

**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 2012-2013



Department of Professional and Occupational Regulation

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

PREFACE

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 reporting period covering November 27, 2012, through November 25, 2013.

Office of the Common Interest Community Ombudsman
Heather S. Gillespie, Ombudsman
Department of Professional and Occupational Regulation
(804) 367-2941
CICOmbudsman@dpor.virginia.gov

TABLE OF CONTENTS

Executive Summary	1
Ombudsman Office Regulations	1
Inquiries & Complaint Statistics	2
Education & Outreach	5
Constituent Expectations	6
Legal Developments	7
News of Interest	10
Statutory Authority	11

EXECUTIVE SUMMARY

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 27, 2012 through November 25, 2013.

The Office responds to thousands of inquiries each year from board members and owners in common interest communities, serving as an information resource and guide for citizens seeking to resolve disputes outside of the civil court system. Topics most frequently raised by constituents relate to implementation of the new Regulations, proper methods for submitting complaints via the association complaint process, how to submit Notices of Final Adverse Decisions (NFADs), and issues related to time-share presentations.

OMBUDSMAN OFFICE REGULATIONS

Although the Common Interest Community Ombudsman Regulations (Regulations) have been in effect for more than a year, association boards, association members and citizens continue to struggle with compliance. In addition, a general lack of understanding persists as to the manner in which the Regulations can be utilized to resolve conflicts with law and regulations related to common interest communities.

The Office works closely with members of association boards and owners in common interest communities, by providing guidance and information to help associations comply with the new Regulations and to assist owners and citizens in making use of association complaint procedures. Some of the more common inquiries received by the Office relate to the appropriateness of complaints that may be submitted through the complaint procedure, the extent to which the Regulations apply to all common interest communities in the Commonwealth, and whether associations must respond to submitted complaints within specific timeframes.

A Notice of Final Adverse Decision (as defined in § 55-530 of the *Code of Virginia* and 18VAC48-70-10 of the Regulations) can be submitted to this Office only after a complainant has utilized the complaint procedure and exhausted the appeals process (if any) within an association.¹ After submitting a complaint through an association complaint procedure, a complainant will receive a response that constitutes a *Final Adverse Decision* only if contrary to what the complainant sought.

¹ In two instances, the Office will accept complaints directly: (1) If a complainant properly submits a complaint to an association and does not receive a response in a reasonable timeframe; or (2) if a complainant requests a copy of an association’s complaint procedure and the association fails to provide one.

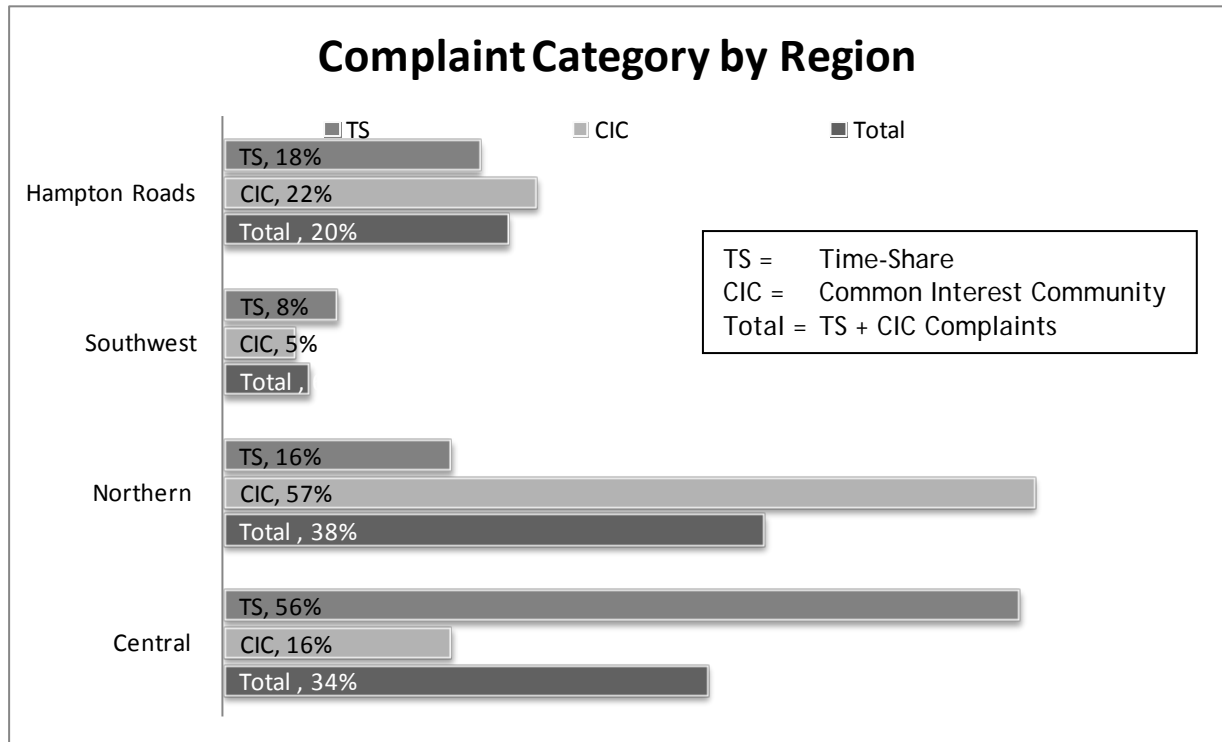
Upon receipt of a Final Adverse Decision, a complainant may subsequently submit a Notice of Final Adverse Decision (NFAD) to the Office, along with the statutorily mandated \$25 filing fee (or a Request for Waiver of the filing fee). Upon receipt of the NFAD, and after confirming its timeliness, completeness and appropriateness, the Ombudsman (as designee for the DPOR director) reviews the NFAD and provides a determination as to whether “the final adverse decision may be in conflict with laws or regulations governing common interest communities” (§55-530 and 18 VAC 48-70-120).

INQUIRIES & COMPLAINT STATISTICS

Common Interest Communities

Since implementation of the Regulations (effective July 1, 2012), the Office has received 43 Notices of Final Adverse Decision. Of that total, 34 were received this year.

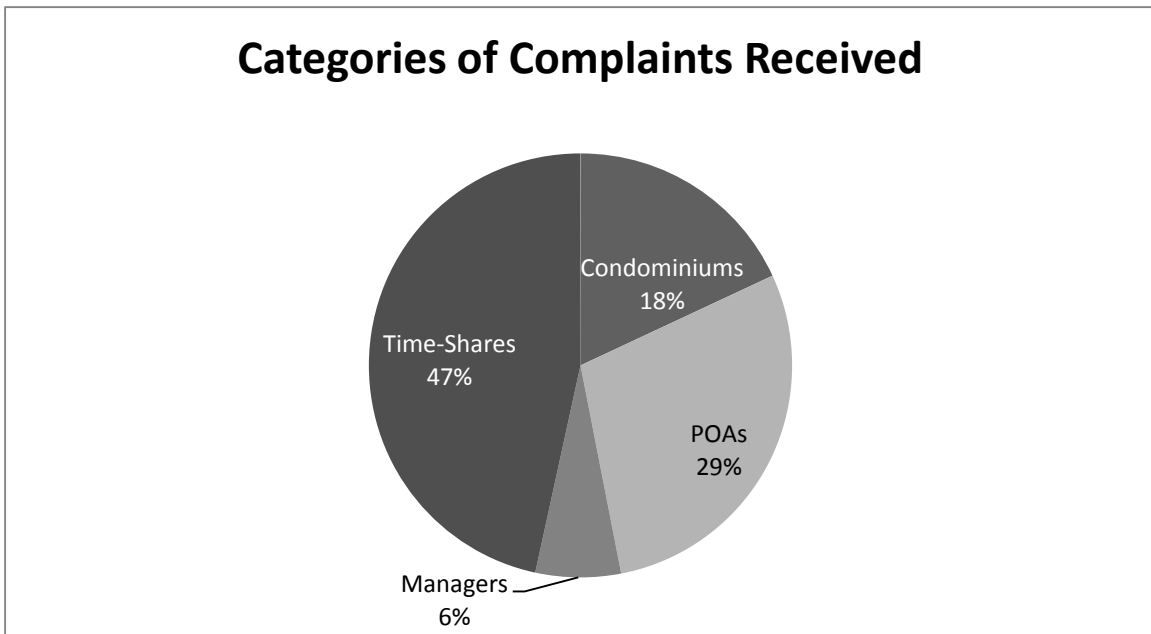
During the 2012-13 reporting period, the Office received 1,377 telephone calls and 2,006 email messages. The Office responds to all phone calls and emails by the next business day, unless unusual circumstances prevail and make that turnaround time unfeasible. The bulk of the phone calls and emails received this past year concerned implementation of the new Regulations, proper methods for submitting complaints via the association complaint process, how to submit Notices of Final Adverse Decisions (NFADs) to the Office, and issues related to time-share presentations.



The Office received a total of 268 complaints (including NFADs) during the 2012-13 reporting period in the following categories:

- 28.88% related to Property Owners' Associations (POAs);
- 18.05% related to Condominium Unit Owners' Associations;
- 46.57% related to Time-Shares;
- 0% related to Cooperatives; and
- 6.5% related to Management Companies*

**Complaints concerning management companies should be submitted through the standard DPOR complaint process rather than through the Office. The numbers above represent complaints submitted inaccurately to the Office, citing the management company as being at fault or in violation of common interest community laws or regulations.*

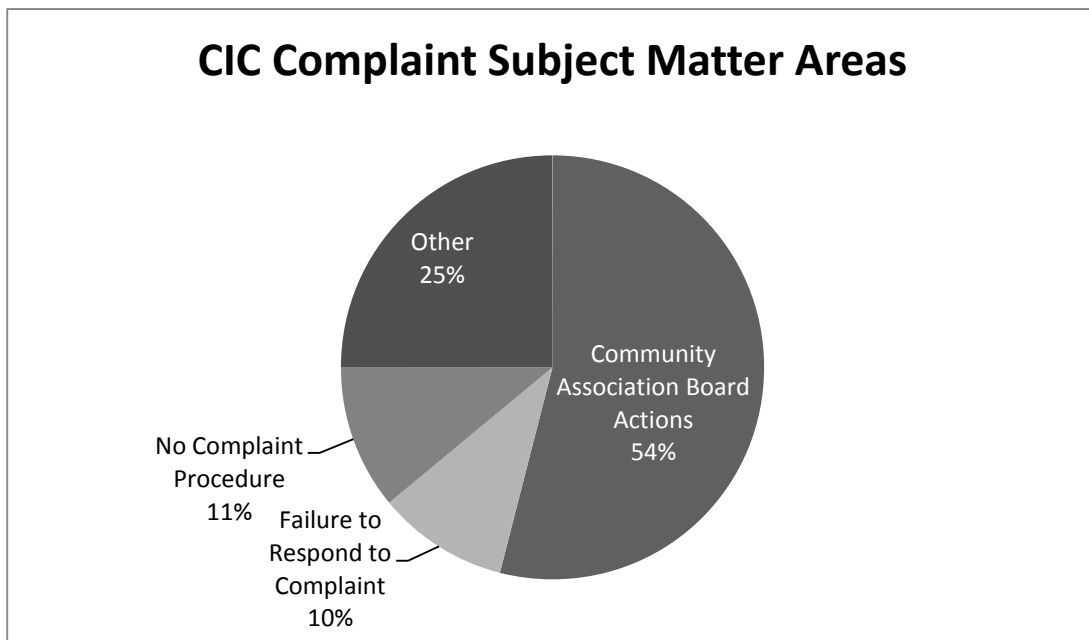


The complaint categories remained in-line with last year's statistics, except for complaints regarding time-shares, which increased by nearly 10 percentage points over the prior reporting period. The Office closed 264 complaints in 2012-13, which includes resolution or closure of some complaints received during the prior reporting period.

Although the number of complaints and the closure rate decreased this reporting period, the volume of work for this Office actually increased as a result of the implementation of the Regulations and requirements for NFAD responses in the form of Determinations by the Ombudsman (which are substantially more labor-intensive than previously provided responses to submitted complaints).

Of all common interest community complaints received (including NFADs), 54% related to actions (or lack of action) by the community association board. Of those board-related complaints: 13% concerned violations of the association’s governing documents (an area outside the jurisdiction of this Office); 6% related to assessments; 6% related to declarant (developer) actions; 6% concerned access to books and records; and 3% concerned disclosure packets or resale certificates.

Two other primary complaint areas (other than board-related actions) related to associations’ failure to respond to a complainant’s submitted association complaint (10%), and associations’ failure to adopt a complaint procedures as required by the Regulations (11%).

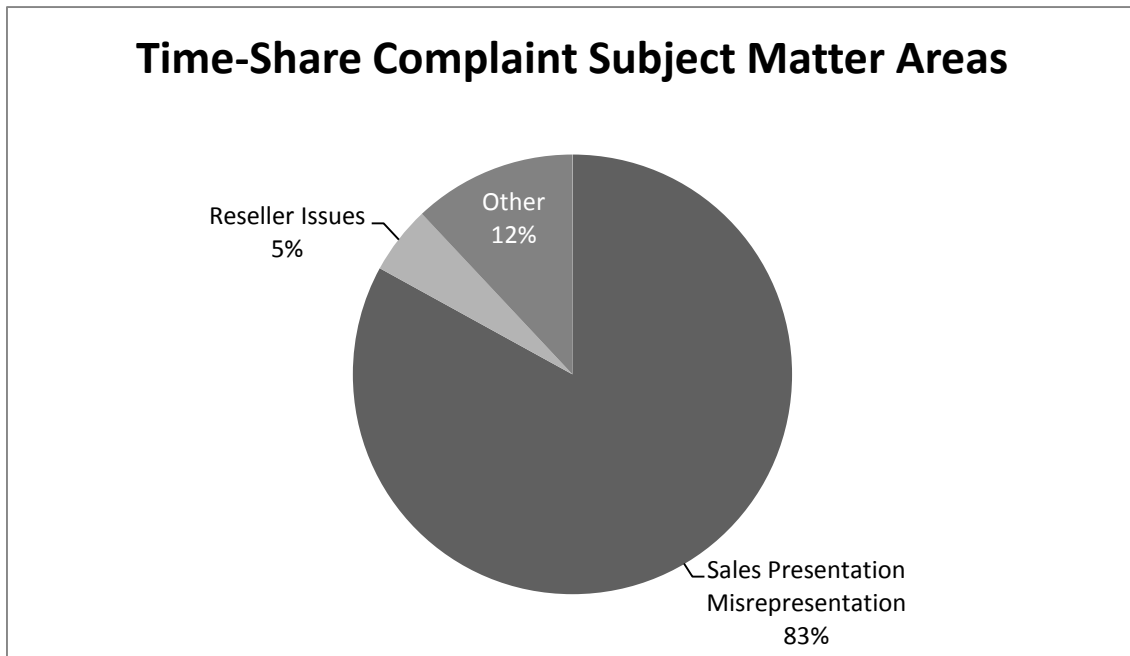


Time-Shares

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. Although time-shares are not considered common interest communities under the Regulations, this Office has responded to complaints related to time-shares for the past five years. Time-share complainants may submit complaints directly to the Office, rather than follow an internal complaint procedure and NFAD as required of common interest communities.

As noted in previous annual reports, the vast majority of time-share complaints relate to alleged misrepresentations made during sales presentations. Of the 129 time-share complaints received during the 2012-13 period, 83% alleged sales presentation misrepresentations—a 12 percentage point increase over the last reporting period.

Whether perception or reality or somewhere in between, this issue of misrepresentation appears to constitute an ongoing and significant problem area in Virginia's time-share industry.



The Common Interest Community Board regulates the time-share industry through its registration of projects and re-sellers. Its authority extends to time-share transactions occurring within Virginia, even if the property involved is located outside the Commonwealth. Enforcement of the Time-Share Act, however, is primarily civil and generally requires court intervention.

EDUCATION & OUTREACH

During the 2012-13 reporting period, the number of presentations given by the Ombudsman fell precipitously, as a result of fewer speaking requests in concert with an overall decrease in the amount of outreach programs generally. It is unclear if the sharp drop reflects an unusual year or if this indicates a pattern now that both the CICB and the Office have been in existence for several years and require less of an introduction across the Commonwealth. The Ombudsman is in the process of reaching out to local groups involved with common interest communities in an effort to facilitate more outreach opportunities.

Presentations provided this year included the Central Virginia Chapter of Community Association Institute's Community Association Day, the Prince William County Neighborhood Day, James City County's Neighborhood Leaders' Forum, and the McLean Citizens Association.

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

CONSTITUENT EXPECTATIONS

The primary concerns expressed by constituents who contacted the Ombudsman's Office this reporting period related to implementation of the new association complaint procedures and Regulations. The majority of inquiries concerned association efforts at adopting a complaint procedure, association neglect in adopting a complaint procedure, or association failures to respond to a submitted complaint in a reasonable timeframe.

In addition, the Ombudsman worked directly with CICB staff to counsel associations that failed to certify the existence of a complaint procedure when filing their statutorily mandated annual reports. Many associations did not understand the legal requirement to establish an internal complaint procedure and, until they could provide proof of adoption of a complaint procedure, the CICB could not process their annual report filing.

With regard to time-shares, constituent frustration and complaints alleging sales presentation misrepresentations in particular have only increased each year since the inception of this Office. Complaint statistics indicate that time-share purchasers are allegedly making decisions based on verbal information provided during sales presentations that they later learn was inaccurate or deliberately misleading. As previously stated, whether perception or reality or somewhere in between, this issue of misrepresentation appears to constitute an ongoing and significant problem area in Virginia's time-share industry.

LEGAL DEVELOPMENTS

State Legislation

Significant developments related to common interest communities from the 2013 General Assembly Session are listed below.

Bill No.	Patron	Description
HB 1595	Watts	Allows condominiums and POAs to charge late fees for assessments 60 days or more past due (not to exceed five percent), unless the governing documents, rules or regulations provide otherwise.
HB 1630 SB 772	Cosgrove Wagner	Allows the developer to control the common elements until at least 20 percent of the time-share estates no longer list the developer as the beneficiary on mortgage notes, unless the purchase contract or time-share instruments expressly state otherwise. Also clarifies assessments may be levied to fund a reserve or to finance common expenses; makes it optional for a foreclosure trustee to file with the commissioner of accounts; and places monetary caps on fees a commissioner of accounts may charge in time-share foreclosures.
HB 1711	Plum	Amends the Condominium and Property Owners' Association Acts to state that if an annual meeting to elect members of the board of directors is cancelled, then the seven-day notice required for any subsequent meeting to conduct such election must include a statement that the meeting is scheduled expressly for election of directors.
HB 1807	Miller	Amends the Condominium and Property Owners' Association Acts to require resale certificates and disclosure packets to include language informing the buyer whether the project is approved for FHA-backed purchases or refinances.
HB 1861	Rust	Extends statewide the existing requirement (now applicable only to localities in Northern Virginia) for local governments to receive notice of foreclosure sales, and specifies that such notice must be provided within 60 days from the date of foreclosure sale. Also requires common interest community associations be notified when a property in a homeowners' association is sold at foreclosure.
HB 2200	Webert	Requires Property Owners' Associations to allow any home-based business within an owner's residence (unless the declaration expressly allows outright prohibition)—subject to reasonable restrictions on time, place, and manner of business operation, as well as restrictions on size and placement of business-related signage on the owner's lot. Any approved home-based business in a POA also must comply with all local ordinances.

Bill No.	Patron	Description
HB 2275	Peace	Amends the Condominium Act to allow the initial declarant (developer) control period to be extended for up to 15 years from the sale of the first unit, provided 2/3 of existing owners agree. Developers must provide unit owners a disclosure form developed by the Common Interest Community Board prior to any such vote to extend the developer control period. In addition, the unit owners' association must form a warranty review committee if the developer control period is extended, and the warranty expiration is extended to account for longer periods of developer control.
HB 2305	Ramadan	Clarifies that common interest community associations may impose reasonable restrictions (on size, placement, etc.) governing solar devices located on property that is individually owned or designated for individual ownership. Associations <u>may not prohibit</u> such solar devices outright if they are located on an individually owned lot (unless an association's restrictive covenants went into effect prior to July 1, 2008, or if the association amends its governing documents). Requires the Real Estate Board to amend the Residential Property Disclosure Form to insert a disclaimer that the seller makes no representations concerning a right to use or install solar devices on the subject property; and requires the disclosure packet/resale certificate provided to prospective purchasers of association lots/condominium units to include a statement outlining any restrictions or limitations on the rights of individual owners to use or install solar energy collection devices.

Virginia Court Cases

The Supreme Court of Virginia considered fewer cases this reporting period pertaining to common interest communities, but a substantial number of circuit court cases involved association issues. These cases are not necessarily suitable for submission through the association complaint procedure. Below is a brief summary of some of the more recently decided cases.

- Lynnhaven Dunes Condominium Association v. City of Virginia Beach | Two key issues were considered in this case: whether the locality had the power to condemn the property and, in so doing, whether it could do so without providing compensation to the Association. The Supreme Court found the condemnation was proper, as the City had acquired an easement by implied dedication over a sizable period of time. The Supreme Court reversed and remanded the decision by the Circuit Court that there was no requirement for compensation to the Association.
- Scoggins v. Lee's Crossing Homeowners Ass'n | This appeal involved a Fair Housing claim filed by a family that had requested the use of an ATV for their disabled child within the Association. The request was not deemed a reasonable accommodation as defined by the Fair Housing Amendments Act. A request for a ramp, which had been part of the original action in district court, was vacated as not being ripe for judicial review.

- Walker v. Great North Mountain Property Owners' Association | Here an owner had built a retaining wall that the association claimed was encroaching upon the right of way. Without a hearing or formal notice, the association subsequently tore out the wall and billed the owner for the cost. The Circuit Court determined the association exceeded its authority under its restrictive covenants and awarded compensatory damages and attorneys' fees.
- Mondana Nicksolat v. Mohammad Gharavi, et al. | A parking space assigned to a unit that was subject to a Deed of Trust was sold to Defendant without notice to the mortgagees. The unit was subsequently foreclosed and Plaintiff became the new owner. In its opinion letter, the court found that "§ 55-79.73:1(C) was violated by not obtaining prior consent" and therefore the transfer of the parking space to Defendant was "a nullity" and that Plaintiff, in purchasing the unit, also purchased the parking space.
- Op. Va. Att'y Gen. 12-104 | Two inquiries were made of the Office of the Attorney General: (1) whether the Property Owners' Association Act, by providing or allowing developer control for a specific period of time or until a particular number of lots are sold, violates the constitutional rights of owners in the association; and (2) whether a conflict of interest exists when a lawyer works on behalf of the developer and the association when the developer still controls the association. The official advisory opinion of the Attorney General found that "there is no Virginia Code provision to evaluate for constitutionality" and that determining a conflict of interest in relation to an attorney is "an ethical issue properly addressed by the Virginia State Bar."

Federal Topics

While the following information is not directly related to common interest communities, the following three proposed or new Acts may affect homeowners tremendously.

- ***The Homeowner Flood Insurance Affordability Act (HFIA)*** is intended to abate flood insurance rate increases, at least temporarily, while the requirements of the Biggert Waters Flood Insurance Reform Act (BW-12) are implemented. As a result of the BW-12 law, which mandated updates to flood insurance rate maps, many homeowners have experienced increased insurance costs as their properties are now considered higher risk. HFIA proposes additional time be given before rate increases take effect, so as to allow the Federal Emergency Management Agency (FEMA) to study the impact of BW-12.
- ***The Housing Finance Reform and Taxpayer Protection Act of 2013***—introduced by a bipartisan group, including Virginia Senator Mark Warner—would dissolve Fannie Mae and Freddie Mac and replace them with a single agency: the Federal Mortgage Insurance Corporation (FMIC).

- The Home Equity Conversion Mortgage (HECM) is the federal government’s reverse mortgage product, available to homeowners age 62 or older who have paid off their mortgage or paid down a considerable amount. However, in response to substantial losses to the Federal Housing Administration (FHA) as a result of the reverse mortgage program, Congress passed the *Reverse Mortgage Stabilization Act of 2013*.

The FHA has already issued a mortgagee letter highlighting key changes to the program based on the new law, including: limiting the amount of money that can be drawn at closing and during the first 12 months of a reverse mortgage; requiring a financial assessment before loan approval to ensure that borrowers can meet all the financial obligations related to housing (taxes, assessments, etc.); and requiring that money be set aside for the payment of property taxes and insurance.

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 of note gleaned from news reports which may be of interest to stakeholders.

- Edgehill Condominium in Chesterfield is reportedly dealing with ongoing problems related to its failure to abate building code violations. The association has been in court several times as it moves forward on making the repairs necessary to meet building code requirements and county ordinances.
- The River Ridge Community Association in Woodbridge has been struggling with its deer population and made a decision to cull the deer by working with an animal management company. Although many support this approach, some owners are also strongly opposed to this solution.
- An Albemarle County woman serving as treasurer for the Hollymead Citizens Association pled guilty to embezzling approximately \$73,000 from the association over a four-year period. Sentencing will be determined in January 2014.
- After a long battle, Hillwood Square Mutual Association in Falls Church (Fairfax County) was sold in June. The new owner reportedly plans to raze the World War II-era development—which was one of only a handful of cooperatives in Virginia—and build more than 450 garden-style apartments on the site.

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.