



# COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Glenn A. Youngkin  
Governor

November 1, 2022

G. Bryan Slater  
Secretary of Labor

Demetrios J. Melis  
Director

The Honorable George "Bryan" Slater  
Secretary of Labor  
P.O. Box 1475  
Richmond, VA 23218

The Honorable James A. "Jay" Leftwich  
Chair, House Committee on General Laws  
308 Cedar Lakes Drive  
2nd Floor  
Chesapeake, Virginia 23322

The Honorable George L. Barker  
Chair, Senate Committee on General Laws and Technology  
P.O. Box 10527  
Alexandria, Virginia 22310

Dear Secretary Slater, Delegate Leftwich, and Senator Barker:

The Department of Professional and Occupational Regulation ("the Department"), on behalf of the Common Interest Community Board ("the Board"), respectfully submits the following report pursuant to Chapter 244 of the 2022 Acts of Assembly (Senate Bill 693). Senate Bill 693 directed the Board to "...review the feasibility of allowing audio and video recordings to be submitted with a notice of final adverse decision as a record pertinent to the decision in accordance with § 54.1-2354.4 of the Code of Virginia."

The Department conducted the review in conjunction with the Board, and with assistance from a committee comprised of common interest community attorneys, citizens residing in common interest communities, Board members, and the Common Interest Community Ombudsman. This report outlines the Board's findings and recommendation. Please let me know if I can answer any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Demetrios J. Melis", written over a horizontal line.

Demetrios J. Melis  
Director

# DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION



Report to the

**House Committee on General Laws,  
Senate Committee on General Laws and Technology,  
& Secretary of Labor**

*Common Interest Community Board Review on the Feasibility of  
Allowing Audio and Video Recordings to be submitted with a Notice  
of Final Adverse Decision pursuant to Senate Bill 693 (2022)*

October 26, 2022



Department of Professional and Occupational Regulation

9960 Mayland Drive, Suite 400  
Richmond, Virginia 23233  
(804) 367-8500

<http://www.dpor.virginia.gov>

## **PREFACE**

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Senate Bill 693, as originally introduced during the 2022 Session of the General Assembly, proposed to amend provisions in § 54.1-2354.4 of the Code of Virginia regarding the requirements for the filing of a notice of final adverse decision with the Common Interest Community Board (“the Board”) by a complainant who has received an adverse decision from a common interest community association through the association complaint process. Specifically, the bill required that audio and video recordings could be included with a notice of final adverse decision.

The original bill passed the Senate. During consideration of the bill by the House of Delegates, the original bill was amended by way of a substitute. The amended bill was subsequently passed by the House and the Senate, and approved by the Governor on April 8, 2022. The bill, as amended, directed the Board to “...review the feasibility of allowing audio and video recordings to be submitted with a notice of final adverse decision as a record pertinent to the decision in accordance with § 54.1-2354.4 of the Code of Virginia.”

The Board conducted the review with assistance from a committee comprised of common interest community attorneys, citizens residing in common interest communities, Board members, and the Common Interest Community Ombudsman.

### ***Review Committee Membership***

Matt Durham\*

Paul Orlando

Lori Overholt,\* Chair

Sue Tarley

Jerry Wright

*Heather Gillespie, Common Interest Community Ombudsman (non-voting member)*

*Drew Mulhare,\* Common Interest Community Board Chair (ex-officio member)*

*\*Common Interest Community Board member*

### ***Staff Acknowledgements***

Demetrios "Mitch" Melis, Director

Department of Professional and Occupational Regulation

Trisha L. Lindsey, Executive Director

Common Interest Community Board

Joseph C. Haughwout, Jr., Board Administrator

Common Interest Community Board

Raven Custer, Administrative Coordinator

Common Interest Community Board

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## **EXECUTIVE SUMMARY**

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Sections 54.1-2354.3 and 54.1-2354.4 of the Code of Virginia establish the Office of the Common Interest Community Ombudsman (“CICO”) and the requirement for each common interest community (“CIC”) association to establish an internal complaint procedure to resolve complaints made by an association member or citizen (“complainant”) against the association. A complainant who receives an adverse decision from an association may file a notice of final adverse decision (“NFAD”) with the Common Interest Community Board (“the Board”). The NFAD is to include all records pertinent to the association’s adverse decision. The CICO reviews the NFAD to determine whether the association’s decision conflicts with laws and regulations governing CICs. Under applicable statute and Board regulations, an NFAD must be in writing.

Senate Bill 693, as introduced during the 2022 General Assembly session, proposed to amend the Code of Virginia to require that an NFAD filed with the Board include “...any video or audio recordings...” The original bill was amended. The amended bill directed the Board to “...review the feasibility of allowing audio and video recordings to be submitted with a notice of final adverse decision as a record pertinent to the decision in accordance with § 54.1-2354.4 of the Code of Virginia.” The bill required the Board to:

- Identify pertinent statutory and regulatory amendments necessary to allow for the submission of recordings;
- Identify any impediments to the submission of recordings, including information technology limitations and compliance with the provisions of the Virginia Freedom of Information Act and other public records laws;
- Consider whether allowing the submission of recordings would assist the CICO in the performance of duties with respect to any NFAD;
- Solicit and consider public comments; and
- Report its findings and any legislative, regulatory, policy, or budgetary recommendations to the Secretary of Labor and the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology.

The Board conducted the review with assistance from a committee comprised of common interest community attorneys, citizens residing in common interest communities, Board members, and the CICO.

The committee concluded that § 54.1-2354.4 of the Code of Virginia would likely need amendment to clarify that audio and video recordings can be submitted as records pertinent to a decision. The Common Interest Community Ombudsman Regulations (18VAC48-70) would require significant amendment to provide the public with the requirements and processes for submitting audio and video recordings with NFADs. CICs would be required to amend their internal documents and policies in order to comply with these changes. Implementation of these changes by CICs are impediments that may not make such changes feasible.

The Department of Professional and Occupational Regulation (DPOR) has the technical capacity to receive and archive digital audio and video recordings, but would need to establish clear guidelines prescribing acceptable file formats and procedures for submission of recordings. DPOR would need to provide appropriate training and resources for its public records management staff to perform redactions of recordings in order to timely and appropriately comply with the Freedom of Information Act when requests for closed NFAD cases are received.

The CICO may be able to receive and review recordings, and DPOR's public records management staff may be able to fulfill public records requests, without the need for additional staff. Additional staff would be required if there are a high number of NFADs that include recordings.

The committee also concluded that allowing for submission of audio and video recordings would be contrary to the role and purpose of the CICO and the association complaint process as designed by the General Assembly. Moreover, allowing for submission of audio and video recordings would not assist the CICO in performing the duties required by statute, and would likely be detrimental to the performing of these duties. The committee further concluded there was no substantial evidence for a change, and no identifiable public problem that allowing for submission of audio and video recordings would address. Moreover, the committee concluded that allowing for submission of recordings to the CICO may result in unintended negative impacts to CICS.

Based on the committee's findings and conclusion, the Board recommends against any legislative or regulatory changes to allow for the submission of audio and video recordings with an NFAD.

## **BACKGROUND**

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### ***Enabling Legislation***

In April 2008, the General Assembly passed, and Governor Tim Kaine approved, Chapter 851 of the 2008 Acts of Assembly<sup>1</sup>. This legislation created the Common Interest Community (“CIC”) Board, established a licensure requirement for common interest community managers, and made other significant changes to CIC statutes. The legislation also created the Office of the Common Interest Community Ombudsman (“CICO”).

The legislation, which was a recommendation of the Virginia Housing Commission<sup>2</sup>, sought to address the significant number of constituent complaints received by legislators regarding CIC associations by establishing a state entity with the authority to resolve such complaints. The CICO replaced the Community Association Liaison, a position that was created by the General Assembly in 2001<sup>3</sup>.

In addition, the legislation charged the Board with establishing a requirement for associations to develop a complaint procedure for association members and other citizens to resolve complaints, and created a mechanism for association members to file notices of final adverse decision with the Board in order to receive a final determination. The CICO is responsible for receiving notices of final adverse decision. The legislation authorizes the Director of the Department of Professional and Occupational Regulation (“DPOR”), or a designee, to determine whether the final adverse decision “...may be in conflict with laws or regulations governing common interest communities or interpretations thereof by the Board...” The determination is not binding upon the complainant or the association that made the final adverse decision.

### ***Powers and Duties of the CICO***

Section 54.1-2354.3 of the Code of Virginia establishes the Office of the CICO, and authorizes the Director of DPOR to appoint the CICO. Under the provisions of this section, the CICO must “...be a member in good standing in the Virginia State Bar.” The section also outlines the duties of the CICO, which can be grouped into three basic functions: (i) serving as an information resource for associations, association members, and the public; (ii) monitoring and reporting; and (iii) receiving notices of final adverse decision.

The duties of the CICO are to:

- Assist members in understanding rights and the processes available to them according to the laws and regulations governing CICs and respond to general inquiries;
- Make available, either separately or through an existing website, information concerning CICs and such additional information as may be deemed appropriate;

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<sup>1</sup> Virginia Acts of Assembly, 2008 Session, Chapter 851, (<https://lis.virginia.gov/cgi-bin/legp604.exe?081+ful+CHAP0851>)

<sup>2</sup> Virginia Housing Commission, 2007 Annual Report, (<http://dls.virginia.gov/commissions/vhc/files/2007.pdf>)

<sup>3</sup> Virginia Acts of Assembly, 2001 Session, Chapter 816 (<https://lis.virginia.gov/cgi-bin/legp604.exe?011+ful+CHAP0816&011+ful+CHAP0816>)

- Upon request, assist members in understanding the rights and processes available under the laws and regulations governing CICs 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;
- 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;
- Maintain data on inquiries received, types of assistance requested, notices of final adverse decisions received, actions taken, and the disposition of each such matter;
- Monitor changes in federal and state laws relating to common interest communities;
- Provide information to the [DPOR] Director that will permit the Director to report annually<sup>4</sup> on the activities of the Office of the CICO to the standing committees of the General Assembly having jurisdiction over CICs and to the Housing Commission. The report must be filed by December 1 of each year and include a summary of significant new developments in federal and state laws relating to common interest communities each year;
- Upon request to the [DPOR] Director by (i) any of the standing committees of the General Assembly having jurisdiction over CICs or (ii) the Housing Commission, provide to the Director for dissemination to the requesting parties assessments of proposed and existing CIC laws and other studies of CIC issues;
- Receive notices of final adverse decisions; and
- Carry out activities as the Board determines to be appropriate.

With respect to notices of final adverse decision, § 54.1-2354.4(C) of the Code of Virginia states, in part:

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....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.

Though formal authority to issue non-binding determinations of notices of final adverse decision is vested with the Director of DPOR, the CICO is the authorized designee to perform this duty.

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<sup>4</sup> The Office of the CICO prepares and submits this annual report to the House Committee on General Laws, the Senate Committee on General Laws and Technology, and the Virginia Housing Commission (<https://rga.lis.virginia.gov/Published/2021/RD721>).



## **Association Complaint Process**

Section 54.1-2354.4(A) of the Code of Virginia provides that the Board "...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..." and that "[e]ach association shall adhere to the written procedures established ... when resolving association member and citizen complaints."

In July 2012, the Board established the Common Interest Community Ombudsman Regulations (18VAC48-70). This regulation requires associations to "...have a written process for resolving association complaints from members and citizens." The regulation further outlines the minimum requirements for an association complaint procedure, to include the process for consideration of a complaint by the association, and notification to the complainant of the association's final determination on the complaint. To the extent the final determination of the association does not result in the cure or corrective action sought by the complainant, the determination is considered an "adverse decision" or "final adverse decision" as defined<sup>5</sup> in the regulation.

The regulation provides that the complainant "...may file a notice of final adverse decision in accordance with § 54.1-2354.4 B of the Code of Virginia concerning any final adverse decision that has been issued by an association..." The notice of final adverse decision must "...be in writing on forms provided by the Office of the Common Interest Community Ombudsman." The notice of final adverse decision must "...include a copy of the association complaint, the final adverse decision, reference to the laws and regulations the final adverse decision may have violated, any supporting documentation related to the final adverse decision, and a copy of the association complaint procedure."

The CICO, as designee of the DPOR Director, reviews<sup>6</sup> the notice of final adverse decision. The CICO may request additional information from the association that provided the final adverse decision. The association must provide such information to the CICO within a reasonable time. If the CICO "...determines that the final adverse decision may be in conflict with laws or regulations governing common interest communities or interpretations thereof by the [CIC Board]..." the CICO may "...provide the complainant and the association with information concerning such laws or regulations governing common interest communities or interpretations thereof by the [CIC Board]..."

The determination made by the CICO is "...a matter within the sole discretion..." of the CICO, and "...is final and not subject to further review." However, the determination of the CICO "...shall not be binding upon the complainant or the association that made the final adverse decision."

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<sup>5</sup> 18VAC48-70-10 provides that "Adverse decision" or "final adverse decision" means the final determination issued by an association pursuant to an association complaint procedure that is opposite of, or does not provide for, either wholly or in part, the cure or corrective action sought by the complainant. Such decision means all avenues for internal appeal under the association complaint procedure have been exhausted.

<sup>6</sup> Under the regulation, a complainant who files a notice of final adverse decision must also pay a \$25 filing fee as required by § 54.1-2354.4(B) of the Code of Virginia. This filing fee may be waived by the Board if the fee will cause a financial hardship to the complainant. Review of the adverse decision will not occur until the filing fee has either been received, or waived by the Board.

The regulation provides that “...any matter involving a violation of applicable laws or regulations of the board may be referred for further action by the board in accordance with the provisions of Chapter 23.3 (§ 54.1-2345 et seq.) of Title 54.1; Chapters 18 (§ 55.1-1800 et seq.), 19 (55.1-1900 et seq.), and 21 (§ 55.1-2100 et seq.) of Title 55.1 of the Code of Virginia; and the board's regulations.”

Generally, CICO review of a notice of final adverse decision typically results in one of the following outcomes:

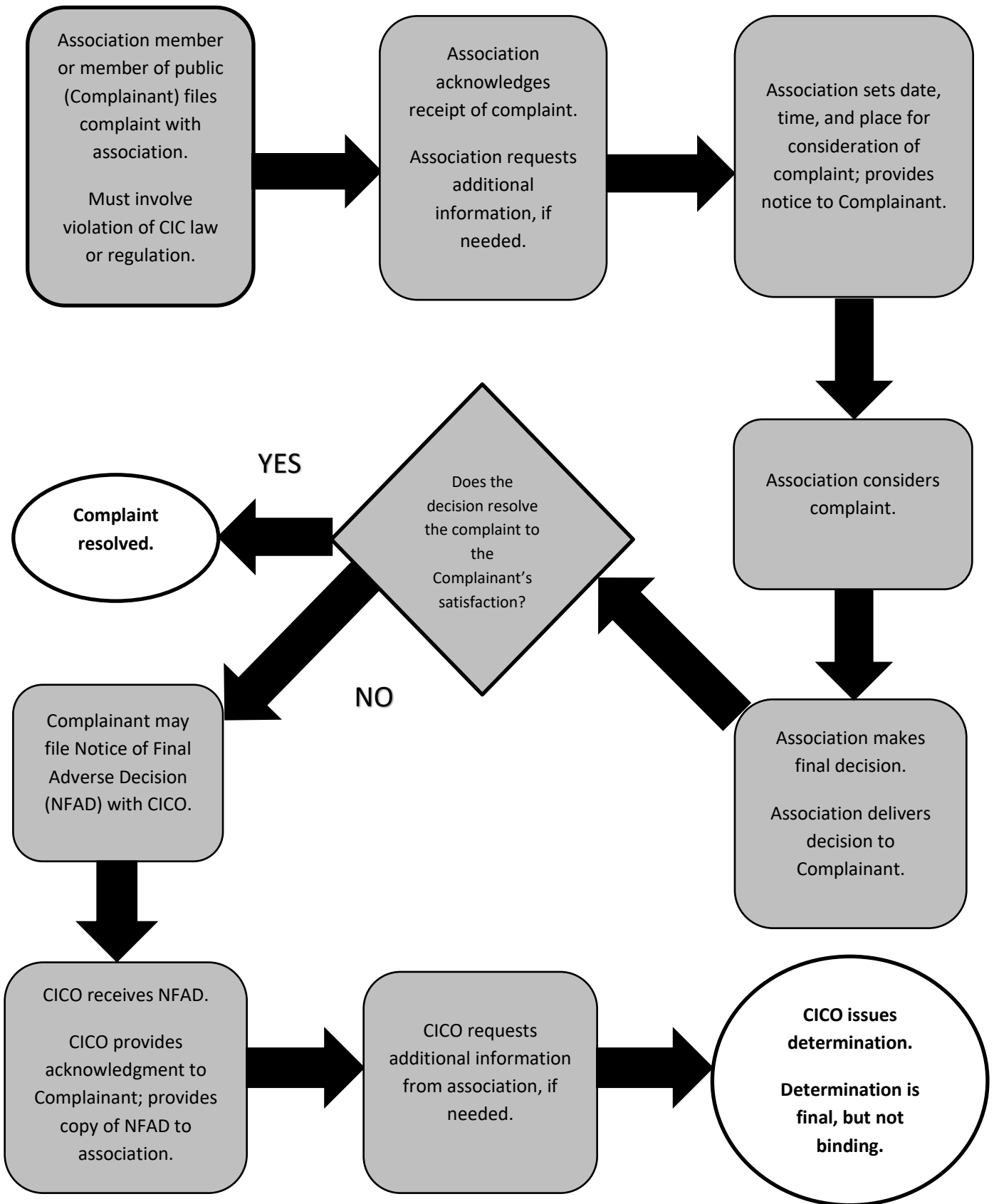
- No violation. No action required of the association;
- Possible violation. The association is requested to come into compliance going forward or is given a timeframe for compliance (i.e. if the violation is related to access to books and records, allow two weeks to provide requested documents);
- Insufficient information to provide a determination; or
- No violation in relation to original complaint, but the association did not properly carry out the complaint process. The association is requested to come into compliance going forward.

If an association does not come into compliance or meet a deadline, the CICO may refer the matter to the Board for enforcement.

The authority of the CICO is limited to review of adverse final decisions submitted as part of a notice of final adverse decision, and only to the extent that such adverse decisions are inconsistent with applicable CIC law or regulations. Allegations involving violations of a community's governing documents, such as the declaration, bylaws, covenants, or rules and regulations, are outside the authority of the CICO to review. In addition, the CICO cannot address allegations involving statutes that may be applicable to CICs, such as the Virginia Non-stock Corporation Act (Chapter 10 of Title 13.1 of the Code of Virginia), but are not CIC laws. (See Appendix B for the guidelines for CICO complaint submissions.)

The CICO cannot consider information or documentation that is not part of the record of the association's decision. The CICO cannot receive and review *de novo* complaints against an association. In addition, the CICO does not investigate claims raised in an association complaint and cannot adjudicate such claims. Moreover, as the CICO can only issue non-binding determinations, the CICO cannot order an association to take action or provide remedy.

Figure #1: Flowchart of the CICO Process



### **Senate Bill 693**

Senate Bill 693 was introduced in the Senate on January 20, 2022. As originally introduced, the bill would have amended subsection B of § 54.1-2354.4 of the Code of Virginia as follows:

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, *including any video or audio recordings*, 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.

The original bill passed the Senate without opposition on February 1, 2022. On March 3, 2022, a subcommittee of the House Committee on General Laws recommended reporting the bill with a substitute. The substitute directed the Board to “...review the feasibility of allowing audio and video recordings to be submitted with a notice of final adverse decision as a record pertinent to the decision in accordance with § 54.1-2354.4 of the Code of Virginia.” The bill further specified:

In conducting its review, the Board shall (i) solicit and consider public comments; (ii) identify pertinent statutory and regulatory amendments necessary to allow for the submission of audio and video recordings in accordance with the provisions of this act; (iii) identify any impediments to the submission of audio and video recordings, including information technology limitations and compliance with the provisions of the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia) and other public records laws; and (iv) consider whether allowing the submission of audio and video recordings pursuant to the provisions of this act would assist the Common Interest Community Ombudsman in the performance of his duties with respect to any notice of final adverse decision.

During the original bill’s consideration by the Senate Committee on General Laws and Technology<sup>7</sup>, the bill’s patron indicated the bill was the result of a constituent request. In speaking to the Senate committee, one of the requesting constituents indicated that since the Property Owners’ Association Act allows for the recording of association board meetings, electronic recordings of meetings may be pertinent to an association complaint, and should be included with a notice of final adverse decision as relevant records.

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<sup>7</sup> Meeting of the Senate Committee on General Laws and Technology, January 26, 2022, ([https://virginia-senate.granicus.com/ViewPublisher.php?view\\_id=3](https://virginia-senate.granicus.com/ViewPublisher.php?view_id=3)).

## ***Review Methodology***

On June 9, 2022, DPOR staff requested and received authorization from the Board to form a committee to review the feasibility of allowing audio and video recordings to be submitted with a notice of final adverse decision as directed by SB 693.

DPOR and the Board sought public comment by posting a General Notice on the Virginia Regulatory Town Hall on July 21, 2022. The Board accepted comments from July 26, 2022, through August 9, 2022. The Board conducted a public hearing on August 9, 2022.

In addition, staff researched applicable laws and regulations, including those related to the association complaint process and the Virginia Freedom of Information Act, gathered information regarding the DPOR's technical and administrative capacity to receive audio and video recordings, collected and analyzed information regarding notices of final adverse decision filed with the CICO, reviewed procedures in other jurisdictions that have a common interest community ombudsman office or similar office, and compiled public comments received.

## **RESEARCH**

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### ***Review of CIC Laws and Regulations***

Section 54.1-2354.4(B) of the Code of Virginia and the Common Interest Community Ombudsman Regulations (18VAC48-70) provide the requirements for filing a notice of final adverse decision. The applicable statute states, in part:

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...

Section 18VAC48-70-90 states, in part:

A complainant may file a notice of final adverse decision in accordance with § 54.1-2354.4 B of the Code of Virginia concerning any final adverse decision that has been issued by an association in accordance with this chapter.

2. The notice shall be in writing on forms provided by the Office of the Common Interest Community Ombudsman.

3. The notice shall include a copy of the association complaint, the final adverse decision, reference to the laws and regulations the final adverse decision may have violated, any supporting documentation related to the final adverse decision, and a copy of the association complaint procedure.

The CICO interprets the underlined provisions as excluding audio or video recordings as part of the submission of a notice of final adverse decision. Although subdivision 3 of 18VAC48-70-90

requires a notice to include “supporting documentation” related to the final adverse decision, this term refers to the documentation that supports the association’s adverse decision to the complainant.

The enabling statute does not provide a meaning for the term “records pertinent to the decision” used in subsection B of § 54.1-2354.4. The Board has not provided interpretative guidance regarding the meaning of this term.<sup>8</sup>

Under certain provisions of the Property Owners’ Association Act (Chapter 18 of Title 55.1 of the Code of Virginia) and the Virginia Condominium Act (Chapter 19 of Title 55.1 of the Code of Virginia), an owner is authorized to record meetings of the association’s governing board. Sections 55.1-1807 and 55.1-1939 provide in pertinent part:

Every [owner] who is a member in good standing of a [association] shall have the following rights:

3. The right to have notice of any meeting of the board of directors, to make a record of any such meeting by audio or visual means, and to participate in any such meeting...

In addition, §§ 55.1-1816 and 55.1-1949 provide in pertinent part:

Any [owner] may record any portion of a meeting that is required to be open. The board of directors or subcommittee or other committee of the board of directors conducting the meeting may adopt rules (a) governing the placement and use of equipment necessary for recording a meeting to prevent interference with the proceedings and (b) requiring the member recording the meeting to provide notice that the meeting is being recorded.

### ***Notices of Final Adverse Decisions and Determinations Issued by the CICO***

The CICO monitors and reports information regarding notices of final adverse decisions received by the Office of the CICO. These include the number of notices received and the topics or issues raised in complaints made to associations. The CICO provides this information as part of the annual report required by § 54.1-2354.3(B)(9) of the Code of Virginia.

During the previous four (4) reporting periods, the CICO received a total of 163 notices of final adverse decision. The following table reflects the number of notices and top three topics in these final adverse decision received by the CICO:

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<sup>8</sup> Summary of Board Interpretations, Policies and Guidance Documents  
(<https://townhall.virginia.gov/L/ViewGDoc.cfm?gdid=6256>)

*Table #1: Notices of Final Adverse Decision Received by the CICO.*

Reporting Period <sup>9</sup>	Number of Notices Received	Top Three Topics (% of Total Complaints)
2017-2018	32	1. Books & Records (41%) 2. Meeting Notice (13%) 3. Assessments (10%)
2018-2019	33	1. Notice/Meetings (21%) 2. Books & Records (21%) 3. Resale Disclosure (9%)
2019-2020	35	1. Notice/Meetings (32%) 2. Books & Records (18%) 3. Communication (13%)
2020-2021	63	1. Notice/Meetings (25%) 2. Books & Records (25%) 3. Communication (16%)

DPOR also posts determinations made by the CICO to the website for the Office of the CICO. The website lists the subjects addressed in the determinations. During the previous four (4) fiscal years, the CICO issued 119 determinations. The following table reflects the number and top three topics addressed in these determinations:

*Table #2: Determinations Issued by the CICO.*

Period <sup>10</sup>	Number of Determinations Issued	Top Three Topics (# of Total Cases with Issue)
2017-2018	27	1. Meetings & Minutes (10) 2. Notice & Access (10) 3. Books & Records (8)
2018-2019	42	1. Books & Records (15) 2. Meetings & Minutes (14) 3. Notice & Access (12)
2019-2020	17	1. Notice & Access (10) 2. Meetings & Minutes (8) 3. Books & Records (7)
2020-2021	33	1. Books & Records (14) 2. Meetings & Minutes (13) 3. Notice & Access (13)

See Appendix C for additional information on this subject.

<sup>9</sup> Reporting periods are as follows: 2017-2018 (11/26/17 to 11/25/18); 2018-2019 (11/26/18 to 11/25/19); 2019-2020 (11/27/19 to 11/26/20); and 2020-2021 (11/27/20 to 11/26/21).

<sup>10</sup> Period is Virginia state fiscal year (July 1 to June 30).

## ***Freedom of Information Act and Public Records Requirements***

The Virginia Freedom of Information Act (Chapter 37 of Title 2.2 of the Code of Virginia) (FOIA) outlines the Commonwealth's laws regarding the public's access to public records in the custody of a public body or its officers and employees. Under the definition of "public records"<sup>11</sup> in FOIA, notices of final adverse decision and determinations issued by the CICO are considered public records.

FOIA contains numerous exclusions (§§ 2.2-3705.1 through 2.2-3706.1 of the Code of Virginia) for certain types of records or information. In addition, § 54.1-108 of the Code of Virginia outlines exclusions to FOIA applicable to DPOR specifically.

DPOR has adopted the following guidance<sup>12</sup> regarding release of information:

Pursuant to the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia), the Department of Professional and Occupational Regulation assumes a predisposition toward full disclosure of all public records in the Department's possession. Specific exclusions shall apply in accordance with § 54.1-108 and §§ 2.2-3705.1 through 2.2-3706 of the Code of Virginia and, in the absence of any board policy to the contrary, when the Department exercises its discretionary authority to withhold personal or confidential information that may compromise an individual's safety and security. A subpoena duces tecum for the production of records shall be processed in accordance with Director's Policy #100-06, Subpoenas, Service of Process and Notices.

Section 54.1-108 permits DPOR to exclude from disclosure "[r]ecords of active investigations being conducted by [DPOR] or any board." DPOR's policy provides the following guidance regarding disclosure of information about complaint files:

Open complaints may be publicly acknowledged when a Department investigation has determined that sufficient evidence exists to establish probable cause that there was a violation of a law or regulation; however, the case file is exempt from disclosure until case closure. Cases where probable cause has been found are disclosed on the Department's web site. Nothing in this policy shall conflict with the release of complaint information during disciplinary investigations as provided for in the Administrative Process Act.

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<sup>11</sup> "Public records" means all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.

<sup>12</sup> DPOR Policy #100-04, Release of Information

([https://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\222\GDoc\\_DPOR\\_2388\\_v11.pdf](https://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\222\GDoc_DPOR_2388_v11.pdf))



DPOR applies the guidance regarding complaint files to notices of final adverse decision received by the CICO. Once a matter has been closed by the CICO, the case file is subject to disclosure upon request.

In accordance with FOIA, DPOR policy treats the following information as non-disclosable:

- Nine (9) character social security numbers or Virginia DMV control numbers;
- Bank routing and account numbers;
- Credit/debit card numbers;
- Examination scores, pass/fail status, or number of times an examination was taken by a candidate/licensee unless a board policy to the contrary exists;
- State income, business and estate tax returns and personal property tax returns; and
- Any information that may compromise the privacy or safety of an individual or business (i.e., medical/mental records, scholastic records, etc.) may be disclosed only upon approval of the Director, Deputy Directors, or Information Management Director.

Identifying information of a complainant or respondent in a case, including the name, address, and contact information is subject to disclosure.

When DPOR receives a request for a case file, DPOR's public records management staff will review the case file for non-disclosable information and redact such information from the case file prior to fulfilling the request.

As permitted under § 2.2-3704(F) of FOIA, DPOR may assess reasonable charges for the actual costs associated with accessing, duplicating, supplying or searching for records.

### ***DPOR Technical Capacity to Receive Audio and Video Recordings***

DPOR is able to receive digital audio and video recordings provided such submissions are made by way of a secure portal approved by Virginia Information Technologies Agency (VITA). Such VITA-approved secure portals available to DPOR include the Box platform and the Microsoft SharePoint platform. Either of these portals may receive digital files up to 250 GB (250,000 MB) in size.<sup>13</sup>

DPOR has limited ability to receive digital recordings through email due to restrictions on the size of file attachments allowed by DPOR's VITA-authorized email vendor. DPOR is able to receive digital recordings stored on tangible media (e.g. DVD<sup>14</sup> or flash drive).

DPOR has the ability to playback digital audio and video recordings that are in formats supported by Windows Media Player.

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<sup>13</sup> The file size of one hour of full HD (1080p resolution) video is 1.2 GB to 1.4 GB.

<sup>14</sup> Most computers assigned to DPOR staff are laptop computers that do not contain a DVD drive. DPOR may need to procure one or more external DVD drives in order to accept submissions on disc.

DPOR's electronic records are stored in a cloud-based network operated and maintained by VITA. Digital audio and video recordings retained by DPOR would be stored on this network. There are no limitations on the ability of DPOR to store or archive these recordings.

See Appendix D for additional information on this subject.

### ***DPOR Administrative Capacity to Receive Audio and Video Recordings***

Under DPOR's organizational structure, the Office of the CICO consists of the CICO (Hearing and Legal Services Manager III) and a CIC Administrative Support Specialist (General Administrative Coordinator I). The support specialist is a classified full-time position. The position has been vacant for several years. The CICO largely performs the functions of the Office of the CICO alone. As needed, the CICO has received administrative assistance from other members of DPOR staff on a part-time basis.

The Fiscal Impact Statement (FIS)<sup>15</sup> for SB 693 as originally introduced indicated that DPOR anticipated "...needing one pay band 4 classified position to allow for the review of recordings by the Ombudsman's Office."

According to the FIS, the need for an additional position was based on "...estimates that approximately 50 complaints a year will include audio/video recordings of board and other meetings, interactions with board members, managers, and others, along with accompanying phone call records."

When DPOR receives a public records request for a complaint file, the agency's Records Manager (Policy and Planning Manager I) performs review of the file and, if needed, redacts any non-disclosable information.

According to the FIS, "...due to privacy issues and potential liability resulting from the recordings becoming public record, especially recordings that could include private meetings among private citizens, some of whom cannot be recorded due to their federal security positions, and other scenarios that [DPOR] anticipates could compromise information security, many of the recordings may include information that will be required to be redacted." The FIS indicated DPOR anticipated "...needing one pay band 4 classified IT Specialist to review and potentially edit the recordings."

Neither DPOR's Records Manager, nor current public records management staff, possess the requisite training or expertise to redact information from audio and video recordings. In addition, DPOR does not have appropriate software to perform redaction of audio and video recordings.

The FIS reflected additional non-general fund appropriation would be needed to pay for salaries and benefits for the new positions, as well as costs for furniture and equipment, and other recurring costs (e.g. telephone, computer support, and supplies).

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<sup>15</sup> SB 693, 2022 Fiscal Impact Statement, Department of Planning and Budget (<https://lis.virginia.gov/cgi-bin/legp604.exe?221+oth+SB693F122+PDF>)

### **Other States with an Ombudsman or Similar Office**

There are five (5) states other than Virginia that have an ombudsman, or similar, office: Colorado, Delaware, Florida, Illinois, and Nevada. The powers and duties of the ombudsman office in each state vary, including the authority to investigate and resolve complaints. Of these states, Delaware, Florida, and Nevada allow for the investigation of association complaints. Only the State of Nevada expressly permits audio or video recordings to be included with a complaint filing<sup>16</sup>.

*Table #3: Comparison of States with Ombudsman or Similar Office.*

<b>State</b>	<b>File Association Complaint First?</b>	<b>Can Ombudsman Investigate?</b>	<b>Audio and Video Recordings Allowed?</b>
Colorado <sup>17</sup>	No	No – No enforcement authority.	N/A
Delaware	Yes	Yes	Unconfirmed <sup>18</sup>
Florida	No	Yes	No
Illinois	Yes	No – May only assist parties to resolve disputes.	N/A
Nevada	Yes	Yes	Yes
Virginia	Yes	No	No

See Appendix F for additional information on this subject.

### **Public Comments**

DPOR accepted public comments from July 26, 2022, to August 9, 2022. Comments were received from two (2) individuals<sup>19</sup>. Only one of these individuals substantively addressed the subject of the review. The commenter raised several concerns regarding allowing audio and video recordings to be included with a notice of final adverse decision. These concerns included (i) the potential for increased costs to associations; (ii) the potential for longer and more complex hearings, placing additional burdens on volunteer directors; (iii) the risk of directors being subject to abuse or harassment; and (iv) the need to provide notice that recordings will be subject to public records disclosure laws.

All comments are provided in Appendix J.

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<sup>16</sup> Those who submit such recordings must indicate the time stamp which identifies the alleged violation, and where the Nevada Real Estate Division may begin review.

<sup>17</sup> The State of Colorado does not have an ombudsman office. The HOA Center housed in the Division of Real Estate in the state's Department of Regulatory Agencies performs many of the duties as the ombudsman offices in the other states that were reviewed.

<sup>18</sup> Staff attempted to make inquiry to the State of Delaware ombudsperson office to determine whether it allowed submission of audio or video recordings. Staff was unable to obtain confirmation.

<sup>19</sup> The Board received one comment posted to the comment forum on Virginia Regulatory Town Hall, and one comment submitted directly to the Board by email. No commenters appeared for the public hearing.

## **COMMITTEE FINDINGS**

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### ***Committee Discussion***

On August 9, 2022, following the public hearing, the Committee met to review resources and information gathered by staff and discuss the issues surrounding SB 693. The CICO provided the Committee with an overview of the association complaint process, including the requirements for filing a notice of final adverse decision. Committee members considered the research findings, and offered their own expertise and perspectives on the subject.

Committee discussion included the following:

- Applicable state law and regulations.
- The role and purpose of the Office of the CICO.
- The reason for the legislation and the problem it was intended to solve.
- The procedure for submission and review of notices of final adverse decision.
- Whether audio and video recordings would be relevant to association complaints.
- Whether audio and video recordings would assist the CICO in performing review of notices of final adverse decision.
- DPOR's technical capacity to receive audio and video recordings.
- Requirements of FOIA and release of information as related to audio and video recordings.
- Various concerns regarding audio and video recordings, including concern about the ability of those reviewing recordings to identify individuals that are part of a recording and concern that a recording could be distorted or edited.
- DPOR's administrative capacity to receive and review audio and video recordings.
- The potential effects on CIC associations of allowing audio and video recordings to be included with notices of final adverse decision.
- Whether there is demand for a change.

On September 22, 2022, the Committee met to review a draft report prepared by staff that included the Committee's findings and conclusion. After review and revision, the Committee adopted a report for consideration by the Board.

### ***Findings***

#### ***Potential Statutory or Regulatory Amendments***

Subsection B of § 54.1-2354.4 of the Code of Virginia provides that “[t]he notice [of final adverse decision] ... shall be in writing on forms prescribed by the Board, [and] shall include copies of all records pertinent to the decision...” As interpreted by the CICO, the prescription that the notice “be in writing” precludes the submission of audio or video recordings. The enabling statute does not provide a meaning for the term “records pertinent to the decision.” It is not clear whether an audio or video recording could fall within the meaning of this term in cases where such a recording was pertinent to an association’s adverse decision to a complainant.

The General Assembly could amend the enabling statute to provide a meaning for the term “records pertinent to the decision,” which could include any audio or video recordings relevant to the association’s final adverse decision. Notwithstanding action by the General Assembly, the Board could amend the Common Interest Community Ombudsman Regulations to clarify the meaning of “records pertinent to the decision” to address the subject of audio or video recordings that are relevant to an association’s final adverse decision. Absent any change to statute or regulation, the Board could provide interpretive guidance regarding the meaning of the term used in the statute by way of issuing a guidance document.

It is important to draw distinction between records that might be pertinent (i.e. relevant or applicable) to the decision made by the association regarding the complaint made to the association, and records that might be pertinent to the complaint filed by the complainant. To the extent a complaint filed with an association included an audio or video recording, it is not clear that such recording would necessarily be admissible as part of a notice of final adverse decision unless it was relevant or applicable to the association’s decision.

#### *The Role and Purpose of the Office of the CICO*

Based on the powers and duties of the Office of the CICO established in the enabling statute, the General Assembly did not create the CICO to perform investigation of complaints or adjudicate claims. As to notices of final adverse decision, the role of the CICO is limited to reviewing the decision made by the association to determine whether the decision is in conflict with CIC laws or regulations. The CICO does not perform *de novo* review of the complaints made by a complainant. Moreover, final determinations made by the CICO are not binding on either the association that is the subject of the complaint, or the complainant. To the extent that there is a violation of applicable CIC law or regulation, the CICO may refer such cases for investigation by DPOR, and potential disciplinary action by the Board.

The CICO review process is not an evidentiary process, and is not intended to stand in the place of the civil court system.

The proposal to permit submission of audio and video recordings with a notice of final adverse decision, as reflected in the original SB 693, appears contrary to the role and purpose of the CICO as designed by the General Assembly.

#### *Effect on the Association Complaint Process*

The CICO’s review of a notice of final adverse decision includes the association’s final decision to the complaint made with the association, and the supporting documentation related to the association’s decision. The CICO cannot consider information or documentation that is not part of the record of the association’s decision. During Committee discussion, the CICO explained that when a complainant submits additional information or documents that were not part of the complaint to the association, the CICO excludes these from review of the final adverse decision<sup>20</sup>.

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<sup>20</sup> The Committee reviewed a sample notice of final adverse decision where this occurred. The CICO’s determination noted that the CICO did not consider documents that were not part of the association complaint in making the determination (see Appendix E).

From a standpoint of procedural fairness, it would be inappropriate for the CICO to receive and consider information that the association did not have an opportunity to review and consider when making its final decision to a complainant. If audio and video recordings were allowed to be submitted as part of a notice of final adverse decision, the CICO would be obligated to provide the association with the opportunity to review and respond to any recordings that are submitted. This would effectively re-open the matter previously decided by the association through the association complaint process. The association's final decision would not actually be "final."

The CICO review of association decisions of complaints is not intended to sanction or "punish" associations for making decisions that are inconsistent with CIC laws and regulations, but to inform and educate associations on these laws and regulations, and help ensure compliance in the future.

The proposal to permit submission of audio and video recordings with a notice of final adverse decision, as reflected in the original SB 693, appears contrary to the purpose of the association complaint process as designed by the General Assembly.

#### *The Relevance of Audio or Video Recordings to Association Complaints*

The Committee was not able to determine how audio or video recordings would be relevant to an association complaint. While the Property Owners' Association Act and the Virginia Condominium Act permit association members to make recordings of governing board meetings, the minutes of meeting are the official record of a governing board's meetings and actions taken.

#### *Potential for Recordings to be Edited or Distorted*

During Committee discussion, concerns were raised as to the potential for audio or video recordings submitted to the CICO to be distorted or edited. Since the CICO review process is not an evidentiary one, it is not clear the CICO would be able to rely on such recordings as proof to substantiate a violation of CIC law or regulation.

#### *DPOR's Technical Capacity to Receive Audio and Video Recordings*

Generally, DPOR has the technical capacity to receive and archive digital audio and video recordings that might be submitted as part of notices of final adverse decision. During Committee discussion, it was determined that if audio and video recordings were allowed to be submitted to the CICO, DPOR would need to establish clear guidelines prescribing acceptable file formats and procedures for submission of recordings.

#### *Compliance with FOIA and Public Records Requirements*

Under FOIA, a notice of final adverse decision, including any audio or video recording submitted as part of such notice, is considered a public record. Compliance with FOIA would not be an impediment to the submission of audio or video recordings.

In accordance with DPOR's Release of Information Policy, consistent with the requirements of FOIA, whenever a request for a closed CICO case is received, DPOR's public records management staff would review any audio or video recordings included with a notice of final adverse decision, and redact any non-disclosable information. To the extent necessary to recover

costs associated with fulfilling a records request, including staff time to review and redact audio or video files, DPOR may assess reasonable charges to a requesting party for actual costs incurred.

#### *DPOR's Administrative Capacity to Receive and Review Audio and Video Recordings*

The Office of the CICO may be able to receive and review audio and video recordings submitted with notices of final adverse decision without the need for an additional staff position. During Committee discussion, the CICO indicated that the office plans to fill the existing vacant position. However, the ability to receive and review audio and video recordings without need for additional staff would be contingent upon the number of cases received by the Office of the CICO that include recordings.

DPOR may be able to fulfill public records requests for closed CICO cases without the need for an additional staff position. However, current staff lack (i) the training and expertise to redact information from audio or video recordings; and (ii) appropriate software to perform redaction of audio and video recordings. These may impose an impediment on the ability of DPOR to timely and appropriately comply with FOIA. In addition, the ability to fulfill public records requests without the need for additional staff would be contingent upon the number of records requests received by DPOR for closed cases that include audio or video recordings.

#### *Potential Impacts on Common Interest Community Associations*

During Committee discussion, Committee members identified multiple negative potential impacts that allowing for submission of audio and video recordings may have on associations. While it is expected that audio or video recordings of governing board meetings might be among the types of recordings submitted to the CICO, there is potential that recordings taken in other settings may be submitted. These could include recordings of telephone conversations or encounters between individuals within the community. This may create or contribute to discord within communities. There is also the potential for a “chilling effect” on interactions between governing board members and association members outside of meetings. Board members may be wary of interacting with community members if they believe that such interactions may be subject to a recording. This would likely result in less communication with, and less access to, board members, which would be detrimental to effective community governance.

In addition, there is the potential that allowing for recordings may have a similar effect on participation in association governance, such as attendance at governing board or association meetings, or service on governing boards. Individuals may be reluctant to appear at meetings if they believe that they will be subject to recording, particularly video recording, that would become public record if submitted as part of a notice of final adverse decision. In some cases, being recorded could create professional or personal risk to an individual<sup>21</sup>.

Further, there is the potential that submission of audio and video recordings to the CICO may impose costs on associations. These costs would likely include the time spent by board members to review recordings and provide a response to the CICO. These costs could also include legal fees to have recordings reviewed by an attorney, if so desired, and obtain advice. In addition,

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<sup>21</sup> These include individuals possessing security clearances who are restricted by their employer from being identified in a recording, and individuals who may be victims of domestic abuse, among others.

there may be pressure on associations to create their own recordings of board meetings in order to have a record available in the event of a complaint. Associations would assume the costs of creating and storing such recordings. These create the potential that associations may raise assessments on members to offset these costs.

CIC associations are highly dependent upon volunteer community members. Associations often have a substantial challenge in finding and attracting individuals who are willing to commit their time and talents to serve. These potential negative effects would likely create disincentives for individuals to join governing boards, attend meetings, and otherwise participate in community governance. This would have a deleterious effect on associations.

Committee members did not identify any positive impacts that would result from allowing audio and video recordings to be submitted to the CICO.

#### *Lack of Significant Demand for a Change in the CICO Process*

There does not appear to be significant demand for a change to allow audio and video recordings to be submitted to the CICO. During Committee discussion, the CICO indicated that since the creation of the CICO office in 2008, there have only been two (2) instances where complainants made a request to submit a recording. The scant public feedback received during the public comment opportunities is further evidence there is lack of demand for a change. Moreover, the Committee was not able to identify a public problem that would be remedied by allowing audio and video recordings to be submitted to the CICO.

#### *Relationship to the Ability of the Office of the CICO to Perform its Duties*

The Committee was not able to identify how allowing submission of audio and video recordings would assist the CICO in the performance of duties with respect to any notice of final adverse decision. Allowing for the submission of audio and video recordings would potentially require the Office of the CICO to invest considerable time to review such recordings. Depending on the length and quality of a recording, the CICO and staff might need to spend several hours reviewing a recording for just a single case. It is common for association governing board meetings to last several hours. The CICO and staff would most likely have to review a recording without appropriate context, such as knowing the identity of individuals that are material to the recording (e.g. board members and complainant). The CICO and staff may be required to playback a recording multiple times in order to take notes and identify time stamps to track events. To the extent that a submitted recording is of poor quality, it may not even be useful.

There is the potential for a submitted recording to be distorted or edited, which diminishes the value a recording would have to the CICO.

Based on the issues the CICO addresses in final adverse decision cases, submission of audio or video recordings would not assist the CICO in determining whether an association's decision to a complainant is inconsistent with CIC laws or regulations.



### Conclusion

The Committee concludes that § 54.1-2354.4 of the Code of Virginia would likely need amendment to clarify that audio and video recordings can be submitted as records pertinent to the decision. Further, 18VAC48-70, the Common Interest Community Ombudsman Regulations, would need significant amendment to provide the public with the requirements and processes for submitting audio and video recordings with a notice of final adverse decision. Those amendments to the regulations would also require associations to amend their internal documents and policies. Implementation of statutory and regulatory changes by associations are impediments that may not make such changes feasible.

DPOR has the technical capacity to receive and archive digital audio and video recordings, but will need to establish clear guidelines prescribing acceptable file formats and procedures for submission of recordings. DPOR will need to provide appropriate training and resources for its public records management staff to perform redactions of recordings in order to comply with FOIA.

The Office of the CICO may be able to receive and review recordings, and DPOR's public records management staff may be able to fulfill public records requests, without the need for additional staff. Additional staff will be required if DPOR experiences a high number of cases that include recordings.

However, the Committee concludes that allowing for the submission of audio and video recordings with notices of final adverse decision, as reflected in the original SB 693, would be contrary to the role and purpose of the Office of the CICO, and the association complaint process, as designed by the General Assembly in the enabling legislation. There is no substantial evidence of demand for a change. There does not appear to be an identifiable public problem that making a change to law or regulation to allow for submission of recordings would address.

The Committee concludes that allowing for submission of audio or video recordings would not assist the CICO in performing the statutory duties of the Office of the CICO. Rather, allowing for the submission of audio and video recordings is more likely to be detrimental to the CICO in performing duties with respect to notices of final adverse decisions.

Moreover, allowing for the submission of recordings to the CICO may result in unintended negative impacts to community associations.

### **RECOMMENDATION**

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At its September 22, 2022 meeting, the Board voted to adopt the Committee's findings and conclusion as presented in this report. Based on the Committee's conclusion, the Board recommends against any legislative or regulatory changes to allow for the submission of audio and video recordings with a notice of final adverse decision.

# Appendix A

## Senate Bill 693 (2022)

# VIRGINIA ACTS OF ASSEMBLY -- 2022 SESSION

## CHAPTER 244

*An Act to direct the Common Interest Community Board to review the feasibility of allowing audio and video recordings to be submitted with a notice of final adverse decision; report.*

[S 693]

Approved April 8, 2022

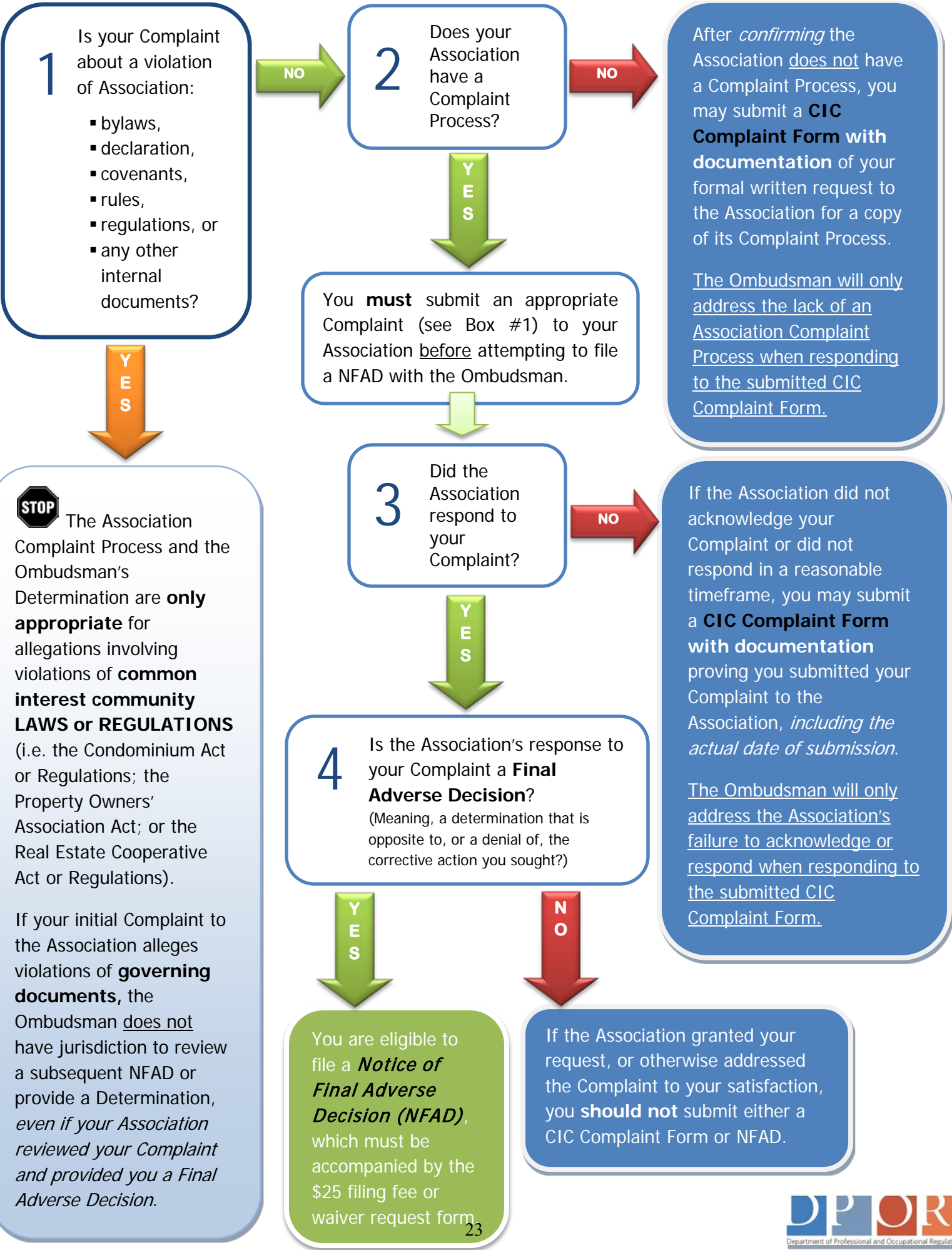
**Be it enacted by the General Assembly of Virginia:**

**1.** § 1. *That the Common Interest Community Board (the Board) shall review the feasibility of allowing audio and video recordings to be submitted with a notice of final adverse decision as a record pertinent to the decision in accordance with § 54.1-2354.4 of the Code of Virginia. In conducting its review, the Board shall (i) solicit and consider public comments; (ii) identify pertinent statutory and regulatory amendments necessary to allow for the submission of audio and video recordings in accordance with the provisions of this act; (iii) identify any impediments to the submission of audio and video recordings, including information technology limitations and compliance with the provisions of the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia) and other public records laws; and (iv) consider whether allowing the submission of audio and video recordings pursuant to the provisions of this act would assist the Common Interest Community Ombudsman in the performance of his duties with respect to any notice of final adverse decision.*

*The Board shall report its findings and any legislative, regulatory, policy, or budgetary recommendations to the Secretary of Labor and the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology on or before November 1, 2022.*

# Appendix B

## Flowchart: Guidelines for Review of Complaint Submissions



# Appendix C

## CICO Notice of Final Adverse Decision

### Statistics

## Notices of Final Adverse Decision (NFAD)<sup>1</sup>

Reporting Period <sup>2</sup>	2017-2018	2018-2019	2019-2020	2020-2021
<b>NFADs Received</b>	32	33	35	63
<b>NFADs by Topic (% of Total Complaints)</b>	<ul style="list-style-type: none"> <li>• Books &amp; Records (41%)</li> <li>• Meeting Notice (13%)</li> <li>• Assessments (13%)</li> <li>• Distribution of Information (10%)</li> <li>• Adoption/Enforcement of Rules (5%)</li> <li>• Association Charges (5%)</li> <li>• Complaint Process (5%)</li> <li>• Reserves (≈3%)</li> <li>• Fidelity Bond (≈3%)</li> <li>• Disclosure Packet (≈3%)</li> </ul>	<ul style="list-style-type: none"> <li>• Notice/Meetings (21%)</li> <li>• Books &amp; Records (21%)</li> <li>• Resale/Disclosure (9%)</li> <li>• Right to Vote (6%)</li> <li>• Distribution of Information (6%)</li> <li>• Executive Session (6%)</li> <li>• Due Process (6%)</li> <li>• Reserves (6%)</li> <li>• Open Forum (3%)</li> <li>• Association Charges (3%)</li> <li>• Annual Report (3%)</li> <li>• Violation of Declaration (3%)</li> <li>• Minutes (3%)</li> <li>• Agenda Packet (3%)</li> </ul>	<ul style="list-style-type: none"> <li>• Notice/Meetings (32%)</li> <li>• Books &amp; Records (18%)</li> <li>• Communication (13%)</li> <li>• Executive Session (11%)</li> <li>• Agenda Packets (8%)</li> <li>• Work Sessions/Informal Meetings (5%)</li> <li>• Reserve Study (≈3%)</li> <li>• Disclosure Packet (≈3%)</li> <li>• Complaint Procedure (≈3%)</li> <li>• Association Charges (≈3%)</li> <li>• Pesticide Application (≈3%)</li> </ul>	<ul style="list-style-type: none"> <li>• Notice/Meetings (25%)</li> <li>• Books &amp; Records (25%)</li> <li>• Communication (16%)</li> <li>• Reserves/Budget (13%)</li> <li>• Use of Technology (4%)</li> <li>• Pesticide Application (4%)</li> <li>• Resale/Disclosure (4%)</li> <li>• Upkeep of Condominium (2%)</li> <li>• Compliance w/ Governing Documents (2%)</li> <li>• Association Charges (2%)</li> <li>• Member Meetings (2%)</li> <li>• Right to Serve on Board (1%)</li> </ul>

<sup>1</sup> Information obtained from CIC Ombudsman Annual Reports for [2017-2018](#), [2018-2019](#), [2019-2020](#), and [2020-2021](#).

<sup>2</sup> Reporting periods are as follows: 2017-2018 (11/26/17 to 11/25/18); 2018-2019 (11/26/18 to 11/25/19); 2019-2020 (11/27/19 to 11/26/20); and 2020-2021 (11/27/20 to 11/26/21)

## CICO Determinations<sup>3</sup>

Period <sup>4</sup>	2017-2018	2018-2019	2019-2020	2020-2021
<b>Determinations Issued</b>	27	42	17	33
<b>Topic Areas (# Cases w/ Issue)</b>	<ul style="list-style-type: none"> <li>• Meetings &amp; Minutes (10)</li> <li>• Notice &amp; Access (10)</li> <li>• Books &amp; Records (8)</li> <li>• Governing Documents (5)</li> <li>• Assessments &amp; Dues (4)</li> <li>• Budget &amp; Reserves (4)</li> <li>• Elections (4)</li> <li>• Governance &amp; Management (4)</li> <li>• Common Areas (3)</li> <li>• Communication Methods (3)</li> <li>• Complaint Procedure (2)</li> <li>• Due Process (2)</li> <li>• Rules &amp; Regulations (2)</li> <li>• Architectural (1)</li> <li>• Bond &amp; Insurance (1)</li> <li>• Disclosure Packet (1)</li> <li>• “Homeowners Bill of Rights” (1)</li> <li>• Maximum Allowable Fees (1)</li> <li>• Ombudsman Regulations (1)</li> </ul>	<ul style="list-style-type: none"> <li>• Books &amp; Records (15)</li> <li>• Meetings &amp; Minutes (14)</li> <li>• Notice &amp; Access (12)</li> <li>• Governance &amp; Management (9)</li> <li>• Governing Documents (9)</li> <li>• Communication Methods (6)</li> <li>• Assessments &amp; Dues (3)</li> <li>• Budget &amp; Reserves (3)</li> <li>• Due Process (3)</li> <li>• Maintenance &amp; Repairs (3)</li> <li>• Association Charges (2)</li> <li>• Disclosure Packet (2)</li> <li>• CIC Board Regulations (1)</li> <li>• Complaint Procedure (1)</li> <li>• Resale Certificate (1)</li> <li>• Voting (1)</li> </ul>	<ul style="list-style-type: none"> <li>• Notice &amp; Access (10)</li> <li>• Meetings &amp; Minutes (8)</li> <li>• Books &amp; Records (7)</li> <li>• Governance &amp; Management (5)</li> <li>• Complaint Procedure (5)</li> <li>• Communication Methods (4)</li> <li>• Architectural Standards (2)</li> <li>• Association Charges (2)</li> <li>• Budget &amp; Reserves (2)</li> <li>• Disclosure Packet (2)</li> <li>• Assessments &amp; Dues (1)</li> <li>• Capital Components (1)</li> <li>• Common Areas (1)</li> <li>• Insurance (1)</li> <li>• Rules &amp; Regulations (1)</li> <li>• Statement of Owner Rights (1)</li> </ul>	<ul style="list-style-type: none"> <li>• Books &amp; Records (14)</li> <li>• Meetings &amp; Minutes (13)</li> <li>• Notice &amp; Access (13)</li> <li>• Budget &amp; Reserves (6)</li> <li>• Complaint Procedure (6)</li> <li>• Distribution of Information (5)</li> <li>• Communication Methods (4)</li> <li>• Resale Certificate (3)</li> <li>• Due Process (2)</li> <li>• Non-Stock Corp. Act – Action w/o Meeting (2)</li> <li>• Pesticide (2)</li> <li>• Recording (2)</li> <li>• Reserve Study (2)</li> <li>• Agenda Packet (1)</li> <li>• Maintenance &amp; Repairs (1)</li> <li>• Ombudsman Regulations (1)</li> </ul>

<sup>3</sup> Information derived from website for Office of Common Interest Community Ombudsman (<https://www.dpor.virginia.gov/CIC-Ombudsman>).

<sup>4</sup> Period is Virginia state fiscal year (July 1 to June 30).



# Appendix D

## DPOR System Capacity to Receive

### Audio and Video Recordings

## Information on DPOR System Capacity to Receive Audio and Video Recordings

**Receiving of Files:** The Department is able to receive digital audio and video recordings through a VITA-approved secure portal. The Department currently uses the Box ([www.box.com](http://www.box.com)) file sharing platform on a limited basis. The Department plans to transition to using the Microsoft SharePoint platform in the near future. Either of these portals may receive digital files up to 250 GB (250,000 MB) in size. For reference, the file size of one (1) hour of full HD (1080p resolution) video is 1.2 GB to 1.4 GB<sup>1</sup>.

Common Name	Pixel Size	Also Known As	File Size for 1 hour of video
720p	1280 x 720	HD or "HD Ready"*	800 - 900MB
1080p	1920 x 1080	FHD or "Full HD"	1.2 - 1.4GB
2K	2048 x 1080	Digital Cinema (DCI)	2.8 - 3GB
4K	3840 x 2160	UHDTV1	20 - 22GB
8K	7680 x 4320	UHDTV2	36 - 38GB

Video File Size Chart

In order for an individual to submit a digital file to the Department through the file sharing platform, the individual would be required to request the Department provide the individual with a link to the platform. A staff member would email the requesting external party a link that would permit access to the platform to upload files only. External parties would not have the ability to download files from the platform. The staff member providing access to the external party would be the sole party able to download the files from the platform. The email address of the external party that uploads files to the platform could not be shared.

The Department has limited ability to receive digital audio and video recordings through email. The Department's email vendor allows receipt of email file attachments up to 25 MB per email.

The Department is able to receive digital audio and video recordings stored on tangible media such as recordable DVD/CD or flash drive. Most of the personal computers issued to Department staff are laptop computers and can accept flash drives. However, most of these laptops do not contain a DVD/CD drive. The Department may need to procure one or more external DVD drives in order for staff to be able to accept submissions by DVD/CD.

The Department may not be able to receive audio and video recordings that are stored on analog media (e.g. tape) due to lack of available equipment to playback such media.

### Playback/Storage/Archiving:

<sup>1</sup> <https://www.filecatalyst.com/blog/how-big-are-movie-files/> (Accessed 7/25/22).

The Department uses laptop computers with a Microsoft Windows operating system. The default media player for these systems is Windows Media Player. Windows Media Player is able to support the following file formats<sup>2</sup>:

Windows Media formats (.asf, .wma, .wmv, .wm)	Audio Visual Interleave (.avi)	Audio Interchange File Format (.aif, .aifc, .aiff)
Windows Media Metafiles (.asx, .wax, .wvx, .wmx, wpl)	Moving Pictures Experts Group (.mpg, .mpeg, .m1v, .mp2, .mp3, .mpa, .mpe, .m3u)	Sun Microsystems and NeXT (.au, .snd)
Microsoft Digital Video Recording (.dvr-ms)	Musical Instrument Digital Interface (.mid, .midi, .rmi)	Audio for Windows (.wav)
CD Audio Track (.cda)	Indeo Video Technology (.ivf)	QuickTime Movie file (.mov)
MP4 Audio file (.m4a)	MP4 Video file (.mp4, .m4v, .mp4v, .3g2, .3gp2, .3gp, .3gpp)	Windows audio file (.aac, .adt, .adts)
MPEG-2 TS Video file (.m2ts)	Free Lossless Audio Codec (.flac)	Windows Media Player Skins (.wmz, .wms)

The Department may not be able to playback files that are not supported by the Windows Media Player without additional modifications to the media player<sup>3</sup>.

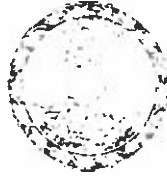
The Department’s electronic records are stored in a cloud-based network operated and maintained by VITA. Digital audio and video recordings submitted to the Department would be stored on this network. To the best knowledge, there are no limitations on the ability of the Department to store or archive these digital records.

<sup>2</sup> <https://support.microsoft.com/en-us/topic/file-types-supported-by-windows-media-player-32d9998e-dc8f-af54-7ba1-e996f74375d9> (Accessed 7/25/22).

<sup>3</sup> <https://support.microsoft.com/en-us/windows/codecs-faq-392483a0-b9ac-27c7-0f61-5a7f18d408af> (Accessed 7/25/22).

# Appendix E

## Sample CICO Determination



# COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Glenn A Youngkin  
Governor

January 21, 2022

G. Bryan Slater  
Secretary of Labor

Demetrios J. Melis  
Director

Complainant: Stephen Eisenberg  
Association: The Oronoco Association  
File Number: 2022-01153

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*The Office of the Common Interest Community Ombudsman has been designated to review final adverse decisions and determine if they may be in conflict with laws or regulations governing common interest communities. Such determination is within the sole discretion of the Office of the Common Interest Community Ombudsman and not subject to further review.*

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### Complaint

The Complainant submitted a complaint to the Association dated September 13, 2021. The Association provided a response to the association complaint dated November 23, 2021. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated December 2, 2021.

### Authority

The Common Interest Community Ombudsman (CICO), as designee of the Director, is responsible for determining whether a "final adverse decision may be in conflict with laws or regulations governing common interest communities." (18VAC 48-70-120) The process of making such a determination begins with receipt of a NFAD that has been submitted to this office in accordance with §54.1-2354.4 (Code of Virginia) and the Common Interest Community Ombudsman Regulations (Regulations). A NFAD results from an association complaint submitted through an association complaint procedure. The association complaint must be submitted in accordance with the applicable association complaint procedure and, as very specifically set forth in the Regulations, "shall concern a matter regarding the action, inaction, or decision by the governing board, managing agent, or association inconsistent with applicable laws and regulations.

Under the Regulations, "applicable laws and regulations" pertain solely to common interest community laws and regulations. Any complaint that does not concern common interest community laws or regulations is not appropriate for submission through the association complaint procedure and we cannot provide a determination on such a complaint. Common interest community law is limited to the Virginia Condominium Act, the Property Owners' Association Act, and the Virginia Real Estate Cooperative Act.

Pursuant to the Regulations (18 VAC 48-70-90), the only documents that will be considered when reviewing a NFAD are the association complaint submitted by a complainant to the association (and any documents included with that original complaint), the final adverse decision from the association, and any supporting documentation related to that final adverse decision. Other documents submitted with the Notice of Final Adverse Decision cannot be reviewed or considered.

This Determination is final and not subject to further review.

### Determination

Additional documents were included with the NFAD that were not, according to the Association, included with the original complaint submitted to the Association. Several memorandums were also included that were not part of the original complaint as evidenced by their date. None of these additional documents or memorandums will be considered for this Determination. The Regulations that govern the complaint process do not provide for the submission of additional documents outside those set forth in the Regulations and this office has never utilized such additional documents since it provides an unfair advantage to the party that submitted them.

The Complainant has alleged that the Association is in violation of §55.1-1949(B)(1)<sup>1</sup> of the Condominium Act. The Complainant alleges that the executive board communicated through informal meetings, casual discussions, and similar activities rather than holding formal and properly called Board meetings.

The Complainant also alleges that the Association improperly withheld association records from unit owners when it denied him documents pertaining to a forensic audit examination. This request was denied via email by one board member on May 25, 2020 and another, also by email, on September 21, 2021. A failure to provide

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<sup>1</sup> B. 1. Except as otherwise provided in the condominium instruments, the provisions of this subsection shall apply to executive board meetings at which business of the unit owners' association is transacted or discussed. All meetings of the unit owners' association or the executive board, including any subcommittee or other committee of such association or board, shall be open to all unit owners of record. The executive board shall not use work sessions or other informal gatherings of the executive board to circumvent the open meeting requirements of this section. Minutes of the meetings of the executive board shall be recorded and shall be available as provided in § 55.1-1945.

access to or copies of association books and records may be a violation of 55.1-1945<sup>2</sup> of the Condominium Act.

The Complainant requested that the Association hold a formal meeting to consider and grant him his request. He further requested that if he is not provided the documents, the Association adhere to its association complaint procedure and provide an in-person hearing rather than a virtual one and that a neutral, professionally qualified recorder take minutes. The Complainant also asks that the Board recuse itself from the

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<sup>2</sup> A. The declarant, managing agent, unit owners' association, or person specified in the by laws of the association shall keep detailed records of the receipts and expenditures affecting the operation and administration of the condominium and specifying the maintenance and repair expenses of the common elements and any other expenses incurred by or on behalf of the association. Subject to the provisions of subsections B, C, and E, upon request, any unit owner shall be provided a copy of such records and minutes. All financial books and records shall be kept in accordance with generally accepted accounting practices.

B. Subject to the provisions of subsection C, all books and records kept by or on behalf of the unit owners' association, including the unit owners' association membership list, and addresses and aggregate salary information of unit owners' association employees, shall be available for examination and copying by a unit owner in good standing or his authorized agent so long as the request is for a proper purpose related to his membership in the unit owners' association and not for pecuniary gain or commercial solicitation. Notwithstanding any provision of law to the contrary, this right of examination shall exist without reference to the duration of membership and may be exercised (i) only during reasonable business hours or at a mutually convenient time and location and (ii) upon five business days' written notice for a unit owner association managed by a common interest community manager and 10 business days' written notice for a self-managed unit owners' association, which notice shall reasonably identify the purpose for the request and the specific books and records of the unit owners' association requested.

C. Books and records kept by or on behalf of a unit owners' association may be withheld from examination or copying by unit owners and contract purchasers to the extent that they are drafts not yet incorporated into the books and records of the unit owners' association or if such books and records concern:

1. Personnel matters relating to specific, identified persons or a person's medical records;
2. Contracts, leases, and other commercial transactions to purchase or provide goods or services, currently in or under negotiation;
3. Pending or probable litigation. For purposes of this subdivision, "probable litigation" means those instances where there has been a specific threat of litigation from a person or the legal counsel of such person;
4. Matters involving state or local administrative or other formal proceedings before a government tribunal for enforcement of the condominium instruments or rules and regulations promulgated by the executive board;
5. Communications with legal counsel that relate to subdivisions 1 through 4 or that are protected by the attorney-client privilege or the attorney work product doctrine;
6. Disclosure of information in violation of law;
7. Meeting minutes or other confidential records of an executive session of the executive board held pursuant to subsection C of § 55.1-1949;
8. Documentation, correspondence or management or executive board reports compiled for or on behalf of the unit owners' association or the executive board by its agents or committees for consideration by the executive board in executive session; or
9. Individual unit owner or member files, other than those of the requesting unit owner, including any individual unit owner's files kept by or on behalf of the unit owners' association.

hearing due to conflicts of interest and that unit owners be appointed to review the matter instead. Finally, the Complainant asks that the Board cease communicating among themselves outside of meetings, and that meetings be formally carried out as required by law and policy. He specifically asks that the Board not use work sessions or other informal gatherings to circumvent open meeting requirements, and that duties of the Board be carried out by the Board and not individual directors.

The Association responded to the complaint by noting that the documents requested were not a forensic audit but instead were a work product of a billing review. The Association wrote that there was a dispute between the Association and the Declarant at the time the documents were requested, and the arbitrator was considering "the issue of attorneys' fees, as well as their reasonableness." The Association said, "The work product was withheld from the Declarant based upon the work-product privilege. Thus, the requested documents were properly withheld under Virginia Code §55.1-1945(C)(3)." The Association further wrote that both parties to the dispute have recently asked for dismissal and the Board of Directors announced the requested documents will be transferred to the Association's managing agent and will be available for inspection.

Regarding the allegation that the Board of Directors has met improperly, the Association stated that "the Board of Directors has regularly and continuously made all of its decisions at open Board of Directors meetings noticed and scheduled in accordance with Virginia Code §55.1-1949." The Association noted that the individual Board member responses to the Complainant's emails regarding the requested documents were simply "restating positions repeatedly discussed by the Board of Directors in open meetings and decisions made by the Board of Directors in open meetings."

It appears that the Association intends to make, or has already made, the requested documents available to the Complainant and all other owners in good standing. Determining whether the Association should have done so sooner, or even a year ago when the documents were originally requested is not something this office can do, since the Association has claimed an exclusion under §55.1-1945(C)(3). This office cannot determine what is or is not appropriate for exclusion under this statute. Determining what constitutes privileged information or work product does not fall under common interest community law. Therefore, this office can only accept an association's conclusion that a document or documents fall under the named exclusion.

As for the allegation that the Board was not holding meetings in accordance with the requirements under §55.1-1949, there is not sufficient evidence for this office to determine that such a violation of the law has occurred. The Association has countered the allegation by saying that all meetings have complied with the law and that the information passed on in emails was a result of decisions made in properly noticed meetings. I would note that association boards do not operate in a vacuum and there are times when board members will gather, communicate or otherwise share information, but they are not necessarily discussing or transacting the business of the association and thus not in violation of the law.



As to the requests from the Complainant, it appears a formal meeting was held to review his complaint. Requesting an in-person meeting over a virtual or electronic meeting is not a legal issue, but instead a preference and a decision that is up to the Association. Asking that a neutral, professionally qualified recorder take minutes is not required by common interest community law, nor is there a requirement under common interest community law that unit owners review complaints rather than executive boards. As for a cessation in communication outside of meetings among the executive board members, such a request is not required by law. What is required is that executive boards provide notice of all board meetings, to include committee and sub-committee meetings. Executive board members will always have the right to communicate outside a meeting if they are not discussing or transacting the business of the association. Executive boards may also have the right to make decisions outside of meetings if done so in a way that comports with the association's governing documents and any applicable law.

#### Required Actions

If the Association has not provided the Complainant the documents he requested, I would ask that they do so within the next fourteen days, to the extent provided under the applicable law.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie  
Common Interest Community Ombudsman

cc: Board of Directors  
The Oronoco Association

# Appendix F

## Information on Other States with a CIC

### Ombudsman or Similar Office

## Information on Other States with a CIC Ombudsman or Similar Office

**Colorado<sup>1</sup>:** The State of Colorado has established an HOA Center within its Division of Real Estate in the Department of Regulatory Agencies. The HOA Center (i) provides information to homeowners regarding their basic rights and responsibilities under state’s Common Interest Ownership Act; (ii) gathers, analyzes, and reports information through complaints and HOA registrations; (iii) creates resource materials; (iv) provides education and forums; (v) provides a website with information for the public; (vi) registers HOAs; (vii) provides an annual report to the Colorado State Legislature. The HOA Center does not act as a regulatory authority over associations, does not mediate or arbitrate, and cannot assess fines or penalties. Although the HOA Center does have a process for receiving complaints from the public, it does not have any investigative or enforcement capability to address complaints. Information received from complaints is recorded and compiled in the HOA Center’s annual report.

**Delaware<sup>2</sup>:** The State of Delaware has established an Office of the Ombudsperson for the Common Interest Community within the Fraud & Consumer Protection Division of the Department of Justice. The Ombudsperson (i) assists members of the public to understand their rights and responsibilities, and the processes available to them according to the law, regulations, and documents governing their particular common interest community; (ii) prepares, publishes, and makes available on request, educational and reference materials about common interest communities; (iii) organizes and conducts educational meetings for community members about their rights and responsibilities, and processes available to them; (iv) provides a template of reasonable procedures for community associations to use internally to resolve complaints with owners and other interested parties; (v) reviews the denial of a complaint that was first submitted to an internal dispute resolution process; (vi) investigates and refers meritorious allegations of violations of existing law to other sections of the Attorney General’s Office or other appropriate law enforcement agency; (vii) provides alternative dispute resolution members of associations before or after first using the informal complaint procedure; (viii) develops and publicizes procedures intended to result in fair elections of members and officers of associations; and (ix) provides election services such as election monitors and vote counting.

Delaware statute requires associations to establish an internal complaint procedure. Individuals must first try resolve a dispute through the internal complaint process. The template internal complaint procedure established by the Ombudsman specifies association complaints include “...any other document or evidence that supports the CIC Complaint, or applies to the claim...”

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<sup>1</sup> HOA Center, Colorado Division of Real Estate website (<https://dre.colorado.gov/hoa-center>), Accessed on 8/1/22.

<sup>2</sup> Office of the Ombudsperson for the Common Interest Community, Delaware Department of Justice (<https://attorneygeneral.delaware.gov/fraud/cpu/ombudsperson/>), Accessed on 7/29/22.

However, the template procedure does not appear to specifically address audio or video recordings.

The Ombudsperson receives complaints when an association board does not take part in an internal complaint process, ignores a complaint, or does not resolve the complaint internally. The Ombudsperson can receive complaints involving violation of the law or community governing documents. The procedures for a complaint to the Ombudsperson require (i) a written complaint on a complaint form; and (ii) submission of all supporting documents, correspondence, and other materials about the issue and the decision. The Ombudsman has the authority to investigate a complaint, if necessary, which can include taking evidence and “...subpoenaing books, records, papers, or other evidence needed for exercising the powers or performing the duties of the Ombudsperson.”

**Florida<sup>3</sup>:** The State of Florida has established an Office of the Condominium Ombudsman within the Division of Florida Condominiums, Timeshares, & Mobile Homes of the Department of Business and Professional Regulation. The Ombudsman (i) prepares and issues reports and recommendations on any matter or subject within the jurisdiction of the division, and makes recommendations for appropriate legislation relative to the division’s procedures, rules, jurisdiction, personnel, and functions; (ii) acts as a liaison between the division, unit owners, boards of directors, board members, community association managers, and other affected parties, and develops policies and procedures to assist such individuals to understand their rights and responsibilities as set forth in law and the condominium documents governing their respective association; (iii) coordinates and assists in the preparation and adoption of educational and reference material, and coordinates with private or volunteer providers of these services so that their availability is made known to the largest possible audience; (iv) monitors and reviews procedures and disputes concerning condominium elections or meetings, including recommending the division pursue enforcement action where there is reasonable cause to believe election misconduct has occurred; (v) makes recommendations to the division for changes in rules and procedures for the filing, investigation, and resolution of complaints; (vi) provides resources to assist association boards and officers to carry out their powers and duties under law, regulation, and condominium documents governing their association; (vii) encourages and facilitates voluntary meetings with and between unit owners, boards of directors, board members, managers, and other parties when such meetings may assist in resolving a dispute within an association before a person submits a dispute for a formal or administrative remedy; and (viii) appoints election monitors to attend annual meetings of unit owners and conduct the election of directors, when petitioned by a requisite number of owners in a condominium association.

The division receives and investigates complaints involving violations of laws and regulations pertaining to condominiums and cooperatives. The division does not investigate contractual

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<sup>3</sup> Condominium Ombudsman, Division of Florida Condominiums, Timeshares & Mobile Homes (<http://www.myfloridalicense.com/DBPR/condos-timeshares-mobile-homes/>), Accessed 7/29/22.

disputes, criminal matters, discrimination issues, or internal disputes (e.g. related to noise, parking, pets). The division also does not generally investigate issues involving the maintenance or alteration of common elements or common areas, and violations of governing documents. The procedures for submission of complaints permit submission of documents supporting allegations that are made. It does not accept any evidence from audio or video recordings<sup>4</sup>.

**Illinois<sup>5</sup>:** The State of Illinois has established an office for a Condominium and Common Interest Community Ombudsperson within the Division of Real Estate for the Department of Financial and Professional Regulation. The Ombudsperson (i) offers training, outreach, and educational materials, and may arrange for the offering of courses to unit owners, associations, boards of managers, and boards of directors in subjects relevant to the operation and management of condominiums and common interest communities; and applicable Illinois CIC laws; (ii) publishes information useful to unit owners, associations and their respective boards; and (iii) responds to relevant inquiries by providing educational materials and directing citizens to relevant resources.

Under current statute, associations are required to adopt a written policy for resolving complaints made by owners. Owners may request the Ombudsperson provide assistance in resolving disputes when the dispute involves a violation of the law, provided the owner has first utilized the association complaint procedure and receive a “final and adverse” decision from the association, and meets other requirements. The Ombudsperson can “...confer with the interested parties and assist in efforts to resolve the dispute by mutual agreement of the parties...” The Ombudsperson can only assist parties that mutually agree to participate in dispute resolution. (Note: The enabling statute for the Ombudsperson is set to be repealed on January 1, 2024.)

**Nevada<sup>6</sup>:** The State of Nevada has established the office of the Ombudsman for Owners in Common-Interest Communities and Condominium Hotels within the Real Estate Division of the Department of Business and Industry. The Ombudsman (i) assists in processing claims submitted to mediation or arbitration pursuant to Nevada law; (ii) assists owners in common-interest communities to understand their rights and responsibilities as set forth in law and the governing documents of their associations, including publishing materials related to those rights and responsibilities; (iii) investigates disputes involving applicable law, or the governing documents of an association, and assist in resolving such disputes; (iv) assists persons appointed or elected to serve on executive boards of associations to carry out their duties; and (v) compiles and maintains a registration of each association organized within the state.

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<sup>4</sup> Email from Spencer E. Hennings, Esq., Florida Condominium Ombudsman, received August 30, 2022.

<sup>5</sup> Illinois Condominium & Common Interest Community Ombudsperson, (<https://idfpr.illinois.gov/CCICO/>), Accessed on 7/29/22; Illinois Condominium and Common Interest Community Ombudsperson Act (Illinois Compiled Statutes, Ch. 765, Act 615, Sections 1 through 999), effective May 27, 2022.

<sup>6</sup> About the Ombudsman's Office, (<https://red.nv.gov/Content/CIC/Ombudsman/About/>), Accessed on 8/1/22; Common-Interest Ownership (Uniform Act) (Nevada Revised Statutes – Chapter 116).

Under Nevada statute, a person aggrieved by a violation of applicable common interest community law or governing documents must first attempt to resolve the dispute within the association by, first, using any dispute process in the community's governing documents; and, second, by providing notification of the complaint to the executive board so that the complaint may be addressed by the executive board. If the complaint is not resolved, the individual may file complaint with the division (called an Intervention Affidavit). Complaints that involve disputes regarding governing documents must go through a mandatory ADR process. Complaints that involve violations of law or regulation may be investigated by the division. The Ombudsman may also convene an informal conference to help resolve the dispute. The procedure for filing a complaint allows for the submission of audio or video recordings<sup>7</sup>. Those who submit such recordings must indicate the time stamp which identifies the alleged violation, and where the division may begin review.

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<sup>7</sup> Intervention Affidavit (Form 530), Revised 9/1/2021, State of Nevada, Department of Business and Industry, Real Estate Division (<https://red.nv.gov/uploadedFiles/rednvgov/Content/Forms/530.pdf>)

# Appendix G

August 9, 2022, Committee Meeting

Minutes

SB 693 COMMITTEE  
OF THE  
COMMON INTEREST COMMUNITY BOARD

MINUTES OF MEETING

The SB 693 Committee of the Common Interest Community Board (Board) met on August 9, 2022 at the Department of Professional and Occupational Regulation (DPOR), 9960 Mayland Drive, 2<sup>nd</sup> Floor, Board Room 3, Richmond, Virginia 23233.

The following members were present:

Lori Overholt, Chair  
Matt Durham  
Heather Gillespie (Ex-officio, Non-voting)  
Drew Mulhare (Ex-officio)  
Paul Orlando  
Sue Tarley  
Jerry Wright

DPOR staff present for all or part of the meeting included:

Demetrios J. Melis, Director  
Trisha L. Lindsey, Executive Director  
Joseph C. Haughwout, Jr., Board and Regulatory Administrator  
Raven Custer, Administrative Coordinator

Ms. Overholt, Chair, called the meeting to order at 10:32 a.m.

**Call to Order**

Mr. Haughwout advised the Committee of the emergency evacuation procedures.

**Emergency  
Evacuation  
Procedures**

Mr. Durham moved to approve the agenda as presented. Mr. Orlando seconded the motion which was unanimously approved by: Durham, Mulhare, Orlando, Overholt, Tarley, and Wright. Ms. Gillespie did not vote as she is a non-voting member of the committee.

**Approval of Agenda**

There were no members of the public present who wished to address the Committee. Mr. Haughwout informed the Committee that a public hearing had been held before the Committee meeting and no members of the public were present to comment.

**Public Comment  
Period**

Mr. Haughwout provided the Committee with an overview of the purpose of the Committee and legislative study guidelines.

**Overview**



Mr. Haughwout introduced the Committee Members and Board Staff.

**Introduction of  
Members and Staff**

Mr. Haughwout provided an overview of the resources available to the Committee Members.

**Resources and  
Information**

The Committee was provided with (i) applicable common interest community laws and regulations, including those related to the association complaint process; (ii) Senate Bill 693; (iii) background on creation of CIC Ombudsman Office; (iv) information on CIC complaint procedure, including a sample NFAD; (v) information on DPOR system capacity to receive audio and video recordings; (vi) Freedom of Information Act (FOIA) requirements for public records; and (vii) information about other states that have an community association ombudsman or similar office.

Ms. Gillespie provided a presentation on the association complaint process, including requirements for filing of a Notice of Final Adverse Decision (NFAD).

**Discussion**

The Committee discussed the Department's technical capacity to receive and review audio and visual recordings as part of an NFAD, and related requirements for submission of recordings. The Committee also discussed whether recordings would assist the Ombudsman in performing review of an NFAD and making a determination, and related issues.

The Committee Recessed from 12:27 p.m. to 12:38 p.m.

**Recess**

The Committee discussed public records requirements under FOIA and the Department's practices related to the release of information. The Committee also discussed privacy issues related to common interest communities, and how allowing for audio and video recordings may affect associations.

**Discussion  
Continued**

Discussion was held on the next steps for the Committee.

**Other Business**

The Committee agreed by consensus to move forward and authorize staff to prepare a report of findings.

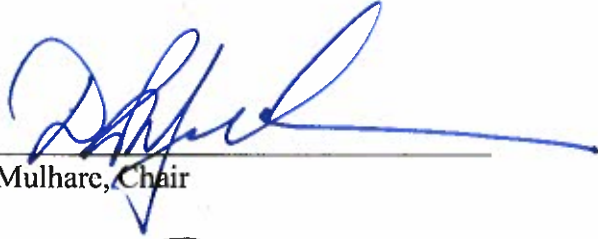
The Committee agreed to plan for the next meeting to be held in September 2022.

**Future Meeting  
Date**

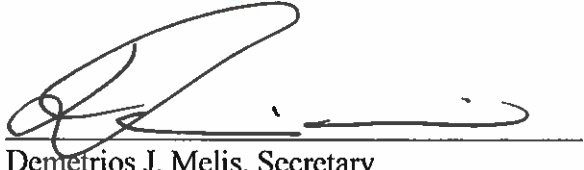
There being no further business, the meeting adjourned at 1:07 p.m.

**Adjourn**

SB 693 Committee  
August 9, 2022



Drew Mulhare, Chair



Demetrios J. Melis, Secretary

# Appendix H

September 22, 2022, Draft Committee

Meeting Minutes

SB 693 COMMITTEE  
OF THE  
COMMON INTEREST COMMUNITY BOARD

MINUTES OF MEETING

The SB 693 Committee of the Common Interest Community Board (Board) met on September 22, 2022 at the Department of Professional and Occupational Regulation (DPOR), 9960 Mayland Drive, 2<sup>nd</sup> Floor, Board Room 3, Richmond, Virginia 23233.

The following members were present:

Lori Overholt, Chair  
Matt Durham  
Heather Gillespie (Non-voting)  
Drew Mulhare (Ex-officio)  
Sue Tarley  
Jerry Wright

Committee Member Paul Orlando was not present at the meeting.

DPOR staff present for all or part of the meeting included:

Trisha L. Lindsey, Executive Director  
Joseph C. Haughwout, Jr., Board and Regulatory Administrator  
Stephen Kirschner, Licensing and Regulatory Programs Division Deputy Director  
Raven Custer, Administrative Coordinator

Ms. Overholt, Chair, called the meeting to order at 9:01 a.m.

**Call to Order**

Mr. Haughwout advised the Committee of the emergency evacuation procedures.

**Emergency  
Evacuation  
Procedures**

Mr. Durham moved to approve the agenda as presented. Mr. Wright seconded the motion which was unanimously approved by: Durham, Mulhare, Overholt, Tarley, and Wright. Ms. Gillespie did not vote as she is a non-voting member of the committee.

**Approval of Agenda**

There were no members of the public present who wished to address the Committee.

**Public Comment  
Period**

Mr. Haughwout provided an overview of the resources available to the Committee Members.

**Resources and  
Information**

The Committee was provided with (i) applicable common interest community laws and regulations, including those related to the association complaint process and (ii) Senate Bill 693.

Mr. Haughwout provided the committee with comments on the committee report from Mr. Orlando.

**Discussion**

After discussion, the committee agreed to make revisions to the committee report to the Board.

Mr. Wright moved to adopt the report as revised and recommend to the Board for consideration. Mr. Durham seconded the motion which was unanimously approved by: Durham, Mulhare, Overholt, Tarley, and Wright. Ms. Gillespie did not vote as she is a non-voting member of the committee.

**Other Business**

Ms. Overholt reminded the Committee members to complete their conflict of interest forms and travel vouchers.

**Complete Conflict  
of Interest Forms  
and Travel  
Vouchers**

There being no further business, the meeting adjourned at 9:32 a.m.

**Adjourn**

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Drew Mulhare, Chair

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Demetrios J. Melis, Secretary

# Appendix I

September 22, 2022, Draft Board

Meeting Minutes

COMMON INTEREST COMMUNITY BOARD

MINUTES OF MEETING

The Common Interest Community Board (Board) met on September 22, 2022, at the Department of Professional and Occupational Regulation (DPOR), 9960 Mayland Drive, 2<sup>nd</sup> Floor, Board Room 3, Richmond, Virginia 23233.

The following members were present:

Drew Mulhare, Chair  
Maureen A. Baker  
Matt Durham  
Jim Foley  
Eileen M. Greenberg  
David S. Mercer, Vice-Chair  
Lori Overholt  
Anne M. Sheehan  
Scott Sterling  
Katherine E. Waddell

Board member Amanda Jonas was not in attendance at the meeting.

DPOR staff present for all or part of the meeting included:

Demetrios J. Melis, Director  
Trisha L. Lindsey, Executive Director  
Heather Gillespie, Ombudsman  
Joseph C. Haughwout, Jr., Board and Regulatory Administrator  
Stephen Kirschner, Licensing and Regulatory Programs Division Deputy Director  
Raven C. Custer, Administrative Coordinator

Elizabeth Peay, Assistant Attorney General with the Office of the Attorney General, was present.

Finding a quorum of the Board present, Mr. Mulhare called the meeting to order at 10:32 a.m. **Call to Order**

Ms. Lindsey advised the Board of the emergency evacuation procedures. **Emergency Evacuation Procedures**

Mr. Durham moved to approve the agenda. Ms. Greenberg seconded the motion which was unanimously approved by: Baker, Durham, Foley, Greenberg, Mercer, Mulhare, Sheehan, Sterling and Waddell. **Approval of Agenda**

Ms. Lindsey introduced to the Board Licensing and Regulatory Programs Division Deputy Director Stephen Kirschner.

**Introduction of Staff**

Mr. Durham moved to approve the June 9, 2022, Board meeting minutes as presented. Ms. Greenberg seconded the motion which was unanimously approved by: Baker, Durham, Foley, Greenberg, Mercer, Mulhare, Sheehan, Sterling and Waddell.

**Approval of Minutes**

Ms. Overholt moved to approve the August 9, 2022, SB 693 Committee meeting minutes as presented. Ms. Greenberg seconded the motion which was unanimously approved by: Baker, Durham, Foley, Greenberg, Mercer, Mulhare, Sheehan, Sterling and Waddell.

No members of the public present came forward to address the Board.

**Public Comment Period**

Mr. Mulhare and Mr. Mercer recused themselves from the meeting during the discussion and deliberation of File Number 2022-00949.

**Recusal Board Members**

In the matter of File Number **2022-00949, Purple Sage Cluster, Inc.**, the Board members reviewed the Consent Order. Purple Sage Cluster, Inc. admits to a violation of 18 VAC 48-70-50.4 as outlined in Count 1, and a violation of 18 VAC 48-70-50.7 as outlined in Count 2. Purple Sage Cluster, Inc. consents to the imposition of a monetary penalty of \$450.00 for violation of Count 1, and a monetary penalty of \$250.00 for violation of Count 2, for total monetary penalties of \$700.00 and Board costs of \$150.00. Ms. Waddell moved to approve the Consent Order as presented. Mr. Foley seconded the motion which was unanimously approved by: Baker, Durham, Foley, Greenberg, Sheehan, Sterling and Waddell.

**File Number 2022-00949, Purple Sage Cluster, Inc.**

Mr. Mulhare and Mr. Mercer returned to the Board meeting.

**Return of Board Members**

Mr. Haughwout provided an update on the current status of the regulatory review processes for the Board's regulatory package:

**Update on Regulatory Actions**

Mr. Haughwout advised that the CIC Manager Regulatory Review Committee recommendations and draft proposed amendments to the CIC Manager Regulations were approved, with revisions, by the Board at the March 3, 2022 Board meeting. The proposed regulatory text was submitted for Executive Branch review on March 14, 2022.



Ms. Lindsey presented the Board with the agenda from the Workgroup meeting on August 5 and provided the roster and schedule for the Workgroup.

**Update on SB 740  
Structural Integrity  
and Reserves  
Workgroup**

Ms. Lindsey provided an overview of the discussions from the Workgroup.

The next meeting for the Structural Integrity and Reserves Workgroup will be in Roanoke on October 19, 2022.

Mr. Haughwout provided an update on the SB 693 Committee and presented the Board with the Committee Report.

**Update on SB 693**

After discussion, Ms. Sheehan moved to adopt the Committee's findings and conclusion as presented in the report. Based on the Committee's conclusion, the Board recommends against any legislative or regulatory changes to allow for the submission of audio and video recordings with a notice of final adverse decision. Mr. Foley seconded the motion which was unanimously approved by: Baker, Durham, Foley, Greenberg, Mercer, Mulhare, Sheehan, Sterling and Waddell.

**Review and  
Consider SB 693  
Report**

The Board received a report from the Office of the Common Interest Community Ombudsman. The report contains statistics on complaints received by the Ombudsman's office, as well as compliance and enforcement statistics.

**Ombudsman Report**

Ms. Lindsey provided the Board with the most recent financial statements. The Board recovery fund has been replenished following the recovery claim at the June 9, 2022 Board meeting.

**Board Financial  
Statements**

Ms. Lindsey provided the Board with information on the 2022 Board Member Training Conference.

**2022 Board Member  
Training  
Conference**

Ms. Lindsey provided information regarding the passing of former Board Member Doug Rogers to the Board.

**Other Board  
Business**

Mr. Custer provided the Board with information regarding the new procedure for the distribution of meeting agendas.

Mr. Mulhare reminded Board members to complete their conflict of interest forms.

**Complete Conflict  
of Interest Forms  
and Travel  
Vouchers**

There being no further business, the meeting was adjourned at 11:11a.m.

**Adjourn**

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Drew Mulhare, Chair

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Demetrios J. Melis, Secretary

# Appendix J

## Public Comments



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Agency

Department of Professional and Occupational Regulation

Board

Common Interest Community Board

[Back to List of Comments](#)

**Commenter:** Vic N

7/28/22 5:42 pm

**No.**

Not asking much to show up in person.

CommentID: **124129**



DPOR Common Interest Community Board, rr <cic@dpor.virginia.gov>

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## Public Comment SB 693

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**jeffery porter** <jeffery.porter3@verizon.net>  
Reply-To: jeffery porter <jeffery.porter3@verizon.net>  
To: "CIC@dpor.virginia.gov" <CIC@dpor.virginia.gov>

Mon, Aug 8, 2022 at 4:09 PM

Attached is comment for the subcommittee hearing on August 9.

Thank you for your time and assistance.

Best wishes,

Jeff Porter

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 **subcommittee comment SB 693.docx**  
19K

4435 Airlie Way  
Annandale, VA 22003  
August 8, 2022

Common Interest Community Board  
Subcommittee on SB 693

PUBLIC COMMENT FOR AUGUST 9, 2022 Hearing

Thank you for the opportunity to comment on the subcommittee's consideration of § 54.1-23544 allowing submission of audio and video recordings to assist the Ombudsman in reviewing notice of final adverse hearings submitted by Homeowner Association (HOA) and Condominium Association members. After reviewing the legislation and the information packet for the subcommittee's consideration, I am offering the following comments. My comments reflect my experience as both Board Recorder and Board Secretary for a HOA. Additionally, my experience as a System of Records Administrator for the Freedom of Information Act and Privacy Act at the federal level influence my comments. The staff support in this effort is highly commendable and the exhibits made available for public review are invaluable.

COMMENTS

A. Burden upon board and association members and compliance with § 55.1-1816. Meetings of the board of directors.

Comment 1. Amending the applicable statute and related rule process should require clear and early written notice to all parties that either the board or the Association member(s) can request electronic recordings. The **requestor shall bear the costs** of placing the equipment, operating the equipment, maintaining the electronic records, and control of the recordings. This notice should include a statement that if a denial is referred to the Ombudsman, the electronic record becomes subject to Freedom of Information and Privacy Act provisions of the Virginia Code. This may seem redundant to existing statute language in the hearing process, but the point needs to be clear to those not familiar with the process.

Comment 2. Often complaint hearings are held outside regularly scheduled board meetings to meet statutory timeline requirements of the complaint process. Property management firms, per their contractual agreement, generally require expensive fees per hour outside of regular board meetings. The administrative and financial cost to Associations and their members should be a consideration during the legislative and rule making process. In short, the requesting party should cover all costs associated with the hearing outside of a regular board meeting. This would include property manager fees outside of normal board meetings and activities.

Comment 3. Potentially, the time length for conducting hearings and subsequent time and effort expended by the participants will make the hearing process more complex. This places a burden upon the volunteer board secretary who generally has responsibility for all board meeting minutes and knowledge of Association records. This is well documented in the numerous Oronoco Condominium exhibits in the subcommittee's August 9 hearing packet. It would be difficult to hold participants to the same standard of conduct and comment that we experience in professional settings such as hearings in conflict resolution, arbitration, and judicial proceedings. Speakers will refer to documents etc., and not identify them for the audio record. Speakers will often than not be recognized by name. The audio record might not be a value added or provide clarity to the hearing process.

B. Misstatements and Civility of Comments.

Comment 1. No doubt, the decision makers involved in this comment and review process are all too familiar with the emotions associated with common property interest management. Illustrative of this point are the comments in the

Oronoco exhibit that “it is clear that such privileges have been neutralized and given up the board of directors” and that “all financial records open to condominium owners.” Staff comments on the potential liability for the Commonwealth are well taken. While the “First Amendment” likely prevails here, the rules implementing electronic recordings should not place a board or Associate member at any greater risk of harassment, abuse based on the recording, etc. There should be encouragement in the rule for civility if that is at all possible.

Comment 2. The threat of litigation. The General Assembly revised applicable provisions of the HOA and Condominium statutes to state that a **specific threat** of litigation is sufficient for the board to terminate a meeting. As Board Secretary, and during Open Forums, when a threat was made, I asked the board to suspend discussion on the specific topic that prompted the threat and explained to the member why we were suspending the topic. The meeting continued and generally calm and reasoned discussion prevailed. In establishing legislation permitting electronic recordings, an opening statement would be helpful that either party feeling or understanding a comment that threatens litigation, they have the option to terminate the recording process. It should not require a board vote because this is a subjective opinion by the individual. Nor should the member be denied their right to stop recordings.

Comment 3. In reviewing the Freedom of Information Act process and the related privacy interests of board and Association members, I note the request for technology staff and that video and audio recordings will be sanitized prior to their release. I understand the process all too well. What is not clear, how will hearing participants be informed that the original record is sanitized? Will there be a statement that the release record is sanitized to protect the privacy of individuals? Will Board members and other participants recorded comments be entitled to full disclosure of the electronic recording? How would board secretaries and property managers respond to request for these records? Currently, there is a very liberal interpretation of records members can access. I surface these questions as lead into paragraph 3 below and the potential for this process to be used in continuing one on one issues between neighbors. It does appear that two electronic records could be generated. First, the actual hearing and then the review at the Ombudsman level with potential release of the records.

#### C. What might be needed

An education brochure or similar approved government publication should be prepared educating all participants in the electronic process on the who, what, when, and where electronic recordings will be permitted. In summary, the legislation and rulemaking should consider the following:

- (1) Responsibility of the board or the Association member to procure electronic recording devices
- (2) Assignment of the financial costs of electronic recordings
- (3) Maintenance and release of electronic recordings

Again, thank you for the opportunity to comment. I continue to monitor the process of the feasibility study. My comments do not reflect the position of a HOA with which I am affiliated or HOA organizations and associations where I maintain membership.

Electronic signature

Jeff Porter

# Appendix K

August 9, 2022, Public Hearing

Transcript



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COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION

COMMON INTEREST COMMUNITY BOARD

IN RE: PUBLIC HEARING ON SB 693

AUGUST 9, 2022  
SECOND FLOOR CONFERENCE CENTER  
9960 MAYLAND DRIVE  
HENRICO, VIRGINIA 23233  
9:00 A.M.

1 APPEARANCES :

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3 STAFF :

4 Joseph C. Haughwout, Jr., Board and Regulatory  
5 Administrator.

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1                                   NOTE: The public hearing commences  
2 at 9:00 a.m., as follows:

3                                   MR. HAUGHWOUT: Good morning, ladies  
4 and gentlemen. I am Joe Haughwout, and I am the Board  
5 Administrator for the Common Interest Community Board.

6                                   This is a public hearing held at the  
7 Department of Professional and Occupational Regulation,  
8 9960 Mayland Drive, Richmond, Virginia.

9                                   This hearing is being held to  
10 receive public comment for a review being conducted by  
11 the Common Interest Community Board pursuant to Senate  
12 Bill 693 to review the feasibility of allowing audio and  
13 video recordings to be submitted with a notice of final  
14 adverse decision as a record pertinent to the decision  
15 in accordance with Section 54.1-2354.4 of the Code of  
16 Virginia.

17                                   A committee selected by the Common  
18 Interest Community Board will have an opportunity to  
19 review and consider all public comments received,  
20 including the transcript of this public hearing along  
21 with all other information relevant to the subject  
22 matter to consider a recommendation for the Board.

23                                   The committee's recommendation in  
24 the form of a draft report prepared by staff will be  
25 presented to the Board. The staff of the Department of

1 Professional and Occupational Regulation will then  
2 submit a final written report to the Secretary of Labor,  
3 and the Chairmen of the House Committee on General Law,  
4 and the Senate Committee on General Laws and Technology.

5 The list of interested parties and  
6 organizations which were notified of this process and  
7 invited to comment is available upon request. The  
8 opportunity for public comment was distributed to  
9 registered individuals via the Virginia Regulatory Town  
10 Hall.

11 Now I would like to present the  
12 rules for this public hearing.

13 Comments will be received from any  
14 member of the public and comments will be limited to a  
15 maximum of 5 minutes depending on the number of  
16 individual who wish to speak.

17 If you have not signed up to speak  
18 and you wish to give testimony today, please sign your  
19 name on the sign up seat at this time. Please note that  
20 the public hearing is being transcribed by a court  
21 reporter in order to provide an accurate and complete  
22 account of the comments received today.

23 Staff members may ask speakers  
24 questions or to clarify statements. However, this is  
25 not the proper forum for questions to the Board. If you

1 have a question for the Board, please forward them in  
2 writing to the Board.

3 Any speaker who wishes to provide a  
4 written statement in addition to his oral testimony or  
5 in lieu of oral testimony, may do so until 11:59 p.m.,  
6 today, August 9, 2022. And we'll go off the record.

7 NOTE: A brief recess is now  
8 taken.

9 MR. HAUGHWOUT: The record of the  
10 public hearing will be kept open until 11:59 p.m. today,  
11 August 9, 2022, and written comments will be accepted up  
12 until that time. This hearing is now closed.

13 NOTE: The public hearing  
14 concluded at 9:50 a.m.

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CERTIFICATE OF COURT REPORTER

I, Claudia M. Whisenand, hereby certify that I was the Court Reporter at the Public Hearing on SB 693, heard in the County of Henrico, Virginia, on August 9, 2022, at the time of the hearing herein.

I further certify that the foregoing transcript is, to the best of my ability, a true and accurate record of the testimony and incidents of the hearing herein.

Given under my hand this 9th day of August, 2022.



\_\_\_\_\_  
Claudia M. Whisenand  
Notary Registration No. 291277

My Commission expires:  
October 31, 2025

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