

**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 2022-2023



Department of Professional and Occupational Regulation

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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 16, 2022, through November 15, 2023.

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EXECUTIVE SUMMARY

In 2008, the General Assembly created the Office of the Common Interest Community Ombudsman (“Office”), and the Common Interest Community Board (“CICB”), at the Department of Professional and Occupational Regulation (“DPOR”). In accordance with statutory requirements, this document reports on the activities of the Office for the period from **November 16, 2022, through November 15, 2023.**

The department had a record volume of phone calls and emails since its establishment, along with an increase in complaints, including Notices of Final Adverse Decision, subsequent to the redirection of time-share complaints to another division within the Agency.

Associations still face challenges in adopting and implementing association complaint procedures outlined in the 2012 Common Interest Community Ombudsman Regulations. Consequently, the Office remains committed to providing guidance to associations to achieve compliance and to owners, enabling them to obtain decisions on appropriately filed association complaints.

The complaint process, when simplified to its fundamental elements, entails three essential actions by the association: (1) acknowledge receipt of a properly submitted association complaint; (2) provide notice and consideration of the complaint; and (3) provide a final decision on the complaint. The Office functions as a comprehensive resource for association complaint procedures, offering guidance on both the process itself and the expectations outlined in the regulations that pertain to associations.

There was only one instance this year where the Office referred a matter to the Common Interest Community Board for enforcement. In this case, an association failed to adhere to the response requirements outlined in the Regulations and did not acknowledge receipt of the Complainant’s submitted association complaint. A Consent Order was approved by the CICB, and the CICB assessed a \$450.00 penalty as well as \$150.00 in Board costs.

On the legislative front, Senate Bill 740, a bill that was passed in 2022, required the Agency, rather than the CICB, to create a work group to study the adequacy of current laws addressing standards for structural integrity and for maintaining reserves to repair, replace, or restore capital components in common interest communities. In 2023, the work group completed the work it began in 2022, after holding several more meetings, and provided a report on its findings to the General Assembly.

OMBUDSMAN REGULATIONS & ROLE OF OFFICE

The Common Interest Community Ombudsman Regulations (18VAC48-70), enacted in 2012, require community associations to establish an internal association 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 new or direct complaints from association members or owners.

Notices of Final Adverse Decision (NFADs), as described in § 54.1-2354.4 and the Regulations, are appropriate 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 regulations.

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 internal 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 filing 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

Constituent Response Statistics

During the 2022-2023 reporting period, the Office responded to 1,994 telephone calls and 3,397 email messages. Our practice is to respond as quickly as reasonably possible to all inquiries, and every effort is made to provide a response within 24 hours to any phone call or email.

The number of emails received by the Office increased by 47% over last year's numbers, and phone calls increased by 34% over last year. Complaints increased by 27% over the prior year. These numbers resulted in the highest number of emails and phone calls received by the Office since it was first created. Looking back over the past 15 years, the next highest number of calls ever previously received was 1,697 which is 297 fewer calls than we received this year. If we assign a 30-minute limit to each of those additional calls, that would result in an additional 149 working hours needed to respond. Emails require a similarly high level of customer service, and with 352 more emails than ever received before, if we assign a 20-minute response, this year's email numbers resulted in an increase of 117 work hours needed to respond. These high numbers of emails and phone calls created a potential increase of more than six and a half weeks of work over any prior year.

The Office added a new staff member this year to assist with the increase in calls, emails, and complaints. The Administrative Assistant (AA) position was filled in February 2023, after we reviewed a considerable number of applications and completed interviews. This position is now responsible for triaging most of the phone calls and emails that come into the office and for carrying out our efforts to bring associations into compliance when they have failed to respond to an association complaint or have not adopted an association complaint procedure. The Ombudsman continues to be solely responsible for reviewing and responding to Notices of Final Adverse Decision (NFADs).

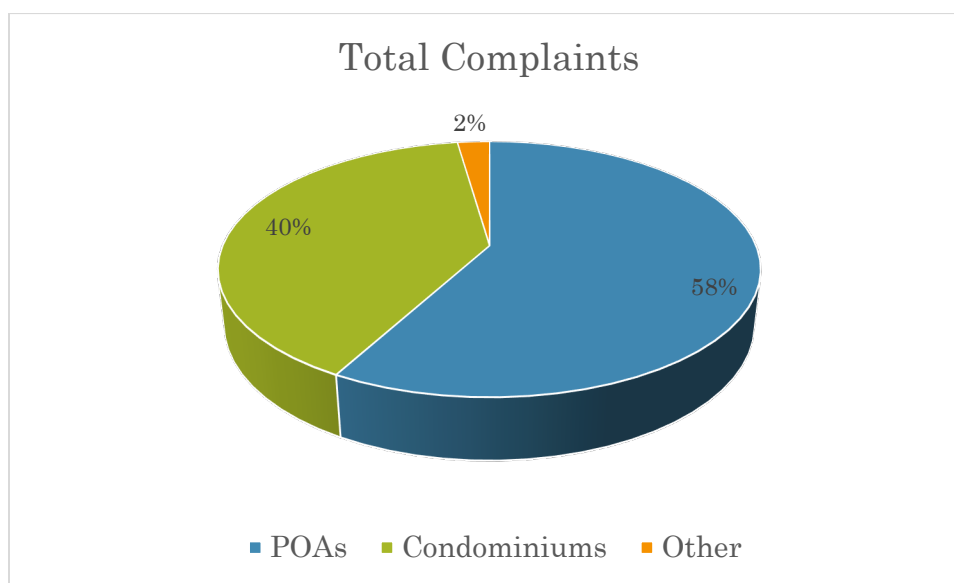
As a result of new legislation enacted July 1, 2023, several new requirements have been codified that impact the Office. Changes to §54.1-2354.3 and §54.1-2354.4 of the Code of Virginia allow, but do not require, the Ombudsman to refer Notices of Final Adverse Decision directly to the Common Interest Community Board (CICB). To maintain continuity, the Ombudsman has not referred any NFADs to the CICB at this time. New changes also require the Office to provide its determinations to both the governing board and the association's common interest community manager, if applicable. This task can be somewhat difficult, since the Agency does not always have contact information for both. We hope to rectify this challenge with updated Annual Report and Registration Application forms in the coming year that will specifically request such information. New statutory language also requires that if, within 365 days of issuing a determination that an association was in violation of common interest community law or regulation, the Ombudsman receives a subsequent NFAD for the same violation, the Office must refer the matter to the CICB and it must maintain data on referrals made to the CICB.

Virtual meetings continue to be a challenge for owners and associations, with the Office receiving many inquiries regarding associations that chose to hold virtual rather than in-person meetings. As discussed last year, this can be confusing since associations can, under current common interest community law,¹ hold meetings that are either fully or partially held by electronic means. If an association chooses to hold a meeting fully electronically, such decision precludes any form of in-person meeting. Based on our anecdotal information, meetings held via electronic methods seem to be better attended since it is often easier for an owner to log on than it is to show up at a meeting and they seem to be held more frequently and regularly.

Complaint Statistics

The Office received 219 complaints² this year:

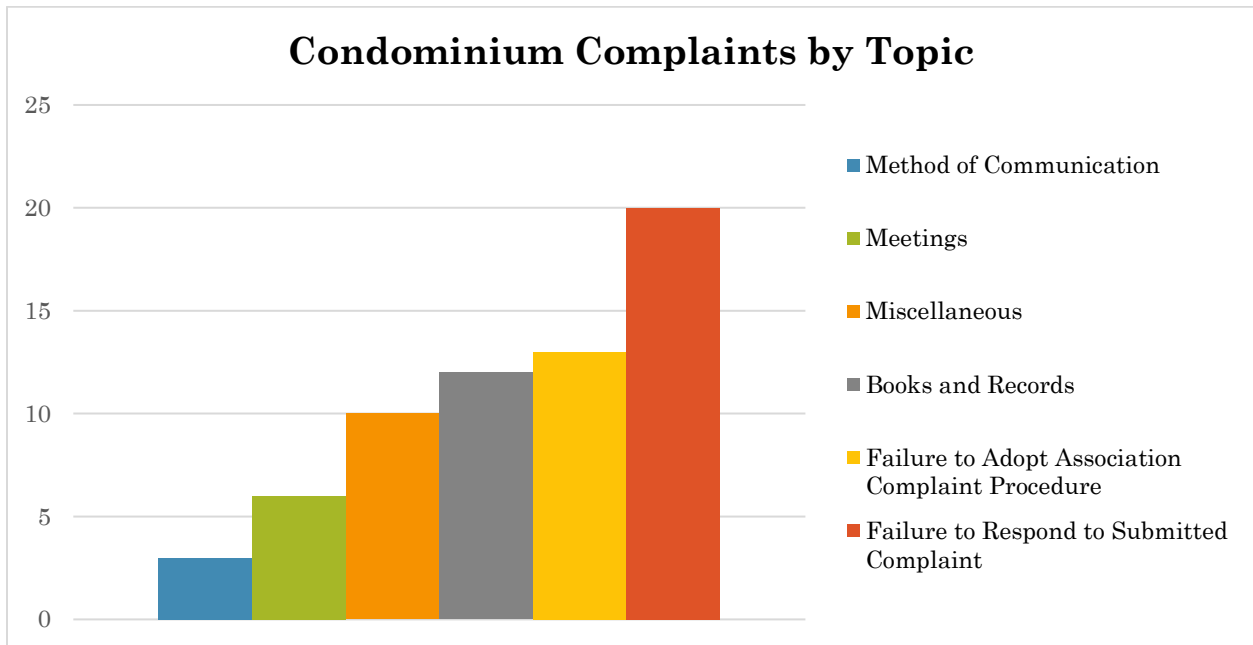
- 58% related to Property Owners' Associations (POAs);
- 40% related to Condominium Unit Owners' Associations; and
- 2% related to Managers.



¹ Any meeting of the association, the board of directors, or any committee may be held entirely or partially by electronic means, provided that the board of directors has adopted guidelines for the use of electronic means for such meetings. Such guidelines shall ensure that persons accessing such meetings are authorized to do so and that persons entitled to participate in such meetings have an opportunity to do so. The board of directors shall determine whether any such meeting may be held entirely or partially by electronic means.

² As used in this Annual Report, the term “complaints” includes Notices of Final Adverse Decisions (NFADs); complaints related to an association failure to adopt a complaint procedure or respond to a submitted complaint; complaints against time-shares through December 31, 2020; and complaints that have been improperly submitted directly to the Office when they should have been submitted through an association’s internal complaint process.

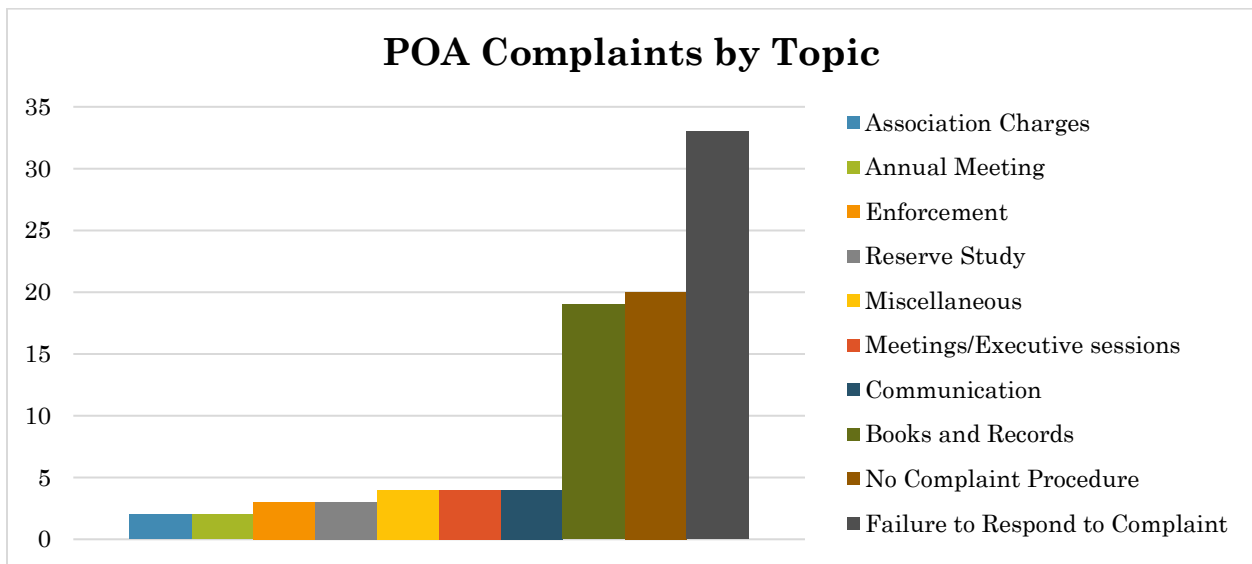
This year we received the largest number of complaints, phone calls, and emails (excluding time-share complaints) since the Office was created and the Common Interest Community Ombudsman Regulations (Regulations) were adopted. We have not been able to determine what prompted this increase in numbers. Phone calls and emails covered a wide gamut of topics, including access to books and records, meeting notice, disclosure (a deluge of inquiries occurred after the introduction of the new Resale Disclosure Act in July 2023), and methods of communication. We also received an enormous number of complaints and inquiries that were outside the scope of our authority, thus limiting our ability to provide guidance. Whenever possible, we provide alternative solutions to the public, whether it is a referral to Fair Housing, their local Commonwealth’s Attorney, or the suggestion that they consider consulting with an attorney to determine their legal rights in a given situation.



The Office experienced a 71% increase in the number of condominium complaints as compared to the prior year. The complaints we received that were related to condominiums were primarily concerning access to books and records (12), meeting issues (6), method of communication (3), an association’s failure to respond to a submitted association complaint (20), and an association’s failure to adopt an association complaint procedure (13). While the Office has always seen a broad swathe of multiple complaints related to possible violations of the Condominium Act, other than the complaints mentioned above, all other alleged violations were single in number (included as “Miscellaneous” in the graph above). This was an unusual year for condominiums with such limited complaint topics and such a substantial increase in condominium complaints.

Twenty-three percent of the condominium complaints we received were related to a condominium association’s failure to respond to a submitted association complaint. Based on the total number of condominium complaints we received, this is a 7% decrease over the prior

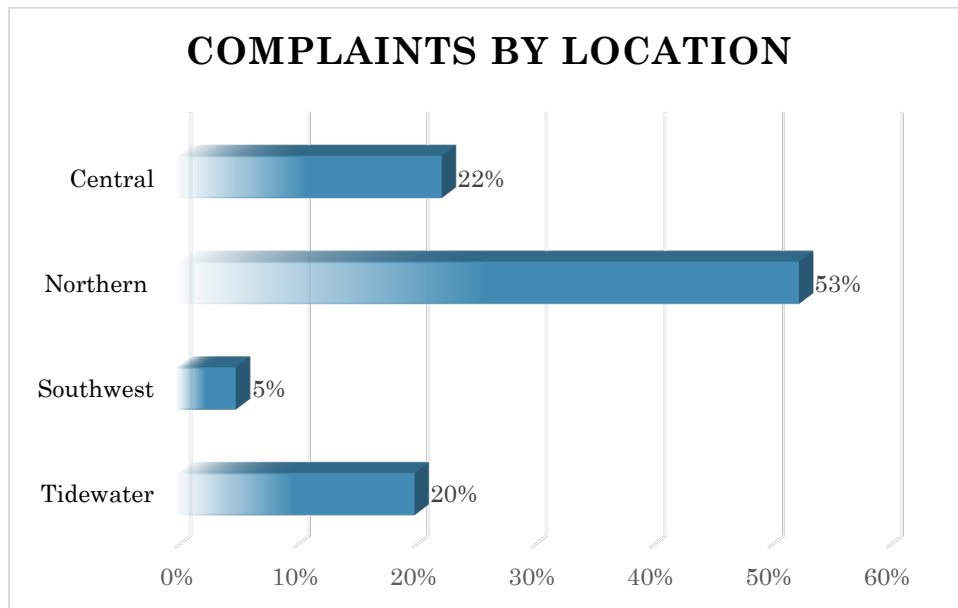
year. If we look solely at the numbers on their own, however, it is a disappointing data point, since the actual number of such complaints more than doubled from 9 to 20. If an association fails to respond to a submitted complaint, that means the association actually has a complaint procedure in place but has failed to adhere to it. In a few cases, a complaint may have been improperly submitted. But in most cases, condominium associations are simply not carrying out their responsibilities under the Regulations and their own complaint process. We also saw a decrease in the percentage of complaints related to a failure to adopt a complaint procedure, but the actual numbers tell a different story, namely that the number of such complaints almost doubled.



Property Owner Association (POA) complaints received by the Office covered a wide range of topics. The largest grouping of complaints was related to an association’s failure to adopt a complaint procedure and failure to respond to a submitted association complaint. However, in comparison to last year, there was barely a percentage point difference between the two years for these two types of complaints and the total number of complaints submitted was nearly identical to last year.

The Office encounters ongoing challenges in effectively communicating our guidelines to owners seeking to submit complaints or Notices of Final Adverse Decision. Following an update and reorganization of our website aimed at enhancing comprehension of our jurisdiction among owners and members, we continue to receive complaints that do not fall under our authority and are not related to common interest community law. Of the 148 different POA complaint allegations (many actual complaints and NFADs had multiple complaint allegations) we received, 36% were simply not appropriate for submission to our Office because they were related to violations of the association’s governing documents, civil or criminal law issues, or violations of the Virginia Nonstock Corporation Act. This was true for condominium complaints as well, where roughly 40% of the condominium complaint topics were not appropriate for submission to the Office, whether as a complaint or as a NFAD.

When constituents submit complaints or NFADs to our Office falling beyond the scope of our jurisdiction, our inability to provide assistance might be misconstrued as a neglect of duties or evading public responsibility. Contrary to such perceptions, addressing complaints, NFADs, or communication such as phone calls and emails is notably more manageable when within the purview of our authority, allowing for a more effective and comprehensive response. We understand that owners do not want us to tell them that they may need to seek assistance from an attorney, but often there is no other option, due to the nature of their concerns. The Office will continue to work toward finding ways to help the public better understand our authority so that they are less disappointed and have reasonable expectations as to how we can help.



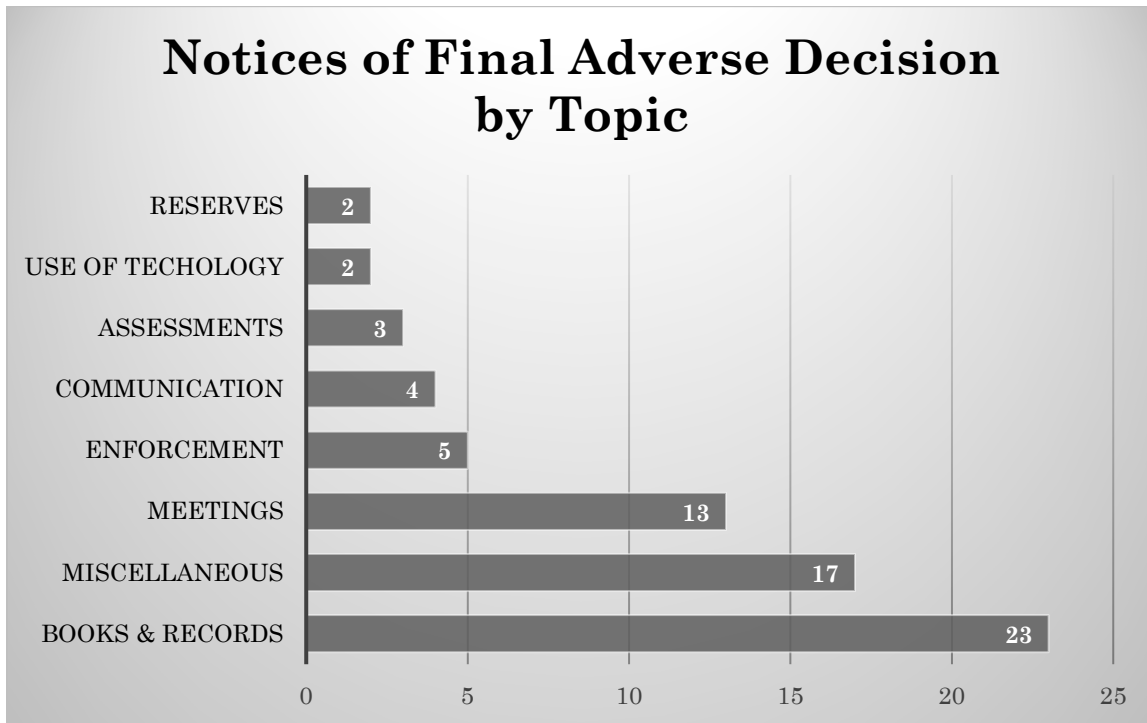
The percentage of complaints from the four distinct regions of Virginia changed by little more than two percentage points from last year. Northern Virginia accounted for 53% percent of all complaints received by the Office, with the remainder coming from the Central Virginia region (22%), the Tidewater area (20%), and Southwest Virginia (5%).

Ombudsman Determinations

This year the Office received 60 Notices of Final Adverse Decision (NFADs), which is the highest number of NFADs in its history, tying with the 60 NFADs received 2 years ago. Last year the Office received 36 NFADs. As noted in prior reports, many if not nearly all the NFADs we receive are made up of multiple complaint allegations, so 60 NFADs are a significantly higher number of complaints that must be reviewed and to which a determination must be provided, if appropriate.

We saw a number of new complaints this year that we have not seen with any regularity in the past. These included complaints about adoption and enforcement of the governing documents, assessments, and reserves. As was the case last year, access to association books and records

made up the largest number of complaints (increasing slightly this year), while issues related to notice and executive sessions (Meetings) fell slightly.



The issue of books and records was the most complained about problem in associations this past year. The law is very straightforward on this topic, and it is only in extremely rare cases that a board should not provide owners access to the books and records. The Office has still not found the motivating factor that will ensure that associations adhere to the applicable common interest community laws and provide owners and members the information they request.

The next largest number of complaints in NFADs received by the Office alleged a failure to provide proper notice of meetings or to adhere to the statutory requirements for executive sessions. Owners often misunderstand notice requirements since they can easily confuse the difference between notice of member/owner meetings and notice of board meetings. However, the applicable statutes lay out the precise requirements and acceptable reasons for holding an executive session, so improperly held executive sessions should not be a common complaint.

This year we saw several NFADs fail because they were not submitted in a timely manner. Under the statute and regulations that govern the complaint process, a NFAD must be filed with the Office, meaning it must be received by the Office, within 30 days of the date of the final decision issued by the association. Unfortunately, complainants often wait until the last minute to submit their NFAD and we receive it a day or a few days past the deadline. Since it is a statutory requirement, we cannot provide additional time to the constituent, regardless of the facts surrounding the reason for the late submission. Another timeliness issue that we see

regularly are NFADs that are submitted improperly or lack a required document or the filing fee and are received on the last days before the statutory deadline. While the Office always reviews all NFADs as quickly as possible, there are times when we cannot review them quickly enough to notify a complainant that the NFAD is incomplete prior to the statutory deadline. As a result, there may not be sufficient time for the complainant to provide whatever is missing from the submitted NFAD. Until a complete NFAD is received, we cannot consider it filed.

Approximately 23% of the NFADs received by the Office did not allege any violation of common interest community law. Instead, these NFADs alleged violations of the governing documents, violations of the Virginia Nonstock Corporation Act, and violations of local ordinances. Associations do not have to process complaints that do not allege a violation of common interest community law. But, out of an abundance of caution, many associations provide final decisions to complainants who have filed improperly, likely because the association either doesn't realize they are not required to process such complaints or because it is fearful that a failure to process *any* complaint may result in some type of action from the state. Unfortunately, if an association provides a final decision to a complainant, even if the complainant did not submit a proper association complaint, that complainant is then under the impression they can file a NFAD with us, which means they may be disappointed when we explain our jurisdiction and close the NFAD without a determination.

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 at <http://www.dpor.virginia.gov/CIC-Ombudsman/Determinations>. This year we have made the Determination database searchable so that it can provide the public the opportunity to search on specific topics. Most determinations are posted within a week or less.

STRUCTURAL INTEGRITY WORKGROUP

In April 2022, the Governor approved Senator Scott Surovell's Senate Bill 740. This bill directed the Department of Professional and Occupational Regulation to establish a Work Group to study the adequacy of current laws addressing standards for structural integrity and for maintaining reserves to repair, replace, or restore capital components in common interest communities. The bill directed the Department to report the Work Group's findings and provide recommendations, including any legislative recommendations, to the Chairs of the House Committee on General Laws and the Senate Committee on General Laws and Technology no later than April 1, 2023.

The Work Group was composed of a broad swathe of 25 professionals, including Local Government Representatives, CIC Manager Representatives, Owner Representatives, Insurance Specialists, Reserve Specialists, Banking Representatives, Community Association Attorneys, Developers, and Accountants. In addition, the Work Group partnered with three Research and Community Engagement Specialists to assist the agency in organizing and carrying out the

meetings, research, and final report and to provide a deeper knowledge base to this project. The Research and Community Engagement Specialists were: The Center for Regional Analysis at George Mason University, The Virginia Housing Research Center at Virginia Tech, and The Dragas Center at Old Dominion University.

Five meetings were held across the Commonwealth. Subject matter presentations were given at the meetings, overviews of the scope of work, resources and other applicable topics were also provided, and the meetings held breakout sessions where attendees could hone in on particular topics. In addition, a survey was developed and distributed to 2,696 associations. The survey was open from January 6, 2023, until January 27, 2023, and there were 361 responses received, which was a 12% response rate.

Based on the work of the Work Group and the results of the survey, the Work Group ultimately provided a series of recommendations to the Chairs of the House Committee on General Laws and the Senate Committee on General Laws and Technology. While the entirety of the report and its recommendations can be found online (<https://rga.lis.virginia.gov/Published/2023/RD207/PDF>), along with full descriptions of the recommendations, we provide many of the recommendations below. The Work Group recommended the following:

- Any new legislation should consider amendments to definitions included in existing law to reflect any changes that may come from the recommendations.
- Consideration should be given to allow associations the time necessary to come into compliance with any new legislation.
- Developers should be required to provide “record plans,” and include any change orders and significant field adjustments that require plan changes, to associations before or upon transition. Associations and management shall retain and maintain record building plans, including amendments and changes.
- That the Commonwealth require that independent, appropriately qualified entities perform reserve studies for CICs within two years of issuance of the first occupancy permission and every five years thereafter.
- That the Commonwealth should require the scope of reserve studies to include all the capital components of CICs and the definition of capital components should be refined to align with industry standards.
- Reserve studies should be adjusted in conjunction with budget development and review, to reflect changes in reserve funding resulting from expenditure of reserve funds or changes reflected in updated reserve studies.
- The Commonwealth should add a source of authority to enable CICs to fund reserve contributions to levels recommended in reserve studies.
- The Commonwealth should remove statutory language allowing owners to rescind special assessments for maintenance, replacements, repair, and restoration and funding reserves.

- The Commonwealth should authorize boards to have authority to borrow for maintenance, replacements, repair, and restoration of structural components and for funding recommended reserves.
- The Commonwealth should require community associations to fund reserve contributions to levels recommended in then-current reserve studies.
- The Commonwealth should require visual, non-invasive inspection of structural components by a registered design professional 30 years after substantial completion and every 10 years thereafter. In coastal contexts, Virginia should require visual, non-invasive inspection of structural components by a registered design professional 25 years after substantial completion and every 10 years thereafter.
- The Commonwealth should require additional professional inspection if the required structural inspection indicates weakness that could compromise the integrity of the structure.
- The CIC Board should update the *Guidelines for the Development of Reserve Studies for Capital Components* to include recommendations and best practices for inspections of common property.
- The Commonwealth should fund and support the offering of virtual and web-accessible, on-demand education and programming for association boards and owners through the Office of the CIC Ombudsman.

The Work Group made several other recommendations that were outside the scope of the legislation and can be found in the report.

THE VIRGINIA RESALE DISCLOSURE ACT

Chapter 23.1 in Title 55.1 of the Code of Virginia (<https://law.lis.virginia.gov/vacode/title55.1/chapter23.1/>) aka the “Resale Disclosure Act” became law this year. This is a single set of laws that will govern all resale disclosures for property owners’ associations, condominium associations, and real estate cooperatives. This new legislation brings all the disclosure requirements into a single act and standardizes nearly every aspect of disclosure. The act follows prior legislation related to resale disclosure, but adds substantial changes, as well.

Previously, resale disclosure documents were called disclosure packets for property owner associations and resale certificates for condominiums and real estate cooperatives. They will now be known universally as resale certificates and the statutory requirements for each type of association will be nearly identical. The term ‘unit,’ which previously applied only to condominiums and cooperatives, will now be the general term to describe condominiums, cooperatives, and property owners’ associations in the context of resale certificates. (§55.1-2307)

The Common Interest Community Board was tasked with creating a standardized resale certificate form to be used for all resale certificates. The form contains 30 items that must be

disclosed, all of which must be in a specific order and may require supporting documentation. (§55.1-2310)

Fees for resale certificates must now be paid upon request for the resale certificate, for all types of associations, whether self-managed or professionally managed. (§55.1-2316)

Purchasers cannot be held liable for unpaid assessments or fees that are greater than the amount set forth in the resale certificate, updated resale certificate, or financial update. Associations will be bound by the information provided in the resale certificate or resale certificate update as to the amount of current assessments and any violation of the governing documents or rules or regulations, unless the purchaser had actual knowledge that the contents of the resale certificate were in error. (§55.1-2313)

The preparer of the resale certificate or any updates thereto shall be liable to the seller in an amount equal to the actual damages sustained by the seller in an amount not to exceed \$1,000. (§55.1-2314)

Associations must publish and make available a schedule of applicable fees for the preparation and delivery of the resale certificate and any updates thereto, for the inspection of the unit, and related to any post-closing costs. (§55.1-2316)

The content of the new resale certificate has a number of new requirements, including (§55.1-2310):

- Preparers must include their name, address, and phone number as well as that of any managing agent;
- Associations must include a copy of the governing documents and any rules and regulations of the association;
- Associations must disclose any restraint on the alienability of a unit;
- Associations must include a copy of the current operating budget;
- Associations must provide a copy of approved board meeting minutes from the past six months and approved or **draft** minutes of the most recent association meeting;
- Associations must provide a statement setting forth any restriction(s), limitation(s), or prohibition(s) on
 - the right of an owner to display the U.S. flag;
 - the right of an owner to install or use solar collection devices;
 - the size, placement, or duration of display of political, for sale, or any other signs on the property;
 - parking or vehicles; and
 - an owner's ability to rent the unit.

EDUCATION & OUTREACH

This year the Office focused on updating its website to make it easier for constituents to find information and to help them better understand the Office's jurisdiction as well as how to move forward if they have a complaint or wish to file a NFAD. The Ombudsman and AA also attended a number of online seminars related to community associations and legislative changes.

As noted last year, the Agency is working toward a substantial technology upgrade in the near future which should pave the way for the Office to create a much stronger online presence. While the Office had several goals for the year, the volume of calls, emails, complaints and NFADs took priority. Now that the AA is fully trained and self-sufficient, it is hoped that many of last year's goals can be met in the coming year. Those goals included the creation of a newsletter to help educate constituents on the law and issues arising in associations and this office, the creation of teaching videos, seminars, a strengthened FAQ section, and possibly some form of online forum for questions and answers.

The Ombudsman was a member of the Senate Bill 740 Work Group and directly involved in the regulatory review process for the CIC Ombudsman Regulations.

The Ombudsman has always served and will continue 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.

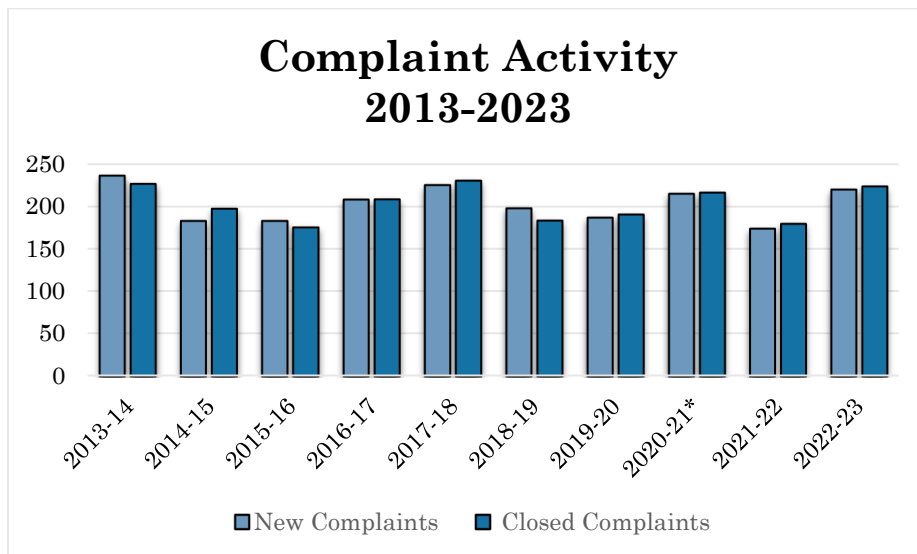
CONSTITUENT EXPECTATIONS

This year was very similar to the prior year. The Ombudsman and AA worked closely together for much of the year as the AA learned the ropes of the law, regulations, and working with members of the public who were concerned about their association's behavior. Between them, they responded to 1,994 phone calls and 3,397 emails.

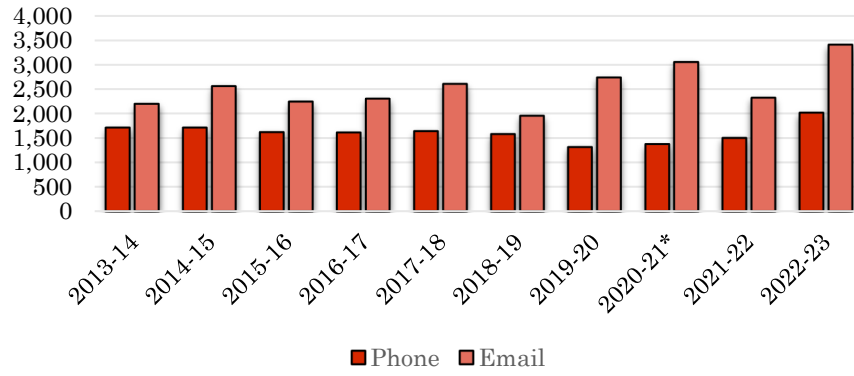
In most cases, phone calls are lengthy and can easily exceed thirty minutes, and it is not unusual to have hour-long conversations. Based on the very high number of calls this year, the increase over the highest prior year would result in nearly an additional four weeks of work, assuming each call took 30 minutes. Emails also take a sizable amount of time for response since we often must research the topic or track prior emails to pinpoint the concerns of the constituent. Estimating 20 minutes per email response and based on the number of emails as compared to the highest number previously received, we estimate an additional three weeks to respond to those. This increase in phone calls and emails was huge and had quite an impact on the office and our ability to accomplish much beyond our daily responses to incoming calls and emails, and the review and drafting of determinations for Notices of Final Adverse Decision.

We continue to spend a large portion of our time counseling associations and constituents on the association complaint process required by the Common Interest Community Ombudsman Regulations. We help associations to better understand the process so that they can carry it out in accordance with the Regulations, we advise them on the requirements of the process and review draft complaint procedures, and we help constituents understand the process for filing a complaint through their own association’s complaint procedure. In addition, as is noted by the large numbers in our annual statistics, the Office also spends a great deal of time reaching out to associations that have failed to adopt a complaint procedure or have failed to respond to a submitted association complaint. This poses a challenge as it can take weeks and sometimes months to bring these associations into compliance.

The Office maintains a steadfast commitment to delivering exemplary guidance to constituents, thereby fulfilling its obligations as mandated by law. Our prompt email and phone responses often evoke surprise from constituents due to their expeditious nature. We dedicate significant time on phone calls, providing a platform for disheartened members of the public to voice their grievances, with the aim of steering them towards viable solutions or avenues to address their concerns. Determinations for NFADs are provided as quickly as possible, despite the large amounts of supporting documentation that may be included. The Office’s paramount goal is, to the extent possible and within the boundaries of its jurisdiction, to provide the best possible customer service and information it can to every person that contacts us.



Phone Call & Email Activity 2013 - 2023



*2020-2021 is the first full year the Office ceased its review of times-shares and focused solely on common interest communities.

LEGAL DEVELOPMENTS

State Legislation

Very few bills related to common interest communities were seen at the General Assembly this year, but the few that were passed have the potential to make a substantial impact on common interest communities and the Office of the Common Interest Community Ombudsman.

Bill No.	Patron	Description
HB 1519	Adams	Provides with respect to the Property Owners' Association Act and the Virginia Condominium Act that a management contract that contains an automatic renewal provision may be terminated by the association or unit owners' association, as the case may be, or the common interest community manager of either such association at any time without cause upon not less than 60 days' written notice. This bill adds §55.1-1837 and §55.1-1940.1 to the Code of Virginia.
HB 1627 SB 1042	Coyner McPike	<p>Allows the Office of the Common Interest Community Ombudsman, upon receiving any notice of a final adverse decision issued by a common interest community association, to either (i) refer such final adverse decision to the Common Interest Community Board for further review of whether such decision is in conflict with relevant laws or Board regulations or (ii) make a determination of whether such final adverse decision conflicts with relevant laws or Board regulations. If the Office determines that such final adverse decision conflicts with relevant laws or Board regulations, the bill requires the Office to promptly notify the governing board, and if applicable the common interest community manager, of the association of such determination. If the Common Interest Community Ombudsman receives a subsequent notice of final adverse decision for the same violation within one year of such determination, the Office shall refer the matter to the Board. The bill also requires the Office to maintain data on referrals made to the Board.</p> <p>Finally, the bill provides that if, within one year of issuing a determination that an adverse decision issued by a common interest community association is in conflict with relevant laws or Board regulations, the Director of the Department of Professional and Occupational Regulation receives a subsequent notice of final adverse decision for the same violation, the Director must refer the repeat violation to the Board. This bill amends §54.1-2354.3 and §54.1-2354.4 of the Code of Virginia.</p>
HB 2235 SB1222	Wampler Mason	Establishes the Resale Disclosure Act, which sets out disclosure requirements and authorized fees relating to contracts for the resale of property located within common interest communities and provides for the issuance of resale certificates or financial updates. The bill repeals the existing disclosure requirements and authorized fees relating to association disclosure packets under the Property Owners' Association Act

		<p>and resale certificates under the Virginia Condominium Act. The bill requires a seller to obtain a resale certificate and provide the certificate to the purchaser. The bill does not apply to contracts ratified prior to July 1, 2023. This Act can be found at Chapter 23.1 in Title 55.1 of the Code of Virginia.</p>
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Virginia Court Cases

There were a number of cases related to common interest communities, several of which may have a lasting impact on associations.

Stephen J. McNaughton v. Mountain Brook of Troy, Inc.

Louisa Circuit Court, Louisa, Virginia, February 2023

A declaratory judgment was entered, subsequent to a letter opinion, against the association that declared, among other things, that the association was an unincorporated association of lot owners, that the incorporation of the association by members of its architectural control committee was *ultra vires*, unanimous consent was required to incorporate the association, the eighth declaration to the covenants was improperly adopted and not enforceable, the eighth declaration is not a declaration as defined by the POA Act, and it failed to ratify the incorporation. As a result of these findings, the association cannot take any action to enforce the declaration. The case resulted from a challenge by the plaintiff to the validity of an eighth declaration of the association resulting from the actions of the architectural control committee under the seventh declaration and its failure to obtain unanimous consent from all members of the association prior to incorporation.

Dorcon Group, LLC v. Westrick, et al.

Unpublished, Court of Appeals of Virginia, Leesburg, August 2023

This is an appeal from the Circuit Court of Loudoun County where the court failed to award Appellant declarant and injunctive relief. This case pertains to a subdivision created in 1981 with a deed that imposed restrictive covenants on all but four lots. The four lots were not required to be residential and could be used for non-residential purposes approved by the county zoning and subdivision ordinances and they were also excepted from crop raising restrictions to which all other lots were subject. The Appellant purchased one of the four lots and planned to build a Bed and Breakfast. The lot owners amended the Deed to include a new restrictive covenant that prohibited commercial activities. The Appellant filed suit to challenge the amendment. The circuit court dismissed the case. The Appellant returned and argued that the language in the covenants allowing the restrictions to be excepted, modified, or vacated were improperly construed. While the circuit court found the term ‘modified’ to be unambiguous, the Appeals Court found otherwise. It found that a modification cannot add an entirely new restrictive covenant not previously present. The new language made the restrictive covenant more restrictive, and it did not specify what restrictive covenant was being amended.

Burkholder v. Palisades Park Owners Association, Inc.

Court of Appeals of Virginia, Winchester, February 2023

This case addressed the use of assessments to pay for third-party inspection of lots for violations. The court found that §55.1-1805 allows associations to use assessments only for reasons related to the use of common areas, or for reasons specifically allowed by law or the association's governing documents. The association argued that it had the power, under the declaration, to use assessments for this purpose, but the court ultimately decided that while such authority may have been implied in the declaration, it was not "expressly authorized" by the declaration. A dissenting opinion on the decision found that the declaration did expressly authorize the use of the annual assessments for lot compliance inspections, but it did not explicitly do so. The dissent further noted that "[s]tretching "expressly" to mean "explicitly," raises the bar beyond what is required by the plain meaning of the applicable statute..."

Telegraph Square II, A Condominium Unit Owners Association v 7205 Telegraph Square, LLC

Court of Appeals of Virginia, Winchester, April 2023, June 2023

The trial court found that the condominium association breached its contract with the appellee, and violated the Condominium Act when it assigned all common elements in Phase I to a limited number of unit owners. The Association appealed the decision. This action came about after the association re-allocated parking in a portion of the association to a limited number of owners while still assessing all owners for the cost of maintenance and repair. The Court viewed this as a failure to provide equal access to common elements by all owners. The court also awarded the Appellant monetary damages for lost rent, resulting from the changes to the use of parking, and approved the Appellant's withholding of assessments during the dispute. The Court found that the association "impermissibly converted common elements into limited common elements," "failed to comply with Fairfax County zoning ordinance minimum requirements..." could have foreseen the lost rent damages proximately caused by the association, "improperly assessed the Appellant for the repair and maintenance..." and "the Appellant is entitled to an award of its attorney fees..." On June 6, 2023, a petition for a rehearing *en banc* was granted by the Court of Appeals.

Theodore Theologis v. Mark Weiler, et al.

Court of Appeals of Virginia, Winchester, February 2023

The plaintiff was elected as a board member in 2017 and as president in 2019. He was reelected in 2020. In July of 2020 a petition was signed by roughly twenty-four owners to remove the plaintiff from the board and a special meeting was scheduled. Four of the defendants circulated a letter to the other association owners encouraging them to vote to remove the plaintiff. The letter contained several specific concerns about the plaintiff's performance. The fifth defendant published a social media message encouraging participation in the special meeting and suggesting the plaintiff had acted inappropriately. The plaintiff filed a complaint in circuit court alleging that he had been defamed by the letter and the social media post and that the five defendants conspired to injure him in his trade, business, and occupation. The circuit court dismissed the defamation claims and the business conspiracy claims. On appeal, the court found that the "defamation claims fail against all defendants because the statements lack sufficient "sting" to harm Theologis's reputation."

Thomas Jefferson Crossings Homeowners' Association, Inc. v. Mansour Etemadipour, et al.
United States District Court, Lynchburg, October 2023

This case came to the Court as a result of Defendant's motion for summary judgment. Plaintiffs filed suit against defendants claiming they were in breach of contract for violating the covenants and restrictions of the association when they built three houses without approval. Defendants argued it was impossible to comply with the covenants and restrictions, that the remedies sought were improper, and the plaintiff failed to join a party.

Defendants allegedly built their homes without permission and did not follow the architectural standards for the community. However, at the time of construction, the Architectural Review Board was not in existence and the Defendants claim they could not comply with the covenants as a result, while Plaintiffs argued that they should have submitted their plans to the board, per the covenants. The Defendants did keep the President aware of their progress and used plans that had been used by the developer. There were, however, several alterations to the plans, namely pressure treated wood was used instead of Trex, and the windows did not conform with the plans. The Court did find that there was a dispute of a material fact (whether Plaintiff prevented Defendants from having their architectural plans approved) and the Defendants' request for summary judgment was denied.

One of the requested remedies was for an injunction that would allow demolition of the homes. The Court found this remedy inappropriate since such action would be out of proportion with the relief sought. Instead, the Defendants could replace any non-conforming aspects of the homes, rather than tearing them down. The Court would not determine whether the use of a crawl space rather than slab construction warranted destruction of the homes, since the governing documents of the association only provide authority to regulate external appearances and the plans do not specify slab construction. The Court awarded summary judgment to the Defendants regarding demolition of their homes, but denied it as to whether other, more reasonable remedies are available to the Plaintiff.

Federal Developments

Following are recently introduced federal bills that may affect community associations. Several bills have carried over from the prior year and are still under consideration.

Freedom to Invest in Tomorrow's Workforce Act of 2023 (H.R. 1477/S. 722)

This bill would amend the Internal Revenue Code of 1986 to permit certain expenses associated with obtaining or maintaining recognized postsecondary credentials to be treated as qualified higher education expenses for purposes of 529 accounts. *Introduced March 2023, referred to the House Committee on Ways and Means/ Introduced March 2023, referred to the Committee on Finance.*

National Flood Insurance Program Reauthorization and Reform Act of 2023 (S. 2142)

This bill would reauthorize the National Flood Insurance Program and other purposes. *Introduced June 2023, referred to the Committee on Banking, Housing, and Urban Affairs.*

Federal Disaster Housing Stability Act of 2023 (H.R. 3219) This bill provides for a moratorium on evictions from and foreclosures on residences during a major disaster or emergency, and for other purposes. *Introduced May 2023, referred to the House Committee on Financial Services.*

Disaster Assistance Fairness Act (H.R. 3777) This bill amends the Robert T. Stafford Disaster Relief and Emergency Assistance Act to provide assistance for common interest communities, condominiums, and housing cooperatives damaged by a major disaster, and for other purposes. *Introduced May 2023, referred to the Subcommittee on Economic Development, Public Buildings, and Emergency Management June 2023.*

Protecting Small Business Act of 2023 (H.R. 4035/S. 2623)

This bill would require the Secretary of the Treasury to harmonize the effective dates of all rules required under the Corporate Transparency Act, and for other purposes. *Introduced June 2023, referred to House Committee on Financial Services / Introduced July 2023 and referred to Committee on Banking, Housing, and Urban Affairs.*

Fair Accounting for Condominium Construction Act (H.R. 4280) This bill amends the Internal Revenue Code of 1986 to provide an exception to percentage of completion method of accounting for certain residential construction contracts. *Introduced June 2023, referred to the House Committee on Ways and Means.*

National Flood Insurance Program Reauthorization and Reform Act of 2023 (H.R. 4349) This bill would reauthorize the National Flood Insurance Program, and for other purposes. *Introduced June 2022, referred to the Subcommittee on Economic Development, Public Buildings, and Emergency Management. Initially referred to the Committee on Financial Services, and in addition to the Committees on Transportation and Infrastructure, and Ways and Means.*

Making Condos Safer and Affordable Act of 2023 (H.R. 4465) This bill amends the National Housing Act to authorize insurance of certain mortgages to finance repairs and improvements to condominium projects, and for other purposes. *Introduced July 2023, Referred to the House Committee on Financial Services.*

The U.S. Corporate Transparency Act (H.R. 6395 as part of the William M. Thornberry National Defense Authorization Act for Fiscal Year 2021) This bill was passed to reduce money laundering, tax fraud, terrorist finance, and other financial wrongdoing and was part of the Anti-Money Laundering Act of 2020. The bill became law in 2021 when the House and Senate overrode the President's veto. It will require certain types of corporations not otherwise exempted to file information with the Financial Crimes Enforcement Network (FINCEN). The initial report is required no later than December 2024.

Reports must contain the name of the company, any “dba” associated with the corporation, the address of the corporation, the IRS taxpayer identification number (including the employer identification number) and beneficial owner information. Those involved in community associations are concerned about the impact of these new requirements on community associations. In addition to the general corporate information required, information on the “beneficial owners” will also be required and will have to be updated regularly. Based on the current definition of a beneficial owner, people serving on their community association board may be considered a beneficial owner and thus subject to a requirement that every beneficial owner have its full legal name, current residential address, unique identifying number, and a copy of the document that includes that number (passport or state identification) filed with FINCEN. This information will have to be updated every time a board member changes if that association falls under this legislation.

A failure to comply with the law may result in civil penalties of \$500 per day up to \$10,000 as well as criminal fines or prison. Numerous community association organizations are delving into this issue since it is not thought that this bill was ever intended to impact community associations, but as written, it may indeed have a substantial impact. Associations, managers, and attorneys will need to keep their eye on this law in the coming months.

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 and may either (i) refer such decision to the Board for further review of whether such decision is in conflict with laws or Board regulations governing common interest communities or interpretations thereof by the Board or (ii) make a determination of whether a final adverse decision is in conflict with laws or Board regulations governing common interest communities or interpretations thereof by the Board and promptly notify the complainant of such determination. If the Office determines that such conflict exists,

the Office shall promptly notify the governing board, and if applicable the common interest community manager, of the association that issued the final adverse decision that such decision is in conflict with laws or Board regulations governing common interest communities or interpretations thereof by the Board. If within 365 days of issuing such determination the Ombudsman receives a subsequent notice of final adverse decision for the same violation, the Office shall refer the matter to the Board;

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, referrals made to the Board, 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 Ombudsman 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 Ombudsman shall provide a copy of the written notice to the governing board, and if applicable the common interest community manager, of 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 shall provide the complainant and the governing board, and if applicable the common interest community manager, of 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 final and not subject to further review. If within 365 days of issuing a determination that an adverse decision is in conflict with laws or Board regulations governing common interest communities or interpretations thereof by the Board the Director receives a subsequent notice of final adverse decision for the same violation, the Director shall refer the repeat violation to the Board, which shall take action in accordance with § 54.1-2351 or 54.1-2352, as deemed appropriate by the Board.