

**DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL REGULATION**



**OFFICE OF THE
COMMON INTEREST COMMUNITY OMBUDSMAN**

Report to the

**House Committee on General Laws
Senate Committee on General Laws and Technology
Housing Commission**

Annual Report 2019-2020



Department of Professional and Occupational Regulation

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

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

PREFACE

The Office of the Common Interest Community Ombudsman prepared the report contained herein pursuant to § 54.1-2354.3 of the *Code of Virginia*.

This annual report documents the activities of the Office of the Common Interest Community Ombudsman for the reporting period covering November 27, 2019, through November 26, 2020.

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

TABLE OF CONTENTS

Executive Summary	1
Ombudsman Regulations & Role of Office	2
Office Activities	2
Complaint Statistics.....	2
Complaint Procedure	6
Ombudsman Determinations	7
Education & Outreach	9
COVID-19	10
Constituent Expectations	11
Legal Developments	12
State Legislation	12
Virginia Court Cases	14
Federal Developments.....	16
News of Interest	18
Statutory Authority	20-21

EXECUTIVE SUMMARY

In 2008, the General Assembly created the Office of the Common Interest Community Ombudsman (“Office”), and the Common Interest Community Board (“CICB”), at the Department of Professional and Occupational Regulation (“DPOR”). In accordance with statutory requirements, this document reports on the activities of the Office for the period from **November 27, 2019, through November 26, 2020.**

This was a year like no other, not just for the Office and for Virginia, but for everyone in the world. Our office continued to operate as normally as possible given the unprecedented challenges presented by the COVID-19 pandemic. We continued to receive complaints, Notices of Final Adverse Decision, and many calls and emails. There were, of course, many inquiries related to holding meetings safely; this has since been addressed by language amendments to the Appropriations Act that allow for fully virtual common interest community board meetings.

As in the past, the Office continued to work closely with Associations adopting complaint procedures or learning how to carry out the complaint process under the Common Interest Community Ombudsman Regulations (“Regulations”). The Office reviewed draft complaint procedures and advised associations on changes needed to comply with the Regulations. In most cases, smaller associations that did not have legal counsel and did not understand the complaint process required more time and assistance.

Associations continue to struggle to carry out the three necessary components of the internal complaint procedure: acknowledge receipt of complaint; provide consideration of the complaint; and provide a final decision on the complaint. Even after the Office advises an association of the proper steps necessary, the same association will often continue to ignore the required steps the next time it receives a complaint. This results in ongoing monitoring by this Office as we work toward ensuring that everyone who submits a valid association complaint not only can trust their complaint will be addressed properly, but also will be able to use their right to “appeal” the decision to this Office by filing a Notice of Final Adverse Decision.

The Office referred no complaints to investigations or enforcement this past year, because we were able to obtain compliance on every complaint or Notice of Final Adverse Decision received. Although many association members and owners would prefer their association receive punishment when it fails to adhere to common interest community law, the process of coming into compliance has a longer lasting and positive impact on associations. Punitive measures would also be very likely to deter any future board members from serving, since a lack of compliance is most often due to a lack of knowledge or a simple mistake.

A variety of new issues arose this year due to recently enacted legislation. For example, the Office received inquiries related to solar panels; however, the applicable statutes are not common interest community law, but instead fall under the Virginia Energy Plan (Title 67), leaving us unable to provide much guidance. Questions about electric vehicle charging stations are increasing, as associations appear unaware that new legislation provides for these charging stations and they are challenging owners who wish to install them.

Finally, an amendment to the statute governing disclosure packets required associations to include a statement setting forth any restrictions on political signs. While this seemed a simple change, its execution proved far more difficult than anticipated, perhaps given the overall political climate leading associations to jump to inaccurate conclusions the moment they saw the words “political signs.” The Office received many inquiries from board members who were under the impression the law now required their associations adopt new rules or regulations to address political signs.

OMBUDSMAN REGULATIONS & ROLE OF OFFICE

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

Notices of Final Adverse Decision (NFADs), as described in § 54.1-2354.4 and the Regulations, are appropriate after—and only after—an owner or citizen submits a complaint to an association through the mandatory association complaint procedure. Complaints subject to review by the Ombudsman are restricted by law and regulation to allegations of violations of common interest community law or regulation.

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

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

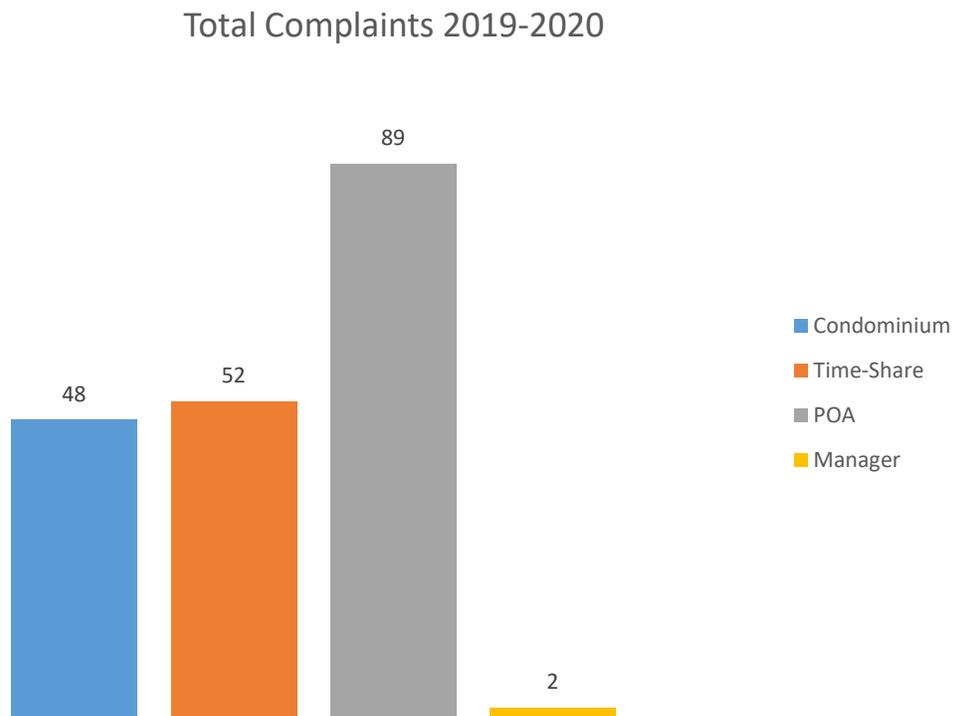
OFFICE ACTIVITIES

Complaint Statistics

During the 2019-20 reporting period, the Office responded to 1,326 telephone calls and 2,791 email messages. The Office continues to respond as quickly as reasonably possible to all inquiries, and generally provides a response within 24 hours to any phone call or email.

The volume of emails increased enormously over the prior year, with the Office receiving nearly 1,000 more email messages. Phone calls decreased slightly, though still in line with what we have received in other years. As has been noted in previous reports, the complexity of phone calls and emails continues to increase, and even more so this year as the Office attempted to respond to questions resulting from the new world of COVID-19.

Given the *de novo* nature of the pandemic-related inquiries, we had to do considerable research and querying of common interest community professionals to provide answers or suggestions. We did our level best to provide guidance at a time when there really was no guidance. Although the Office does not provide legal advice, it was necessary to provide some direction early on in the pandemic. Therefore, we allowed ourselves some latitude in our responses to ensure that associations understood that we could not provide legal advice but we could provide guidance based on existing common interest community law and common sense.



The Office received 190 complaints¹ this year:

- 47% related to Property Owners’ Associations (POAs);
- 27% related to Time-Shares; and
- 25% related to Condominium Unit Owners’ Associations.

¹ As used in this Annual Report, the term “complaints” includes Notices of Final Adverse Decisions (NFADs); complaints related to an association failure to adopt a complaint procedure or respond to a submitted complaint; complaints against time-shares; and complaints that have been improperly submitted directly to the Office when they should have been submitted through an association’s internal complaint process.

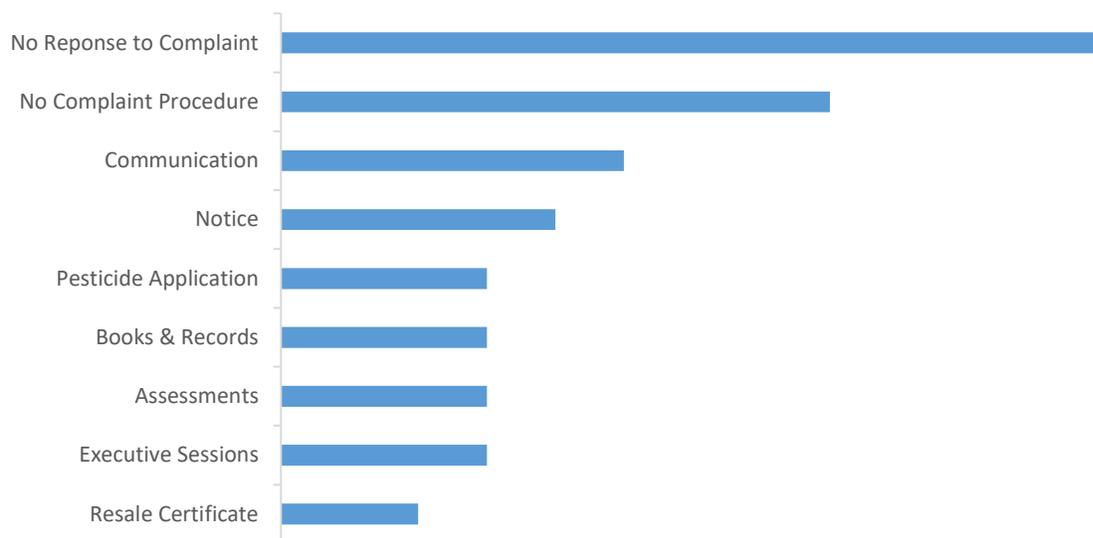
The percentage of POA Complaints remained the same as last year, while Condominium Complaints increased by five percent and Time-Share complaints decreased by five percent. Once again, the Office did not receive any complaints related to cooperatives this past year, but we did have a few phone calls and emails from individuals who live in a Cooperative. Of the two complaints naming a CIC Manager as the respondent, one concerned the actions of the board of directors and was not appropriate for pursuing against the manager; the other was referred to the DPOR Complaint Analysis and Resolution section.

Seventy-two percent of all complaints received this year were related to common interest communities (POAs and condominiums), a six percent increase over last year. Twenty-seven percent of the complaints received were related to time-shares.

The Office closed 190 complaints in 2019-20, which is a very slight decrease over the prior year. It is difficult to determine why we saw fewer complaints and yet had a 70 percent increase in emails. It may be that the Office was able to help people resolve issues within their association and better understand the law, ultimately resulting in fewer complaints.

The greatest number of condominium association complaints related to associations that did not respond to a complaint submitted through the association complaint procedure. Some condominium associations had still not adopted a complaint procedure, resulting in seven complaints submitted to the Office. Meeting notices continue to be a problem, and we saw several instances of situations where notice of pesticide application was not provided, owners were denied access to the books and records of the association, and executive sessions were not held in compliance with common interest community law.

Condominium Complaints by Topic

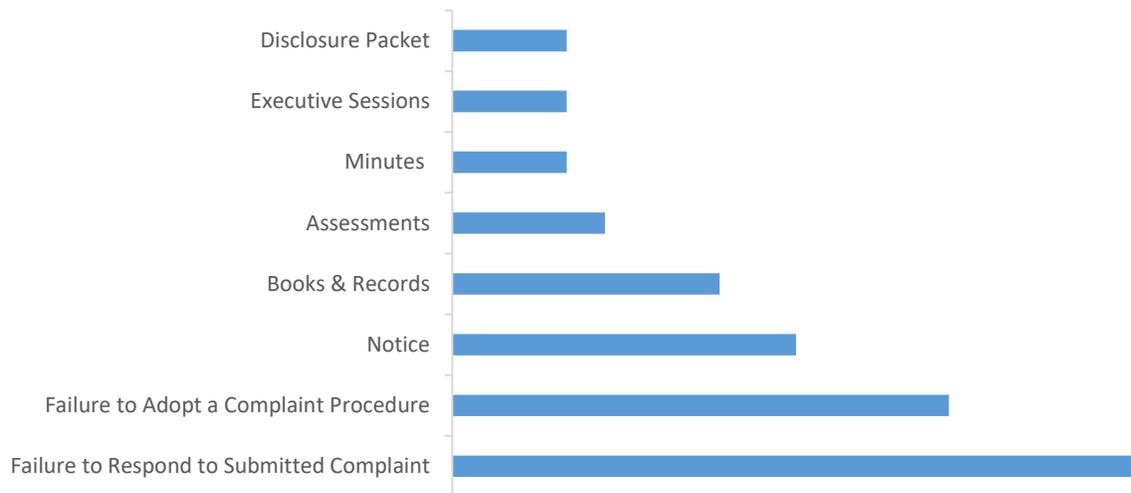


As noted in last year’s report, fire and water damage continue to be an issue in condominiums. While we have no authority to address these situations, the Office does receive numerous calls and emails about associations that are taking what appears to be an unreasonable amount of time

to address fire and water damage, resulting in an owner having to live elsewhere. We also received inquiries related to noise issues in condominiums, another issue that does not fall under our authority.

As with condominium complaints, failure to respond to a submitted complaint topped the list of POA complaints, followed by failure to adopt a complaint procedure. Two of the most basic expectations of living in a community association continue to be problematic in POAs: notice of meetings and access to the books and records of the association.

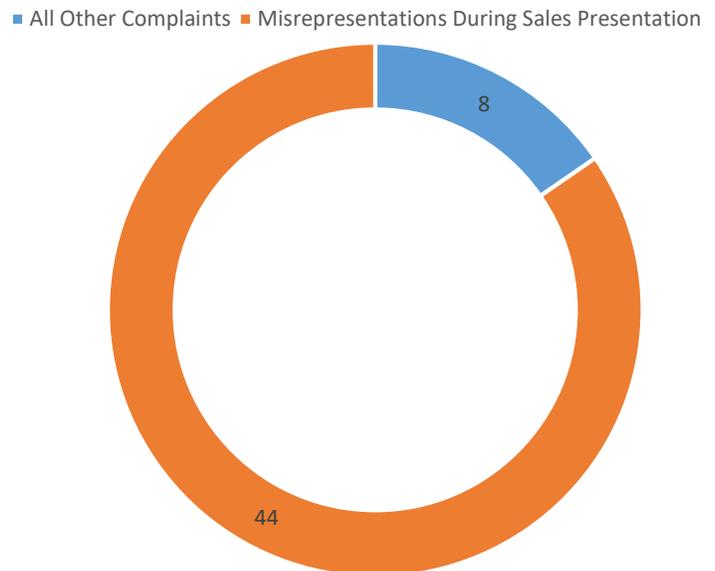
POA Complaints by Topic



Time-share complaints decreased again this past year, with the Office receiving 11 fewer complaints. Seventy-two percent of the complaints allege some form of misrepresentation during a sales presentation. Many of these sales presentations occurred fairly recently, but we also receive complaints related to purchases made years ago or even more than a decade ago.

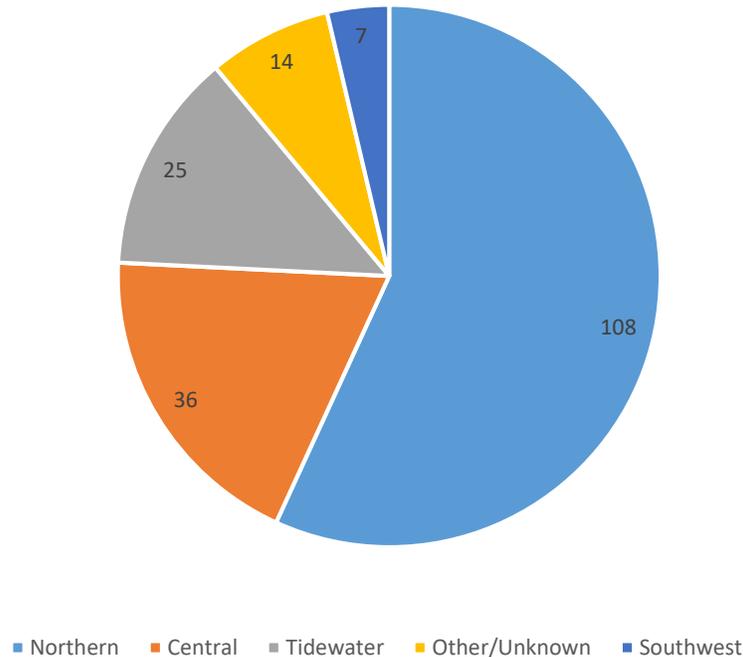
Due to an absence of evidence showing a violation of the Virginia Real Estate Time-Share Act—generally due to the verbal nature of sales presentations—the Office is unable to take action on these complaints.

Time-Share Complaints



Northern Virginia accounted for 57 percent of all complaints received by the Office, with the remainder of the complaints coming from the Central Virginia region (19 percent), the Tidewater area (13 percent), and Southwest Virginia (four percent).

Complaints by Location



Complaint Procedure

Among those associations that have adopted an association complaint procedure, and follow both the Regulations and their own procedure, the complaint process appears to be successful in helping resolve member concerns. Not only does it provide an internal conduit for being heard, it also allows for resolution and even appeal, if the complainant is dissatisfied with the outcome of a complaint.

On the flip side are the associations that have not adopted a complaint procedure and if they have, they are not carrying it out in accordance with the Regulations. It is not clear why the complaint procedure continues to flummox associations. The process is straightforward, requiring acknowledgment of a submitted complaint, notice of consideration of that complaint, and a final decision on the complaint.

Complaints alleging a failure to adopt a complaint procedure made up 11 percent of all the complaints received by the Office, which was a three-percentage point increase over the prior year. Complaints alleging a failure to respond to a submitted complaint made up 16 percent of all complaints received, a four-percentage point decrease over the prior year.

The Office spends a substantial amount of time advising associations about the adoption of a complaint procedure, reviewing draft complaints procedures solely for compliance with the Regulations, and “encouraging” associations to carry out the association complaint process properly. Generally, we contact associations that have failed to respond to a submitted complaint and provide them a two-week period to provide consideration of a complaint and a final decision.

If extenuating circumstances exist, we will allow additional time but only in those situations where it is clear the association has already made progress on a response to the complaint. On a positive note, the Office was successful in bringing every association into compliance—meaning they either adopted a complaint procedure or followed the Regulations by providing consideration and a final decision on a complaint.

We still receive complaints that are submitted directly to the Office without going through the internal association complaint process. This happens because owners simply are not aware of the complaint process or they believe that by submitting directly to us they will obtain a faster response. Based on the Regulations, the Office cannot provide a determination on a complaint until it has been submitted through an association and has traveled the complaint procedure path and obtained a final decision. At that point, the individual can submit a Notice of Final Adverse decision to this Office.

The only time it is appropriate to submit a complaint directly to this Office is when the complainant is either alleging a failure to adopt a complaint procedure, or that the association has failed to respond to a submitted complaint. In both cases, the complainant must demonstrate that they have either formally requested the complaint procedure, or that they submitted a complaint that was appropriate for the complaint procedure. Often a complainant may simply assume his association does not have a complaint procedure if he has never heard about it. Or he may think he can submit any type of complaint to the association and expect a response. Thus, the Office must ask for proof that a complaint procedure was formally requested or that the submitted complaint alleged a violation of common interest community law before we can move forward and ask an association to come into compliance.

As part of the Office’s efforts to make the complaint procedure and filing of a Notice of Final Adverse Decision easier to understand, we are in the process of revising some of our online forms to explain more fully what must be submitted and to further outline reasonable expectations of the process.

Ombudsman Determinations

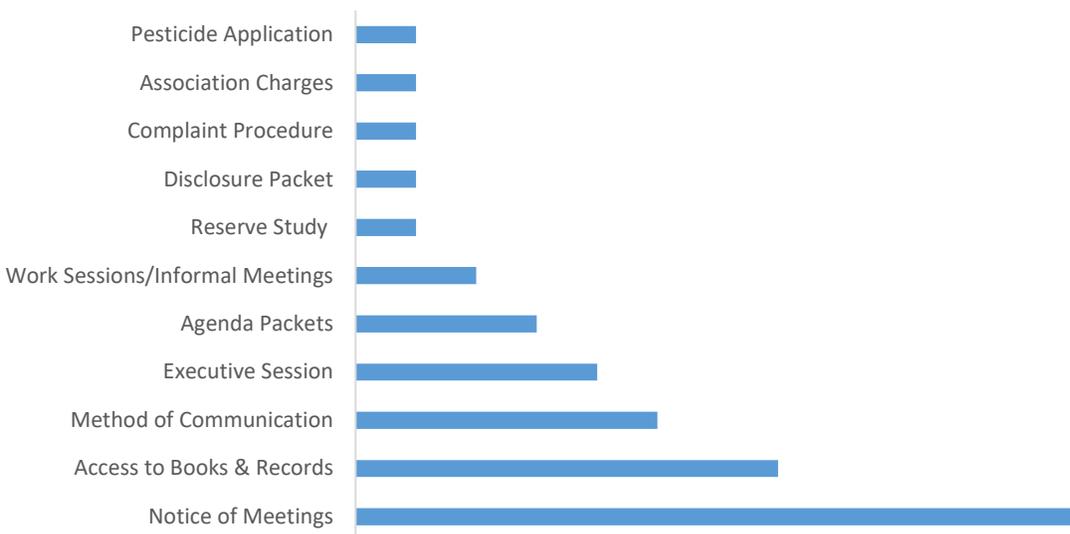
During the 2019-20 reporting period, the Office received 35 NFADs. We often receive NFADs that consist of multiple complaints submitted to the association at the same time, and this year was no different. In one instance, a NFAD was made up of 23 separate complaints submitted through an association complaint process.

Thirty-two percent of the complaints included in NFADs over which the Office had jurisdiction related to a failure to provide notice of meetings. Not all of these were accurate concerns, nor were they all found in favor of the complainant.

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

- Notice of Meetings – 32%
- Access to Books and Records – 18%
- Method of Communication – 13%
- Executive Sessions – 11%
- Agenda Packets – 8%
- Work Sessions/Informal Meetings – 5%
- Reserve Study – 3%
- Disclosure Packet/Resale Certificate – 3%
- Association Charges – 3%
- Pesticide Application – 3%

Notice of Final Adverse Decision by Topic



Meeting notice is a clear problem and it really should not be. Admittedly, some of the NFADs erroneously identified action taken without a meeting of the board of directors as meetings held without notice to the owners. This is an inaccurate conclusion because associations that are incorporated do have the option to make decisions outside of meetings, using provisions contained in the Nonstock Corporation Act (which is not common interest community law and does not fall under our authority). The difficulty owners experience in attempting to obtain access to books and records is also troubling, since any member in good standing has an absolute right to those records, barring certain limited exclusions contained in the law.

Of the NFADs that were not appropriate for the complaint procedure and should not have been submitted to the Office, the issues raised included violations of governing documents, a failure to provide reasonable accommodations (which was referred to the Virginia Fair Housing Office as all such allegations are), and rudeness during a virtual meeting.

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

EDUCATION & OUTREACH

Because of the pandemic, there was little opportunity for in-person outreach and the Office did not provide any presentations this past year. There are plans in place for a virtual discussion of the complaint procedure in December 2020, and the Office will continue to work on virtual options while the pandemic continues.

The Office created another new video for our website, this time for association boards of directors to help them better understand the complaint process and their obligations under the Regulations governing that process. We continue to receive positive feedback on the prior year's video directed toward complainants as well as this year's new video for associations and their boards of directors.

The Ombudsman provided anecdotal information and guidance to the Department of Housing and Community Development (DHCD) when it prepared a report for Delegate Sickles on motion-activated doorbell cameras. The conclusion reached by DHCD was that there is little in the way of best practices for motion-activated video cameras, and existing common interest community law does not address these devices. The report suggested possible options for associations to address some of the privacy issues related to these cameras.

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

The Ombudsman provides technical assistance and objective analysis for General Assembly members who are considering legislation. Rather than providing opinions on legislation, she instead provides anecdotal information and acts as a sounding board to help legislators determine on their own whether there is a need for specific legislation. The Ombudsman is also a frequent party in conference calls related to community associations, usually when requested by localities, other agencies, or legislators.

DPOR will be launching a revised website in the near future and at that time, the Office will review options for increasing visibility and education via the web. We are currently considering the possibility of providing a question and answer forum, short videos discussing frequent association issues, and perhaps a moderated forum where members and boards can share information. In the coming year, the Office hopes to find other methods of outreach to owners and associations.

COVID-19

The COVID-19 pandemic did have a substantial impact on the Office and that impact continues. The Ombudsman teleworked for most of the year and will continue to do so. The transition to a remote office was seamless and appears to have been largely invisible to the public.

Associations experienced quite a few new issues because of the pandemic, not the least of which was the difficulty in holding meetings safely. Fortunately, the General Assembly approved language amendments to the Appropriations Act that allowed associations to hold fully virtual board meetings when the Governor has declared a state of emergency. These new provisions apply only to association board meetings and do not address annual or member/owner meetings.

This removed an enormous burden from many associations that had been unable to hold meetings due to the size of the community or the understandable fear of the members that they may contract the virus if they were to attend a meeting. While the new law is not considered common interest community law, the Office fielded an enormous number of inquiries regarding virtual meetings. We also heard from a very small minority of owners who were upset that their association refused to hold in-person meetings.

Along with the difficulty in holding meetings, associations also struggled to meet to consider association complaints timely. These considerations are really no different than a board meeting, but boards of directors do not always think of them that way. As a result, the Office had numerous associations that failed to provide consideration of a complaint in a timely manner because they were not aware or did not understand that they could do so virtually. We worked with those associations to help them understand that they could use the new legislation to hold virtual consideration.

One of the workarounds for associations, both prior to the new legislation allowing virtual meetings and after, was the more common use of action without a meeting. For those association that are incorporated, the Nonstock Corporation Act (Virginia Code § 13.1-865) allows for action without a meeting; in some cases, an association's own governing documents do as well. However, many owners see these actions without a meeting as meaning that the board met and did not provide required notice. While the Office has no jurisdiction over these decisions since they do not fall under common interest community law, we did respond to many inquiries regarding the use of action without a meeting and directed people to the Nonstock Corporation Act, among other resources.

Associations also struggled with many of their amenities and common elements during the pandemic, and while the Office has no authority over these, we still fielded many inquiries. Out of an abundance of caution in some cases, or in order to adhere to the Governor's guidelines, some associations chose to close clubhouses, gyms, and any other areas where owners might congregate. Some associations also made the difficult and unpopular choice not to open swimming pools in the spring, out of fear that they would not be able to control the number of people gathering at the pool or maintain a cleaning protocol sufficient to protect owners.

CONSTITUENT EXPECTATIONS

January 2020 started out much like any other year for the Office, but as the COVID-19 pandemic gripped our country and the world, we experienced a sharp increase in inquiries, most notably a nearly 1,000 uptick in emails from last year. The emails we received covered an enormous number of topics, some over which we had jurisdiction and could provide guidance, others that were far outside the reaches of our authority and meant that we had to direct the individual to other resources, if known.

While those emails and phone calls that pertained to allegations that an association was in violation of common interest community law often resulted in a complaint submitted through an association's complaint procedure, many inquiries did not fall under our authority but merit mention nonetheless. Many constituents contacted the Office regarding the behavior of their associations' board of directors and fellow owners; we heard about harassment, discrimination (referred to the Fair Housing Office), bullying, and retaliation. After 12 years of hearing from constituents, these types of concerns increased dramatically this year, and although we cannot involve ourselves in these types of issues, people were disappointed that we could not assist them in resolving these types of conflicts.

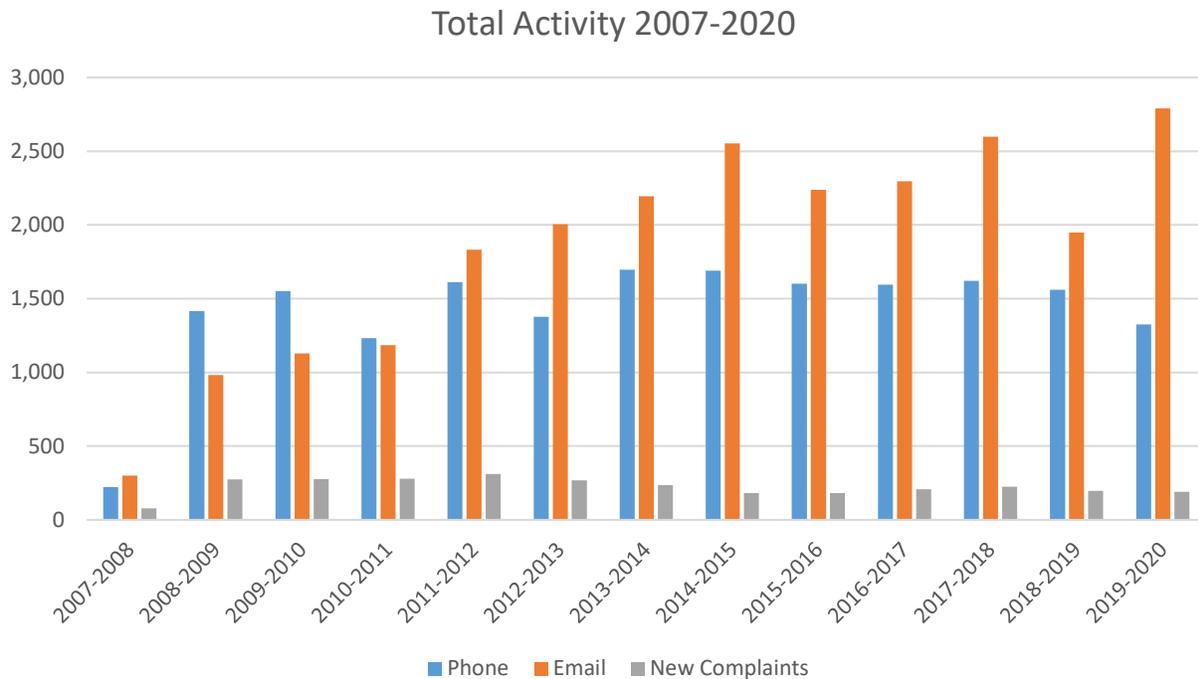
Unlike prior years where there were a multitude of different topics reflected in complaints and NFADs, this year there were really four primary areas of concern: notice, access to books and records, failure to adopt a complaint procedure, and failure to respond to a submitted complaint. The highest number of complaints and NFADs received by the Office alleged a failure to give notice, which is so troubling because a failure to give notice is a failure to involve the community. If notice was given, or not needed, but the owners think otherwise, it reflects a failure to educate association members and keep them apprised of the board's activities. Constituent expectations that their associations provide notice are absolutely valid, and we must work on ways to help associations address this ongoing problem.

Access to the books and records of an association was the second largest area of concern this year, and again, any failure to provide a member in good standing the right to examine or copy the books and records of an association is problematic. Those records are as much the property of the owners as they are of the board, and except for the very specific exclusions contained in common interest community law, they should be provided upon request to any member in good standing. This, also, is an area that we must focus on to ensure better compliance in the future.

Obtaining full compliance with the Regulations governing the complaint process will likely always be difficult. As boards turn over and new board members take the reins of leadership, institutional knowledge of the complaint process is often lost and the board must start its learning process from scratch. The Office will continue to guide associations in the proper way to respond to complaints and will assist those associations that are either new and in the process of adopting a complaint procedure, or are established and have simply failed to adopt a complaint procedure at all.

We do continue to hear from constituents who believe our approach to compliance is not harsh enough and would prefer the Office take a more punitive approach. There have been several

times over the past year where we heard from individuals who felt *very* strongly about this. However, in light of the fact that boards are composed of volunteers and not trained (or paid) professionals, it does not seem appropriate to take an iron fisted approach to compliance, and the governing laws do not provide for such an approach. Our goal will always be to provide guidance and education to associations and to their boards of directors. When the very rare situation arises that we cannot obtain compliance with the law, this Office will always, as we have done in the past, refer such a case elsewhere in the agency for investigation and appropriate enforcement action.



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

LEGAL DEVELOPMENTS

State Legislation

This was an unusual year as there were only six common interest community bills and one time-share bill passed during the 2020 Session of the General Assembly. Several bills were enacted that are not technically common interest community law but still have an important impact on associations.

This session also saw technical amendments to the recodification of Title 55, now Title 55.1.

Bill No.	Patron	Description
HB 176 SB 672	Simon Mason	Provides for a limited extension of the right of cancellation where such extension is provided for in a ratified real estate contract.
HB 720	Reid	Requires the association disclosure packet to contain a statement of any restrictions on the size, place, duration, and manner of placement or display of political signs by a lot owner on his lot.
HB 1340	Leftwich	Makes technical amendments relating to the revision and recodification of Title 55 enacted in the 2019 Session. The bill also implements clarifying changes and other changes made in the revision and recodification.
HB 1548	Simon	Provides that the respective interests of unit owners upon the termination of a condominium shall be as set forth in the termination agreement, unless the method of determining such respective interests is other than the relative fair market values, in which case the association shall provide each unit owner with a notice stating the result of that method for the unit owner's unit and, no later than 30 days after transmission of that notice, any unit owner disputing the interest to be distributed to his unit may require that the association obtain an independent appraisal of the condominium units.
SB 630	Surovell	Prohibits certain common interest community associations from prohibiting the installation of an electric vehicle charging station within the boundaries of a member's unit or limited common element parking space appurtenant to the unit owned by the unit owner or, in the case of a property owners' association, a lot owner's property, and sets forth provisions governing the installation and removal of such charging stations.
HB 29 HB 30	Torian	Appropriations Act 2020-2022. If the Governor has declared a state of emergency pursuant to Va. Code § 44-146.17, association governing boards may meet electronically without having a member physically present at one location. This is permitted only if the emergency makes it impracticable or unsafe for the board to assemble in one place; the purpose of the meeting is to discuss or transact business of the association required by statute or necessary to continue operations of the association; and the governing board distributes minutes of the meeting the same way it provided notice of the meeting. In order to convene a meeting under this new law, the governing board must give notice to members using the best method available given the nature of the emergency, and that notice must be given at the same time it is given to the governing board. The governing board must also make arrangements for association members to access the meeting through electronic means, including videoconferencing if practicable. If possible, the members should be provided an opportunity to comment. Minutes of any such electronic meeting should include the nature of the emergency, the fact that the meeting was held electronically, and the type of electronic meeting method used. <i>While this law is not considered common interest community law, it is applicable to common interest communities.</i>

Bill No.	Patron	Description
HB 414 SB 504	Delaney Petersen	Provides that a restriction on solar energy collection devices is not reasonable if application of the restriction to a particular proposal (i) increases the cost of installation of the solar energy collection device by five percent over the projected cost of the initially proposed installation or (ii) reduces the energy production by the solar energy collection device by 10 percent below the projected energy production of the initially proposed installation. The owner shall provide documentation prepared by an independent solar panel design specialist that is satisfactory to the community association to show that the restriction is not reasonable according to the criteria established in the bill. <i>While this law is not considered common interest community law, it is applicable to common interest communities.</i>
SB 584	Mason	Amends language in the Virginia Real Estate Time-Share Act to clarify the use of the terms "project" and "program" as they relate to registration of a time-share program. <i>While this law is not considered common interest community law, it is applicable to common interest communities.</i>
SB 868	Ebbin	Creates causes of action for unlawful discrimination in public accommodations and employment in the Virginia Human Rights Act. <i>While this law is not considered common interest community law, it is applicable to common interest communities.</i>
HB 1049	Levine	Prohibits discrimination in employment, public accommodation, public contracting, apprenticeship programs, housing, banking, and insurance on the basis of sexual orientation or gender identity. The bill also adds discrimination based on sexual orientation or gender identity to the list of unlawful discriminatory housing practices. <i>While this law is not considered common interest community law, it is applicable to common interest communities.</i>

Virginia Court Cases

Presumably resulting from the closure of courts amid the COVID-19 epidemic, there were few reported common interest community law cases this year. The cases below have some bearing on common interest community law.

- **James Cawlo vs. Rose Hill Reserve Homeowners Association, Inc. et al.**
Fairfax Circuit Court of Virginia, Case No. CL 2019-11702

A demurrer was sustained by the defendant in a case where he argued that “the complaint fails to state a cause of action because the facts stated do not impose upon him a legal duty necessary to maintain an action in tort.” This case was about a tree that fell and injured members of a family, approximately a year after the association had asked an arborist to inspect trees near the family’s home and determine those that were dangerous or unsound. Some trees were removed. The tree that later fell was not identified or removed at that time. The court found that the arborist did not owe a legal duty to the

family as prior case law has determined that “a landowner owe[s] no duty to those outside the land with respect to natural conditions existing on the land, regardless of their dangerous conditions.” The Court further noted that “[a]ll an individual has a duty to do is to refrain from acting to place another in peril.” The court also wrote that the tree fell almost a year from the date the property on which it grew had been inspected and therefore there was no imminent threat since it had not fallen in that year, and if the arborist had a duty it was not one that would last forever. The Court also found that the arborist had not assumed a duty of care to the family, and that instead his duty was to the homeowners association and management company that had hired him. The Court sustained the demurrer because the arborist’s “inaction does not allow recovery for personal injuries.”

- **Erie In. Exch. V Alba**

- ***Supreme Court of Virginia, Record No. 190389***

This case determined that a tenant in a condominium association, who was not a named or additional insured on the insurance policy, was not an insured party and was “not protected by any waiver the provider may have made as to subrogation.” This case was reversed and remanded to the circuit court for further proceedings. This case resulted from a fire that began in the condominium unit leased by a tenant that caused substantial damage. Under the association’s insurance policy, the insurer named each unit owner as an additional insured, and waived any right of recovery against the additional insured. The circuit court found that the tenant had the same obligations under the condominium instruments and therefore should have the same benefits, namely the subrogation waiver. Contrary to this finding, the Supreme Court found that the agreed upon insurance coverage “can only be found in the binding agreement between the Association and Erie as contracting parties.” The Supreme Court found that the tenant was not an insured party or an implied insured. Judgment was reversed and the case was remanded for further proceedings.

- **Quingling Sun v Braddock Place Townhouses Ass’n**

- ***United States District Court for the Eastern District of Virginia, Alexandria Division, Civil Action No. 1:19-cv-00423***

The Plaintiffs recently purchased a townhome that they believed came with two parking spaces. According to the Association’s declaration, all owners are entitled to one reserved parking space and reasonable use of other unreserved spaces. Two units in the community (with the subject townhome being one of them) did not have a garage or driveway and so the Association decided, in 2000, to give those two units two parking spaces instead of one. This was not done via an amendment to the declaration. The property was sold once and retained the parking spaces, but after the sale to the Plaintiffs, an owner in the community questioned why the Plaintiffs were provided an additional reserved parking space in violation of the governing documents. As a result, the extra parking space was returned to general use. The Plaintiffs alleged discrimination in their suit against the Association, but the court did not find that the Plaintiffs established that they had been deprived of a protected right under a contract. In addition, no discriminatory intent was found as the individual who questioned the association about the parking space was a member of the same protected class as the Plaintiffs. The

Plaintiffs also alleged breach of contract, but the Court found that the disclosure packet was not a form of contract, and therefore there was no valid contract, due to a lack of offer and acceptance, and a lack of consideration. The contention that the disclosure packet was a form of contract failed. The Court found the Defendants were entitled to summary judgment on all claims.

- **Clarke Norman v Foxchase Owners' Association**
Charlottesville Circuit Court, Case No. CL20-1481

A motion for reconsideration was denied when the Plaintiff suggested that the Association had exceeded its power under its Declaration by requiring owners to sign an assumption of risk form in order to use the swimming pool, gym, and clubhouse. The Court found that the Association was reserved the right to "limit the number of members and to place other reasonable restrictions upon the common area(sic)" under its Declaration. Based on this provision in the Declaration, "the rights of the plaintiff to use the common area swimming pool, gym, and clubhouse facilities are limited by the reasonable restrictions imposed by the defendant." The Court further noted the "unique and unprecedented safety challenge" of the current pandemic, and that use of common areas without proper social distancing could result in possible additional infection. The Court believed that posted signs would not necessarily be sufficient to convey the risks, but that a mandatory form would better capture the attention of the signatory.

Federal Developments

Following are some recently introduced federal bills that may potentially affect community associations. Select bills responding to the pandemic are included, though many more exist.

- **Housing Survivors of Major Disasters Act of 2020 (H.R. 2914)** – This bill makes certain individuals and households eligible for housing assistance in connection with a major disaster, including Hurricane Maria of 2017. To be eligible, an individual or household must be: (1) occupying an otherwise unused or uninhabited property located in the area for which the major disaster was declared but does not have documented ownership rights to and is not renting the property; or (2) residing or have resided in an area for which the major disaster was declared but does not have documentary proof of residence.
 - *Introduced in May 2019; passed the House.*
- **Preliminary Damage Assessment Improvement Act of 2020 (H.R. 4358)** – This bill directs the Federal Emergency Management Agency (FEMA) to: (1) submit to Congress a report describing the preliminary damage assessment process, as carried out by FEMA in the five years before this bill's enactment; and (2) establish damage assessment teams within FEMA to conduct preliminary damage assessments with state and local governments and appropriate relief or disaster assistance organizations.
 - *Introduced in September 2019; passed the House.*
- **FEMA Disaster Preparedness Improvement Act (H.R. 6071)** – This bill increases FEMA support for disaster preparedness and emergency response to states and U.S.

territories. Specifically, the bill increases the federal cost share to 85% for: (1) hazard mitigation measures with respect to a major disaster (currently, 75%); and (2) emergency management performance grants (currently, 50%). The bill makes special flood hazard areas that have suffered at least one severe repetitive loss or repetitive loss under the National Flood Insurance Program eligible for FEMA hazard mitigation grants. It also exempts the time it takes to complete environmental reviews from the 36-month deadline to complete FEMA-funded hazard mitigation projects.

- *Introduced in March 2020; referred to the Subcommittee on Economic Development, Public Buildings, and Emergency Management.*
- **Take Responsibility for Workers and Families (H.R. 6379)** – This bill responds to the COVID-19 outbreak and its impact on the economy, public health, state and local governments, individuals, and businesses. The bill provides FY2020 supplemental appropriations for federal agencies to respond to the COVID-19 outbreak. The supplemental appropriations are designated as emergency spending, which is exempt from discretionary spending limits.
 - *Introduced in March 2020; referred to the Committee on Appropriations, and in addition to the Committees on the Budget, and Ways and Means.*
- **Rent and Mortgage Cancellation Act (H.R. 6515)** – This bill provides housing assistance during the COVID-19 public health emergency. Specifically, the bill suspends rental and mortgage payments for primary residences for a period lasting until 30 days after the termination of the federal emergency declaration relating to COVID-19. The Department of Housing and Urban Development (HUD) must establish funds to reimburse lessors and lenders for payments suspended under the bill. In addition, HUD must establish an Affordable Housing Acquisition Fund to support the acquisition of multifamily housing projects by nonprofit organizations, public housing agencies, cooperative housing associations, community land trusts, and state and local governments. For a five-year period, entities that are approved for such assistance shall be provided the first right of purchase with respect to such projects.
 - *Introduced in April 2020; referred to the House Committee on Financial Services.*
- **COVID-19 Homeowner Assistance Fund Act of 2020 (H.R. 6729)** – To establish a Homeowner Assistance Fund to provide funds to State housing finance agencies for the purpose of preventing homeowner mortgage defaults, foreclosures, and displacements of individuals and families experiencing financial hardship, and for other purposes.
 - *Introduced in May 2020; referred to the Committee on Financial Services, and in addition to the Committee on the Budget.*
- **COVID-19 Mortgage Relief Act (H.R. 6741)** – To amend the CARES Act to provide forbearance and foreclosure moratoriums for all mortgage loans, and for other purposes.
 - *Introduced May 2020, referred to the Committee on Financial Services, and in addition to the Committee on the Judiciary.*
- **FEMA Assistance Relief Act of 2020 (H.R. 8266)** – This bill modifies the federal cost share of certain emergency assistance relating to COVID-19. Specifically, the bill

provides for: (1) a 100% federal cost share of assistance provided under the emergency declaration issued by the President on March 13, 2020, relating to COVID-19 and any subsequent major disaster declaration that supersedes it; and (2) at least a 90% federal cost share of assistance provided for any emergency or major disaster declared by the President from January 1-December 31, 2020.

○ *Introduced September 2020; passed the House.*

- **COVID-19 Relief for Small Businesses Act of 2020 (S. 3554)** – This bill establishes measures to provide assistance to small businesses impacted by COVID-19. Specifically, the Small Business Administration (SBA) must: (1) provide economic injury grants for certain small businesses that have suffered substantial economic injury resulting from COVID-19; (2) establish a program to make direct loans to small businesses, up to 50% of which may be forgiven; and (3) pay the principal, interest, and associated fees on certain SBA loans, including microloans, for a six-month period.

○ *Introduced March 2020; referred to the Committee on Small Business and Entrepreneurship.*

NEWS OF INTEREST

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

Two condominium associations and several residents have sued Virginia Beach in response to the approval of a 22-story senior housing building that will ultimately house as many as 905 senior citizens. The new building will replace an existing condominium as well as several commercial buildings. The litigants fear that they will lose their views, privacy, and light because of the new building, thus decreasing their enjoyment of their homes and potentially affecting property values. They also believe the City gave the developer preferential treatment.

Another flag-flying fight took place in Culpeper, with a 77-year old veteran ultimately winning the right to fly his American flag. The issue arose because the veteran failed to obtain approval for his 20-foot flagpole. In support of the veteran's flag, several other neighbors also raised flags in their yards. Ultimately, the association decided that they would not place restrictions on flagpoles and the veteran and his neighbors were free to fly their flags.

Last year we reported on efforts to incorporate Massanutten, which have not yet resulted in the desired effect. Efforts are still underway to incorporate, but it does not appear that incorporation is likely in the near future.

Enforcement of boat size rules in a large community association caused consternation among those owners who believed their boats were the proper size. Some residents who received letters regarding oversized boats claim that their boats were as little as one-quarter inch too long. The association stated that it is required to enforce these requirements, as they are part of the Deed.

However, the association will work with these boat owners to create an agreement to grandfather the non-conforming boats.

In a very sad case in Fairfax County, a man shot and killed his neighbor after a longstanding disagreement between the two failed to come to a resolution. A door camera recorded a portion of the shooting, and the shooter is awaiting trial. It appears that the neighbors had been in contention for years over a variety of issues, including noise, loose dogs, domestic disputes, and various threats.

STATUTORY AUTHORITY

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

A. The Director in accordance with § 54.1-303 shall appoint a Common Interest Community Ombudsman (the Ombudsman) and shall establish the Office of the Common Interest Community Ombudsman (the Office). The Ombudsman shall be a member in good standing in the Virginia State Bar. All state agencies shall assist and cooperate with the Office in the performance of its duties under this article.

B. The Office shall:

1. Assist members in understanding rights and the processes available to them according to the laws and regulations governing common interest communities and respond to general inquiries;
2. Make available, either separately or through an existing website, information concerning common interest communities and such additional information as may be deemed appropriate;
3. Receive notices of final adverse decisions;
4. Upon request, assist members in understanding the rights and processes available under the laws and regulations governing common interest communities and provide referrals to public and private agencies offering alternative dispute resolution services, with a goal of reducing and resolving conflicts among associations and their members;
5. Ensure that members have access to the services provided through the Office and that the members receive timely responses from the representatives of the Office to the inquiries;
6. Maintain data on inquiries received, types of assistance requested, notices of final adverse decisions received, actions taken, and the disposition of each such matter;
7. Upon request to the Director by (i) any of the standing committees of the General Assembly having jurisdiction over common interest communities or (ii) the Housing Commission, provide to the Director for dissemination to the requesting parties assessments of proposed and existing common interest community laws and other studies of common interest community issues;
8. Monitor changes in federal and state laws relating to common interest communities;
9. Provide information to the Director that will permit the Director to report annually on the activities of the Office of the Common Interest Community Ombudsman to the standing committees of the General Assembly having jurisdiction over common interest communities and to the Housing Commission. The Director's report shall be filed by December 1 of each year and shall include a summary of significant new developments in federal and state laws relating to common interest communities each year; and
10. Carry out activities as the Board determines to be appropriate.

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

A. The Board shall establish by regulation a requirement that each association shall establish reasonable procedures for the resolution of written complaints from the members of the association and other citizens. Each association shall adhere to the written procedures established pursuant to this subsection when resolving association member and citizen complaints. The procedures shall include the following:

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

2. Such association shall provide complaint forms or written procedures to be given to persons who wish to register written complaints. The forms or procedures shall include the address and telephone number of the association or its common interest community manager to which complaints shall be directed and the mailing address, telephone number, and electronic mailing address of the Office. The forms and written procedures shall include a clear and understandable description of the complainant's right to give notice of adverse decisions pursuant to this section.

B. A complainant may give notice to the Board of any final adverse decision in accordance with regulations promulgated by the Board. The notice shall be filed within 30 days of the final adverse decision, shall be in writing on forms prescribed by the Board, shall include copies of all records pertinent to the decision, and shall be accompanied by a \$25 filing fee. The fee shall be collected by the Director and paid directly into the state treasury and credited to the Common Interest Community Management Information Fund pursuant to § 54.1-2354.2. The Board may, for good cause shown, waive or refund the filing fee upon a finding that payment of the filing fee will cause undue financial hardship for the member. The Director shall provide a copy of the written notice to the association that made the final adverse decision.

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