

2015 ANNUAL REPORT TO THE GOVERNOR



Assisting Common Interest Communities to Understand Their Rights and Responsibilities, and the Processes Available to Resolve Disputes

**COMMON INTEREST COMMUNITY
OMBUDSPERSON
DELAWARE DEPARTMENT OF JUSTICE**

The Common Interest Community Ombudsperson shall:

"[M]ake an annual report of the Office's activities to the Governor, the Attorney General, the General Assembly, and the Chief Justice of the Supreme Court on or before December 1 of each year. ... Each such report shall contain:

- a. Statistics on the number of inquiries and complaints handled by the Office;*
- b. Information on education and outreach efforts by the Office;*
- c. Concerns expressed to the Office by declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, or other interested parties;*
- d. Legal developments impacting common interest communities;*
- e. Recommendations for changes to Delaware law or rules of court procedure designed to improve the regulation and operation of common interest communities made by the Ombudsperson and the Common Interest Community Advisory Council;*
- f. Any other information deemed appropriate by the Ombudsperson."*

29 Del. C. §2544 (16)

Acknowledgements

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Geneer Johnson, Sr. Paralegal; Lisa Spellman, Office of Foreclosure Prevention, Outreach Coordinator; Rebecca Warne, Office Manager; David Casler, Deputy Attorney General, and Colette Monaghan, Administrative Specialist.

Table of Contents

Message.....	1
What is an Ombudsperson?	1
Community Served by the Office of the Ombudsperson.....	1
The Need Addressed by the Office of the Ombudsperson.....	2
Overview of the Services Available Through the Ombudsperson	2
Status of the Office.....	3
Advisory Council	4
Education.....	4
Outreach.....	5
Dispute Resolution.....	5
Election Services	5
Database of Community Contacts.....	6
Special Projects	6
Investigations.....	6
Final Thoughts.....	6
Annual Report.....	9
INQUIRIES AND COMPLAINTS HANDLED BY THE OFFICE.....	9
Inquiries	10
Email Inquiries	10
Post-IDR Complaints	10
Alternative Dispute Resolution	11
Education Efforts.....	13
Educational Programs Planned	14
Outreach Efforts.....	15
Meetings and Presentations.....	15
Information Gathering	15
Newspaper Interviews.....	15
Email.....	15
Tweets	16
Mail	16

CONCERNS EXPRESSED TO THE OMBUDSMAN	17
Concerns Expressed- by County	17
Kent County	17
Sussex County.....	17
New Castle County	18
Concerns Expressed By Community Members	18
Concerns Of Purchasers.....	18
Concerns of Homeowners.....	18
Concerns of Boards	25
Concerns Of Board Members.....	27
Concerns of Declarants.....	28
Concerns of Other Interested Parties	29
LEGAL DEVELOPMENTS IMPACTING COMMON INTEREST COMMUNITIES	31
Utilities Shut Off Problems Addressed By HB 177:.....	31
Pre-Existing HOA's Authorized to Adopt All or Some of DUCIOA: HB 5:.....	31
RECOMMENDATIONS FOR CHANGES TO DELAWARE LAW OR COURT RULES TO IMPROVE REGULATION AND OPERATION OF COMMON INTEREST COMMUNITIES ...	33
Under Study:.....	33
ADVISORY COUNCIL	37
Additional Committee.....	38
Advisory Council Activity	38
Mechanisms to Increase Collection Rate	38
Mechanism to Register Communities.....	38
CONCLUSION	39
Appendix	1
THE COMMON INTEREST COMMUNITY OMBUDSPERSON ACT	3
The Common Interest Community Ombudsperson Act	5
§ 2540 Short title.....	5
§ 2541 Definitions.....	5
§ 2542 Common Interest Community Ombudsperson; creation, appointment, role, term of office, and vacancy.....	6
§ 2543 Common Interest Community Ombudsperson; qualifications.....	6
§ 2544 Common Interest Community Ombudsperson; powers and duties.....	7

§ 2545 Required information.....	11
§ 2546 Common Interest Community Advisory Council.....	12
PROCEDURE FOR FILING A COMPLAINT	15
Procedure for Filing a Complaint.....	17
TEMPLATE FOR INTERNAL DISPUTE RESOLUTION PROCESS (IDR).....	21
Template Internal Dispute Resolution Process (IDR).....	23
Template IDR Complaint Form	29
CIC CONTACT/COMPLAINT FORM.....	33
ADR PROCEDURES AND FORM AGREEMENTS	45
ADR Procedures and Form Agreements	47
TEMPLATE FAIR ELECTIONS PROCEDURE.....	61
Template Fair Elections Procedure	63
TEMPLATE BYLAW FOR THIRD PARTY NOTICE TO HOA BEFORE UTILITY SHUTOFF...71	
Template Bylaw for Third Party Notice to HOA before Utility Shutoff.....	73
ADVISORY COUNCIL MEMBERS	75
Advisory Council Members	77
WEBSITE ANALYTICS	79
Website Analytics	80

Message

The General Assembly created the Office of the Common Interest Community Ombudsperson in the Department of Justice in August 2014. The Office assists members of residential “common interest communities” such as condominiums, cooperatives and planned subdivisions of single family homes, to understand their rights and responsibilities, and the processes available to them. Where possible, the Ombudsman is to help resolve homeowners’ association disputes without resort to the judicial system.

The Act requires the Ombudsperson to submit an annual report each December. 29 *Del. C.* §2544 (16). This report covers the first 10 months of operation of the Office of the Ombudsperson.

What is an Ombudsperson?

An ombudsperson (or ombudsman) is a government official who receives, reports on, investigates complaints, and tries to deal with problems fairly.

The Common Interest Community Ombudsperson’s statutory charge is to “assist [members of common interest communities] in understanding their rights and responsibilities and the processes available to them according to the law, regulations and documents governing their respective common interest community.”

Community Served by the Office of the Ombudsperson.

Common interest communities are condominiums, cooperatives, and planned subdivisions that share one essential common feature: They are authorized by deed restrictions, covenants or conditions to set and collect mandatory annual assessments for the maintenance of common areas or common elements of the community such as streets, street lights, open space, storm water management ponds, and amenities such as play grounds, clubhouses, swimming pools, and many others.

Unlike the Delaware Uniform Common Interest Ownership Act, (the DUCIOA), the law creating the Office of the Ombudsperson applies to all common interest communities regardless of size or when they were created.

The members of the “Common Interest Community” served by the Office of the Ombudsperson include:

- Homeowners or “unit owners” in common interest communities;
- Developers or “declarants” who “declare” the deed restrictions;
- Homeowners’ associations (HOA), condominium or cooperative councils, Property Owners’ Associations (POA), and maintenance corporations;
- Executive boards of common interest community associations; and
- Other interested parties.

The Need Addressed by the Office of the Ombudsperson.

The General Assembly explained its reason for creating the Office:

In Delaware, county and municipal governments have required that land developers create common interest communities to administer, maintain, or improve common elements in the community such as pools, community centers, storm water management systems, or other common space or infrastructure. These communities are created by legal documents drafted by the developer and are managed by those living in these communities. This system can create difficulties for those living in these communities, especially when disputes arise.

This bill [creates] an Office of the Common Interest Community Ombudsman. The bill [empowers] the Ombudsman to assist common interest communities to understand their rights and responsibilities and to resolve disputes without recourse to the judicial system.

The bill ...also [creates] a Common Interest Community Advisory Council to advise and assist the Ombudsman and to undertake a review of the current common interest community system and make recommendations to the Ombudsman for changes to Delaware law and rules of court procedure to improve the system, with the hope these recommendations would be incorporated into legislation by the 148th General Assembly.

Overview of the Services Available Through the Ombudsperson

The Ombudsperson has the powers and duties stated in 29 *Del. C.* §2544 (1)-(20). They fall into 6 functions:

- **Create** processes, forms and rules for: a Template “Internal Dispute Resolution” (IDR) process for communities to adopt; Alternative Dispute Resolution” (ADR); a Contact/Complaint form to engage the Office; a Template “Fair Election Procedure” and others.

- **Educate** members of Common Interest Communities-through a website, publications, and presentations about the Office to communities and groups throughout the State. The Office also arranges and participates in educational opportunities and workshops for members of the Common Interest Community. The Office participates in public meetings to gain an understanding of the issues facing common interest communities in Delaware.
- **Mediate**, arbitrate and provide other Alternative Dispute Resolution (ADR) options when the parties consent. ADR does not depend on use of a complaint process.
- **Investigate**, first by reviewing complaints that were not resolved through the "Internal Dispute Resolution" (IDR) required by the Act, at the Association level; and if appropriate, issuing subpoenas, and referring meritorious allegations of violations of existing Delaware law to other divisions of the Department of Justice, or to other law enforcement agencies.
- **Electorate Services**: Provide vote counting and other services to promote fair elections to homeowners' associations, and create a Fair Election Process.
- **Advisory Council** development and support for study and recommendations on changes to Delaware law or rules, to improve regulation and operation of common interest communities and to advise the Ombudsman on statutorily required subjects:
 - a. Mechanisms to increase the collection rate for common interest community assessments.
 - b. Developing conflict resolution procedures within common interest communities.
 - c. The feasibility of mandatory mediation, arbitration, or other forms of ADR for disputes not able to be resolved within common interest communities and, if feasible, how to implement such a process;
 - d. Developing mechanisms for the registration of common interest communities with the State or other political subdivision.
 - e. Any other topic the Council deems appropriate.

Status of the Office

The Attorney General appointed the Common Interest Community Ombudsman on November 3, 2014. The law allowed the Office until February 1, 2015 to organize and begin operations. It opened on time, received complaints and provided information on request.

Since November 2014 the Ombudsman:

Advisory Council

- Formed an Advisory Council of extraordinary, talented and committed members, appointed by the officials listed in the Act. A list of Members of the Council is included in the Appendix. Although required to meet four (4) times each year, the Council met five (5) times in 2015. Although a few positions remain unfilled, each person who resigned, (usually because of moving away) offered to remain in touch with the Office to assist.
- Established committees of the Advisory Council to address the statutorily assigned topics. The Council is developing additional committees, such as an Education Committee and a Mentoring Committee.

Education

- Created a website for information, announcements, resources, educational materials and forms for requesting services which has been up and running since February. New links are added and updated often. Additional articles are being developed to further assist the homeowners in understanding their rights. The website is available at attorneygeneral.delaware.gov, and listed under "Public Resources" on the Department of Justice homepage.
- Created Templates for homeowners' associations to adopt or use:
 - "Internal Dispute Resolution" Complaint form and Procedure (IDR)
 - "Contact/Complaint" form to make an "Inquiry," request a presentation to introduce the Office, or file a post-IDR request for review
 - Fair Elections Procedures
 - Template Bylaw for associations to use to require homeowners to designate the association as a third party to receive notice of termination of utility service, under recent legislation, HB 177.

Copies of these forms are on the website and in the Appendix.

- Arranged a Leadership Workshop presented by the Community Associations Institute, (CAI) in September, and began arrangements for similar presentations in Kent and Sussex.

Outreach

- Answered hundreds of telephone calls and emails from homeowners, association boards and attorneys about the services and procedures of the Office. Assisted callers in understanding general questions about DUCIOA, General Corporation Law, and Roberts Rules of Order, the processes available for IDR, filing a Complaint, ADR, and other processes available through the Department of Justice, Consumer Protection Unit, and the Chancery Court.
- Made dozens of presentations to hundreds of people in each county to introduce the Office of the Ombudsperson, to answer questions, and to hear public comment on issues affecting common interest communities.

Dispute Resolution

- Offered and conducted consensual mediation and other forms of Alternative Dispute Resolution. ADR is available before or because of a review of an unsuccessful IDR. Form agreements and procedures for ADR are available on the website and in the Appendix.
- Arranged for the Court of Common Pleas to accept referral of cases for mediation through the CCP Community Mediation program if the parties prefer that the mediation *not* be conducted by a Deputy Attorney General. The Ombudsman made two referrals in 2015.
- Reviewed Complaints submitted after unsuccessful IDR. These usually result in a detailed letter explaining the Ombudsman's concerns and offering meetings or ADR. Should an HOA board not respond to the homeowner or the Ombudsman about serious departures from the bylaws in elections or spending, among other things, the Office responded by sending the Ombudsman's review letter to every member of the community and inviting the entire community to a presentation to introduce the Office, to discuss and answer questions, and discuss options for addressing the concerns. As a result, some officers resigned and were replaced with bylaw-reading homeowners. It generated new interest in community governance.

Election Services

- Published a procedure for fair elections, based upon a two envelope, secret ballot. The procedure is available on the website.
- Arranged for the Department of Elections to provide election services under contract with the Office of the Ombudsman when petitioned by 15% of the community.

Database of Community Contacts

- Worked with the Division of Corporations, New Castle and Kent Counties to develop a database of community associations and maintenance corporation contacts. (Sussex has no comparable database.) Although incomplete, the Office used the database to announce educational HOA Leadership Workshops. We intend to continue development of the database and use it for those and other announcements.
- Those who are interested can sign-up for the email list from the “Announcements/News” page of the website.

Special Projects

- Worked with a low income homeowners’ association at the request of DNREC to restore the HOA collection of assessments so residents can maintain the community’s septic system, as required by its bylaws. A working group of other agencies is assisting the community in this effort and in several other ways.

Investigations

- Subpoenaed bank and association records when appropriate in review of disputes. Apparent theft was uncovered and referred for further investigation in one community. Subpoenaed records exonerated a treasurer in another investigation.
- Uncovered insurance misunderstandings and other matters that the Office referred for investigation to other divisions of the Department of Justice, or to other agencies.

Final Thoughts

The Ombudsman uses the website every day. The “Important Statutes” are indexed and word-searchable. We are always looking for ways to make this complex area of law more easily understood by those in the Common Interest Community.

I hope you will visit the Ombudsperson’s Website and read about this Office.

At the link for “Announcements/News,” I hope you will sign up to receive email notices of legislative changes and educational opportunities such as CAI’s “Leadership Workshop.” We expect to hold additional sessions of that and others in each county in 2016, and send reminders of these events along with reminders of such things as the due date for filing annual franchise tax forms.

At the link for "Information for Homeowners," you will find direct links to several publications of the Community Associations Institute (CAI), including its book "Introduction to Community Association Living," and to CAI's Foundation's "Best Practices Reports" on several topics.

At the link for "Services of the Office of the Ombudsperson" you will find a description of the services offered by the Office, with direct links to the forms needed.

Feel free to notify the Office of anything that you would find useful to include on the website.

Christopher J. Curtin
Deputy Attorney General
Common Interest Community Ombudsman

Annual Report

INQUIRIES AND COMPLAINTS HANDLED BY THE OFFICE

The Ombudsperson Act requires the Ombudsman:

"To contact declarants, common interest community associations, the executive board of a ... community association, unit owners ... and other interested parties to inform them of the services available through the Office." 29 Del. C. §2544 (1)

The staff of the Office of the Common Interest Community Ombudsman consists of the Ombudsman and a shared senior paralegal. The Office fields many calls and emails every day, besides a myriad of other duties.

The discussion below of "Concerns Expressed" by members of common interest communities details many types of calls. Many are questions concerning the procedures of the new "Internal Dispute Resolution" process established by the Ombudsperson Act, or the next step in the process to file the complaint with the Office. We answer many other questions and inquiries by reference to a community's bylaws, or to the information available on the Ombudsperson's website. We answer many more by a general, nonbinding explanation of the rights and responsibilities of the caller, and the processes available under the law and the governing documents of the community.

The Act clarifies that:

- The Ombudsperson is not the attorney for declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, or other interested parties;
- No attorney-client relationship is implied or established by the Ombudsperson's communication with any persons, and
- The Ombudsperson may not act as, or appear to act as an attorney in a legal action brought by any person.

29 Del. C. §2544 (2).

This is so because of the Ombudsperson's duty to provide neutral service in mediation, arbitration or other Alternative Dispute Resolution. The Ombudsperson is to refer matters to other divisions or agencies where appropriate.

Inquiries

The statistics for the first 10 months of operation do not capture all contacts with members of the common interest community, since the mechanism for capture were not part of the original implementation of the Office. However, we expect new systems that will capture more of the contacts beginning in 2016.

Inquiries come in through telephone, email and "Contact/Complaint" forms. We do not have statistics on telephone calls, but the Office took hundreds of calls in the first 10 months since its inception. The Office receives most "Inquiries" seeking information by email. A few Inquiries required a review of the governing documents. Inquirers filed those using Contact/Complaint forms.

Website Hits: 3172 Pageviews; 2349 Unique Pageviews

Email Inquiries

The Office receives and responds to many email and telephone requests for information daily. We try to get information back to the inquirer within 24 hours, or less. Most often we must inform the inquirer that the issue must first go through the IDR process before the Act permits the Office to review the matter. While some seek only general information; others may require a private attorney.

Before the website was operational the Office mailed or emailed many copies of the Internal Dispute Resolution form and procedure to community members. We estimate that only 2% returned as Complaint forms for review. We have heard from many that the IDR process succeeded in resolving complaints, with no more contact with the Office than reviewing the website.

The Office responded to 3925 emails

Post-IDR Complaints

HOA boards ignored or failed to resolve a few complaints using the IDR process. The Office accepts those as Complaints. Although the number is small, these are complex reviews. Often, there is not enough the information provided to determination whether or how much of the DUCIOA applies, or whether the community adopted any part of it. Some communities elect to continue to follow the Unit Property Act. Sometimes governing documents are silent on a specific issue, and DUCIOA may come back into play. In some cases bylaws conflict with mandatory sections of DUCIOA, so DUCIOA may come back into play. Sometimes the General Corporation Law or Robert's Rules of Order answer the question. The Office offers ADR in nearly every Post-IDR review. Sometimes the parties agree to ADR before review is complete.

Several complaints involved HOA boards that did not follow bylaws about:

- Election procedures.
- Expenditures beyond maintenance of common areas.

Others are more complex and require involvement of County governments concerning systemic problems, e.g. release of contractors' bonds without adequate inspection.

Several Boards did not respond to the IDR or the Ombudsman's request for the board's position. Sometimes the Ombudsman's inquiry caused compliance with the bylaws, or resignation of an officer or director. In appropriate cases the Office issued subpoenas to an association or a bank, especially if circumstances suggested theft of funds. Several complaints were withdrawn after the Office requested information.

Received: 20

Resolved: 10

Pending: 10, including 2 for monitoring

Alternative Dispute Resolution

Mediation: Parties requested and scheduled mediation only a few times. Only two cases went to mediation, but in each case the mediation was one or two full days. One case was unsuccessful, and one participant sued. The other case is pending another day of mediation. Both matters were complex. Neither went through a complete IDR process and Ombudsman review, since the parties agreed to mediation.

In two other cases, the matter suggested circumstances justifying referral to the Court of Common Pleas Community Mediation program, which only accepts referrals from law enforcement agencies. The Office made the referrals.

Binding Arbitration: The parties in one matter agreed to binding arbitration, but it is not yet scheduled.

Board Initiated ADR: In two cases, a board contacted the Office to make the offer of ADR to a homeowner, rather than filing suit. The Office agreed to make a non-threatening offer to provide ADR to a homeowner. However, neither offer was accepted. The Office did not receive a request to review either matter.

Expectations: When the database of community contacts is completed, the Office will send an announcement of the existence of the Office and the website, and the availability of IDR and ADR. The Office expects that the number of requests for review after IDR will increase significantly.

Other Statistics

Postage Expense: \$3895.00

Mailed fliers for Educational Workshop: 2100+ flyers, 300+ emails

Mailed letters to entire communities when a board did not respond: 400

Fees Collected (per Statute)

Filing Fees for Contact/Complaint forms:\$700

Billed for ADR (\$100/hour): \$3800

EDUCATION AND OUTREACH EFFORTS

The Act requires the Ombudsperson:

“To organize and conduct meetings to educate declarants, ... community associations, the executive board of a ... community association, unit owners ...and other interested parties about their rights and responsibilities and the processes available to them according to the law, regulations, and documents governing their respective common interest community.” 29 Del. C. §2544 (3)

In 2015 the Office received most requests for outreach during telephone calls or by email. The Website now offers a direct email link to request a presentation by the Ombudsman, or to join the mailing list. If a community has specific concerns that may require more preparation or review, a community can request a presentation using the “Contact/Complaint” form and include information specific to the community, including copies of its governing documents. The form is available, and “fill-able” on the Website.

Education Efforts

The Ombudsman made presentations to 35¹ homeowners associations, umbrella groups, and resident groups throughout the State to introduce the Office of the Ombudsperson, answer questions, and explain important points such as:

- The need to adhere to governing documents.
- The reason for and importance of honoring quorums.
- The right to access to HOA documents including financial information.
- The importance of proper accounting and fiscal procedures for protection of the homeowners' association's money.
- The rules and procedures for running effective meetings.
- The ability of an association to use Justice of the Peace Court “Debt Actions,” without an attorney, to recover unpaid assessments, as a supplement to liens.

The Ombudsman made presentations to groups as small as four board members, and to umbrella and other groups with over 100 attendees. The Ombudsman makes most presentations after business hours or on weekends, which often require driving two or three hours roundtrip.

¹ One intrepid Advisory Councilperson made a presentation when the Ombudsman developed a calendar conflict.

The Office of the Ombudsman teamed with two chapters of Community Associations Institute (CAI) for educational programs. The Act makes a representative of CAI a member of the Common Interest Community Advisory Council. CAI is a nonprofit industry group that provides educational materials and presentations and other resources to those living in and managing common interest communities.

In September 2015, CAI and the Ombudsman offered a "Leadership Workshop" aimed at board and association members for a basic understanding of the documents creating common interest communities and basics such as collections of assessments and enforcing community bylaws and restrictions. It was the first time CAI made a presentation in Delaware. The Ombudsman sent 2100 flyers and 300 emails announcing the program. CAI normally expects 15 to attend this Workshop, but 50 attended, which was the capacity of the facility to accommodate the demand. It is an all day presentation. The attendees remained engaged all day and asked the presenters pertinent and challenging questions. The attendees gave the program high marks.

In early November, the Office supported a presentation of the same workshop in Ocean City, by emailing notice to the limited Sussex County database.

Plans are underway with the CAI chapter that includes Kent and Sussex counties for 2016 presentations of the same Leadership Workshop as a foundation for other programs. Sites have been arranged and planning will continue in the new year.

The Office supported an educational presentation on issues faced by HOAs and the role of insurance by Community Association Underwriters, by posting the announcement on the website. CAU was a sponsor of the September CAI presentation.

Educational Programs Planned

Collection of annual assessments is a topic of interest to all HOA's and residents, throughout the State. Most boards and residents are unfamiliar with many processes for collection. While most are familiar with an association's authority to place liens on the property of delinquent unit owners, most find foreclosure or waiting for an owner to sell is too expensive or too remote for immediate funding requirements. Most boards are not familiar with the rules of the Justice of the Peace Courts that permit a corporation to designate a non-lawyer member to appear in court on behalf of the association to collect delinquent assessments. Many are also unfamiliar with the availability of processes for enforcing or executing on a judgment through wage garnishment or seizure and sale of personal property, or other real estate. The Advisory Council is preparing a Best Practices report as a guide, which the Office will use for an educational program.

Outreach Efforts

The Outreach efforts included newspaper interviews, email and direct mail to the evolving database of common interest communities, offering to make presentations and making presentations outside the Office to those who called the Office, providing Tweets for the Department of Justice to disseminate, and encouraging members of the Advisory Council to notify their association members to spread news of the existence of the Office.

Meetings and Presentations

The Ombudsman made 35 presentations about the Office and the services available, and attended participated in another 34 meetings concerning the Office.

Information Gathering

The Act requires the Ombudsperson *“To organize and hold public meetings as necessary to gain a comprehensive sense of the issues facing common interest communities in the state. 29 Del. C. §2544 (17) and to report the concerns expressed by members of common interest communities to the Office. 29 Del. C. §2544 (16) c.*

The Ombudsman made presentations and collected information in at least one meeting in each County.

Newspaper Interviews

Several news articles discussed The Office of the Ombudsperson in 2015:

- Wilson, Xerxes, *Got a gripe with a homeowner association? State office created to handle disputes*, Delawareonline.com June 19, 2015
- Bergdahl, Jenni, *When Residents Clash with Homeowner Associations, Some States Step In*, Stateline, (a publication of the PEW Charitable Trusts), October 5, 2015
- Stump, Jessica, *The Office of the Ombudsperson for the Common Interest Community- Reaching Solutions Together*, Synergy, Institute for Public Administration, University of Delaware <http://www.ipa.udel.edu/crp/synergy/spotlight.html>

Email

Nearly every response to an email seeking information includes a link to the Ombudsperson's Website.

The Office developed a preliminary database of contacts for homeowners' association for each county. Kent and New Castle counties have databases, based on storm water management records or manual searching, but both are incomplete since they do not include

the 57 municipalities in Delaware. Sussex County does not have a similar database, but members of the Advisory Council were able to provide contact information for many Sussex County Communities.

Working with the Division of Corporations, we are in the process of creating a more comprehensive database using annual franchise tax returns. All of these sources are incomplete but the combined databases should complement each other. The Office used this database to announce the CAI Leadership Workshop, and other educational opportunities.

Tweets

The Department of Justice periodically issues tweets. This Office submitted Tweets on educational opportunities, new website features, upcoming public forums and more.

Mail

The Office mailed 2100+ fliers to those in the database announcing the Leadership Workshop, and providing information about the office and the Website. In two matters, the Office mailed the Ombudsman's report of a Post-IDR complaint to every member of the affected community. There are usually 200+ affected homeowners in each community. These letters also explain the Office and give the link to the Ombudsperson's Webpage.

CONCERNS EXPRESSED TO THE OMBUDSMAN

Concerns Expressed- by County

The Act requires the Ombudsperson *"To organize and hold public meetings as necessary to gain a comprehensive sense of the issues facing common interest communities in the state. 29 Del. C. §2544 (17) and to report the concerns expressed by members of common interest communities to the Office. 29 Del. C. §2544 (16) c.*

The Ombudsman made presentations and conducted question-and-answer sessions to answer community questions and hear the concerns in each county. Several legislators, police community liaison officers, and county officials will hold a public meeting to discuss issues affecting Sussex County in February 2016.

In its first 10 months members of common interest communities expressed many and varied concerns to the Office of the Ombudsperson. The Internal Dispute Resolution Process resolved most of the issues and concerns. Others suggested the need for education and a few suggested the need for legislation:

Kent County

In Kent County, the Ombudsman made an information gathering presentation in cooperation with the Levy Court at the Administration Complex. The group was mostly residents concerned with problems of collection of annual assessments, and lack of quorums at annual meetings. These were major concerns in each County.

Concerns expressed include that the lien process is expensive and requires sale of the property before collection, a long time to wait in the current economic climate. The Ombudsman explained the availability of a personal Debt Action in Justice of the Peace Courts against homeowners in default of their assessments that would not require an attorney. This generated interest at each presentation. There were further explanations that a personal judgment, could lead to wage garnishment, or seizure and sale of personal property resulted in an additional discussion. Because of the widespread interest in this, the Advisory Council committee on Improving Collection of Assessments is working on a "Best Practices" report for the website. The Office is planning educational presentations on the subject in 2016.

Sussex County

In Sussex County, homeowners complained of poor road construction, and failure to build amenities due to amendment of declarations after the declarant or developer's bankruptcy or sale of the development project. This led to meaningful conversations with the County Administrator, who has been very active in identifying and correcting weak parts of the County's process.

To further the conversation in Sussex County, the Office of the Ombudsperson is working closely with a group of legislators, Delaware State Police Community Liaison Officers and County officials for a presentation scheduled for February 2016 in Sussex County. The Office developed an agenda and secured a location.

New Castle County

In New Castle County, the County Administration hosted a meeting with knowledgeable, active County residents to discuss issues of concern. Some, again, dealt with construction in violation of County Code, and means for resolving the issues.

Concerns Expressed By Community Members

Concerns Of Purchasers

Artificially Low Assessments During Sales

In all counties, there is concern that developers subsidize actual costs for common areas to keep assessments unrealistically low, for advertising purposes. Sticker shock sets in when the first homeowner controlled board formulates its first budget or first reserve fund. Purchasers who rely upon the developer's representations feel cheated.

Late Disclosure of Deed Restrictions and Rules

The sale process in some communities is troubling. Several sellers did not provide the governing documents until the day of, or at settlement. By then the purchasers could not adequately review or understand these complex documents. Some owners purchased in communities that they might not have considered if they had more time to review the restrictions imposed by the governing documents. Other communities posted the governing documents on the website for anyone to review. Sales staff in other communities discuss the realities of living in a common interest community before contracts are signed. This is an area of study for the Advisory Council.

Concerns of Homeowners

Transition

Another universal concern is the lack of specific requirements for "Transition" from developer to homeowner control of an Association, especially in Kent and Sussex counties. New Castle County participates in transitions. This results in homeowners better equipped to take control of their homeowners' association. A good transition involves working homeowners onto the board and committees as training. Many boards are adrift, not knowing how to operate a successful nonprofit, nonstock corporation or association. They report that at transition, the

developer dropped off a set of keys, and there was no effort to introduce the new board to its duties and responsibilities. Problems that result range from failure to file annual franchise tax returns and Federal Forms, to poor financial controls such as a treasurer having blank checks signed and balancing the bank statement without oversight. In one or two cases this practice resulted in significant theft of homeowners' funds.

Lack of Communication and Transparency During Declarant Control

- A number of communities report disregard of requests for access to financial records, and other information from declarant controlled boards and their property managers.
- Communities report declarants' refusal to have audits during and after declarant control.

Owner or Member Apathy

Community apathy resulting in lack of quorum for elections or voting on issues is rampant in each county. The Ombudsman discussed various strategies for increasing community participation at many presentations. The Office put links to Community Associations Institute's "Best Practices" reports on its website. These reports provide discussion and useful checklists and sample documents for several important issues that associations face, including "Governance." The Office also arranged for CAI to place several publications in a public library in each county. The State Librarian catalogued them on its website and can deliver each publication to any public library in the State.

Skills for Running Meetings

Lack of knowledge of proper procedure for running meetings is a frequent obstacle to proper operation of homeowners associations. The Office of the Ombudsperson included simplified Roberts Rules of Order publications on the website. Several Advisory Council members are very experienced in procedure. One assisted by explaining proper procedures to groups. One community we are working with benefited from the Office and Advisory Council members demonstrating proper meeting procedures following simplified Robert's Rules of Order.

Failure to Comply with or Adhere to Bylaws

This was among the most common complaints received from homeowners. Complaints usually result from failure of the homeowner or the Board to read governing documents. Specific complaints include:

- Elections-
 - The Board fails to follow quorum requirements.

- The Board changes directors' terms in office, making them conflict with the bylaws, and without changing the bylaws.
- The Board fails to provide notice of the elections, or ballot, or proxy, or nomination procedures stated in the bylaws.
- The Board enforces restrictions and bylaws against owners for such things as not concealing trash cans while Board members violate the same bylaws.
- The Board amends adopted budgets or bylaws without complying with bylaws.
- The Board waives payment of assessments for board members who provide services to the association, like grass cutting, or awards a contract for grass cutting to a board member or relative without offering the community the same opportunity.
- The Board extends the use of assessments beyond the authority in the bylaws. For example:
 - The Board spends or budgets funds for Community Events when bylaws limit expenditures to maintenance of common areas, and expressly describe the procedure for extending the use of the assessments by vote of the owners.
 - The Board takes on responsibility for infrastructure expenses, in a neighboring community without Association approval.
- The Board applies standards for fences and other architectural features in a discriminatory way, or without making reasonable accommodations under Americans with Disabilities Act requirements.
- The Board fails to keep minutes of board or Association meetings, or fails to provide them upon request of an owner.
- The Board fails to arrange audit of Association finances required in the bylaws.

Failure to Provide Reasonable Access to Association Records

Boards often deny access to Association records, such as bylaws, declarations, board meeting minutes, financial records and budgets. Homeowners report:

- Unprofessional and obstructive responses to requests for documents made to management companies.
- Lack of transparency and lack of response to requests for access to documents and other information by owners of storm damaged property.
- Obstructive interpretation of "proper purpose" for requesting association records.

Refusal to Resolve Owner Complaints Internally

The Ombudsperson's Act requires all communities to have a written "Internal Dispute Resolution" (IDR) procedure, or to use the one created by the Ombudsperson according to the Act. So far, no community submitted a pre-existing IDR process that a homeowner may use for a complaint about the Board, although many bylaws permit a Board to complain informally against a homeowner. Homeowners report refusal of internal dispute resolution for such matters as:

- Repairs to common areas such as bulkheads.
- Requests for access to Association records.
- Complaints concerning violation of bylaws about election procedures.
- Discriminatory enforcement of rules and Architectural Review standards.

Raising Assessments and Failing to Raise Assessments.

Homeowners report complaints concerning mandatory annual assessments, including:

- Disputes over including expenses of social events in assessments.
- Disputes over what is a "capital improvement."
- Disputes over what is a "common area."
- Disputes over what the "Reserve Fund" covers.
- Disputes over the amount of funding for the "Reserve Fund."
- Failure of the Board to collect against delinquent Association members.
 - Collecting delinquent accounts costs more than is recovered.
 - Failure of the Board to collect, resulting in others to refusing to pay.
 - Charging fines or fines too high for late payment or rule violations.
 - Refusal to consider unusual circumstances such as loss of a job, or hospitalization for illness or injury justifying a payment plan.
- Refusing to collect or fully fund reserves in non-condominium communities with amenities.
- Refusing to pay for improvements to storm damaged property beyond restoration.

- Charging the wrong interest rate, and sometimes the full annual interest rate each month, or charging interest on penalties.

Failure to Make Board Meetings Open to Association Members

Some executive Boards exclude Association members who are not directors for various reasons, including:

- The Board will claim that a meeting of the Executive Board is an “executive session” that is closed to the owners.
- Some Boards hold meetings in a resident’s house and exclude other owners.
- Some Boards do not allow comments from other owners during Board meetings.

Failure to Use Roberts Rules When Required in Bylaws

Not every Association is required to adhere to Roberts Rules of Order. Even when they do, owners report:

- No agenda.
- No prior meeting minutes for approval in advance.
- No Quorum.
- No minutes taken.

Unfair Election Procedures

Complaints about the Board include:

- No nomination process, only a vague request in a notice of an annual meeting.
- Ignoring quorum requirements for election of directors.
- Ignoring written ballot requirements in the bylaws.
- Ignoring secret ballot requirements in the bylaws.
- Ignoring procedures for directors electing officers.
- Misunderstanding the DUCIOA and Delaware General Corporation Law authority and requirements for ballots without meetings.

Exemption from DUCIOA Where Annual Assessments < \$590

A number of boards and communities with annual assessments lower than \$590 (this year) complained that adopting the DUCIOA, with its provisions to impose statutory liens, and other beneficial provisions, is prohibitively expensive. Other sections that owners report as desirable for exempt communities include:

- 81-305: Termination of contracts and leases of declarant.
- 81- 308A: Executive board meetings, requiring open meetings.
- 81-309 (f): Ballots without meetings.
- 81-316: Liens, and priority for HOA liens for assessments.
- 81-419 (a): Declarant's obligation to complete amenities identified in the plat unless labeled "Need Not Be Built."
- 81-421: Amendment of public offering statements after purchase.

Unduly Restrictive Architectural Review Committees:

- Denial of applications for solar panels because unaware of statutes permitting solar panels despite restrictive covenants.
- Denial of fences though many exist in the community, and singling out residents for enforcement.
- Allowing or refusing allowed plantings in storm water control ponds and swales.
- Denial of changes for reasonable accommodation under the Americans with Disabilities Act.

Entrenched Boards

Problems reported include "autocratic rule," lack of civility, personality clashes, ejecting residents for asking the board questions about finances, threatening to call police if questioners do not leave, and calling police on pretext about people who ask questions at board meetings.

Failure to Provide Notice of Filing Liens to Collect Unpaid Assessments

- Owners report instances when they were not delinquent, but had to hire attorneys to save their homes from foreclosure.
- Absentee owners reported that they did not receive notice mailed to their unit when they lived out of state, and the Association charged penalties and fees as a consequence.

- Owners were unaware that the Board unjustly filed liens against their property.

Declarants Amend Declaration after Sale of Units to Homeowners

- Extending the Period of Declarant Control.
- Delaying declarant contribution to assessments contrary to bylaws in effect during sale to homeowners.
- Declarants eliminating advertised amenities, after the sale, usually after sale of the property or after bankruptcy.

Failure of the Developer to Build Amenities Due to:

- Economic downturn
- Bankruptcy
- Sale of the development to third parties because of either of the above
- Delay in construction due to economic downturn-sometimes increasing the percentage sold for completion of amenities from 75% to 100%.

Road Issues: Owners Report a Number of Significant Issues

- Dedication to Public Use for State Maintenance: Sussex County does not require developers to build private roads to State specifications so they cannot be dedicated to public use, and fail earlier than expected.
- Roads not built to Sussex County standards, fail early. Owners face high assessments for road restoration as a result.
- Developers do not disclose the lower standards, so sale prices and assessments are artificially low.
- Declarant/developer failure to complete roads.
- Sussex County released bonds for unfinished or roads not to specification.

Lack of Communication and Transparency After Catastrophic Loss

Communities report disregard of requests for access to financial records and other information from the Board after a casualty loss, especially where insurance is exhausted, or remedies include uninsured betterment.

Misunderstanding of Application of DUCIOA to a Community or an Issue

There is widespread lack of awareness of, and understanding of the applicability of DUCIOA to preexisting communities.

Theft of Association Funds by Association Treasurer

Several communities report serious financial red flags, such as boards not responding to IRS and Division of Corporations notices about filing and not filing Non-profit, informational tax returns, or delivering checks signed in blank to the treasurer.... This Office issued subpoenas in two instances. One cleared a treasurer of all wrongdoing; the other resulted in an arrest.

Concerns of Boards

Collection of Delinquent Assessments

This was the most common complaint received. Boards are frustrated that filing a lien against the property does not translate to collection of the delinquent assessments until sale of the property. Most found collecting on a lien through foreclosure prohibitively expensive and ineffective. Board members complain about:

- Expense of lawyers eliminates recovery.
- No mechanism for determining a person's employer for wage garnishment. One complainant wants the judicial system to provide the information.
- Exclusion from DUCIOA for communities with less than \$590 annual assessment denies them "super-priority" liens.
- Boards open bank accounts, and file suit without knowing the proper name of the HOA, impeding the Association's ability to collect or protect officers from liability.
- Boards can have New Castle or Kent County bill and collect assessment payments, but counties do not bill for late fees or penalties, nor undertake collection. Sometimes payment to the county is timely but the association gets the County's distribution of funds on the County's schedule. This can make the payments seem late to the Association. Debt collectors rarely check this.
- Third party Debt collectors often violate the Fair Debt Collection Practices Act.
- Debt collectors sue on assessments barred by the statute of limitations.

Community Apathy

Failure to achieve quorum for elections, turnout for annual meetings, inability to recruit new board members, and other consequences that force additional work by board members and jeopardize Board efforts.

Enforcing Rules

A few communities seeking to enforce rules when faced with Owner refusal, asked the Ombudsman to make a non-threatening offer of ADR to the homeowner, instead of going directly to court over such matters as:

- Parking unlicensed or disabled vehicles in driveways or the street.
- Parking business or trade vehicles with business advertising in the community.
- Operating a business in the community in violation of zoning or deed restrictions.
- Fence disputes.
- Parking oversized vehicles like recreational vehicles for longer than permitted.
- Parking boats on the property.

To date none of these offers resulted in ADR or complaints after IDR.

Failure of the Developer to Prepare Owners for Transition from Declarant Control

Inadequate preparation of homeowners for transition to homeowner control and operation by the homeowners' association is a significant problem. Volunteer layman boards are often ill equipped to manage the work of the Association. This is evident from the number of boards failing to file information returns to maintain non-profit status, poor accounting and financial controls and oversight, and lack of awareness of the need to adhere to the bylaws and other restrictions. Better developer/declarants create committees and homeowner involvement on the board, as a training ground to familiarize leaders with their future responsibilities. Better transitions result in better communities, and better reputations for the community and the developer.

Questions from owners for declarants include:

- What state or local laws or ordinances regulate the process of transition from developer to owner association, including timeline for steps involved?
- What is the Nominating Process for the new board, especially at end of developer control?
- What is the Voting process, including proxies?

- What is the process for Education of the Board on their fiduciary and other responsibilities?
- What is the process for Education of property owners on how common interest ownership communities operate, including what to expect from the board and management?
- What are the Responsibilities of the Board and management to operate in a transparent (to owners) manner – regarding meetings, agendas, minutes, financial records, etc?
- How can the Property Owners Association collect delinquent assessments (how liens work, etc.)

Declarants Understating the Assessments and the Costs of Operating the Community.

There are concerns that some developers understate the assessments to promote sales of homes. Lower assessments make the community appear more desirable compared to other communities with similar amenities. Purchasers do not know the true costs to justify the assessments until after Transition.

Difficult Homeowners

Many Boards express frustration that there are a few homeowners who challenge everything the Board does, in ways that increase not only frustration, but also expense to the entire community by requiring an attorney to review all requests from these individuals. Problems mentioned include:

- Threatening suit that would interfere with negotiations bearing on Transition.
- Document requests that are voluminous, and stated in a way that makes it difficult to know what the requestor wants.
- Angry homeowners, who shout and disrupt meetings with demands or questions about matters not on the agenda.
- Statements implying that an owner intends to bring a weapon to a meeting.
- Statements that one can interpret as death threats.

Concerns Of Board Members

Individual members of Boards also have concerns about how the Board is operating. Occasionally a director or officer will discuss filing an internal dispute resolution complaint with the board. Some officers or directors have resigned when confronted with violations of bylaws and common business procedures.

Failure of the Board President to Follow Bylaws for Elections, Expenditures, and Other Matters Involving Community Funds.

Failure of the Board President to Report Financial and Other Important Data To the Board including:

- Notice from IRS of failure to file multiple years of nonprofit status reports.
- Failure to share financial reports with board members for months at a time.
- Discontinuing taking of minutes.

Refusal of Prior Board Member to Turn over Books and Records to Newly Elected Board, including:

- The financial account records.
- Other financial documents.
- Governing documents.

Residents Discharging Firearms in the Community (Skeet Shooting) despite Bylaws and Rules Prohibiting Firearm Discharge in the Community.

Concerns of Declarants

Few developers or declarants contacted the Office of the Ombudsperson. However, representatives from the building community informed the Advisory Council of several concerns.

- Concern that new legislation will over-regulate development of common interest communities.
- Individuals or small groups of residents, who are not on the Board, disrupt the Transition process by trying to micromanage the community with constant complex demands for records, and threats of lawsuits, that threaten to derail transition processes.
- Lack of standards for transition to homeowner management of the community.

Concerns of Other Interested Parties

Inter-neighborhood disputes over boundaries and liability for encroaching amenities. The Office of the Ombudsperson notifies parties to these disputes that the Office is available for dispute resolution.

LEGAL DEVELOPMENTS IMPACTING COMMON INTEREST COMMUNITIES

The Act requires the Ombudsperson to report on “Legal developments impacting common interest communities.” 29 *Del. C.* § 2544 (16) (d).

The Ombudsman commented on bills presented to the General Assembly, usually at the invitation of the sponsor.

Utilities Shut Off Problems Addressed By HB 177:

On September 3, 2015, the Governor signed into law a bill aimed at helping common interest communities, including condominiums, cooperatives, and deed restricted subdivisions avoid damage to common areas or common elements when owners are absent.

When a homeowner fails to pay a utility bill, the utility has a right to turn off service such as water or electricity. That action can cause major damage to a home and other property. For example, if a utility company cuts off electricity during the winter and a home remains unheated; water lines can freeze, burst, and flood the property. That may cause tremendous damage to the home and even adjacent homes. This law requires utility companies to have a “third party notification system.” It allows a customer to name a person who will also receive notice before the utility cuts off service.

The law allows common interest communities, to adopt bylaws requiring homeowners to name the HOA to receive notice before cutting off utility service. The HOA can notify the homeowner, or make other arrangements.

Finally, this law directed the Ombudsperson to prepare a template bylaw that an HOA can use to *require* homeowners to name the HOA as a third-party to receive notice that service will be cut off. The form-bylaw is on the Ombudsperson’s Website in the “Announcements” link. The Department of Justice sent a tweet announcing the new bylaw with a link to it on the Website. It is included in the Appendix to this report as well.

Pre-Existing HOA’s Authorized to Adopt All or Some of DUCIOA: HB 5:

The Governor signed the Benjamin Kuntz Act in July 2015. This amended the DUCIOA section about its applicability to preexisting communities. Twenty-five *Del. C.* § 81-119 now explicitly allows “any preexisting common interest community” to amend its governing documents to comply with any or all requirements of the DUCIOA, or a community can select particular sections to apply, without adopting the entire law. The copy of the DUCIOA on Ombudsperson’s Website incorporated the new Act into its proper place at the end of § 81-119. This amendment clarified other sections of the DUCIOA, to eliminate confusion about this right.

RECOMMENDATIONS FOR CHANGES TO DELAWARE LAW OR COURT RULES TO IMPROVE REGULATION AND OPERATION OF COMMON INTEREST COMMUNITIES

The Act requires the Ombudsperson to report:

“Recommendations for changes to Delaware law or rules of court procedure designed to improve the regulation and operation of common interest communities made by the Ombudsperson and the Common Interest Community Advisory Council.” 29 Del. C. §2546 (e)

The Advisory Council's “Change of Law Committee” is reviewing several proposals for changes to law or Court rules. In addition to the subjects the Committee selects, the Ombudsman submits subjects for study for consideration, as issues are uncovered. The following topics do not represent specific proposals for legislation by the Department of Justice, the Ombudsman, the Committee or the Council at this time:

Under Study:

Small Community Exemption from DUCIOA

According to the DUCIOA § 81-120, communities with 20 or fewer units, or an annual assessment less than \$590 per year (increasing at 3% per year), are exempt from the 21 sections of DUCIOA that apply to other pre-existing communities under § 81-119. Section 81-121 of the DUCIOA authorizes small communities to amend their declarations to take advantage of the DUCIOA. Recently, the Benjamin Kunz Act amended § 81-119 to clarify that any community can adopt any or all of the DUCIOA. Unfortunately, small communities are the least able to afford the cost of amendment. Most declarations and bylaws require a supermajority of the Association to approve amendments to declarations. This creates an additional obstacle to the clarity provided by the DUCIOA. Proposals for consideration include:

- a. Add to the sections applicable to small communities under § 81-120, § 81-316 “Lien for Assessments” to allow a lien with “super priority” to smaller communities;
- b. Lower the dollar limit threshold of § 81-120 so more small communities have the benefit of at least the 21 sections applicable through § 81-119;
- c. Make § 81-120 an “opt out” provision rather than an exclusion.

Increase the Super-Priority for Association Liens above Six Months

The DUCIOA allows a community collecting liens for unpaid assessments a so-called “super-priority” over other creditors for a sum equal to six months worth of delinquent annual assessments. § 81-316. Many communities complain this is too little, because several years’ worth of delinquent assessments will accrue before sale of the property. Too often, proceeds from sale at auction are not enough to cover the balance of delinquent assessments after other liens are paid. This places a burden on all other residents of the community who are paying their assessments. The problem is compounded by banks that do not take ownership in foreclosure, specifically to avoid having to pay assessments accruing before sale. A study by the Commission on Uniform State Laws discusses the issue and offers several options including increasing the level of the super-priority.

Notice of Filing Liens for Delinquent Assessments

Homeowners and their attorneys report that often the homeowner receives no notice that the HOA placed a lien on their property. Some report that the homes of owners who were not in arrears on their assessments were rescued from foreclosure when notice was given to the homeowner shortly before Sheriff’s sale.

This can happen for innocent reasons. Two counties now accept payments of assessments as a service to communities and send two or three follow-up bills. However, the county does not always turn over the funds to the community on the community’s schedule for determining late fees. The community may assume the homeowner made no payments, when all payments were made to the county on time. The goal of the liens includes payment of the delinquent fees. Notice to the homeowner that a lien was filed will likely advance that goal. Nothing either prevents or requires providing notice of filing a lien on a property.

Reserves for Planned Subdivision Communities

The DUCIOA requires budgets for condominiums and cooperatives to include reserve funds for repair and replacement of common elements. § 81-324 (a). Owners in non-condominium/cooperative communities with many amenities such as swimming pools, club houses, playgrounds, roads, streetlights, and others, expressed concern that their community is not funding a reserve account, or is not fully funded as required by the Unit Property Act for condominiums. Concerned owners anticipate large, unaffordable, special assessments. They seek changes to the DUCIOA compelling the Association to establish and fully fund reserves.

Audits for Planned Subdivision Communities.

The DUCIOA requires condominiums and cooperatives to have audits by a CPA every three years, and reviews by an accountant for the other years. §81-306 (6). Owners in non-condominium/cooperative communities reported problems of improper financial accounting, and in one case theft by a treasurer. Audit requirements could extend to non-condominium/cooperative communities.

Earlier Disclosure of Governing Documents.

The DUCIOA requires that sellers provide copies of governing documents to purchasers by the date of contract to purchase a home in a common interest community. §§ 81-408 (a); 81-409 (a). Many homeowners report complete unawareness that there were bylaws, a requirement for a mandatory assessment enforceable by liens, and the limitations on the use of the property they agreed to by purchasing in a common interest community. While many realtors provide these documents earlier and explain the significance of these documents and the restrictions they contain, others, including some developers, do not. Providing documents well before the date of contracting, or the date of settlement, gives potential purchasers a better opportunity to gauge whether they can live comfortably under the restrictions for the community or would be happier in a different community.

Transition/Turnover Requirements

The DUCIOA says little about requirements for the declarant to prepare the first homeowner elected board to take control of the Association at the end of the period of declarant control. The DUCIOA only requires election of several homeowner representatives to the board during the period of declarant control. § 81-303 (d). Homeowners in many new and pre-existing communities report the declarant simply “handed over the keys” to a representative of the Association at the end of the period of declarant control. Boards of many communities, new and pre-existing, are unaware of essential business practices including:

- The need for filing state and federal nonprofit franchise tax forms to maintain their nonprofit status.
- Basic conflict of interest and business judgment rules.
- Collection procedures.
- Many others.

Without some introduction to operating an association governed by the DUCIOA, the Unit Properties Act, Delaware General Corporations Law, declarations and bylaws boards, often make mistakes that invalidate their actions, or worse.

Several states and New Castle County have requirements concerning transition/turnover, including a checklist of documents and information the developer must provide, and a negotiated contract. Best practices of the best declarants involve homeowner involvement on committees and an introduction to newly elected boards and those interested in running for the board seats through training and transparency to see how the Association must run. Most would agree that the best run communities had the best transition periods.

Waiver of Fees for filing HOA liens

The recorder of deeds in each County might waive filing fees for homeowners' association liens for delinquent assessments in certain circumstances. The person filing a lien would have to review educational materials concerning proper filing of liens, and the lien would have to include a proof of or notice of service on the homeowner.

Use of Mortgage Settlement Funds for a Community Housing Fund

One legislator proposed using \$1 Million of the funds from the Mortgage Settlement obtained by the Department of Justice to fund a "Community Housing Fund." Residents in certain low income communities could apply for a small sum for improvements to housing, such as \$300 for a replacement window. The grant would become a lien on the property, to be recovered during sale of the property.

Court Rules Under Consideration

Several attorneys suggested that Justice of the Peace Court Institute "common interest community" days, at which a courtroom and judge are assigned to handle the collection actions for communities with several matters consolidated to begin at the same hour. This could result in judicial economy through familiarity with the requisites of collecting delinquent assessments, rulings on the authenticity, validity and requirements of books and records and authority granted by governing documents.

ADVISORY COUNCIL

The Act created the “Common Interest Community Advisory Council” to advise the Ombudsperson about issues relating to common interest communities. The members of the Council were appointed by government officials including:

- The Governor
- The Mayor of the City of Wilmington
- The County Executive or President of County Council in each county
- The Speaker of the House and the President Pro Tempore of the Senate
- The Secretary of State
- The Real Property Section of the Delaware State Bar Association
- The President of the Home Builders Association of Delaware
- The Chief Executive Officer of the Community Associations Institute (CAI)

The Council added *ad hoc* positions including:

- A representative of a large and a small property management firm
- A representative of the real estate sales and development industry

A list of the members of Council is available online and in the Appendix. The Council now consists of talented, interested, skilled and hard-working representatives of different aspects of common interest communities from unit owners, board members, City and County officials, the Division of Corporations, educators and developers.

The Council is not yet complete. Because of resignations, the Governor still must appoint two members of the public who are members of the executive board of a common interest community, one from New Castle County and one from Kent County. In addition, the President of Sussex County Council must replace a designee.

The Advisory Council formed committees to study the topics that assigned by the Act:

- Mechanisms to increase the collection rate of community assessments.
- Development of conflict resolution procedures within common interest communities.
- Feasibility of mandatory mediation, arbitration or other ADR and implementation of a process.
- Development of mechanisms for registration of common interest communities with the state or other political subdivision.
- Advising the Ombudsperson in the operation of the Office.
- Study and recommend to the Ombudsperson the adoption, amendment, or rescission of Delaware Law or Rules of Court designed to improve the regulation and operation of common interest communities.

Additional Committee

A committee will soon be formed to develop a Community Mentoring program. A notice on the Ombudsperson's website asks if a community wants a mentor, or if a person will mentor a community HOA.

Another committee just forming is an Education Committee to assist in developing educational programs of interest to common interest community members.

Advisory Council Activity

The Council met five times in the first 10 months, although the last meeting did not reach quorum.

Mechanisms to Increase Collection Rate

Among the most active committees is the committee charged with studying mechanisms to increase the collection rate for common interest community assessments. This is an issue of high importance to the residents of each County. The committee is preparing a report on methods for collecting annual assessments that include in addition to the lien process authorized in the DUCIOA, the use of personal debt lawsuits in Justice of the Peace Court, without using a lawyer to represent the community. When finalized, this will appear on the Ombudsperson's Website and will be the core of an educational program.

Mechanism to Register Communities

The Committee for Development of Mechanisms for Registration of common interest communities is focusing on the information already available from the Division of Corporations Annual Franchise Tax filings. Most common interest community associations are corporations. They are already required to file annual franchise tax forms in order to maintain their nonprofit status. These forms include not only the proper name of the association, but must list officers and directors. Currently under discussion is the possibility of adding questions to the franchise tax form to include email addresses and identification as a common interest community Association. Using this approach, associations would not have to file any form other than the annual franchise tax informational form in order to register, and no additional fee. This approach also avoids the necessity for developing the same information from each County and each of the 57 incorporated municipalities in Delaware.

The Office considers this a high priority in order to announce the existence of the Ombudsperson's website, educational opportunities, the necessity to have an IDR process, new legislation, and reminders for such things as filing the annual franchise tax forms, state and federal.

CONCLUSION

Vice Chancellor Parsons made these comments about Common Interest Communities:

A Note on Homeowners Associations

Preliminarily, I note that this litigation illustrates all too well some of the procedural and legal pitfalls that the generally volunteer leadership of homeowners associations can experience if they fail to pay attention to their governing documents. Real estate developers establish homeowners associations to control the appearance of a residential subdivision and manage its common area assets during the marketing, managing, and selling of homes in the subdivision. Initially, the developer effectively governs the maintenance organization or entity. The governing documents also provide a mechanism for the developer eventually to disengage itself from the financial and legal responsibility of the maintenance organization, typically by transferring ownership of the entity to the homeowners after selling off a predetermined number of lots.

After control of a maintenance organization is transferred to the homeowners in the form of the homeowner's association, the association's primary purpose becomes to maintain community facilities, enforce restrictive covenants, and provide services for the benefit of the residents. Many associations...are incorporated and controlled by boards made up of community homeowners. In that regard, they are subject to a well-defined body of corporate law, like the [Delaware General Corporation Law]. But, the members of the homeowners association who take governance positions on the board frequently have little to no experience with corporations or the laws that govern them and, as a result, may end up taking actions that conflict with the association's governing documents or the law. The problems of running a homeowners association often are compounded by the difficulty of finding individuals willing to serve on the board in the first place. Similar problems arise when only a relatively small percentage of the homeowners in a subdivision attend important meetings of their homeowners association, like the annual meeting.

Adams v. Calvarese Farms Maintenance Corporation, Inc., 2010 WL 3944961 (Del. Ch. Sept. 17, 2010).

The experience of the first 10 months of the Office of the Common Interest Community Ombudsperson reveals the truth of V. Ch. Parson's comment. There are many issues that worry, concern and anger people in the Common Interest Community, from declarants and developers, to members of associations/owners, as well as associations' boards. Many of the concerns and misunderstandings result from not reading or understanding the governing documents. Both the Board or the homeowner, and sometimes the declarant are guilty.

The Act's requirement of Internal Dispute Resolution is very beneficial. It requires a complainant to read, cite and quote the provision violated. Many times this appears to resolve the complaint by resolving the misunderstanding of what is required. No set of bylaws reviewed this year contained a process that owners could use to address issues with

Boards or Declarants and receive the benefits of “notice and opportunity to be heard,” and external review. The IDR process fills that role.

There is also widespread confusion and misunderstanding about the interplay of the laws and governing documents that affect those in the Common Interest Community, and the processes available for remedying violations of the laws and governing documents.

Educational opportunities were minimal in Delaware, but because of the Act, CAI made its first Leadership Workshop available, with more to come.

As the members of the Common Interest Community pay more attention to the governing documents, problems in communities should decrease.

The ability of the Ombudsperson to issue subpoenas in appropriate cases may lead to fewer instances of theft of association funds paid by homeowners, and fairer treatment of owners and boards.

There is much work to do. The Common Interest Community Ombudsperson Act is the best resource available to address many of the issues.

Respectfully submitted,

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email: CIC.OmbudsmanDOJ@state.de.us
Web site: <http://attorneygeneral.delaware.gov/fraud/cpu/ombudsman.shtml>

Appendix

THE COMMON INTEREST COMMUNITY OMBUDSPERSON ACT

The Common Interest Community Ombudsperson Act

DELAWARE CODE TITLE 29

State Government

State Offices Created by Constitution

CHAPTER 25. STATE DEPARTMENT OF JUSTICE

Subchapter IV. Common Interest Community Ombudsperson

§ 2540 Short title.

This subchapter shall be known as the “Common Interest Community Ombudsperson Act.”

79 Del. Laws, c. 408, § 1; 70 Del. Laws, c. 186, § 1.

§ 2541 Definitions.²

For the purposes of this subchapter, the following definitions shall apply:

- (1) “Bylaws” shall have the meaning as used in § 81-103 of Title 25.
- (2) “Common interest community” shall have the meaning as used in § 81-103 of Title 25 and includes small preexisting cooperatives and planned communities as referenced in § 81-120 of Title 25.
- (3) “Common interest community association” shall have the meaning ascribed to “association” or “unit owners’ association” as used in § 81-103 of Title 25 and includes associations or unit owners’ associations for small preexisting cooperatives and planned communities as referenced in § 81-120 of Title 25.
- (4) “Declarant” shall have the meaning as used in § 81-103 of Title 25.
- (5) “Declaration” shall have the meaning as used in § 81-103 of Title 25.

² The definitions all refer to definitions found in the Delaware Uniform Common Interest Ownership Act, or the “DUCIOA.” Its citation is 25 Del. C. Chapter 81.

- (6) "Department" means the Department of Justice.
- (7) "Executive board" shall have the meaning as used in § 81-103 of Title 25.
- (8) "Office" means the Office of the Common Interest Community Ombudsperson.
- (9) "Ombudsperson" means the Common Interest Community Ombudsperson.
- (10) "Rule" or "rules" shall have the meaning as used in § 81-103 of Title 25.
- (11) "Unit" shall have the meaning as used in § 81-103 of Title 25.
- (12) "Unit owners" shall have the meaning as used in § 81-103 of Title 25.

79 Del. Laws, c. 408, § 1; 70 Del. Laws, c. 186, § 1.

§ 2542 Common Interest Community Ombudsperson; creation, appointment, role, term of office, and vacancy.

(a) There is established within the Department an Office of the Common Interest Community Ombudsperson.

(b) The Attorney General shall appoint the Ombudsperson, consistent with the qualifications for the Ombudsperson set forth in § 2543 of this title.

(c) The Ombudsperson shall be the head of the Office and is charged with managing the Office consistent with the powers and duties vested in the Ombudsperson by § 2544 of this title, within the limitations of the funds appropriated by the General Assembly.

(d) The Ombudsperson shall serve at the pleasure of the Attorney General.

(e) A vacancy in the Ombudsperson position shall be filled in the same manner as the original appointment.

79 Del. Laws, c. 408, § 1; 70 Del. Laws, c. 186, § 1.

§ 2543 Common Interest Community Ombudsperson; qualifications.

The Ombudsperson must:

- (1) Be a member in good standing of the Bar of this State.
- (2) Have at least 5 years of experience in the practice of law in this State.
- (3) Have experience in real estate law, including common interest community law.
- (4) Have experience in conflict and alternative dispute resolution.

(5) Not engage in any other business or profession that conflicts with the powers and duties of the position or the Office.

(6) Comply with all restrictions on political activity applicable to Department employees pursuant to § 2509A of this title.³

79 Del. Laws, c. 408, § 1; 70 Del. Laws, c. 186, § 1.;

§ 2544 Common Interest Community Ombudsperson; powers and duties.

The Ombudsperson shall have the following powers and duties:

(1) To contact declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, and other interested parties to inform them of the services available through the Office. In addition to any other method used to publicize the Office's services, the Ombudsperson shall maintain a website containing information about the Office, contact information, the services available through the Office, any information required to be placed on the website by other provisions of this chapter, and any other information deemed appropriate by the Ombudsperson.

(2) To assist declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, and other interested parties in understanding their rights and responsibilities and the processes available to them according to the law, regulations, and documents governing their respective common interest community. The Ombudsperson is not the attorney for declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, or other interested parties; no attorney-client relationship shall be implied or established by the Ombudsperson's communication with such persons, and the Ombudsperson may not act as or appear to act as an attorney in a legal action brought by such persons.

(3) To organize and conduct meetings to educate declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, and other interested parties about their rights and responsibilities and the processes available to them according to the law, regulations, and documents governing their respective common interest community.

(4) To prepare and publish educational and reference materials about common interest communities and to make these resources available in print and on the Office's website. The materials about common interest communities shall include general information

³ "§ 2509 Conflict of interest. No member of the Department of Justice shall act as attorney or counsel in any controversy in which the State, a county or a municipality has an interest except in the member's official capacity."

about the roles, rights, and responsibilities of the various parties, suggestions for the orderly operation of the common interest community association, mechanisms for internal dispute resolution, or any other information deemed appropriate by the Ombudsperson.

(5) To develop and publicize procedures intended to result in fair elections for members and officers of a common interest community association.

(6) To provide monitors and vote counting services to common interest community associations, intended to result in fair elections for members and officers of a common interest community association, when 15% of the total voting interests of a common interest community association, or 6 unit owners, whichever is greater, petition the Ombudsperson to do so.

(7) To provide meetings, mediation, or other forms of alternative dispute resolution as may from time to time be requested by declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, or other interested parties. Nothing in this paragraph shall affect the right of a declarant, common interest community association, the executive board of a common interest community association, unit owners in common interest community, or other interested parties from proceeding pursuant to the procedure established by § 348 of Title 10.⁴

(8) To establish a template of reasonable written procedures for the executive board of a common interest community association to adopt to internally handle complaints from unit owners and other interested parties. Each common interest community association shall adhere to the established written procedures when resolving complaints from unit owners and other interested parties. The procedures established by the Ombudsperson and adhered to by the common interest community association may include the following, in addition to procedures outlined in the common interest community association's declaration, bylaws, or other governing documents:

- a. That the complaint to the common interest community association must be in writing.
- b. That a sample complaint form, if any, on which the complaint must be filed shall be provided upon request.
- c. That the common interest community association's complaint written procedure shall include the process by which the complaint shall be delivered to the common interest community association.

⁴ "§ 348 Disputes involving deed covenants or restrictions." A Chancery Court master may "mediate disputes involving the enforcement of deed covenants or restrictions" in certain circumstances. 10 Del. C. § 348.

d. That the common interest community association shall provide written acknowledgment of the receipt of the complaint to the complainant within 14 days of receipt. Such acknowledgment shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the complainant at the address provided or, if consistent with established procedure of the common interest community association, delivered by electronic means, provided the sender retains sufficient proof of the electronic delivery.

e. That any specific documentation that must be provided with the complaint shall be described in the common interest community association's complaint procedure. In addition, to the extent the complainant has knowledge of the law or regulation applicable to the complaint, the complainant shall provide that reference, as well as the requested action or resolution.

f. That the common interest community association shall have a reasonable, efficient, and timely method for identifying and requesting additional information that is necessary for the complainant to provide in order to continue processing the complaint. The common interest community association shall establish a reasonable timeframe for responding to and disposing of the complaint if the request for information is not received within the required timeframe.

g. That, within a reasonable time prior to the consideration of the complaint, the complainant shall be notified of the date, time, and location that the complaint will be considered. For purposes of this paragraph, "reasonable time" shall mean such time as established by the common interest community association's complaint procedure, but shall not be less than 7 days prior to the date for consideration of the complaint. Notice of the date, time, and location for consideration of the complaint shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the complainant at the address provided or, if consistent with established procedure of the common interest community association, delivered by electronic means, provided the sender retains sufficient proof of the electronic delivery.

h. That after the final determination is made, the written notice of the final determination shall within 14 days be hand delivered or mailed by registered or certified mail, return receipt requested, to the complainant at the address provided or, if consistent with established procedure of the common interest community association, delivered by electronic means, provided the sender retains sufficient proof of the electronic delivery.

i. That the notice of final determination shall be dated as of the date of issuance and include specific citations to the common interest community

association's declaration, bylaws, or other governing documents, or to an applicable law or regulation that led to the final determination, as well as the registration number for the common interest community association. If applicable, the name and license number of the common interest community manager shall also be provided.

(9) To receive complaints from declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, or other interested parties regarding potential violations of the law, regulations, or documents governing their respective common interest community. Prior to submitting a complaint to the Ombudsperson, complainants must complete the process established by the Ombudsperson and adopted by the executive board of a common interest community association pursuant to paragraph (8) of this section and must include a copy of the final determination with the complaint filed to the Ombudsperson.

(10) To investigate any complaint received and, if meritorious and appropriate, to provide meetings, mediation, or other forms of alternative dispute resolution to those parties involved in order to assist in the resolution of the complaint.

(11) To refer meritorious violations of existing Delaware law to the Attorney General or other appropriate law-enforcement agency for prosecution.

(12) To subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of books, papers, records or other evidence needed for the exercise of the powers or the performance of the duties vested in the Ombudsperson by this section. The power contained in this paragraph may also be exercised by any other employee of the Office who is a member in good standing of the Bar of this State.

(13) To establish and publish, in print and on the Office's website, procedural rules for meetings, mediation, or other forms of alternative dispute resolution organized pursuant to this section.

(14) To establish and publish, in print and on the Office's website, procedures and forms for accepting complaints from declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, or other interested parties regarding potential violations of the law, regulations, or documents governing their respective common interest community.

(15) To establish: fees for meetings, mediation, or other forms of alternative dispute resolution; election monitoring; vote counting; or other services as provided by the Ombudsperson pursuant to this section. The amount to be charged for each fee imposed under this paragraph shall approximate and reasonably reflect all costs necessary to defray the expenses related to providing these services.

(16) To make an annual report of the Office's activities to the Governor, the Attorney General, the General Assembly, and the Chief Justice of the Supreme Court on or before December 1 of each year. A copy of the report shall be provided to the Director of the Division of Research. Each such report shall contain:

- a. Statistics on the number of inquiries and complaints handled by the Office;
- b. Information on education and outreach efforts by the Office;
- c. Concerns expressed to the Office by declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, or other interested parties;
- d. Legal developments impacting common interest communities;
- e. Recommendations for changes to Delaware law or rules of court procedure designed to improve the regulation and operation of common interest communities made by the Ombudsperson and the Common Interest Community Advisory Council;
- f. Any other information deemed appropriate by the Ombudsperson.

(17) To organize and hold public meetings as necessary to gain a comprehensive sense of the issues facing common interest communities in this State. When such meetings are held, at least 1 meeting shall be held in each county at a convenient place within each county. When such meetings are held, the information obtained from these meetings shall be made part of the report issued pursuant to paragraph (15) of this section.

(18) To perform any other function necessary to fulfill the powers and duties outlined in this section.

(19) To direct the work of the Office consistent with the powers and duties established by this section.

(20) To employ and supervise staff necessary to assist in carrying out the powers and duties established by this section, within the limitations of funds appropriated by the General Assembly.

79 Del. Laws, c. 408, § 1; 70 Del. Laws, c. 186, § 1.;

§ 2545 Required information.

(a) When a declarant, a common interest community association, the executive board of a common interest community association, a unit owner in a common interest community contacts the Office to make an inquiry, request services, or file a complaint, the declarant, a common interest community association, the executive board of a common interest

community association, a unit owner in a common interest community shall provide the Office with at least the following information regarding the common interest community at issue:

(1) The name, address, telephone number, and any other contact information for the common interest community association.

(2) The name of the person engaged in property management for the common interest community association or the name of the person who manages the property at the site of the common interest community.

(3) The name, mailing address, telephone number, and any other contact information for those on the executive board of the common interest community association.

(4) The name, mailing address, telephone number, and any other contact information for the declarant.

(5) The declaration, bylaws, and any rules for the common interest community association.

(6) The annual budget adopted by the common interest community association.

(7) The number of units in the common interest community.

(8) The total annual assessment made by the common interest community association.

(b) The Ombudsperson may waive the requirement created in subsection (a) of this section when it is deemed appropriate.

79 Del. Laws, c. 408, § 1; 70 Del. Laws, c. 186, § 1.;

§ 2546 Common Interest Community Advisory Council.

(a) There is established the Common Interest Community Advisory Council ("Council"), which shall consist of the following members:

(1) Three members of the public who are members of the executive board of a common interest community, 1 from each county, appointed by the Governor;

(2) The Mayor of the City of Wilmington or a designee appointed by the Mayor;

(3) The County Executive of New Castle County or a designee appointed by the County Executive;

(4) The President of the Kent County Levy Court or a designee appointed by the President;

(5) The President of the Sussex County Council or a designee appointed by the President;

(6) Three members appointed by the Speaker of the House;

(7) Three members appointed by the President pro tempore of the Senate;

(8) The Secretary of State or a designee appointed by the Secretary of State;

(9) Two members from the Real Property Section of the Delaware State Bar Association whose practice involves the creation of, or the handling of disputes arising from, common interest communities, appointed by the President of the Delaware State Bar Association;

(10) The President of the Home Builders Association of Delaware or a designee appointed by the President;

(11) The Chief Executive Officer of Community Associations Institute or a designee appointed by the Chief Executive Officer.

(b) The members of the Council shall serve until a replacement is appointed pursuant to the same process as the member's appointment.

(c) The members of the Council shall serve without compensation, except that they may be reimbursed for reasonable necessary expenses incident to their duties as members in accordance with State law.

(d) The Chairperson of the Council shall be designated by the Attorney General from among the members of the Council.

(e) The powers of the Council shall be exercised by a majority vote of all members present. A quorum of 9 shall be necessary to hold a meeting of the Council.

(f) The Council shall:

(1) Advise the Ombudsperson regarding issues related to common interest communities, including:

a. Mechanisms to increase the collection rate for common interest community assessments;

b. The development of conflict resolution procedures within common interest communities;

c. The feasibility of mandatory mediation, arbitration, or other forms of alternative dispute resolution for disputes not able to be resolved within common interest communities and, if deemed feasible, how to implement such a process;

d. The development of mechanisms for the registration of common interest communities with the State or other political subdivision;

e. Any other topic the Council deems necessary to advise the Ombudsperson on related to common interest communities.

(2) Advise the Ombudsperson in the operation of the Office.

(3) Study and recommend to the Ombudsperson the adoption, amendment, or rescission of Delaware law or rules of court procedure designed to improve the regulation and operation of common interest communities.

(4) Assist the Ombudsperson in the preparation of the annual report required of the Ombudsperson by § 2544(16) of this title.

(g) The Ombudsperson shall provide support as requested by the Council. At a minimum, the Ombudsperson shall prepare the agenda for and minutes of meetings and shall post the agenda and minutes as required by the Freedom of Information Act, Chapter 100 of this title.

(h) The Council shall meet at least 4 times each year. The Chairperson, the Ombudsperson, or a majority of the members may call a special meeting of the Council.

79 Del. Laws, c. 408, § 1; 70 Del. Laws, c. 186, § 1.;

PROCEDURE FOR FILING A COMPLAINT

Procedure for Filing a Complaint

PROCEDURE FOR FILING A COMPLAINT WITH

THE OFFICE OF THE OMBUDSPERSON

Filing a complaint with the Office of the Ombudsperson is a two-step process:

First, a person with a complaint must attempt to resolve the complaint through an “internal dispute resolution process” (or IDR process) between the homeowner and the board. Either a Homeowner or an Association can start the IDR process.

Second, if the board ignores the IDR complaint form, or does not participate in an IDR process, or if the matter is not resolved internally, a party to the process may file a “Contact/Complaint” form with the Office of the Ombudsperson.

Details of each part of the process are below:

1. Before the Office of the Ombudsperson Will Accept a Complaint Alleging a Violation Of The Law or Documents Governing The Community:

- A unit owner or board must first attempt to resolve a common interest community complaint alleging violation of the law or documents governing the Community through the Association’s Internal Dispute Resolution process.
- If the Community has no IDR process it must use and follow the process outlined in the “Ombudsperson’s Template for Internal Dispute Resolution,” available on the Ombudsperson’s website.
- A complaint must be stated in writing on the Association’s complaint form, but if Association has none, the complaint must be stated on the form attached to the “Ombudsperson’s Template for Internal Dispute Resolution.” The complaint form is the last two pages of the Template.
- If a unit owner submits a complaint for IDR to the Association, the Association must participate in the IDR process in its bylaws, or the Ombudsperson’s Template for Internal Dispute Resolution.
- If the Association declines to submit the complaint to IDR, or does not respond to it in 20 days, a unit owner may file the complaint with the Office of the Ombudsman. A unit owner must allege the Association’s refusal to participate on the Ombudsperson’s Contact/Complaint Form in addition to the underlying complaint.

- If a unit owner declines to participate in IDR, the Association may proceed with any process or remedies available to it.
- A complaining party *other than a unit owner* should also first attempt to resolve a complaint through the association's internal dispute procedure.
- The "Internal Dispute Resolution Complaint" is the last 2 pages of the Template Internal Dispute Resolution file. It leaves little room for a complaint, but invites additional pages.
- Please be specific and detailed in describing your complaint.
- Quote necessary parts of the community's certificate of incorporation, declarations, bylaws, rules, regulations and statutes, to make a "roadmap" for understanding the complaint. This will assist both the board and the homeowner in understanding the governing documents and the specific complaint. It will also assist the Ombudsperson if review is required.
- Explain your complaint as if you are explaining it to someone with no familiarity with your situation.
- Start at the beginning and explain your complaint in chronological order. It is the easiest way for others to understand.
- State specifically what you want. Detail the *action* you are asking the board to take or *the relief or result* you seek from the board.
- Sign and date the complaint, and add your contact information. Check off how you delivered the complaint to the other party.

2. Filing the Complaint- Use the Ombudsperson's "Contact/Complaint" Form:

- If the decision by the Association after following the IDR process does not resolve the issue, and the issue involves an allegation of violation or potential violation of the law or documents governing the community, a party may file the complaint for review by the Office of the Ombudsperson.
- Obtain a copy of the Office of the Ombudsperson's "Contact/Complaint" Form. Read it before filling it out. A copy of the Contact/Complaint Form is available by contacting

the Office of the Ombudsperson or downloading from or filling it out on the Ombudsperson's Website.

- The Ombudsperson's Act requires the complaint to include the "Required Information." It requires attaching a copy of the community's governing documents including: the certificate of incorporation; the declarations; the bylaws; and the rules and regulations of the community. Attach the complete record of the IDR complaint, including all documents presented by either party during that process. You need not provide another copy of any document in the IDR process record.
- When the Complaint Form is complete, deliver it to the Office of the Ombudsperson, by hand delivery, mail, or eMail. The address and contact information is on the form, with a check for \$35 to Department of Justice, Office of the Ombudsperson.
- The Contact/Complaint Form:
 - Must be filed with the Ombudsperson within 30 days of the final adverse decision of the Association, or the Association's refusal to participate in internal dispute resolution (unless waived by the Ombudsperson for good cause);
 - Must be completed in writing on a "Contact/Complaint Form" from the Office of the Common Interest Community Ombudsperson (available at the website of the Office of the Ombudsperson or by calling the number below);
 - Must include copies of any "Required Information"⁵ listed in the Contact/Complaint Form and all supporting documents, correspondence and other materials related to the issue and the decision, and
 - Must include a check for the \$35 filing fee⁶ attached, (unless waived by the Ombudsperson for good cause). The check should be made payable to "Department of Justice, Office of the Ombudsperson."

You may contact the Office of the Ombudsperson at any of the following:

Delaware Department of Justice
Office of the Common Interest Community Ombudsperson
820 N. French Street
Wilmington, DE 19801

⁵ 29 Del. C. §2545 (a)

⁶ 29 Del. C. §2544 (15)

Tel: 302-577-8600

Outside New Castle County: 800-220-5424

Fax: 302-577-6499

eMail: CIC.OmbudsmanDOJ@state.de.us

Web site: <http://attorneygeneral.delaware.gov/fraud/cpu/ombudsman.shtml>

The Office of the Ombudsperson will review the complaint and the submitted materials. If the complaint appears to be meritorious and if it is appropriate, the Ombudsperson may offer to provide meetings, mediation, arbitration or other forms of Alternative Dispute Resolution (ADR) to the parties involved, to assist resolving the complaint. **The Ombudsperson is not authorized to order anyone to do anything, unless the parties agree to binding arbitration.** ADR is available only by consent of all parties.

- The Ombudsperson may further investigate a complaint, in the sole discretion of the Ombudsperson, by:
 - subpoenaing witnesses;
 - compelling the attendance of witnesses;
 - compelling witness testimony;
 - administering oath's or affirmations;
 - taking evidence;
 - subpoenaing books, records, papers, or other evidence needed for exercising the powers or performing the duties of the Ombudsperson.
- The Ombudsperson may again offer to provide meetings, mediation or other forms of Alternative Dispute Resolution including binding or non-binding arbitration to the parties involved, to assist in resolving the complaint.
- The Ombudsperson may refer a meritorious claim of violation of existing Delaware law to others within the Department of Justice or any other appropriate law-enforcement agency, in the Ombudsperson's discretion.
- The Ombudsperson may decline further action, in the exercise of discretion, and in that event will notify the parties.

TEMPLATE FOR INTERNAL DISPUTE RESOLUTION PROCESS (IDR)

Template Internal Dispute Resolution Process (IDR)

COMMON INTEREST COMMUNITY OMBUDSPERSON'S TEMPLATE FOR HOMEOWNERS' ASSOCIATIONS EXECUTIVE BOARDS TO ADOPT FOR INTERNAL RESOLUTION OF COMPLAINTS

Introduction

The Common Interest Community Ombudsperson Act requires the Office of the Ombudsperson (the "Office") "To establish a template of reasonable written procedures for the executive board of a common interest community Association to adopt to internally handle complaints from Unit Owners and other interested parties." 29 Del. C. §2544 (8). The Act then states:

"Each common interest community association shall establish and adhere to the established written procedures when resolving complaints from Unit Owners and other interested parties.

The procedures established by the Ombudsperson and adhered to by the Association may include the following, in addition to procedures outlined in the common interest community Association's declaration, bylaws, or other governing documents."

The Office of the Ombudsperson interprets this as requiring each common interest community (CIC) Association to establish a written procedure for internally and informally reviewing and resolving Unit Owner complaints and Association Complaints against a Unit Owner. An Association's compliance with the written procedure requirement may include the following procedures established by the Office in addition to those procedures outlined in the CIC's declaration, bylaws, or other governing documents. The Office recommends that the requirements of the governing documents be collected into a single written procedure, and if there are any conflicts with the requirements of section 2544 (8), that the conflicts be resolved by the Association.

If the Association has no written procedure for internally resolving complaints concerning Unit Owners, the following may be adapted to the language and governing documents of the Association, and adopted by the Association. The Office will apply this Template procedure if the Association does not adopt its own.

The Office recommends that each Association adopt this internal procedure to notify a Unit Owner of CIC Complaints and provide an opportunity to be heard prior to proceeding with legal action, or placing a lien on a Unit Owner' property.

Please direct comments about these procedures to the Office.

[Name of Common Interest Community Association]

[Address and Telephone Number of Association or Managing Agent]

1. The Unit Owner or other interested person may present a Common Interest Community (CIC) Complaint to the Association.⁷ The Association may present a CIC Complaint to a Unit Owner or Other interested person. Whoever presents a CIC Complaint is the "Complainant." Whoever the CIC Complaint seeks a response from is the "Respondent."

1.2. A Unit Owner shall not be charged a fee to participate in the process, unless the Association determines the process is being abused.

2. The CIC Complaint must be on the attached CIC Complaint Form, or be substantially similar to the CIC Complaint Form. The Association will provide a copy of the Form to the Unit Owner upon request, or otherwise make the form generally available.⁸

3. The Complainant must deliver the completed CIC Complaint, including all required supporting information to the Respondent: in person; or, by mail or delivery service; or, [if consistent with established procedure of the Association,] by electronic means provided the complaining party retains sufficient proof of electronic delivery. The Association's representative shall mark on the CIC Form the date the CIC Complaint is received, and shall mark the date of receipt on copies of the CIC Form if requested by the Unit Owner.⁹

3.1 For the purposes of these procedures a party makes "delivery"¹⁰ in one of the following ways:

- hand delivery by or to a Unit Owner to the current address, in person, or by services such as FedEx, UPS or other delivery service that creates a record of delivery; or
- registered or certified mail, return receipt requested; or USPS "delivery confirmation," at the address provided by the Association or the Unit Owner; or,
- [if consistent with established procedure of the Association,] by electronic means, provided the sender retains sufficient proof of the electronic delivery.

3.2 If a Unit Owner delivers a CIC Complaint to the Association, the Association must participate in this internal dispute resolution procedure.

4. The Association must deliver written acknowledgment of receipt of a Unit Owner's CIC Complaint to the Unit Owner within 14 days of receipt by any of the means described in paragraph 3.1.¹¹

⁷ 29 Del. C. §2544 (8)

⁸ 29 Del. C. §2544 (8) (a), (b)

⁹ 29 Del. C. §2544 (8) (c)

¹⁰ 29 Del. C. §2544 (8) (c), (d)

¹¹ 29 Del. C. §2544 (8) (d)

5. Any specific documentation required in support of the CIC Complaint must be delivered with the CIC Complaint, and must be described in the CIC Complaint.¹² This documentation may include:

- the Certificate of incorporation;
- the Declaration;
- the Bylaws;
- any Rules of the Association;
- any other governing document of the Association;

and, if needed for the issue in dispute:

- notice letters, correspondence;
- bills;
- checks;
- photographs; and
- any other document or evidence that supports the CIC Complaint, or is relevant to the matter complained about.

5.1 The Association will make and provide a copy of the governing documents to the Unit Owner upon request, including the Certificate of Incorporation, Declarations, Bylaws, Rules, covenants or any other documents creating or governing the Association and other pertinent books and records of the Association.¹³

5.2 If the Complainant or Respondent relies upon any law or regulation applicable to the CIC Complaint, they should provide that information, and describe the desired action or resolution in the CIC Complaint.¹⁴

6A. A party to a dispute may request the other party, in writing, to meet and confer in an effort to resolve the dispute. The board shall promptly designate a director to meet and confer. The parties shall meet promptly at a mutually convenient time and place, informally explain their positions to each other, and confer in good faith in an effort to resolve the dispute. A resolution of the dispute agreed to by the parties shall be memorialized in writing and signed by the parties, including the board designee on behalf of the association. The agreement binds the parties and is judicially enforceable if it is signed by the parties; is not in conflict with law or the governing documents of the Association; and is either consistent with the authority granted by the board to its designee or the agreement is ratified by the board.

6B. If the dispute is not resolved through “meet and confer,” or requires additional information, the Respondent, if it is the Association shall review the CIC Complaint at the

¹² 29 Del. C. §2544 (8) (e)

¹³ 25 Del. C. §81-318 (a)(4), (b)

¹⁴ 29 Del. C. §2544 (8) (e)

next Association meeting, and within 10 days after, make a reasonable, efficient, and timely request for any additional information that is necessary for the Unit Owner to provide in order to continue processing the CIC Complaint.¹⁵ A Unit Owner who is a Respondent, may request additional information within 20 days of receipt of the Complaint,

6.1 The Respondent will provide the requested information, if any, within 10 days of the request, unless there are unforeseen circumstances. If there are unforeseen circumstances the Respondent must notify the Complainant when the information will be provided.

6.2 The Respondent must respond to and act upon the CIC Complaint within 20 days after the Complainant provides the information requested, or the time expires.¹⁶

7. The Association must notify the Unit Owner a reasonable time before, of the date, time, and location that the Association will consider the CIC Complaint.¹⁷

7.1 For purposes of paragraph 7, "reasonable time" means [the time established by the Association's internal complaint procedure, but] not less than 7 days prior to the date for consideration of the CIC Complaint or at a convenient time for both the Association and the Unit Owner.¹⁸

7.2 The Association will deliver notice of the date, time, and location for consideration of the CIC Complaint to the Unit Owner by the means described in section 3.1¹⁹

8. The Association must permit the Unit Owner a full opportunity to explain the Unit Owner's position and evidence, and to question witnesses, Association members, employees or representatives. The Association may ask the Unit Owner questions, and question others.

8.1 Each party must treat the other with dignity, respect and civility. Neither party need tolerate rudeness, name calling, or disrespect. Either party may call a 10 minute recess in the meeting for this reason.

9. No later than 14 days after consideration of the CIC Complaint, the Association shall make its final determination of the CIC Complaint in writing. The Association shall deliver written notice of the final determination to the Unit Owner.²⁰

9.1 The notice of final determination shall be dated with the date of issuance and include:

¹⁵ 29 Del. C. §2544 (8) (f)

¹⁶ 29 Del. C. §2544 (8) (f)

¹⁷ 29 Del. C. §2544 (8) (g)

¹⁸ 29 Del. C. §2544 (8) (g)

¹⁹ 29 Del. C. §2544 (8) (g)

²⁰ 29 Del. C. §2544 (8) (h)

- the written final determination with an explanation of the decision;
- specific quotation of the Associations' declaration, bylaws, rules or other governing documents, or
- a reference to an applicable law or, regulation or rule that led to the final determination of the Association;²¹
- any supporting documents, correspondence, and other materials related to the final decision;

that led to the final determination, as well as:

- the registration number for the Association,²² if any; and
- the name and license number of the community manager,²³ if any.

10. The notice of final determination, if adverse to the Unit Owner, shall inform the Unit Owner of the right to submit the Association's final determination to the Office of the Ombudsperson²⁴ in substantially the following form:

"You have the right to file a notice of final adverse determination with the Common Interest Community Ombudsman in accordance with 29 *Del. C.* §2544 (9), (10).

The notice to the Ombudsperson:

- must be filed within 30 days of the date of the final adverse decision;
- must be in writing on a 'Contact/Complaint' form provided by the Office of the Common Interest Community Ombudsperson (Ombudsperson) (available at the website of the Ombudsperson or by calling the number below);
- must include copies of any Required Information²⁵ listed in the Contact/Complaint form and supporting documents, correspondence and other materials related to the decision; and
- must be accompanied by a \$35 filing fee²⁶ (unless waived by the Ombudsperson for good cause).

²¹ 29 *Del. C.* §2544 (8) (i)

²² 29 *Del. C.* §2544 (8) (i)

²³ 29 *Del. C.* §2544 (8) (i)

²⁴ 29 *Del. C.* §2544 (9), (10)

²⁵ 29 *Del. C.* §2545 (a)

²⁶ 29 *Del. C.* §2544 (15)

You may contact the Office of the Ombudsperson at any of the following:

Delaware Department of Justice
Office of the Common Interest Community Ombudsperson
820 N. French Street
Wilmington, DE 19801
Telephone: (302) 577-8400
eMail: CIC.OmbudsmanDOJ@state.de.us

TEMPLATE IDR COMPLAINT FORM

[Name of Common Interest Community Association]

[Address and Telephone Number of Association or Managing Agent]

COMMON INTEREST COMMUNITY (CIC) COMPLAINT FORM

Pursuant to Chapter 25 of Title 29 of the Delaware Code, the Board of Directors (Board) of the **[Community Association Name]** (Association) has established this complaint form for use by persons who wish to file written CIC Complaints with the Association regarding the action, inaction, or decision by the governing board, managing agent or association inconsistent with the Declaration, Bylaws, Rules or any governing document of the Association, or applicable law.

Legibly describe your *CIC Complaint in the area provided below, as well as the requested action* or resolution of the issues described in the complaint. Please state the specific facts and circumstances at issue and *quote the specific provisions of the governing documents, Delaware laws and regulations that you rely upon* in support of your CIC Complaint. If you need more space, please attach additional pages to this CIC Complaint Form. Also, please attach any supporting documents, correspondence and other materials related to the Complaint.

Please sign, date, and print your name and address below and submit this completed form to the Association at the address listed above.

Printed Name:

Signature

Date:

Your Mailing Address:

Lot/Unit Address:

Your Contact Preference:

☒ Phone ☐ eM

Your eMail Address:

Your Phone Number:

☐ Other:

NOTICE:

If the Association issues a final decision adverse to your CIC Complaint, you have the right to file a notice of final adverse decision with the Common Interest Community Ombudsperson in accordance with 29 *Del. C.* §2544 (9), (10). The notice must be filed within 30 days of the date of the final adverse decision, must be in writing on the "Contact/Complaint" form provided by the Office of the Common Interest Community Ombudsperson (Ombudsperson); must include copies of any "Required Information" and supporting documents, correspondence and other materials related to the decision, and must be accompanied by a \$35 filing fee, unless waived for good cause by the Ombudsperson. The Ombudsperson may be contacted at:

Delaware Department of Justice
Office of the Common Interest Community Ombudsperson
820 N. French Street
Wilmington, DE 19801
Tel: (302) 577-8600

eMail: CIC.OmbudsmanDOJ@state.de.us

I hereby certify that I caused this CIC Complaint and all attached documents to be delivered to the Association at the address provided by the association on _____ [Date] at _____ o'clock am. / pm., by the following means of delivery:

[Check one:]

_____ I personally delivered the papers to the current address of the Association.

_____ FedEx, to the current address provided by the Association

_____ UPS, to the current address provided by the Association

_____ other delivery service that creates a record of delivery [specify] _____ to the current _____ address provided by the Association.

_____ registered mail, return receipt requested, to the current address provided by the Association.

_____ certified mail, return receipt requested, to the current address provided by the Association.

_____ USPS "delivery confirmation," to the current address provided by the Association.

_____ [if consistent with established procedure of the Association,] by electronic means, to [email address] _____.

I further certify that I have made and kept a record of delivery.

Your Name [printed or typed]:

Signature: _____

Date:

CIC CONTACT/COMPLAINT FORM



RETURN THIS FORM TO:

(Devuelva Este Formulario a):

OFFICE OF COMMON INTEREST COMMUNITY OMBUDSMAN

DEPARTMENT OF JUSTICE

STATE OF DELAWARE

820 N. FRENCH STREET, 5TH FLOOR

WILMINGTON, DE 19801

Phone: (302) 577-8600 or 1-800-220-5424

(Teléfono)

Fax: (302) 577-6499

Email: CIC.OmbudsmanDOJ@state.de.us

(Correo electrónico)

FOR OFFICIAL USE:

(Para Uso Oficial)

CIC#: _____

(Caso No)

Investigator:

(Investigador)

COMMON INTEREST COMMUNITY - CONTACT and COMPLAINT FORM*

(Declaración de Querrela)

Your Name:

(Su Nombre):

Name of Person or Business Complaint is Against:

(Nombre de Persona o Empresa):

Your Home Address:

(Su Dirección):

Location:

(Ubicación):

Number and Street (Número y Calle)

Number and Street (Número y Calle)

Development (Urbanización)

City (Ciudad)

City (Ciudad)

State and Zip Code (Estado Y Código Postal)

State and Zip Code (Estado y Código Postal)

Phone Number (s) (Teléfono):

Phone Numbers (Teléfonos):

Email Address (Correo Electrónico):

Home (Hogar): _____

Email Address (Correo Electrónico):

Work (Trabajo): _____

DO NOT FILE A COMPLAINT UNLESS YOU HAVE COMPLETED THE INTERNAL DISPUTE RESOLUTION PROCESS (IDR)

INSTRUCTIONS

PLEASE READ THROUGH THIS FORM CAREFULLY, BEFORE STARTING

Definition: The term "Community" and "common interest community" mean the same thing in this

Form. The Community includes you if you are:

- An owner of a Unit of real estate, and
 - your Unit is in a planned community, planned development, condominium, cooperative, or maintenance corporation;
 - your Community is subject to a plan described in the governing documents of your Community, (such as a Declaration, deed restrictions, Bylaws or rules) and
 - because of your ownership, you are obligated to pay a share of taxes, insurance and other costs; and
 - the costs are for funding, managing and supervising common areas that are available to all members of the Community, such as parks, pools, playgrounds, club houses, open spaces, private streets, etc.

The Community also includes:

- The Developer, also known as the "Declarant;" and
- Your neighborhood's governing Association, no matter what it is called, for example:
 - Planned community association or council;
 - Homeowners association or council;
 - Condominium association or council;
 - Cooperative association or council;
 - Community maintenance corporation, association or council; or
 - Other similar organization, no matter how it is named.
- Any other interested party.

1. You may Contact the Office of the Ombudsperson to make an INQUIRY;

a REQUEST FOR SERVICE; or submit a COMPLAINT if you are:

- a Unit Owner in your Community, or
 - a Declarant; or
 - a Community Association member; or
 - an executive board of a Community Association; or
 - any other interested party;
- and your complaint concerns potential violations of the law, Bylaws, Rules, regulations, or documents governing your Community.

2. DO NOT FILE A COMPLAINT BEFORE YOU COMPLETE THE INTERNAL DISPUTE RESOLUTION PROCESS of your Community's Association or one established by the Ombudsperson. This is required by the Ombudspersons Act. You must include a copy of the

final determination of the Association with the Complaint that you wish to file with the Ombudsperson, AND a \$35 Filing Fee Payable to "DOJ-CICombudsman".

3. You must also attach to your INQUIRY, REQUEST FOR SERVICES, or COMPLAINT:

- a. the Declaration or deed restrictions creating your Community,
- b. the Bylaws of your Community, and
- c. the Rules of your Community and
- d. any other document or evidence supporting your Inquiry, Request For Service, or Complaint.

4. The Ombudsperson is not the attorney for: You, Unit Owners, Declarants, Community Associations, the executive board of a Community Association, or any other interested parties.

- **No attorney-client relationship is implied or created by the Ombudsperson's contact with you or any person, and the Ombudsperson may not act as your attorney in a legal action brought by you or any other person.**
- **The Office of the Attorney General and the Office of the Ombudsman cannot provide legal advice, or legal interpretation. We can only provide general, nonbinding explanations of laws and regulations governing common interest communities.**
- **The goal of the Office, and its statutory responsibility is to:**
 - educate the public;
 - direct you to available Community resources;
 - review final adverse decisions from your Association; and
 - help unit owners and associations avoid lawsuits and resolve problems informally, through meetings, mediation or arbitration.

The Office and the Ombudsperson cannot, however, replace the services of an attorney representing a unit owner's or Association's particular interest.

5. Please attach COPIES, not originals, of all papers that relate to your Inquiry, or Complaint, including REQUIRED INFORMATION as well as papers such as Notices, advertisements, photographs, contracts, receipts, bills, cancelled checks, written agreements, letters or emails. (Envíe copias, no originales, de todos los documentos en relación con esta querrela, inclusive contratos, facturas, recibos, cheques cancelados, cartas o correo electrónico).

REQUIRED INFORMATION

The Common Interest Community Ombudsperson Law (29 Del C. §2945) requires that you provide the following information:

1. Are you a person or one of the following types of organizations? Check all that

apply: ☐ A Unit Owner (a homeowner) in a Community?

☐ A person, or family member who owns a residence in a planned Community?

☐ A "Declarant" (or developer) who still owns a Unit that is created by the Declaration or deed restrictions (the Governing documents)?

☐ A person leasing a unit; and all of the following are **true**:

- your lease will expire when your landlord's lease expires; **and**
- your lease is longer than 20 years, **and**
- your lease is not for a membership campground?

☐ A Declarant?

☐ A Community Association?

☐ The executive board of a Community Association?

☐ A member or representative of the executive board of a Community

association? ☐ A person otherwise interested? If so, please describe your interest:

2. Reason You Are You Contacting the Office of the Ombudsperson:

☐ To make an **INQUIRY**? If so, please state your inquiry and its surrounding circumstances in the "Narrative" section of this form. Please keep in mind that the Office of the Attorney General and the Office of the Ombudsman cannot provide legal advice, but can only provide general nonbinding explanations of laws and regulations and documents, governing common interest communities. There is a fee of \$35 to file an Inquiry.

☐ To **REQUEST SERVICES**? The following services are authorized by the Law:

☐ Provide election monitors and vote counting for fair Community Association elections? (Requires 15% of the voting interests, or 6 Unit Owners, whichever is greater, and a fee.)

☐ Provide assistance in understanding the rights, responsibilities and processes available to you through general, nonbinding explanations of laws, regulations, and governing documents governing common interest communities, in general terms, that does not require review of your governing documents.

☐ Conduct a meeting to educate Community members about their rights and responsibilities, and the processes available under law, regulations, and rules.

☐ Provide meetings, mediation, arbitration, or other forms of alternative dispute resolution as requested for disputes other than Complaints. There is a filing fee of \$35, and fees for the mediator's time and expenses.

☐ Describe any other service you seek. We will review your request and determine whether it is within the authority of the Office of the Ombudsperson or other unit or agency.

☐ To file a **COMPLAINT** that has been through your Community Association's or the Ombudsperson's Internal Dispute Resolution Process? Attach a copy of the Association's Final Decision, or statement that the request was ignored. Are you seeking:

☐ Meeting or
Conciliation? ☐
Mediation?
☐ Arbitration that is binding?
☐ Arbitration that is non-
binding? ☐ Other?
Please describe:

ATTACH A CHECK FOR THE FILING FEE OF \$35.00 PAYABLE TO "DOJ-CIC OMBUDSMAN"

3. Please provide the following information required by the Ombudsperson's

Law: (1) Contact information for the Community Association:

Name of Association: _____

Contact person: _____

Address: _____

Telephone: _____

Mobile: _____

Fax: _____

Email: _____

Any Other Contact information: _____

(2) Contact information for the property manager or the name of the person who manages the property of the Community.

Name: _____

Contact person: _____

Address: _____

Telephone: _____

Mobile: _____

Fax: _____

Email: _____

Any Other Contact information: _____

(3) Contact information for the executive board of the Association.

Name: _____

Contact person: _____

Address: _____

Telephone: _____

Mobile: _____

Fax: _____

Email: _____

Any Other Contact information: _____

(4) Contact information for the Declarant or developer.

Name: _____

Contact person: _____

Address: _____

Telephone: _____

Mobile: _____

Fax: _____

Email: _____

Any Other Contact information: _____

(5) Please attach all of the following Required Information to this Form. (These documents should be available to you from the Community Association, upon request):

- ☐ The final decision of the Community Association on your complaint; ☐ The Declaration;
- ☐ The Bylaws;
- ☐ The Rules for the Community;
- ☐ The annual budget adopted by the Community Association.
- ☐ Any other documentation or evidence that supports Your Inquiry, Request or Complaint, including if appropriate: meeting notices, minutes of Association or executive board meetings, correspondence, bills receipts, photographs, advertisements for the community, as examples.

(6) State when your community was created or approved.

Month _____ Day _____ Year _____

(7) State the number of Units in your Community.

(8) State the amount of the annual assessment made by your Community Association.

SPECIFIC DETAILS IF PERTINENT TO YOUR COMPLAINT OR CONTACT:

(9) What date did you purchase your Unit? _____

Please attach a copy of your purchase contract and all related papers.

(10) Who was your Sales Agent? Name, Firm, Address, Telephone, Email:

(11) Did you obtain advertising information about the Community, or its features? What did you receive:

Please attach a copy of any advertising of the Community, and its features that you relied upon, and any current advertisement of the Community. Please describe information you were told if there is no document:

(12) Were you represented by an attorney at Settlement? Name:

ADDITIONAL INFORMATION

Have you complained to the Unit Owner or Community Association? ☐ YES ☐ NO
(If yes, to whom?)

What was the response?

Have you made a complaint with any other governmental or regulatory agencies?
☐ YES ☐ NO

If yes, who? _____ Which agency? _____

At what address? _____

Please provide the names, telephone numbers, and addresses of persons needed as witnesses.

Please provide the names, telephone numbers, and addresses of other known persons affected.

Does an attorney represent you in this matter? ☐ YES ☐ NO

If yes, provide attorney's name and address:

Have you or anyone else filed a lawsuit against anyone regarding this complaint?
☐ YES ☐ NO

If yes, provide name of court and names of the parties:

Case number: _____ Date case filed: _____
Attach copies of the court documents to this complaint.

READ THE FOLLOWING CAREFULLY BEFORE SIGNING BELOW:(Favor de leer lo siguiente cuidadosamente antes de firmar):

- **I have attached copies of all papers that relate to this complaint.**
(He fijado copias de todo documento relacionado con esta querella).
- **I understand that in order to successfully handle this complaint the Office of the Ombudsperson may need to send this complaint to the person, organization or firm that I have complained about.** (Yo entiendo que para investigar esta querella, la Unida de Protección al Inversor tiene que enviar esta querella a la persona o empresa por cual yo he formulado cargos).

**YOU MUST CHECK ONE OF THE FOLLOWING:
(FAVOR DE INDICAR UNA DE LAS SIGUIENTES):**

☐ You have my permission to send this complaint to the person, organization or business named in my complaint. (Autorizo que envíen esta querella a la persona o empresa por cual yo he formulado cargos).

☐ You **DO NOT** have my permission to send this complaint to the person or business named in my complaint. (**No autorizo** que envíen esta querella a la persona o empresa por la cual yo he formulado cargos).

The information contained in this complaint is true to the best of my knowledge.
(La información incluida en esta querella es correcta según mi mejor conocimiento).

FOR COMPLAINTS

☐ I have attached a completed copy of the Internal Dispute Resolution complaint, and the complete response to it.

☐ I have enclosed a check in the amount of \$35.00 payable to: "DOJ-CIOmbudsman" for the filing fee.

Signature
(Firma)

Date
(Fecha)

Please be advised that Attorney General's Office including the Office of the Ombudsperson is prohibited by law from giving you legal advice, legal opinions, or acting as your private attorney. Therefore, you may wish to consult with a private attorney to discuss your legal rights and remedies.

ADR PROCEDURES AND FORM AGREEMENTS

ADR Procedures and Form Agreements

INTRODUCTION

A central duty of the Office of the Common Interest Community Ombudsperson is providing “alternative dispute resolution,” or “ADR.” The “alternative” to ADR is a lawsuit in court. The Ombudsperson Act gives the Ombudsperson the “power and duty” “To provide meetings, mediation or other forms of alternative dispute resolution as may from time to time be requested by” members of the common interest community. In addition, following a review of a complaint that completed an association’s “Internal Dispute Resolution” process, the Ombudsperson may offer ADR in an appropriate case. In either case, the Office of the Ombudsperson cannot force parties into ADR. All ADR through the office of the Ombudsperson is voluntary.

The Office of the Ombudsperson can either facilitate or conduct ADR. The Ombudsperson can facilitate ADR by accepting the complaint and forwarding it to the opposing party, and help the parties agree on neutral ADR practitioner if either party objects to the Ombudsperson.

To request ADR through the Office of the Ombudsperson, please complete and submit the Ombudsperson’s Contact/Complaint Form with a \$35 check payable to the Delaware Department of Justice, Office of the CIC Ombudsperson. Additional fees apply whether the Office of the Ombudsperson or another ADR practitioner provides ADR services.

ADVANTAGES OF ADR

Lawsuits are expensive, take a long time, will probably involve the additional expense of attorney’s fees, and put the decision concerning how to resolve a dispute in the hands of an uninvolved third-party, like a judge or jury. Although ADR is available in some courts, it is usually not available until a party files a complaint. By that time attorneys are usually involved, since in courts (other than Justices of the Peace Courts²⁷) an attorney must represent a corporation such as a homeowners association. Bylaws of most home owners associations require a complaining homeowner to pay the association’s attorneys fees. Even if the homeowner wins, the association’s attorney’s fees are a cost the association must pay from the assessments that all homeowners in the community must pay, unless the association’s insurance covers the fees as a cost of defense.

²⁷ Justice of the Peace Court Civil Rule 91 permits an officer of a corporation to represent the corporation in Justice of the Peace Court if the officer first files a “Certificate of Representation” with the Chief Magistrate, complies with the other provisions of Supreme Court Rule 57, and pays an annual registration fee of \$20. The form and further information is available at <http://courts.delaware.gov/forms/download.aspx?ID=5348>

The Ombudsperson Act, does not affect the right to sue under §348 of Title 10. That statute authorizes Chancery Court to order a Master in Chancery to mediate a complaint seeking enforcement of deed restrictions. Although the parties may mediate without attorneys, the association board must have an attorney since it is likely a corporation. This increases the expense compared to informal ADR. The statute allows the Court to order the losing party to pay the attorneys fees of the party that wins, unless that would be unfair, unreasonable or harsh. This raises the stakes in lawsuits over deed restrictions. A copy of this law is available on the Ombudsperson's website.

Major advantages of alternative dispute resolution include:

- The parties can work out their own solution to issues in some forms of ADR such as conciliation, meet and confer, or mediation;
- ADR can be conducted informally, without resort to courts or even attorneys;
- ADR can be far faster and less expensive than traditional court procedures;
- ADR can take several forms: conciliation, mediation, nonbinding arbitration, binding arbitration or neutral assessment;
- All ADR is voluntary. Both sides of the dispute must agree to participate in ADR.
- The information discussed during any ADR process remains confidential, by agreement or by law, even if there is litigation after unsuccessful ADR.
- A trained ADR practitioner conducts sessions: a conciliator, or a mediator or an arbitrator, who attempts to fairly resolve the dispute and satisfy the needs of the participants.
- All participants have an opportunity to express their feelings about the case and the facts as they see them.
- ADR offers the parties a safe place for reviewing options and enables them to develop their own settlement terms in a mutually agreed format.
- The parties can agree on an ADR Practitioner, or they can seek help with the selection.

WHAT FORMS OF ADR ARE AVAILABLE THROUGH THE OMBUDSPERSON?

The Ombudsperson or a designee can provide the following types of ADR. These are discussed below in order of increasing complexity.

CONCILIATION

"Conciliation" is a process in which an experienced, neutral person or "conciliator" meets with the parties to a dispute, often separately, to informally discuss and negotiate a complaint informally. The conciliator may make suggestions as the parties consider how to resolve a dispute, as well as their own. An association board, by rule or bylaw, should make this process available to resolve disputes internally. The Office of the Ombudsperson can either coordinate or provide conciliation upon request. To request conciliation through the Office of the Ombudsperson, please complete the Ombudsperson's Contact Complaint Form and the Agreement for Conciliation or Mediation form available on this website.

- The conciliator cannot impose a decision or any penalty on the parties.
- Conciliation is the simplest, fastest, and least expensive form of dispute resolution.
- The parties find their own resolution to a dispute, with or without the assistance of the conciliator.

"Meet and Confer" is another type of conciliation, without the guidance of a neutral person. With or without a neutral conciliator, conciliation follows this process:

- Any party to a dispute involving a homeowner, the homeowners association, the declarant, or other interested party, may request conciliation:

(1) A party may request the other party to meet and confer, with or without a neutral conciliator, to resolve the dispute. The request must be in writing. An Agreement for Conciliation or Mediation is available on this website.

(2) A homeowner may refuse a request to meet and confer. The association may not refuse a homeowner's request to meet and confer.

(3) The homeowner's association board must promptly designate a director to meet and confer.

(4) The parties must meet promptly at a mutually convenient time and place, explain their positions to each other, and confer in good faith to resolve the dispute.

(5) The parties must put any agreement resolving the dispute in writing and sign it. The board's authorized designee must sign the agreement on behalf of the association.

- An agreement made through conciliation binds the parties and is judicially enforceable as a contract if both of the following conditions are satisfied:

(1) The agreement is not in conflict with law or the governing documents of the common interest development or association.

(2) The agreement is consistent with the authority granted by the board to its designee or the agreement is ratified by the board.

- An Association may not charge a homeowner a fee to participate .

MEDIATION

"Mediation" is the most common method used for resolving disputes. Mediation offers the parties a safe forum for reviewing options and enables the parties to develop their own settlement terms by an agreement. Mediation is a process in which a neutral person called a "mediator" aids the parties in agreeing on how to resolve a dispute. To request mediation through the Office of the Ombudsperson, please complete the Ombudsperson's Contact/Complaint Form and the Agreement for Conciliation or Mediation form available on this website.

- The mediator cannot impose a decision or any penalty on the parties.
- The mediator's role is to clarify misunderstandings and ambiguities; to provide a new perspective on disputed issues; and to explore options for agreement.
- Mediation through the Office of the Ombudsperson is voluntary. The parties must agree to mediation and must be present for the mediation conference.
- Mediation is beneficial to both parties because of the time and money saved compared to a lawsuit or trial.

Before the mediation begins, the parties and the mediator sign a written agreement to mediate. A form agreement to mediate is available on this website. The agreement to mediate states that the mediation conference and everything said at the mediation conference is confidential, even if the mediation does not resolve the dispute. It states that neither party can call the mediator as a witness if the case goes to arbitration or trial.

Mediation conferences are informal proceedings. That means that the strict legal rules of evidence do not apply in mediation. This allows for an unrestricted discussion of issues and misunderstandings. If the parties settle, the mediator puts the settlement agreement in writing and all the parties and the mediator sign it. The agreement describes both the settlement of

issues and the future responsibilities of each party. Once signed the agreement is a binding contract, which is enforceable by courts.

If the dispute is not resolved at the mediation conference, the mediator will continue to work with the parties to reach an agreement. Mediation includes all contacts between the mediator and any party, until the parties reach an agreement, or the parties discharge the mediator, or the mediator determines that the parties cannot agree. The context can include telephone conversations, meetings and even additional mediation conferences.

The mediator may terminate the conference if the parties cannot agree. The termination will not bind either party to anything in any other proceeding. If the parties cannot agree after initial mediation sessions, other ADR procedures or more formal processes are available. These include arbitration or filing suit and proceeding with litigation.

The process of mediation often involves:

- The complaining party fills out a Contact/Complaint form requesting mediation and files it with the Ombudsperson, and delivers a copy to the responding party with a copy of an Agreement to Mediate.
- The responding party may supply answering information, provide it to the Ombudsperson, and delivers a copy to the responding party.
- The parties must agree to mediation by signing a written agreement form.
- The agreement to mediate may identify any mediator the parties agree upon, or the Ombudsperson, who may conduct the mediation or designate a mediator.
- If the parties do not agree to a mediator, the Ombudsperson will appoint one.
- The mediator will specify a date and time for the mediation that is convenient to both parties.
- Five days before the mediation date, both the complaining party and responding party will submit records the mediator must understand to assist the parties to agree. The parties need not provide their information to the opposing party, but some mediators sometimes recommend that the parties give it to each other. Since the mediator will not decide the case, the parties need not provide everything they would produce at a trial, or duplicate documentation provided with the Contact/Complaint form.
- The "Required Information" is the complaint form, with an explanation and identification of the parts of the governing documents of the homeowners association, from the certificate of incorporation, declarations, the bylaws, and any rules adopted by the homeowners association. In addition, each party can provide a few items of evidence or documents that would be useful for the mediator to consider, in assisting the parties to agree. Sometimes

the mediator will ask each side to fill out a form that helps the parties think through the strengths and weaknesses of their position, and the agreements they seek.

- The parties may agree on what documentation the mediator will see and provide it together, or may share the information they are providing with the other party. This is not required.
- On the day and time of the mediation the parties will meet with the mediator in a conference room.
- The mediator will explain the mediation process and require each party to sign an agreement to mediate the dispute and agree that neither side will call the mediator as a witness in any other proceeding concerning the dispute.
- The mediator will invite the complaining party to describe the dispute or complaint and explain what the party wants to resolve the dispute.
- The mediator will then invite the responding party to state a response to the complaining party and tell the mediator what he wants to resolve the dispute.
- The mediator may then separate the parties, so that each is in a separate room in order to speak privately with each.
- The mediator will make a judgment about what party to speak with first.
- The mediator may ask questions of the each party, and will ask what they want the mediator to convey to the opposing party as a settlement proposal.
- The mediator will not tell the other side anything that you tell him not to disclose.
- The mediator will take messages back and forth between the rooms separating the parties and discuss the settlement proposal and the response to it. The mediator will attempt to identify areas of agreement and areas of dispute and possible ways for reaching agreement.
- The mediator will continue this process as long as it appears there is room to settle.
- If the parties reach an impasse the mediator will end the mediation conference for the day. The mediator will likely contact the parties later to offer to convey additional proposals in an effort to obtain agreement that will resolve the dispute.
- When the parties agree, the mediator will assist by reducing the agreement to writing. The mediator may follow up with each party to see that each side is honoring the agreement, if that is necessary.

ARBITRATION

“Arbitration” is a voluntary, confidential process in which a neutral “arbitrator” hears both sides of a controversy and decides all aspects of the case based on the facts and the law just like a judge without a jury. If the parties agree in writing, the decision will be binding, and enforceable. To request arbitration by or through the Office of the Ombudsperson, please complete and submit the Ombudsperson’s Contact/Complaint Form and the Agreement to Arbitrate form available on this website.

- Arbitration is often beneficial to both parties because of the time and money saved compared to a lawsuit or trial.
- The arbitrator will decide for the parties. This differs from mediation where the parties negotiate their own result. As in cases decided in courts, arbitration often means that at least one party is unhappy with the decision.
- The arbitrator’s role is to hear the evidence, including testimony, and review the documents and exhibits. The Arbitrator decides: what facts are the important; what law applies to the facts; and applies the law to the facts to reach a decision. The parties do not negotiate their own resolution, but if they agree on certain facts or principles, the arbitrator will consider those.
- The parties can agree in writing that the decision will bind them. If the decision is binding the parties are bound to follow the arbitrator’s decision. The Court of Chancery can enforce a binding arbitration order.
- Arbitration through the office of the Ombudsperson is voluntary. The parties must agree to arbitration, and if they do, they must be present for the arbitration hearing. However, sometimes an agreement made before there is a dispute requires the parties to arbitrate instead of suing. The bylaws of some communities require arbitration before a person can sue.
- Delaware’s Uniform Arbitration Act governs arbitration. The Ombudsman’s Arbitration process incorporates this law to answer questions that arise in the arbitration process. This law makes agreements to arbitrate enforceable in Chancery Court. This law is Chapter 57 of Title 10 of the *Delaware Code*. An indexed, word searchable copy of the law is available on this website on the “Important Statutes” page.

The process of arbitration often involves:

- The complaining party file fills out a Contact/Complaint form requesting arbitration and files it with the Ombudsperson, and delivers a copy to the responding party with a copy of an Agreement to arbitrate.
- The parties must agree to arbitration by signing a written agreement form.

- The parties may agree whether the arbitration will be binding or nonbinding. The written agreement to arbitrate should state whether arbitration is binding or nonbinding. Binding arbitration ends the dispute. Nonbinding arbitration may not.
- The agreement to arbitrate may identify an arbitrator satisfactory to the parties.
- If the parties do not agree to an arbitrator, the Ombudsperson can conduct the arbitration or designate who one will conduct the arbitration.
- The arbitrator will specify a date and time for the arbitration that is convenient for both parties.
- 10 days before the arbitration date the complaining party will submit all records needed for decision of the case to the arbitrator and the responding party.
- The "Required Information" is the complaint form, the governing documents of the homeowners association including the certificate of incorporation, declarations, the bylaws, and any rules adopted by the homeowners association. In addition, the complaining party must provide any other necessary evidence or documentation, including photographs, bills, or other evidence supporting the claim.
- Five days before the arbitration date the responding party must deliver all records needed for decision of the case to the arbitrator and the complaining party. However, the responding party need not provide anything already supplied by the complaining party.
- The parties may agree on what documents and exhibits the arbitrator will see and provide them together. They can also provide additional exhibits, so long as they provide copies to the other party in the time allowed.
- On the day and time of the arbitration the parties will meet with the arbitrator in a conference room or hearing room.
- The arbitrator will invite the complaining party to explain the complaint and the evidence, and explain why the arbitrator should decide for the complaining party.
- The arbitrator will then invite the responding party to state the response and explain why the arbitrator should decide for the responding party.
- The arbitrator will then ask the parties to present their witnesses and their evidence.
- The arbitrator will first ask the complaining party to present evidence, or witnesses, or testify under oath to show and explain the evidence in support of the complaint.
- The arbitrator may invite the responding party to ask questions of the complaining party.
- The arbitrator may ask questions of the complaining party.

- When the complaining party has presented all the testimony, documents and evidence supporting the complaint, and answered all questions of the responding party or the arbitrator, the arbitrator will give the responding party an equal opportunity to present testimony, documents and evidence to support its response.
- The complaining party may ask questions directed to the responding party, and so may the arbitrator.
- If the responding party raises matters that the complaining party wants to address, the arbitrator will give the complaining party an opportunity to present additional witness testimony or documentary evidence if available.
- When both parties have provided all the testimony, documents and other evidence they want the arbitrator to consider, the arbitrator will give each side an opportunity to explain what the evidence shows, the governing documents and law requires, and why the arbitrator should decide in their favor. The complaining party has the first opportunity to make a closing explanation, and may reply to the responding party's closing explanation.
- The arbitrator may decide on the spot or may decide within five days and deliver a written decision to the parties within that time. The parties may agree whether they want the arbitrator to explain the decision .

NEUTRAL ASSESSMENT

"Neutral case assessment" is a less common process by which an experienced "neutral assessor" gives a non-binding, reasoned, oral or written evaluation of a controversy, on its merits, to the parties. The neutral assessor may use mediation and/or arbitration techniques to aid the parties in settling.

The process of neutral case assessment often involves:

- The procedure is the same as mediation, except:
- After hearing from the parties, the neutral assessor will provide a nonbinding, oral or written evaluation on the merits of each party's position.
- This may lead to meetings, mediation, arbitration, or direct negotiations leading to resolution of the dispute you.
- Sometimes the neutral case assessment turns into a mediation that eventually leads to settlement.

OFFICE OF THE COMMON INTEREST COMMUNITY OMBUDSPERSON

**Delaware Department of Justice
820 N. French St., 5th floor
Wilmington, DE 19801**

AGREEMENT FOR CONCILIATION

This is an agreement by the parties to participate in this conciliation process. I understand that conciliation is a voluntary and confidential process, which we may terminate at any time.

By signing this agreement, I indicate I am aware that information shared in the conciliation sessions and all materials prepared for conciliation are confidential. I will not try to force the conciliator to produce documents or to give evidence relating to any conciliation session in any court or administrative proceeding. I understand the conciliator will not disclose confidential information provided during the course of the conciliation or testify voluntarily on behalf of any party. I understand the conciliator may find it helpful to meet with each party separately, but the conciliator will not reveal what is said by either of us, without permission.

I further agree that:

1. No one may attend conciliation without permission of all parties and the consent of the conciliator.
2. The conciliator will not serve as the representative or lawyer for any party. I was encouraged to consult with a lawyer prior to signing any agreement.
3. Any party including the conciliator may withdraw from or terminate the conciliation at any time.
4. The conciliator cannot and will not impose an agreement or penalty. Only the parties can reach a resolution and I agree to abide by the terms and conditions of an agreement.
5. If we resolve the dispute, the parties or conciliator will put the agreement in writing and when signed, it shall reflect the wishes of each party in resolving the dispute. We intend it to be a contract between the parties instead of submitting the dispute to the court process. If a party violates the agreement, I understand either party may seek a remedy through the courts.
5. The conciliator will report to the Office of the Ombudsperson that conciliation occurred and whether it was successful.
6. If I represent a homeowners association, or other corporation, I am authorized by the board to participate and make agreements.

Party

Party

Party

Party

Conciliator
Date:

Conciliator

OFFICE OF THE COMMON INTEREST COMMUNITY OMBUDSPERSON

**Delaware Department of Justice
820 N. French St., 5th floor
Wilmington, DE 19801**

AGREEMENT TO MEDIATE

This is an agreement by the parties to participate in this mediation process. I understand that mediation is a voluntary and confidential process, which we may terminate at any time.

By signing this agreement, I indicate I am aware that information shared in the mediation sessions and all materials prepared for mediation are confidential. I will not try to force the mediator to produce documents or to give evidence relating to any mediation session in any court or administrative proceeding. I understand the mediator will not disclose confidential information provided during the course of the mediation or testify voluntarily on behalf of any party. I understand the mediator may find it helpful to meet with each party separately, but the mediator will not reveal what is said by either of us, without permission.

I further agree that:

1. No one may attend mediation without permission of all parties and the consent of the mediator.
2. The mediator will not serve as the representative or lawyer for any party. I was encouraged to consult with a lawyer prior to signing any agreement.
3. Any party including the mediator may withdraw from or terminate the mediation at any time.
4. The mediator cannot and will not impose an agreement or penalty. Only the parties can reach a resolution and I agree to abide by the terms conditions of the agreement.
5. If we settle the dispute, the mediator will put the agreement in writing and when signed, it shall reflect the wishes of each party in resolving the dispute. We intend it to be a contract between the parties instead of submitting the dispute to the court process. If a party violates the agreement, I understand either party may seek a remedy through the courts.
6. The mediator will report to the Office of the Ombudsperson that mediation occurred and whether it was successful.
7. If I represent a homeowners association, or other corporation, I am authorized by the board to mediate and make agreements.

Party

Party

Party

Party

Mediator
Date:

Mediator

OFFICE OF THE COMMON INTEREST COMMUNITY OMBUDSPERSON

**Delaware Department of Justice
820 N. French St., 5th floor
Wilmington, DE 19801**

Filing Party (Print or type name)

Responding Party (Print or type name)

Matter #:

AGREEMENT TO ARBITRATE

This is an agreement by the parties to participate in voluntary arbitration. I understand that arbitration is a voluntary and confidential process. Arbitration includes all contacts between the Arbitrator and any party or parties, until a final decision is rendered or the parties discharge the Arbitrator.

This agreement incorporates the issues identified in the Common Interest Community Contact/ Complaint form and attachments submitted in this matter. The parties agree that the arbitrator in this process will arbitrate any dispute arising under this agreement.

☐ **If checked here the parties agree the arbitration will be binding.** Please initial if binding.

Filing party _____

Responding party _____

If not checked above, or no agreement, or one party has not initialed, arbitration is non-binding.

☐ Check here if either party requests written explanation of the basis of the decision. If not checked, the arbitrator will deliver the result in writing, but will not explain the basis of the decision.

☐ If you agree on an arbitrator other than the Common Interest Community Ombudsperson (or designee), please identify the agreed Arbitrator. Contact Information of agreed Arbitrator:

The Arbitrator will contact the parties to set a date, time and place for the arbitration hearing and exchange of documents.

The parties further agree to the following:

- The Delaware Uniform Arbitration Act, Title 10 *Del. C.* Chapter 57 governs this Arbitration.
- At least one representative of each party with authority to resolve the dispute must participate in the arbitration hearing. Delaware counsel must attend the arbitration hearing on behalf of a corporation.
- The Arbitration proceedings are private. Only parties and their representatives may attend, unless all parties agree otherwise.
- The Arbitrator may not be compelled to testify in any judicial or administrative proceeding concerning any matter relating to service as Arbitrator in this proceeding.
- All memoranda and work product contained in the case files of the Arbitrator are confidential.

- Any communication made in or in connection with the arbitration that relates to the dispute is confidential. Confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding with the following exceptions: (1) where all parties to the arbitration agree in writing to waive the confidentiality, or (2) where the confidential materials and communications consist of statements, memoranda, materials, and other tangible evidence, which were not prepared specifically for use in the arbitration hearing.
- The parties agree to protect the Arbitrator from civil liability for any act or omission in connection with the Arbitration, unless the act or omission was in bad faith, with malicious intent, or in a manner exhibiting a wilful, wanton disregard of the rights, safety, or property of another.
- The strict rules of evidence shall not prevent the consideration of evidence or testimony.
- As to the Arbitrators' Award, the parties agree:
 - (1) The Arbitrator may grant any remedy or relief that the Arbitrator deems just and equitable and within the scope of any applicable agreement of the parties.
 - (2) In addition to a final award, the Arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders and awards.
 - (3) Upon the granting of a final award, a final judgment or decree shall be a contract between the parties and be enforced as any other contract.
 - (4) The Arbitrator is ineligible to adjudicate any subsequent litigation arising from the issues identified in the petition.

Other agreements of the parties concerning the Arbitration:

I understand and agree to pay ½ of the fee for arbitration according to the Arbitrator's or the Ombudspersons current fee schedule, which is incorporated into and made part of this Agreement, or as otherwise ordered by the Arbitrator, or agreed by the parties.

Filing Party (Please print name)

Responding Party (Please print name)

Filing Party (Signature)

Responding Party (Signature)

Arbitrator

Arbitrator

Date: _____

TEMPLATE FAIR ELECTIONS PROCEDURE

Template Fair Elections Procedure

OFFICE OF THE COMMON INTEREST COMMUNITY OMBUDSPERSON

COMMUNITY ASSOCIATION VOTER AND ELECTION SERVICES²⁸

Election of Directors, Voting Procedure: Secret Ballot

The success of Community Associations²⁹ depends in large part on the manner in which the Association conforms to and complies with the codes and laws that govern them.

The Common Interest Community Ombudsperson's Act requires the Ombudsperson to develop and publicize procedures intended to result in fair elections for members and officers of a common interest community associations.³⁰

The following "Voting and Election Policy and Procedures" assure a community association of a professional, fair and unbiased election of officers governing the association.

The purpose of these procedures is to ensure and protect the integrity of association elections by adopting and implementing specific election processes and procedures for election by secret ballot.

The Office of the Ombudsperson will provide monitors and vote counting services, intended to result in fair elections for members and officers of a Community Association, when 15% of the total voting interest of a Community Association or 6 unit owners, whichever is greater, petition the Ombudsperson to do so. A charge commensurate with and approximating all costs necessary to defray actual expenses of the services will be payable to the Office of the

²⁸ Based loosely upon the California Homeowners Associations' Election process and the DUCIOA. CA HOA's procedures are in turn based upon California State Legislature adopted the "Election Procedure" laws (SB-61) in 2006 (amended several times since); the laws have been recorded in the California Civil Code and include Sections 5100 thru 5145 of the Davis Sterling Act. A number of changes and additions are included in this draft to localize the procedure to Delaware.

²⁹ "Community Associations" is a shorthand term meaning "Common Interest Community Associations" defined as:

"A unit owners' association must be organized no later than the date the first unit in the common interest community is conveyed. The association must have an executive board and the membership of the association at all times consists exclusively of all unit owners The association may be organized as a profit or nonprofit unincorporated association, corporation, trust, limited liability company or other lawful form of legal entity authorized by the laws of this State." 29 Del C. §81-301. "Organization of unit owners' association." Associations include: "maintenance corporations;" "condominium councils;" "cooperative councils;" "homeowners associations;" or any other name appropriate to the type of Association.

³⁰ 29 Del. C. §2544 (5)

Ombudsperson.³¹

These procedures can be adopted if bylaws of the association do not set out a fair voting procedure. These procedures are intended to provide fairness and clarity to the election of officers and members of Executive Boards, and to removal of officers from office. However, they can be used for the many types of votes and voting without a meeting, as described in the DUCIOA:

- Assessments;
- Special Assessments;
- Amendments to Governing Documents;
- Granting of the Exclusive Rights to Use Common Area;
- Budgets;
- Amendments to plats, or property descriptions;
- Changes to rules to restrict uses, or behavior;
- Termination or merger of common interest communities;
- Any other vote required by law;
- Any subject determined by the Association;
- Any Petition signed by a majority of the Associations' members.

Associations may consider alternatives to the procedures set out here. For information concerning voting using internet based services use the search term "online voting and election" or "HOA online voting and election" your web search.

³¹ 25 Del. C. §§2544 (6), (15).

VOTING AND ELECTION POLICY AND PROCEDURES

Election voting is by Secret Ballot and is restricted to unit owners only, unless voting by proxy, as explained below.

1. CALL FOR ELECTION OR OTHER VOTING MEETINGS

The call for a meeting to conduct the business of the Association including the "Notice of Meeting and Agenda" will proceed in the same manner set forth in the Association's bylaws. The form and timing of notice must be reasonably calculated to reach all unit owners.

An Association must provide notice of the meeting to call for elections or other voting at least 7 days in advance of the meeting, unless the bylaws provide a longer time.

Notice for this Voting Procedure is sufficient if delivered to each Unit Owner by:

- (1) hand delivery;
- (2) delivery by United States mail, postage paid, or commercial delivery service to the mailing address of each unit, or to a different address if the Unit Owner has given the Association one in writing;
- (3) electronic means, if the Unit Owner has given the Association prior written authorization and an electronic address; or
- (4) any other method reasonably designed to provide notice to the Unit Owner.³²

The notice of any meeting must state the date, time and place of the meeting and the items on the agenda.³³

All Association members, even those who are in arrears on payment of their assessments are entitled to vote on any matter submitted to a vote of unit owners, even if they are delinquent and other privileges have been suspended because of the delinquency.³⁴ The qualifications, powers and duties, terms of office, and manner of electing and removing executive board members and officers in filling vacancies is as provided by the bylaws.³⁵

2. NAME IN NOMINATION

The Association shall deliver a "Candidate Nomination Form" and an "Issue Form" to all unit owners at least sixty (60) days prior to the election. The Form must be returned to the Association at least forty-five (45) days prior to the election.

³² DUCIOA § 81-127. Notice.

³³ DUCIOA § 81-308. Unit Owners Meeting

³⁴ DUCIOA § 81-302 (11).

³⁵ DUCIOA § 81-306 (3).

A person related by blood or marriage to a sitting board member will be presumed to have a conflict of interest to the Association, and may not be nominated for election to the board.

Members of the Association may nominate themselves or other members of the Association.

3. ELECTION INSPECTORS

The Executive Board must select or appoint "independent third parties" to be the Election Inspectors or Monitors. The Board may choose to have either one or three Election Inspectors. An "independent third party" includes, but is not limited to, a volunteer poll worker with the County Board of Elections, a licensee of the Delaware Board of Accountancy, or a notary public. An independent third party may be a member of the Association, but may not be a member of the Executive Board, or a candidate for the Executive Board, or related to a member of the Executive Board or a candidate for the Executive Board.

The Executive Board must appoint Election Inspectors after the close of candidate nominations but before delivery of the secret ballots to unit owners. Election Inspectors determine where and to whom unit owners must return the secret ballots.

The Duties of Election Inspectors:

1. Determine the number of homeowners or unit owners entitled to vote and the voting power of each.
2. Determine the authenticity, validity, and effect of proxies, if any.
3. Receive ballots.
4. Hear and determine all challenges and questions arising out of or in connection with the right to vote.
5. Count and tabulate all votes.
6. Determine when the polls close.
7. Determine the result of the election.
8. Perform any acts proper to conduct the election with fairness to all members in accordance with this procedure and all applicable rules of the Association regarding the conduct of the election that are not in conflict with this procedure.

4. SECRET BALLOT

The ballots cast by unit owners must remain confidential until counted. The ballots and two preaddressed envelopes with instructions on how to return ballots shall be mailed by first-class mail or delivered by the Association to every member not less than 30 days prior to the

deadline for voting. In order to preserve confidentiality, a ballot must not identify the voter by name, address, lot, parcel, or unit number.

All solicitations for votes by ballot must: 1) State the number of responses needed to meet the quorum requirement; 2) State the percentage of approval necessary to approve each matter other than election of directors; 3) Specify the time by which the ballot must be delivered to the Association in order to be counted, which shall not be less than three days after the date the Association delivers the ballot; and 4) Describe the procedures including time and size and manner by when unit owners wishing to deliver information to all unit owners regarding the subject of the vote may do so.³⁶

The voter must not sign the ballot.

- Once the voter completes the ballot, the voter inserts the ballot into an envelope that is then sealed. This is the secret ballot.
- The voter inserts the envelope containing the secret ballot into a second, pre-addressed return envelope and seals it.
- In the upper left hand corner of the outer envelope, the voter must print and sign his or her name, address, and lot, or parcel, or unit number that entitles him or her to vote.
- The outer envelope must be pre-addressed to the Election Inspectors, who will tally the votes.
- The voter mails or delivers the Secret Ballot in person to the location specified by the Inspectors of Election.
 - As an alternative, the voter may complete the ballot at the meeting set for the election, in the same fashion.

The Election Inspectors only count the ballots delivered prior to the polls closing.

Voters may deliver their secret ballots in person on the day and within the time called for the election.

If only one of several owners of a unit is present at a meeting or submits a secret ballot, that owner is entitled to cast all the votes of for that unit.

If more than one of the owners is present or votes by secret ballot, the votes allocated to that unit must be in accordance with the agreement of the majority in interest of the owners, unless the declaration expressly provides otherwise. There is majority agreement if any one of the owners casts the votes allocated to that unit without protest by any of the other owners of the unit, made promptly to the person presiding over the meeting. The election inspector resolves all protests and disputes.³⁷

³⁶ DUCIOA § 81-310 (f) (2).

³⁷ DUCIOA § 81-310 (a).

Electronic Ballot or Ballot Without Meeting

Any action the Association may take at any meeting of members it may also take without a meeting, if the Association delivers a written or electronic ballot to every member entitled to vote on the matter.

Approval of the ballot is valid only if: 1). The number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action; and 2). The number of approvals equals or exceeds the number of votes that would be required to approve the matter at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot.³⁸

A ballot cannot be revoked after delivery to the Association because of the death, disability or revocation by the person who cast that vote, unless the declaration or bylaws state otherwise.³⁹

Failure to follow the election procedure as adopted by the association will invalidate the ballot and the unit owner's vote.

5. PROXY BALLOT

The "Secret Ballot" process eliminates or reduces the need for a proxy vote since the unit owner may cast their vote by mailing in the secret ballot. However, any instruction given to a proxy holder directing the vote the proxy holder is to cast shall be set forth on a separate page of the proxy that can be detached and given to the proxy holder to retain. The proxy holder shall cast the owner's vote by secret ballot.

A unit owner may revoke a proxy only by actual notice to the person presiding over the meeting for the election.

A proxy is void if it is not dated. A proxy is void if it states it is revocable without notice. A proxy terminates one year after its date, unless it specifies a shorter term.⁴⁰

6. COUNTING THE VOTES

The Election Inspector shall check off on a "sign-in sheet" that a ballot was received for a unit, as the ballots arrive. The first secret ballot received for any unit is the ballot of record and that is the vote counted. Any additional ballot(s) for the same unit are invalid and void.

All votes shall be counted and tabulated by the inspector or inspectors of the election in public at a properly noticed open meeting of the Executive Board or unit owners. Any candidate or other member of the Association may witness the counting and tabulation of the votes. No person, including a member of the Association or an employee of the management company,

³⁸ DUCIOA § 81-310 (f) (2), (3).

³⁹ DUCIOA § 81-310 (f) (4).

⁴⁰ DUCIOA § 81-310 (b).

shall open or otherwise review any ballot prior to the time and place at which the ballots are counted and tabulated.

A majority of the votes cast in person, by proxy or by ballot at a meeting of unit owners for the election shall determine the outcome of the election, so long as the number of votes cast in favor is at least a majority of the number of votes required for a quorum for that meeting.

7. RESULTS OF THE ELECTION

The results of the election shall be promptly reported to the Executive Board of the Association and shall be recorded in the minutes of the next meeting of the Executive Board and shall be available for review by members of the Association. Within 15 days of the election, the Board shall publicize the results of the election in a communication directed to all Unit Owners.

Ballots shall be retained by the Board for no less than 90 days after the results are publicized.

TEMPLATE BYLAW FOR THIRD PARTY NOTICE TO HOA BEFORE UTILITY SHUTOFF

Template Bylaw for Third Party Notice to HOA before Utility Shutoff

Template Bylaw to Require Unit Owners in Common Interest Communities to Name the Homeowners' Association a Third-Party to Receive

Notice of Termination of Service Under HB 177 of the 148th General Assembly.

Introduction

On September 3, 2015, the Governor signed into law a bill aimed at helping common interest communities, including condominiums, cooperatives, and deed restricted subdivisions.

When a homeowner fails to pay a utility bill, the utility has a right to turn off service including water or electricity. That can result in major damage to a home and other property. For example, if electricity is cut off during the winter and a home remains unheated, water lines can freeze, burst, and flood the property. That may cause tremendous damage to the home and to connected homes. This law requires utility companies to have a "third party notification system." It allows a customer to name a person who will also receive notice before the utility cuts off service.

The law allows common interest communities, to adopt bylaws *requiring* homeowners to name the HOA to receive notice before cutting off utility service. The HOA can notify the homeowner, or make other arrangements depending on your bylaws.

Finally, this law requires the Common Interest Community Ombudsperson to prepare a sample bylaw that an HOA can use to require homeowners to name the HOA as a third-party to receive notice before the utility cuts off service.

Each community may choose whether to *require* unit owners to name the association as a third-party to receive notice of a utility shutoff. A community should edit this sample to conform to the language used in its governing documents, and decide if the notice will be required or is optional. As with any bylaw, the community must follow the process stated in its bylaws for adopting new bylaws.

Draft Bylaw:

Designation of Association to Receive Notice of Termination of Utility Service.

Every Unit Owner must [or "may"] name the Association as a third party to receive notice that the utility intends to end service at the same time the utility sends notice to the unit owner. Utility service means gas, water, wastewater, or electricity for use or consumption in any

dwelling unit. Every unit owner must sign the following statement, which the Association will complete and deliver to the utility company.

[To: [name, address, and of Utility company]

Regarding: [Unit Owners' Names, address with unit #, community name, city, state, zip code]

Account Number: [Unit Owner's account number for the utility]

I/we, the undersigned are the owners of the property stated above.

We designate [name and address of homeowners' Association] as a third-party to be notified before you terminate utility service at the above address, under the third-party notification program you created pursuant to 26 *Del. C.* §117 (b). This notification shall be in addition to any other person or entity I have named, or will name.

This notification is to remain in effect until changed by me or my successor.

Signature
Print Name:

Date

Signature:
Print Name:

Date

By the Association:

On behalf of [name homeowners' Association], we acknowledge our willingness to receive prior notice of termination of utility service as a third-party, on behalf of your customer, our association member identified above, but we shall not be held in any way liable to any utility by acceptance of this third-party status.

Send Prior Notice Of Termination of Utility service to us as third party designee, to:

[Name and address of association or property manager]

The Board of this Association authorized me to sign this document.

Signature
Print Name:
Title:

Date

ADVISORY COUNCIL MEMBERS

Advisory Council Members

Name	Organization	Address	Phone	Email	Committee
William P. Brady, Esq.	The Brady Law Firm PA	240 N. James Street, Suite 106, Wilmington, DE 19804	T 302-482-4124 F 302-482-4126	wbrady@bradylawde.com	-Recommend Changes of Law; -Feasibility of Mandatory ADR- Chair -Education Committee -Mentoring Committee -Collection of Assessments; -Feasibility of Mandatory ADR
Steven Burg Executive Assistant II	New Castle County	87 Reads Way New Castle, DE 19720	T 302-395-5057	seburg@nccde.org	-Recommend Changes of Law; -Mechanisms for Registering Communities
Tony Campisi	Pennsylvania- Delaware Valley Chapter Community Associations Institute Benchmark Builders	601 S. Henderson Rd., Ste. 151 King of Prussia, PA 19406-3596	T 610-783-1315 11- F 610-783-1318	tony@cal-padelval.org	Recommend Changes of Law
Frederick Fortunato	Sussex County Council (County Administrator)	818 First State Blvd Wilmington, DE 19804	302-995-6945	Fred@BenchmarkBuilders.com	Recommend Changes of Law
Vacant (Todd Lawson)		P.O. Box 589 Georgetown, DE 19947	302-855-7742	tlawson@sussexcountysde.gov	
Ivey A. Ibrahim Neighborhood Development Director	Office of The Mayor of Wilmington	800 French Street Wilmington, DE 19801- 3537	T 302-576-3106 F 302-571-4119	Albrahim@WilmingtonDE.gov	-Community Conflict Resolution; -Operation of Ombudsman's Office
Sarah Keifer, Director	Kent County Planning	555 Bay Rd Dover, DE 19901	T 302-744-2471	planning@co.kent.de.us	-Recommend Changes of Law -Collection of Assessments -Operation of Ombudsman's Office -Education Committee -Mentoring Committee
Gail E. Launay- Tarlecki	Right Property Management	20245 Bay Vista Road, Suite 205 Rehoboth Beach, DE 19971	T 302-727-7008	glaunay@rightmgmt.com	Community Conflict Resolution
Leslie W. Ledogar, Esq.	Retired	Lewes, DE	610-659-8489	Leslie.Ledogar@gmail.com	-Collection of Assessments -Mentoring Committee -Recommend Changes of Law -Operation of Ombudsman's Office
Delores McLamb	Retired	Bear, DE	571-276-0963	dmc6384485@aol.com	-Mechanisms for Registering
Charles "C.R."	Delaware Department	401 Federal Street	302-857-3083	Charles.mcleod@state.de.us	

Name	Organization	Address	Phone	Email	Committee
McLeod, Chief Community Relations Officer	of State	Dover, DE 19901			Communities-Chair
Jordyn Pusey, VP	Civic League for New Castle County		302-388-1101	jordynmpusey@gmail.com	-Community Conflict Resolution; -Mechanisms for Registering Communities -Operation of Ombudsperson's Office -Collection of Assessments
Charles C. Stirk, Jr. President	Civic League for New Castle County	201 North Woodward Avenue Wilmington, DE 19805	302-463-2239	civicleagueforncoc@gmail.com	-Collection of Assessments-Chair; -Feasibility of Mandatory ADR; -Recommend Changes of Law -Education Committee
Chad J. Toms, Esq.	Whiteford Taylor Preston	400 N. King Street Suite 500 Wilmington, DE 19801	302-357-3253	ctoms@wblaw.com	-Community Conflict Resolution; -Feasibility of Mandatory ADR -Mentoring Committee
Ruth Visvardis			302-836-8001	visvart@msn.com	-Community Conflict Resolution-Chair -Education Committee
Patricia Woodring			302-539-0666	paw-bb@mcchsi.com	
Vacant	Governor's Designee for New Castle County				
Vacant	Governor's Designee for Kent County				

Ad Hoc Members

Name	Organization	Address	Phone	Email	Committee
Chris Nichols, President	Seascope Property Management	17563 Nassau Commons Blvd., Suite 3 Lewes, DE 19958	302-645-2222	CNichols@Seascopepm.com	Collection committee Registering CICs
Neal Richard, Association Manager	Seascope Property Management	17563 Nassau Commons Blvd., Suite 3 Lewes, DE 19958	302-645-2222	nrichard@seascopepm.com	Collections Committee
Jack Hildman	Blenheim Marketing, LLC	220 Continental Dr. Ste 410 Newark, DE 19713-4315	302-254-0700	jhildman@blenheimhomes.com	Recommend Changes of Law

WEBSITE ANALYTICS

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Website Analytics

Ombudsman's Website Analytics:

March 2015-December 11, 2015

Page	Pageviews	Unique Pageviews	Avg. Minutes on Page
Mainpage	3172	2349	109.33
Information for HOAs	1049	741	169.92
Ombudsman's Services	583	441	197.96
Important Statutes	536	445	238.41
Complaint Procedure	523	394	165.27
Live in Sussex?	430	340	109.64
Live in New Castle County?	420	321	173.11
Alternative Dispute Resolution	266	207	236.21
Advisory Council	263	202	206.44
Fair Election Process	211	161	165.28
Announcements/News	170	127	170.08
Live in Kent?	155	127	94.72
Run HOA Meetings	60	47	141.81