainants alleging violations of the Virginia Real Estate Time-Share Act and Regulations. As noted in previous annual reports, the majority of time-share complaints received are related to misrepresentations made during sales presentations. Of the 111 time-share complaints received during the 2011-12 period, 71% allege sales presentation misrepresentations.

Based on information provided by time-share complainants, the most common misrepresentation involves verbal promises made during sales presentations that ultimately never come to fruition. Among such assurances are statements implying that time-shares are investment properties, that time-share owners can obtain tax credits or write-offs as a result of ownership, and that the rental of a time-share is an easily accomplished feat and can offset any expenses that may result from maintenance or other assessments.

Although time-shares are not legally considered common interest communities, regulation of the industry (project registration, resale, etc.) falls under the CICB, while Time-Share Act complaints and enforcement are purely civil in nature and require court intervention. As a result, the Ombudsman considered ceasing the Office's review and acceptance of time-share complaints, instead referring such cases for processing through DPOR's standard regulatory complaint channels. However, as a result of the Ombudsman's participation in the Housing Commission's Time-Share Work Group, and after discussion with DPOR management, the Ombudsman will continue to review and respond to time-share complaints, so that patterns and concerns inherent in such complaints can be identified and perhaps resolved over time.

## **EDUCATION & OUTREACH**

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During the 2011-12 reporting period, the Ombudsman provided 14 presentations throughout the Commonwealth, including presentations for the Community Associations Institute (CAI) 2012 Legal & Legislative Update, the Property Owners' Association of Virginia, Inc., Fairfax County's "Your Community Your Call" television program, an open forum in Fairfax County on the new regulations, the first annual Southwest Virginia CAI Chapter Expo, and several management companies.

The Ombudsman continued to meet with members of the General Assembly and to serve on the Common Interest Communities and Time-Share workgroups of the Housing Commission. In addition, the Ombudsman participated in several in-house training sessions to educate new DPOR employees and other agency sections about the role of the Office, and to provide direction and information for situations where other staff may interact with common interest communities.

## **CONSTITUENT EXPECTATIONS**

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Previous reports noted confusion and dissatisfaction as a result of the public's misunderstanding of the duties performed by the Office. Statutory language led association members and unit owners to believe the Ombudsman's authority allowed for interpretation of governing documents when, in fact, the Ombudsman is not permitted to offer legal advice or interpretation.

In an effort to align constituent expectations more closely with the Office's legal mandate, DPOR successfully sought legislation during the 2012 General Assembly Session to clarify the role of the Ombudsman by removing incorrect references to review of declarations, bylaws, or other association documents. The technical amendments should help the public better understand the nature of assistance the Office can provide, as well as its legal limitations.

During the 2011-12 reporting period, association constituencies also expressed frustration and angst in complying with the new regulatory requirement to prepare and adopt internal complaint procedures. However, the CICB provided notice to every registered association prior to the enactment of the new Ombudsman Regulations, and granted associations a 90-day grace period to meet their responsibilities under the new regulations.

While many associations are particularly nervous about the taxing nature of serial complainers on association resources, as time goes on, savvy associations will learn how best to handle these members and will come to recognize the internal complaint procedure can be an asset rather than a detriment. Associations will now be more fully aware of the areas of complaint by their members and owners, with a more complete understanding of owner perceptions as to what might be construed as violations of common interest community laws or regulations.

As a result of the new complaint procedures, associations may benefit from a far greater opportunity to understand what goes on within the framework of the community, respond to issues in a timely manner, and work toward transparency in governance of the association—which is perhaps the single most important aspect of association governance.

## **LEGAL DEVELOPMENTS**

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### ***State Legislation***

Significant developments in state law related to common interest communities from the 2012 General Assembly Session are listed below.

<b>Bill No.</b>	<b>Patron</b>	<b>Description</b>
HB 377	Brenda L. Pogge	Exempts auction sales from certain provisions of the Condominium Act, provided the resale certificate was made available in advance for prospective purchasers.
HB 410	Vivian E. Watts	Extends the right of associations to sue and recoup associated legal costs against homeowners who fail to pay assessments.
HB 902	J. Randall Minchew	Extends the deadline for expanding, contracting, or converting a condominium from seven years to 10 years.
HB 1219 SB 472	C. Matt Fariss Mamie E. Locke	DPOR-requested legislation to provide an administrative method for terminating inactive condominium and time-share registrations; to correct annual reporting requirement statutes; and to clarify the role and jurisdiction of the Ombudsman.
SB 628	Mark R. Herring	Limits to five years the time a developer-controlled association board can contract with suppliers (for parking, other services, etc.).

In addition to the enacted legislation noted above, Governor McDonnell vetoed the following bills:

- HB 423 (Bulova), which would require the CICB to develop and publish best practices for declarations and a model declaration for associations. State law already defines and outlines the minimum components required of legal declarations, which are community-specific contracts between the association and its members.



- SB 627 (Petersen), which would permit restrictive covenants by associations to limit or prohibit solar energy devices on a homeowners own property. State law already allows associations to restrict or ban solar devices on common elements or in common areas.

## ***Virginia Court Cases***

A number of recently decided cases may have a lasting impact on associations in the Commonwealth. A brief summary of several such cases is provided below. This list is by no means intended to be exhaustive.

- Shadowood Condominium Association, et al. v. Fairfax County Redevelopment and Housing Authority – The Supreme Court of Virginia upheld an appeal from the Circuit Court of Fairfax County, which determined the association lacked authority to assess owners for a failure to submit paperwork and for violations of the rules. In particular, the circuit court had held the association lacked such authority under the condominium instruments and that § 55-79.80:2 did not apply as a result. The Court found the power of an association is “contractual in nature.” One of the questions this case raises is whether recorded condominium instruments must specifically provide authority for an association to levy assessments for violations of its rules.
- Manchester Oaks Homeowners Association, Inc. v. Patrick K. Batt, et al. – The Supreme Court of Virginia affirmed a finding from the Circuit Court of Fairfax County, which determined “the reservation of parking spaces in the common area for use solely by owners of Ungaraged Lots violated the Declaration by discriminating against Garaged Lot owners and giving them unequal access to the common area.” The case also addressed the validity of an amendment to the association’s declaration, as well as the award of damages and attorneys’ fees.
- Charles G. Marterella, et al. v. Bellevue Landowners Council Inc. – The Supreme Court of Virginia reversed the judgment of the trial court that had granted injunctive relief and attorneys’ fees to the Marterellas and entered final judgment in favor of the Marterellas, as the original suit had done when it found in favor of the Marterellas after a jury trial on their estoppels plea. The case revolved around the use of the Marterella property as a winery and vineyard with on-site wine sales. The association argued the sale of wine on the property violated the governing documents and did not constitute a strictly agricultural use of the property which was permitted under the governing documents.
- Lee’s Crossing Homeowners Association v. Bates – The circuit court determined the declarant, after purchasing additional property and “reviving” its Class B membership, had the power to levy special assessments (as outlined in the association’s governing documents) against association members in order to pay for the cost of litigation that involved the association, the association board, or the directors.

## ***Federal Topics***

Three key issues appeared repeatedly in the national news related to common interest communities. The first—which affects all types of homes, not just those in associations—is the issue of foreclosure. Last year, two Massachusetts cases decided in the Supreme Judicial Court came to the forefront regarding the right of lenders to foreclose on properties for which they did not hold all the necessary documents, as well as the legal rights of a new owner who purchased a foreclosed property in which the forecloser may not have had all the proper documents at the time of foreclosure.

Following these two cases, the Massachusetts high court decided Eaton v. Fannie Mae in June of 2012, finding that lenders must hold the promissory note and mortgage in order to foreclose. The court, to the relief of many, held that this decision is to be applied proactively rather than retroactively. Although the cases were decided in Massachusetts, many believe they may have larger, national implications.

A second issue, noted in this report last year, is the ongoing struggle over Federal Housing Finance Agency (FHA) condominium certification requirements. Among the positive changes to certification requirements, the FHA eased the delinquency rate from 15% of units not more than 30 days delinquent to 15% of units not more than 60 days delinquent. In addition, the FHA loosened the investor provisions in the certification process, allowing 50% ownership by a single investor rather than the previous limit of 10% of such investor ownership.

The FHA also amended its fidelity bond/insurance requirements in such a way that it is simpler and more cost effective for an association to obtain and maintain such coverage. Finally, the FHA now requires the individual submitting the certification to attest that he or she has no current knowledge of problems that might harm the condominium project, whereas previously the submitter had a legal responsibility over a two-year period of time to provide information to the FHA regarding any issues that might cause harm to the condominium and put into question the borrower's ability to pay its mortgage.

Third, short sales have been in the forefront of the news as a method by which lenders and owners can avoid the costs of foreclosure and assume a potentially better position than by allowing the property to go into foreclosure. The difficulty within associations is that once an owner reaches the point where he or she is no longer able to pay the mortgage, the owner also cannot pay association assessments. New Freddie Mac and Fannie Mae guidelines simplify the process of selling a home through the short sale process and establish a \$6,000 maximum for payment of existing subordinate liens.

Finally, the “Helping Responsible Homeowners Refinance Act of 2012” is currently pending before Congress and may help “underwater” homeowners refinance in order to remain in their homes. This could be a boon to associations if owners are able to afford both their mortgage payments and assessments. The Act would reduce fees, support competition for refinancing, and ease some of the current restrictions in place for those homeowners who are underwater but current on their payments.

## NEWS OF INTEREST

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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 light of a recent decision by the New Jersey Supreme Court—which determined that outright bans on political signs in an association are unconstitutional—and based on the number of inquiries received by the Office and the increase in articles and stories regarding political signage in common interest communities, the issue is likely to generate continued attention and perhaps legislative proposals. (Previous legislation on this topic includes SB 964 from the 2007 Session as well as SB 621 and HB 878 from the 2006 Session.)
- In Northern Virginia, exclusive easements granted to carrier OpenBand continue to generate questions with regard to potential anti-trust implications. In October, a LoudounTimes.com article (10/20/2012) noted, “The Federal Communications Commission on Wednesday issued a brief in response to a federal lawsuit filed by a Lansdowne homeowners association against telecommunications firm OpenBand, saying the company’s exclusive easement agreement with the community is forbidden by law.”
- A manager of a Virginia association found guilty of embezzling \$170,000 over a three- to four-year period of time was sentenced to three years in prison, with seven years suspended, and ordered to pay restitution of the stolen funds.

# APPENDIX

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## ***Statutory Authority***

### ***§ 55-530. Powers of the Board; Common interest community ombudsman; final adverse decisions.***

*A. The Board shall administer the provisions of this chapter pursuant to the powers conferred by § 54.1-2349 and this chapter.*

*B. The Director in accordance with § 54.1-303 shall appoint a Common Interest Community Ombudsman (the Ombudsman) and shall establish the Office of the Common Interest Community Ombudsman. The Ombudsman shall be a member in good standing in the Virginia State Bar. All state agencies shall assist and cooperate with the Office of the Common Interest Community Ombudsman in the performance of its duties under this chapter. The expenses for the operations of the Office of the Common Interest Community Ombudsman, including the compensation paid to the Ombudsman, shall be paid first from interest earned on deposits constituting the fund and the balance from the moneys collected annually in the fund.*

*C. The Office of the Common Interest Community Ombudsman shall:*

- 1. Assist members in understanding their rights and the processes available to them according to the laws and regulations governing common interest communities;*
- 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 final adverse decisions;*
- 6. In conjunction with complaint and inquiry data maintained by the Director, maintain data on inquiries received, the types of assistance requested, notices of final adverse decisions received, any actions taken, and the disposition of each such matter;*
- 7. Upon request, assist members in understanding the rights and processes available under the laws and regulations governing common interest communities and provide referrals to public and private agencies offering alternative dispute resolution services, with a goal of reducing and resolving conflicts among associations and their members;*
- 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.*

*D. The Board may use the remainder of the interest earned on the balance of the fund and of the moneys collected annually and deposited in the fund for financing or promoting the following:*

*1. Information and research in the field of common interest community management and operation;*

*2. Expedient and inexpensive procedures for resolving complaints about an association from members of the association or other citizens;*

*3. Seminars and educational programs designed to address topics of concern to community associations; and*

*4. Other programs deemed necessary and proper to accomplish the purpose of this chapter.*

*E. The Board shall establish by regulation a requirement that each association shall establish reasonable procedures for the resolution of written complaints from the members of the association and other citizens. Each association shall adhere to the written procedures established pursuant to this subsection when resolving association member and citizen complaints. The procedures shall include but not be limited to the following:*

*1. A record of each complaint shall be maintained for no less than one year after the association acts upon the complaint.*

*2. Such association shall provide complaint forms or written procedures to be given to persons who wish to register written complaints. The forms or procedures shall include the address and telephone number of the association or its common interest community manager to which complaints shall be directed and the mailing address, telephone number, and electronic mail address of the Office of the Common Interest Community Ombudsman. The*

*forms and written procedures shall include a clear and understandable description of the complainant's right to give notice of adverse decisions pursuant to this section.*

*F. A complainant may give notice to the Board of any final adverse decision in accordance with regulations promulgated by the Board. The notice shall be filed within 30 days of the final adverse decision, shall be in writing on forms prescribed by the Board, shall include copies of all records pertinent to the decision, and shall be accompanied by a \$25 filing fee. The fee shall be collected by the Director and paid directly into the state treasury and credited to the Common Interest Community Management Information Fund, § 55-530.1. The Board may, for good cause shown, waive or refund the filing fee upon a finding that payment of the filing fee will cause undue financial hardship for the member. The Director shall provide a copy of the written notice to the association that made the final adverse decision.*

*G. The Director or his designee may request additional information concerning any notice of final adverse decision from the association that made the final adverse decision. The association shall provide such information to the Director within a reasonable time upon request. If the Director upon review determines that the final adverse decision may be in conflict with laws or regulations governing common interest communities or interpretations thereof by the Board, the Director may, in his sole discretion, provide the complainant and the association with information concerning such laws or regulations governing common interest communities or interpretations thereof by the Board. The determination of whether the final adverse decision may be in conflict with laws or regulations governing common interest communities or interpretations thereof by the Board shall be a matter within the sole discretion of the Director, whose decision is final and not subject to further review. The determination of the Director shall not be binding upon the complainant or the association that made the final adverse decision.*

*H. The Board shall issue a certificate of filing to each association which has properly filed in accordance with this title. The certificate shall include the date of registration and a unique registration number assigned by the Board.*

*I. The Board may prescribe regulations which shall be adopted, amended or repealed in accordance with the Administrative Process Act (§ 2.2-4000 et seq.) to accomplish the purpose of this chapter.*