

**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 2018-2019



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 § 54.1-2354.3 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, 2018, through November 25, 2019.

Office of the Common Interest Community Ombudsman
Heather S. Gillespie, Ombudsman

Department of Professional and Occupational Regulation
(804) 367-2941

CICOmbudsman@dpor.virginia.gov

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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 26, 2018, through November 25, 2019.**

As was the case in prior years, the Office worked with numerous associations this year that had failed to adopt a complaint procedure as required by the Common Interest Community Ombudsman Regulations (“Regulations”). In addition, a substantial number of associations had adopted a complaint procedure but failed to carry it out as required under their own complaint procedure and the Regulations. This year more than in the past, the Office expended an enormous amount of time counseling associations and complainants in order to obtain compliance with the Regulations and to find an amicable resolution.

While the Office is typically able to resolve complaints and Notices of Final Adverse Decision (“NFADs”) by obtaining compliance, several instances this past year resulted in the Ombudsman forwarding complaints within the Agency for investigation and enforcement. The few complaints that were not resolved were related to the association complaint procedure and a failure by the association to properly adhere to the Regulations that govern them.

We continue to see many complaints related to owners who wish to examine or obtain copies of the books and records of their association. This is a continuing area of difficulty for associations and, as was noted last year, there is really no good reason for associations to continue to fail to provide the access that owners are requesting.

Our continuing pattern of resolving complaints rather than referring them for investigation or enforcement is a testament to the work that the Office strives to perform. Resolution of complaints, education about common interest community law, and working closely with associations and owners all contribute to the reasonable closure of complaints and NFADS after obtaining compliance.

OMBUDSMAN REGULATIONS & ROLE OF OFFICE

The Common Interest Community Ombudsman Regulations (18VAC48-70), enacted in 2012, require community associations to establish an internal complaint procedure. The statutory framework for complaint processing, established by the legislature when the Office and CICB were initially formed, generally provides for the Office to accept and review only “Notices of Final Adverse Decision,” not *de novo* complaints from association members or owners.

Notices of Final Adverse Decision (“NFADs”), as described in §54.1-2354.4 and the Regulations, are appropriate after—and only after—an owner or citizen submits a complaint to an association through the mandatory association complaint procedure. Complaints subject to

review by the Ombudsman are restricted by law and regulation to allegations of violations of common interest community law or regulation.

Upon receipt of an eligible complaint from an association member or owner—meaning the complaint is appropriate for the complaint procedure and was submitted in accordance with the association’s complaint process—the association board is required to provide a final decision to the complainant. If that final decision is “adverse” or contrary to whatever action or outcome the complainant sought, the complainant may *then* submit a NFAD to the Office for review by the Ombudsman (along with the statutorily mandated \$25 fee or a fee waiver request).

If an owner fails to receive a response from the community association in a reasonable timeframe, or an individual requests a copy of the association’s complaint procedure and the association fails to provide one (either because it has not adopted a complaint process or because it is simply being nonresponsive), a complaint alleging either of these regulatory violations may be submitted directly to the Office using a form specific to that purpose. The Office will then follow up with the association to ensure that it adheres to the requirements for responding to complaints, adopting a complaint procedure, or making the complaint process readily available.

OFFICE ACTIVITIES

Complaint Statistics¹

During the 2018-19 reporting period, the Office responded to 1,560 telephone calls and 1,949 email messages. The Office continues to respond as quickly as reasonably possible to all inquiries, and generally provides a response within 24 hours to any phone call or email.

The volume of inquiries decreased slightly over the prior year. One of the noticeable changes, however, has been in the complexity of both the calls and emails received. It is rare for a call to last less than 15 minutes, and many exceed 30 minutes or more. Emails are also growing more complicated and often require lengthy responses as well as research. The increase in complexity may well be directly related to the decrease in complaints and NFADs this past year, since more time spent explaining and educating may result in fewer complaints. By providing owners and associations with extensive and well thought out responses, it appears that many times complaints become unnecessary and resolution can be obtained when the parties are more knowledgeable and educated about common interest community law.

The Office received a total of 197 complaints² this year:

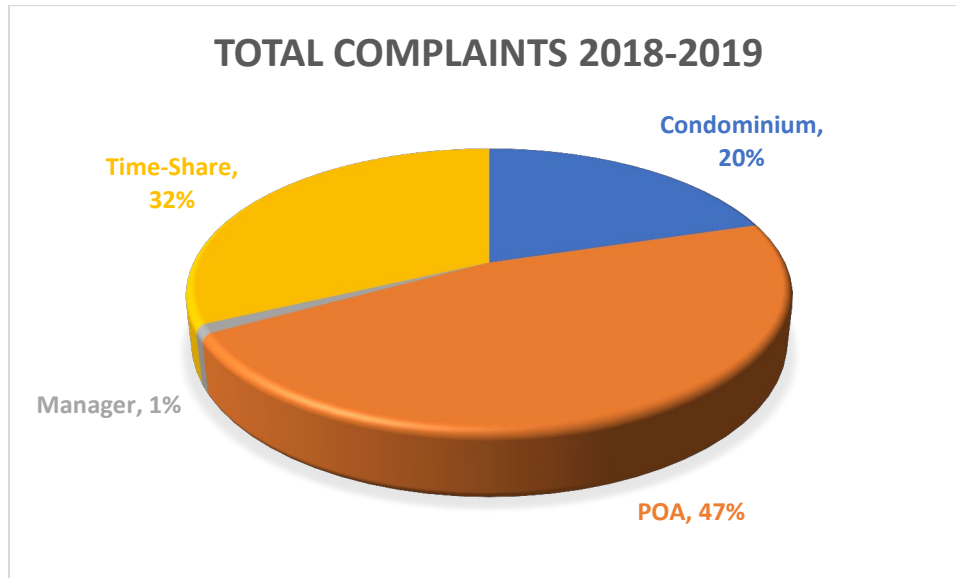
- 47% related to Property Owners’ Associations (POAs);

¹ Throughout this year’s Annual Report, statutory references will be limited due to a recodification of the Virginia Code that resulted in the renumbering of all common interest community law effective October 2019. Instead, the actual topic of a statute will be used to make it easier for the reader. We will return to statutory references next year.

² As used in this Annual Report, the term “complaints” includes Notices of Final Adverse Decisions (NFADs); complaints related to an association failure to adopt a complaint procedure or respond to a submitted complaint; complaints against time-shares; and complaints that have been improperly submitted directly to the Office when they should have been submitted through an association’s internal complaint process.

- 32% related to Time-Shares; and
- 20% related to Condominium Unit Owners' Associations.

POA Complaints decreased by 15 percent this year, while Condominium Complaints increased by nearly 23 percent. Time-Share Complaints fell by 38 percent. While we did not receive any complaints related to cooperatives this year, the Office fielded a number of phone calls and emails related to cooperatives and their boards of directors. A number of complaints related to Managers were referred to DPOR Complaint Analysis and Resolution (CAR) staff.

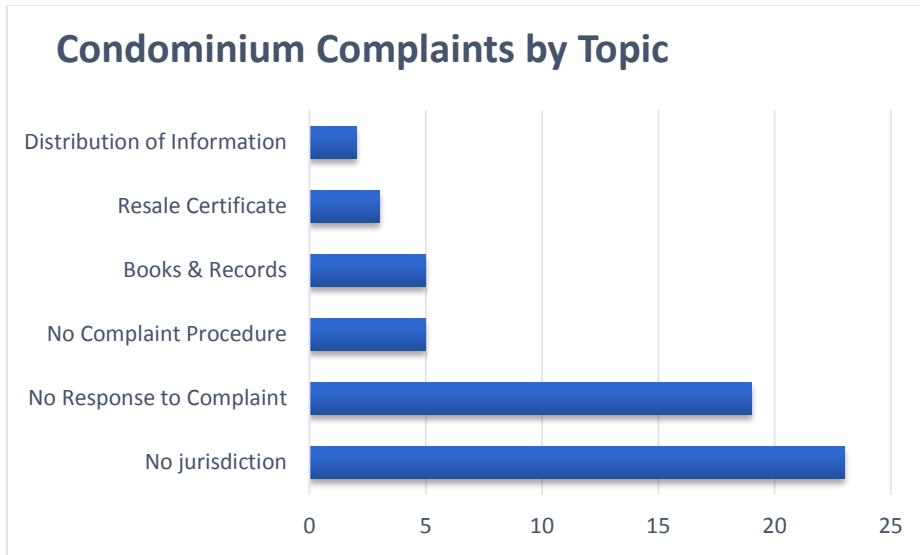


The percentage of common interest community (POAs and condominiums) complaints versus time-share complaints increased this year, with 67 percent of all complaints related to common interest communities and 32 percent related to time-shares.

The Office closed 197 complaints in 2018-19, which is a decrease over the prior year and likely reflective of the changes the Office saw this past year, namely that the complexity of calls and emails has increased which appears to have resulted in fewer complaints since many issues were resolved via phone call or email.

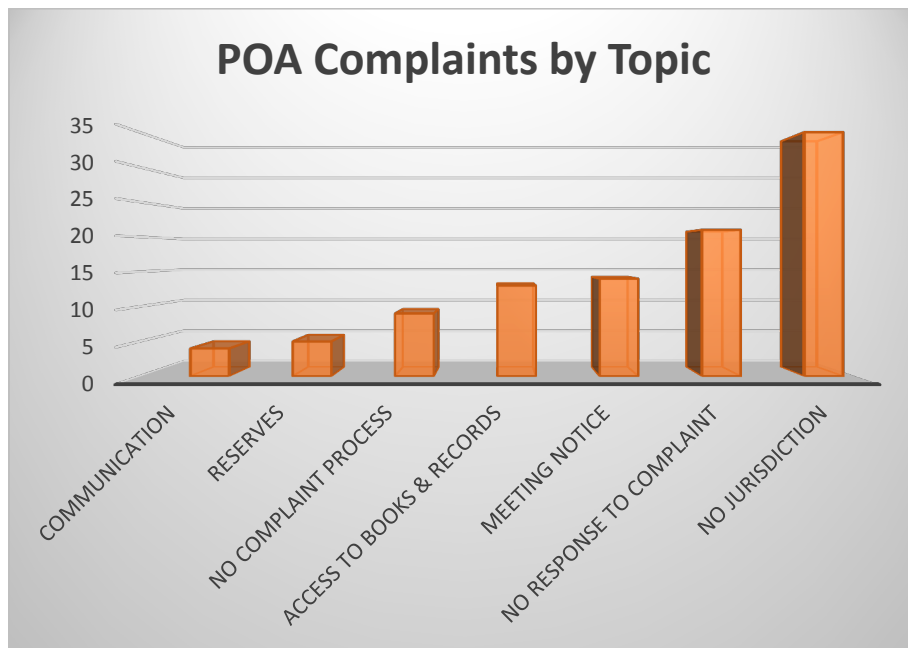
Condominium complaints ran the gamut this year. Unlike previous years, only 22 percent of the condominium complaints submitted were not appropriate for the complaint process or review by this Office, a decrease from the more than 50 percent improper complaints submitted the prior year. This decrease is likely related to the guidance and education provided by the Office on a daily basis. Generally, these complaints, as has been the case in the past, were related to maintenance issues or civil matters.

Associations continue to struggle with the association complaint procedure and its requirements, as illustrated by the chart below.



The Office did hear a repeated concern throughout the year that falls outside the scope of its jurisdiction but appears to be an ongoing problem, specifically in condominium associations. Fire and water damage often create situations where owners are not able to continue living in their units and find that the association is not moving forward at a reasonable pace to resolve the problem so that the individual can return to the unit, or if still living there, live in a healthy and safe environment. While this does not fall under our authority, it is a common and recurring concern that the Office hears about regularly.

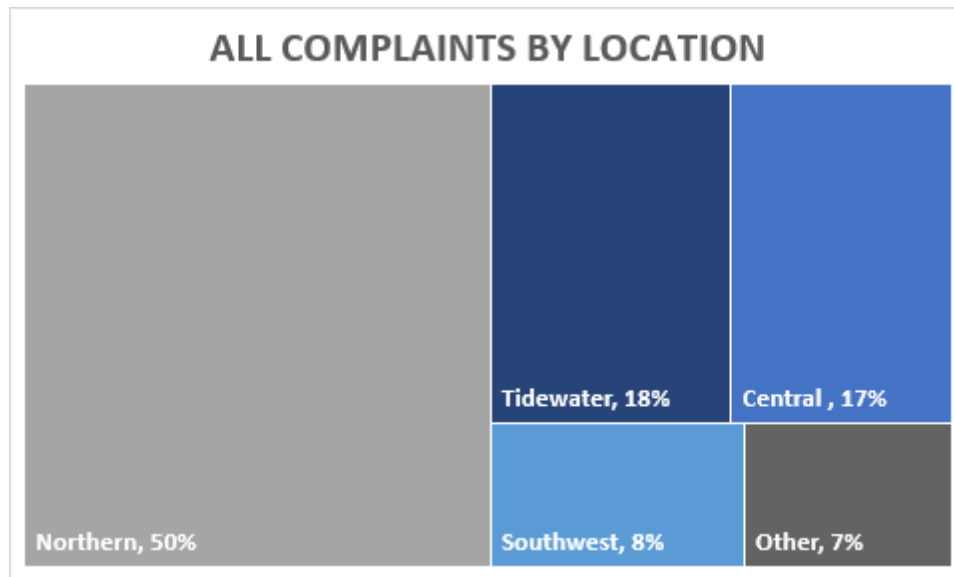
The key complaint topics for POAs included a failure to provide a method of communication, no reserve study, access to books and records, and no notice of meetings.



POAs continue to struggle with the complaint process, but did experience a slight downward trend from the prior year in terms of the number of complaints related to an association that had failed to adopt a complaint procedure or failed to respond to a complaint submitted through the complaint procedure.

This year the Office experienced a 38 percent decrease in the number of time-share complaints submitted. As has always been the case, the vast majority of these complaints are related to alleged violations that occurred during sales presentations and therefore are without any form of evidence or corroboration. While this is a sizable decrease in numbers for the past year, time-share complaints generally take the least amount of time for review and response since they are generally nearly identical in nature.

Northern Virginia continues to be the source of the majority of complaints we receive, with 50 percent of the year's complaints coming from that region. The rest of the complaints are divvied up among the remaining areas of the Commonwealth, with Central Virginia and Tidewater tying and Southwest Virginia coming in last with only a very few complaints.



Complaint Procedure

Associations continue to struggle with adopting and carrying out the state-mandated association complaint procedure. The reasons for this failure to adopt a procedure or follow it correctly vary. Numerous times there has been a turnover of the board of directors and the new directors are simply not up to speed on the complaint process. We often see associations that have stopped responding to complaints because they believe the complaint process is being abused by repeated submissions of complaints from one owner. We also hear from a surprising number of Common Interest Community Managers who are familiar with the complaint procedure requirement but do not necessarily understand how to carry out the process correctly when the association is in receipt of a complaint.

Despite the continued difficulties associations appear to have in relation to the complaint procedure, the Office did see a sizable decrease in the number of complaints related to the complaint procedure in POAs. Only eight percent of the complaints submitted were related to a failure of an association to adopt a complaint procedure, which is a 50% decrease from the prior year. We also saw a two complaint drop in the complaints alleging a failure to respond to an association complaint.

Unfortunately, condominiums went in the other direction, with 16 more complaints regarding a failure to respond to a submitted complaint than the previous year, but only a minor increase of two additional complaints for failure to adopt a complaint procedure. The sizable increase in complaints related to a failure to respond was due, in part, to one condominium where several owners submitted complaints and the association did not respond to them. Ultimately, it was determined by this Office that some of those complaints were not even appropriate for the complaint process.

The CICB often refers associations to this Office when the association is attempting to file its required Registration or Annual Report and is unclear as to what the required certification that the association has adopted a complaint procedure means, and how to go about drafting and adopting the required complaint procedure. The Office will provide associations information regarding the applicable regulations, internet resources, and general guidance on drafting the complaint procedure, but does not provide legal advice. Once an association has created a draft complaint procedure, the Office has always been willing to provide a review of that document to determine if it has met the requirements contained in the Regulations. Because the complaint process also implicates the association's own governing documents as well as other state laws, the Office always suggests a review by an attorney as well.

The other most common way for us to learn that an association has failed to adopt a complaint procedure is when someone requests a copy of his or her association's complaint procedure and is either met with silence or is told there is no complaint procedure. Once a request has been made in writing and no response or a negative response is received, the Office will provide the opportunity for the complainant to file a complaint directly with us so that we can move forward and facilitate the adoption of a complaint procedure. Generally, this is a process that takes several weeks, as the association must not only draft the complaint process, it must also meet to review and approve it prior to formally adopting it. The Office works closely with the association in order to obtain compliance with the law rather than turning the matter into an enforcement issue.

Associations do have a difficult time actually following the Regulations and their own complaint procedure once they receive a complaint. The Office recently created a video tutorial for our website that provides an overview of the process that we hope will help associations and complainants to better understand the process. In those instances where a complainant notifies us that the complaint he or she submitted to the association has not received any type of response, we will contact the association and do our best to facilitate a timely and correct response to the complaint. The Office interfaces with both the association and the complainant, ensuring that both parties are fully aware of what the complaint procedure can or cannot do and what their

reasonable expectations of the procedure can be. As always, the goal of the Office is to obtain compliance rather than to move the matter to the DPOR Investigation or Enforcement sections.

Working with associations that do not have complaint procedures or have not responded to a submitted complaint is one of the most time consuming aspects of this Office. It usually requires multiple lengthy phone calls, emails and letters between the Office and the association as well as the Office and the complainant. As a result of the rather intensive management of these types of complaints, however, they are rarely referred elsewhere in the agency because we are so frequently able to obtain compliance. This Office provides as much guidance and information as it can to facilitate the adoption of a complaint process or response to a complaint, but only to the extent possible without providing legal advice.

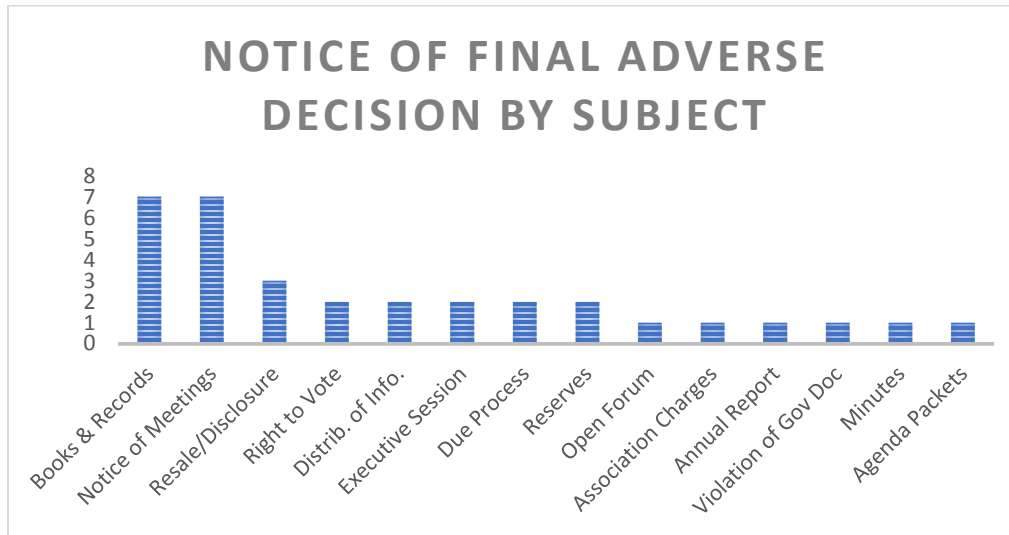
This Office works at all times to help resolve conflicts in associations. As it pertains to the complaint process, conflict resolution is obtained by working with both sides of the complaint to ensure that there is a complete understanding of what expectations will be met by the process, and by ensuring that any complaint submitted through the procedure is properly addressed, (assuming it is a complaint appropriate for the complaint procedure). The Office often receives feedback from complainants who are frustrated that we do not have a more enforcement-based approach when addressing those situations where an association has not fully abided by the Regulations or its own complaint procedure; however, it has always been this Office's philosophy and policy and that little will be gained by force and much can be gained by education and guidance, which are the key reasons the Office was created in the first place.

We are still receiving association complaints that are submitted directly to the Office rather than through the association complaint process. This often happens because the complainant is unaware of the complaint procedure, or, as happened numerous times this past year, they believe that their complaint is too important to submit through the procedure and that it should be submitted directly to this Office. As always, education and guidance are provided to these complainants, and they are counseled to submit their complaints directly to the association. If appropriate, the Office may offer a courtesy review of the complaint to ensure it does, in fact, allege a violation of common interest community law and is thus appropriate for the complaint procedure.

The Office continues to receive complaints from complainants who believe that their association has failed to respond to a submitted complaint in a reasonable time frame. These are always difficult as the Regulations do not provide a particular time frame for response and associations have adopted complaint procedures that often allow for as many as 90 days before a Final Decision must be provided to the complainant. While the association should provide acknowledgement within seven days of receipt of a complaint they often bypass this simple step, leaving a complainant in limbo, not knowing whether the complaint was received. If an association has failed to acknowledge a complaint or has not communicated with the complainant in any way, this Office generally asks the association to move forward on the complaint within 30 days, either by providing consideration of the complaint, or at least by providing notice of the time, date, and location of a future consideration.

Ombudsman Determinations

During the 2018-19 reporting period, the Office received 33 NFADs, many of which consisted of multiple complaints. Access to books and records continues to be the most common topic for NFADs, tied this year with failure to give notice of meetings. It is unfortunate that these topics are the primary concerns outlined in NFADs, since they are essential for transparency in any association and are generally very simple to carry out.



The Office issued Determinations related to properly filed NFADs as follows:

- Books & Records, 21%
- Notice of Meetings, 21%
- Resale/Disclosure, 9%
- Right to Vote, 6%
- Distribution of Information, 6%
- Executive Session, 6%
- Due Process, 6%
- Reserves, 6%
- Open Forum, 3%
- Association Charges, 3%
- Annual Report, 3%
- Violation of Declaration, 3%
- Minutes, 3%
- Agenda Packets, 3%

The statutory 30-day deadline for submission of a NFAD continues to provide some consternation for individuals submitting a NFAD. The Office has noticed a pattern where NFADs are not submitted until the last moment and then often are missing required information or are simply not received in the required timeframe. This is unfortunate as generally, a NFAD should be very simple to submit and if the Office does not receive a complete NFAD within the statutory deadline we have no choice but to return it and take no action.

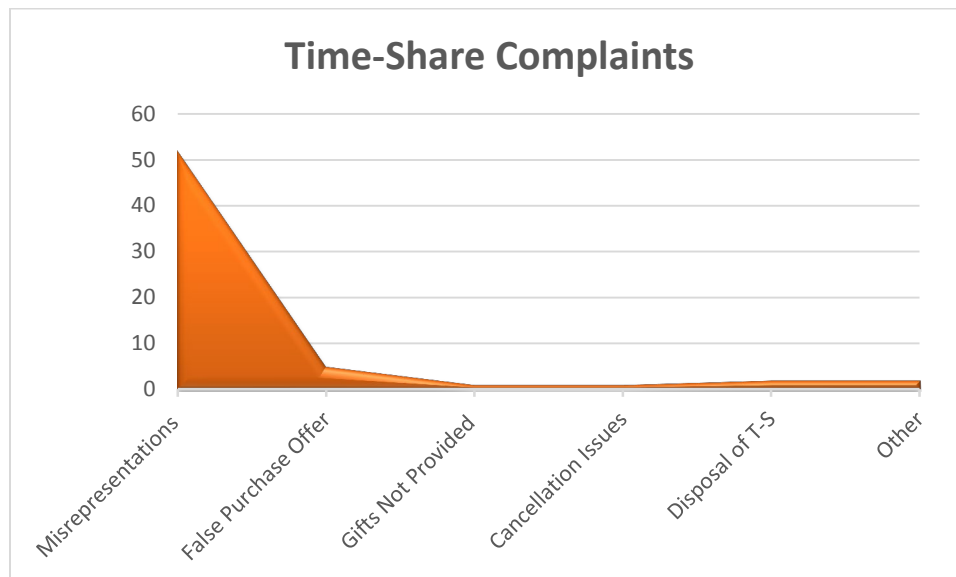
The Office continues to receive NFADs alleging violations of governing documents or statutes other than common interest community law. These complaints should not have been reviewed by an association (they are ineligible as an association complaint) and should not be submitted as NFADs. Instead, the association can certainly review and respond to such complaints, but should do so outside of the association complaint process; thereby not creating an expectation that the ineligible complaint should be submitted as an NFAD to this Office.

The Office continues to post Determinations issued by the Ombudsman as a resource for owners and citizens who may wish to file NFADs, or who are interested in learning more about similar issues. The published Determinations are listed by association name and subject matter area at <http://www.dpor.virginia.gov/CIC-Ombudsman/Determinations>.

Time-Shares

Time-share complaints may be submitted directly to the Office because time-shares are not legally defined as common interest communities; therefore, they do not fall under the Regulations requiring the submission of complaints through an association complaint process.

The Office received 63 time-share complaints, down considerably from the prior year. As has always been the case since the inception of this Office, nearly all complaints are related to perceived misrepresentations during the time-share sales presentation.



Absent evidence or substantiation of the allegations of misrepresentation, the Office is unable to carry out investigations into these allegations, which is understandably frustrating for the complainant. However, there are also numerous complaints submitted well outside the three-year statutory time frame for submitting a complaint to the Agency. Purchasers do have a seven-day rescission period and if they exercise their rights under that rescission period they can walk away from the purchase. Unfortunately, purchasers rarely read their contracts in their entirety, despite the fact that they sign documents attesting to having read them and understood the nature of their purchase.

In addition to the time-share complaints we have always received in the past, we are starting to receive a new form of complaint that is related to the sale of points in time-share programs. Unlike a classic time-share these are not usually deeded properties, but instead are a form of currency that can be used to obtain reservations at a time-share location. The Virginia Real Estate Time-Share Act makes no mention of points and it is unclear whether they fall under the jurisdiction of this office and the CICB. The Office of Attorney General, as counsel for the CICB, is working with the Office to determine whether points fall under our authority.

EDUCATION & OUTREACH

The Ombudsman again participated in a Virginia Bar Association continuing legal education (CLE) program, along with the Chair of the CICB, modeled as a question-and-answer session that generated great interaction and information sharing. She also attended several Community Association Institute (CAI) Expos and CA Days, both as a presenter and exhibitor.

The Office orchestrated the creation of a video tutorial, now available on its website, which fully explains the complaint procedure process for anyone wishing to submit a complaint through the association complaint process. It is also a valuable tool for any association that does not fully understand its obligations under the complaint procedure and Regulations. Plans are underway to create a second video that outlines the association's responsibilities under the Regulations as they pertain to the complaint procedure.

The Ombudsman drafted several articles for *Common Interests*, the CICB newsletter, and had an article reflecting on 10 years as Ombudsman published in *Quorum*, the CAI Washington Metro Chapter's monthly magazine.

The Ombudsman has continued to serve as a resource for DPOR, by providing guidance related to common interest communities and common interest community law when there are investigations or questions related to CIC Managers and community associations.

The Ombudsman continues to provide technical assistance and objective analysis for General Assembly members who are considering legislation and met with several legislators to provide general information about the Office and the types of complaints and issues that we address. Rather than providing opinions on legislation, she instead provides anecdotal information and acts as a sounding board to help legislators determine on their own whether there is a need for specific legislation. The Ombudsman is also a frequent party in conference calls related to community associations, usually when requested by localities, other agencies, or legislators.

In the coming year, the Office hopes to identify other methods of outreach to owners and associations. While presentations are always helpful, the audience often varies to such a great extent that it is very difficult to provide information beneficial and relevant to all. We may examine methods by which we could provide more information on our website, to include a forum and targeted videos, as well as looking into other options for improving our outreach.

CONSTITUENT EXPECTATIONS

The Office received fewer complaints overall this year than last year, with a decrease in the number of emails while the number of phone calls remained consistent. The biggest change noted for this past year was the complexity of the emails and phone calls received and the length of time spent on calls. It is extraordinarily rare for any phone call to be less than 15 minutes, and in many cases phone calls can extend for 30-60 minutes. Emails often require more research than they have in the past and thus are more time consuming as a result.

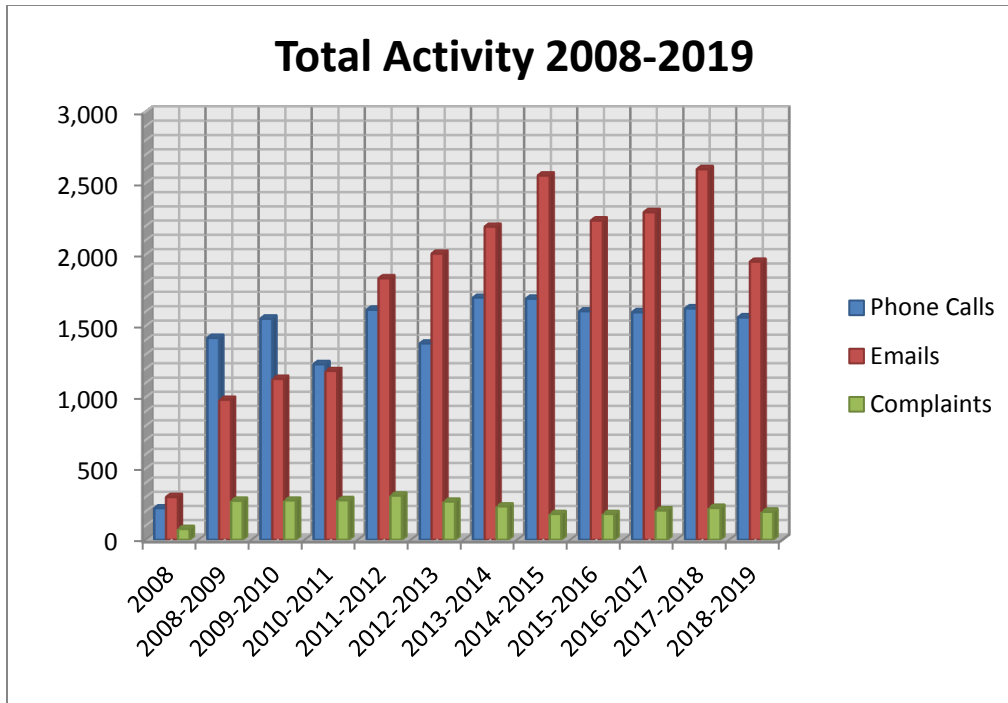
The Office has played a key role in assisting associations not only to adopt and carry out their complaint procedures, but also in helping them when they must respond to individuals who sometimes overwhelm the complaint system by submitting complaints over and over.

In addition to the difficulties associations have in implementing their complaint procedures, we also hear from those who believe that their association should not have to have a complaint procedure, whether it is due to size, location, the nature of the association or for several other reasons. These associations often object to the complaint process as they believe it is unfair for them to have to adopt the procedure and subsequently carry it out.

The Office counsels these associations, and all associations, that the process is not as difficult as many make it out to be, and that once they have carried one complaint through to completion they should be able to do so easily in the future. We frequently explain that the complaint process is an ideal way for associations to better understand the concerns of the owners in the community and how best they may be able to address those concerns.

The Office is regularly questioned by complainants who consider its approach to be too low key and would prefer a much stronger enforcement and punishment process when an association fails to adopt a complaint procedure, respond to a complaint, or has been found in violation of a common interest community law or regulation. The mantra of this Office has long been, and will continue to be, that associations are run by volunteer boards of directors comprised of individuals who are themselves neighbors and owners. These boards are not trained professionals doing their work on a full-time basis, but instead are fitting their board responsibilities in between their jobs, families, and other obligations.

Guidance and education will always work far better in obtaining compliance and is far less costly from a time and monetary standpoint. It is also worth noting that associations frequently have a very difficult time populating their boards of directors. Were this Office to take a heavy-handed approach to the complaints and violations it addresses daily, it is highly unlikely anyone would want to serve on their board for fear of repercussions should they make a mistake or misunderstand the law.



Ultimately, according to its statutory mandate, this Office exists to assist anyone with questions or concerns related to common interest communities. By providing the guidance and education necessary to help owners understand their rights and responsibilities, and to assist boards of directors in understanding the application of common interest community law, this Office helps even the playing field and hopefully brings communities closer together.

LEGAL DEVELOPMENTS

State Legislation

Ten bills amending common interest community law were passed during the 2019 Session of the General Assembly. Additional bills related to the CICB were passed, as were several bills related to stormwater management which often impacts associations. This session also saw the approval of the recodification of Title 55 which is now codified as Title 55.1.

Bill No.	Patron	Description
HB 1853 SB 1537	Bulova Surovell	Provides that if a development is located in a locality classifying home-based child care services as an accessory or ancillary residential use under the locality's zoning ordinance, the provision of home-based child care services in a personal residence shall be deemed a residential use unless (i) expressly prohibited or restricted by the declaration or (ii) restricted by the association's bylaws or rules.
HB 2030 SB 1538	Bulova Surovell	Requires common interest communities under the Condominium Act, the Property Owners' Association Act, and the Virginia Real Estate Cooperative Act (the Acts) to make available to members either the common interest community's annual budget or a summary of the annual budget prior to the beginning of each fiscal year. Requires that the five-year cash reserve study required under the Acts include

		a statement that outlines the amount of the reserves recommended in such study as well as the amount of current cash available for replacement of the reserves. Also requires the Common Interest Community Board to prepare guidelines for the development of reserve studies for capital components.
HB 2385 SB 1580	Bulova Suetterlein	Provides that a purchaser of a unit subject to the Condominium Act or a lot subject to the Property Owners' Association Act who receives a condominium resale certificate or association disclosure packet that is not in conformity with law may cancel the contract for such unit or lot (i) within three days after the date of the contract if the resale certificate or disclosure packet is received on or before the date that the purchaser signs the contract; (ii) within three days of receiving the resale certificate or disclosure packet if the resale certificate or disclosure packet is hand delivered, delivered by electronic means, or delivered by a commercial overnight delivery service or the U.S. Postal Service, and a receipt obtained; or (iii) within six days after the postmark date if the resale certificate or disclosure packet is sent to the purchaser by U.S. mail.
SB 1756	Surovell	Requires a declarant to deliver to the president of the unit owners' association or his designated agent, or in the case of a property owners' association, the board of directors or their designee, an inventory and description of stormwater facilities located on their premises. Requires the delivery of final site plans and applicable recorded easements and agreements regarding the inventory and description of stormwater management facilities located on common elements of a condominium or property owners' association property so that such associations are aware of the requirements for the maintenance, repair, or replacement of the stormwater facilities.
HB 2694	Cole	Allows members of property owners' associations to elect to receive notice of meetings of the association by email in lieu of the current requirement that such notice be sent by U.S. mail or hand delivered, provided that in the event that such electronic mail is returned as undeliverable, notice is subsequently sent by U.S. mail.
HB 2647	Reid	Provides that any proxy shall be void if not signed by or on behalf of the unit owner. Also provides that if the unit owner is more than one person, any such unit owner may object to the proxy at or prior to a meeting of the unit owners' association, whereupon the proxy shall be deemed revoked. Under current law, the proxy of any person is void if not signed by a person having authority, at the time of the execution thereof, to execute deeds on behalf of that person.
HB 2019	Murphy	Provides that the owner of residential real property under the Virginia Residential Property Disclosure Act must include in the residential property disclosure statement provided to a potential purchaser of residential property a statement that the owner makes no representations with respect to the existence or recordation of any maintenance agreement for any stormwater detention facilities on the property, and that advises the potential purchaser to take whatever due diligence steps they deem necessary to determine the presence of any such facilities or agreements, such as contacting his settlement provider, consulting the locality in which the property is located, or reviewing any survey of the property that may have been conducted. Also requires the Common Interest Community Board to include notice that regular annual or special assessments paid by the owner to the association may be used for the construction or maintenance of stormwater management facilities in the form that accompanies association disclosure packets that are required to be

		provided to all prospective purchasers of lots located within a development that is subject to the Virginia Property Owners' Association Act and resale certificates provided to purchasers of units located in a condominium that is subject to the Condominium Act.
HB 1962 (CICB)	Bulova	Authorizes the Common Interest Community Board to issue orders requiring governing boards and developers under the (i) Condominium Act, (ii) Virginia Real Estate Time-Share Act, and (iii) Virginia Real Estate Cooperative Act to take affirmative action to correct certain conditions to come into compliance with relevant statutory requirements. Currently the Board is limited to temporary and permanent cease and desist orders.
SB 1086 (CICB)	Cosgrove	Conforms language regarding temporary cease and desist orders to similar proceedings under the Condominium Act. Removes language that (i) requires hearings of the Board to be formal in nature and to be held in the County of Henrico and at least monthly and (ii) provides the Board with investigative powers already given to and more appropriately exercised by the Director of DPOR.
HB 2081 (CICB)	Watts	Eliminates annual assessments levied by the Common Interest Community Board. The bill allows for the collection of application, renewal, and annual reporting fees set by the Board in accordance with a biennial assessment of the Common Interest Community Management Information Fund similar to the assessment required by the Callahan Act (§ 54.1-113), but at no time shall such fee exceed \$25 unless such fee is based on the number of units or lots in the association.

Virginia Court Cases

A brief summary of some of the past year's most relevant or interesting cases follows.

- **In re Wallace** – Loudon Cir. Ct., December 18, 2018. This is a demurrer filed by the defendants in a case that stems from a Complaint for Declaratory Judgment and Injunction, where the Wallaces asked the court to provide a declaratory judgment that the governing documents of a Property Owners' Association require the association to maintain a pond and dam in the subdivision. They also sought an injunction pursuant to § 55-515 of the Property Owners' Association Act that would require the association to adhere to the governing documents and maintain the dam and pond. Ultimately, the demurrer was overruled, as the Court found that no defendants should be dismissed, (Ground I), that there was a valid cause of action (Ground II), and that Count 2 states a valid cause of action (Ground III). According to court records a Decree and/or Order will be presented on December 6, 2019.
- **Swahn v. Hussain** – Fairfax Cir. Ct, January 18, 2019. “The issue is whether the Hussain family is entitled to attorney fees under Virginia Code § 55-515 as the “prevailing party” on a public nuisance count brought by their neighbors” The case centered around counts of public nuisance and private nuisance based on odors resulting from food that the Hussains cooked and the Swahns found objectionable. The Hussains filed a counterclaim of trespass for illegally entering their home as well as a counterclaim for attorney fees. The Swahns sought to nonsuit the public nuisance claim but the Hussains did not wish to do so and a trial was held that included the public nuisance count. The

private nuisance count was found for the Swahns, and the trespass counterclaim was dismissed. The Hussains prevailed on the public nuisance count which was the only one that permitted attorney fees under § 55-515. The Hussains asked the court for over \$100,000 in attorney fees. The court denied the claim for attorney fees as it did not find that the Hussains had prevailed since both parties had prevailed on different counts. As alternative holdings, the court also opined that since the public nuisance count could have been nonsuited had the Hussains chosen to do so, any attorney fees that could be attributed to that portion of the case should be deducted from the total fees requested. A second alternative holding by the court found that there was not sufficient evidence to determine which fees should be applied to the different counts.

- **Gadams v. Nolde Bakery Condo. Ass'n** – Supreme Court of Virginia, February 28, 2019. Here the incoming association board filed ten counts against the outgoing declarant-controlled board, which counts included breach of fiduciary duty, breach of warranty, breach of contract, and others. The association stated that it believed the statute of limitations had been tolled while it waited for the former board to resign. The circuit court found that there was no tolling. The circuit court dismissed the complaint and denied attorney fees for the former directors. The former directors filed a motion for indemnification which was denied, and then appealed the circuit court's denial of attorney fees and costs. The association appealed the dismissal of the complaint. The Supreme Court granted four assignments of error in the association's appeal and one in the former director's appeal. The Supreme Court upheld the dismissal of the association's complaint. As to the former directors, the Court found according to the Articles and Bylaws of the corporation, it would indemnify "a director who entirely prevails in the defense of any proceeding to which he was a party because he is or was a director of the corporation against reasonable expenses incurred by him in connection with the proceeding." The Court reversed and vacated the circuit court decision and remanded the case for reasonable attorneys' fees and costs.
- **Sainani v. Belmont Glen Homeowners Ass'n** – Supreme Court of Virginia, August 26, 2019. This was a case related to holiday decorations. The association found the Sainanis to be in violation of the seasonal guidelines. Those guidelines were revised to state that their purpose was "to avoid the prolonged display of lights and decorations outside the respective holiday." The Sainanis were cited for violating the guidelines by leaving holiday lights on after midnight, and displaying those lights outside of the dates permitted. Several hearings were held, and assessments were levied for the violations and certain privileges were suspended. A warrant in debt filed with the general district court resulted in summary judgment for the association. The Sainanis appealed and filed counterclaims. The court entered judgment for the association for the unpaid fines and for attorney fees and costs. The Sainanis appealed to the Supreme Court. Ultimately the Supreme Court found that ". . . the basis of the fines imposed against the Sainanis exceed the scope of the restrictive covenants and are not reasonably related to any of them." The Court reversed the trial court's judgment and remanded the case for further proceedings.

Federal Developments

Following are bills that were recently introduced, were previously introduced and are still in committee, or have been newly introduced. All may have an impact on community associations.

- **Property Rights for Patriots Act (H.R. 4337)** – This bill would prohibit the enforcement of certain policies of homeowners associations regarding real property of service members.
 - *Introduced in September 2019; referred to the House Committee on Veterans' Affairs.*
- **Crumbling Foundations Small Business and Homeowners Assistance Act of 2019 (S. 355)** – This bill would establish a grant program to provide assistance to prevent and repair damage to structures due to pyrrhotite.
 - *Introduced in February 2019; referred to the Senate Committee on Homeland Security and Governmental Affairs.*
- **Neighborhood Homes Investment Act (H.R. 3316)** – This bill would amend the Internal Revenue Code of 1986 to allow a credit against tax for neighborhood revitalization, and for other purposes.
 - *Introduced in June 2019; referred to the House Committee on Ways and Means.*
- **National Flood Insurance Program Reauthorization and Reform Act of 2019 (H.R. 3872 and S. 2187)** – These bills would reauthorize the National Flood Insurance Program.
 - *Introduced in July 2019; referred to the House Committee on Financial Services and Senate Committee on Banking, Housing, and Urban Affairs.*
- **National Flood Insurance Program Reauthorization and Reform Act of 2019 (H.R. 3167)** – This bill would reform and reauthorize the National Flood Insurance Program.
 - *Introduced in June 2019; referred to the House Committee on Financial Services and the House Committee on Transportation and Infrastructure. Placed on the Union Calendar, Calendar No. 210.*
- **Amateur Radio Parity Act of 2019 (H.R. 466)** – This bill would direct the Federal Communications Commission to amend its rules so as to prohibit the application to amateur stations of certain private land use restrictions.
 - *Introduced in January 2019; referred to the House Committee on Energy and Commerce.*
- **Energy Savings and Industrial Competitiveness Act of 2019 (H.R. 3962)** – This bill would promote energy savings in residential buildings and industry.
 - *Introduced in July 2019; referred to the House Committee on Energy and Commerce as well as several other committees.*

NEWS OF INTEREST

Media Reports

The Ombudsman tracks articles related to common interest communities to stay abreast of issues and concerns that may impact the Office or are generally noteworthy due to their subject matter. Following are recent items gleaned from media reports which may be of interest to stakeholders.

Several residents of Massanutten are trying to incorporate the association into a town. This movement resulted, in part, by the decision of Great Eastern Resort Management to withdraw from a property owners' association within the Massanutten community. The withdrawal could result in a substantial financial loss; proponents of the move to incorporate the locality into a town believe doing so will help resolve some of the potential financial problems they will face as taxes and fees they now pay to the county could be held by the new town.

A *Washington Post* article opened the door on an association president who appeared to be linked with white nationalist organizations that, in addition to making swastika-shaped cookies, also maintained an online presence that espoused beliefs in separating races, among other things. The information regarding the president emerged as a result of report from the Southern Poverty Law Center's Hatewatch; it was believed that the president may have marched in the Charlottesville demonstration where a woman was killed in August 2017. The president resigned from his association and has been suspended from his government position.

There were a number of articles related to embezzlement over the past year. A Colonial Heights treasurer was charged with embezzling \$55,000 over a two-year timeframe from the Conjurers Neck Homeowners Association. The former treasurer for the Lake Front Royal Property Owners' Association was charged with six felony counts of embezzlement over a six-month period. And the former Lake of the Woods Association financial manager pleaded guilty to embezzlement and money laundering charges related to the theft of as much as \$450,000 from the association; he will be serving six years in prison. Ironically, a portion of the funds he embezzled were used to pay of a previous employer from whom he had stolen money.

Fifteen years after a judge ordered him not to fly his flag, a Vietnam veteran has raised the flag in the front yard of his home in the Wyndham Homeowners' Association with the blessing of the association. According to Mr. Oulton, this was the flag he flew over his bunker in Vietnam and he has been fighting to fly it ever since he returned from the war.

STATUTORY AUTHORITY

§ 54.1-2354.3. Common Interest Community Ombudsman; appointment; powers and duties

A. 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 Office). The Ombudsman shall be a member in good standing in the Virginia State Bar. All state agencies shall assist and cooperate with the Office in the performance of its duties under this article.

B. The Office shall:

1. Assist members in understanding rights and the processes available to them according to the laws and regulations governing common interest communities and respond to general inquiries;
2. Make available, either separately or through an existing website, information concerning common interest communities and such additional information as may be deemed appropriate;
3. Receive notices of final adverse decisions;
4. 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;
5. Ensure that members have access to the services provided through the Office and that the members receive timely responses from the representatives of the Office to the inquiries;
6. Maintain data on inquiries received, types of assistance requested, notices of final adverse decisions received, actions taken, and the disposition of each such matter;
7. 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;
8. Monitor changes in federal and state laws relating to common interest communities;
9. 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
10. Carry out activities as the Board determines to be appropriate.

§ 54.1-2354.4. Powers of the Board; Common interest community ombudsman; final adverse decisions.

A. 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 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 mailing address of the Office. 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.

B. 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 pursuant to § 54.1-2354.2. 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.

C. 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.