

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



2023 ANNUAL REPORT

**ASSISTING COMMON INTEREST COMMUNITIES TO
UNDERSTAND THEIR RIGHTS AND RESPONSIBILITIES, AND
THE PROCESSES AVAILABLE TO RESOLVE DISPUTES**

The Common Interest Community Ombudsperson shall:

"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."

29 Del. C. §2544 (16).

Acknowledgments

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DISCLAIMER

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TABLE OF CONTENTS

| | |
|--|--------------------|
| Introduction | 6 |
| What is an Ombudsperson? | 6 |
| Communities Served by the Office of the Common Interest Community Ombudsperson (CICO). | 6 |
| The Need Addressed by the Office of the Ombudsperson. | 7 |
| Overview of the Services Available Through the Ombudsperson. | 7 |
| | |
| 2023 Annual Report | 9 |
| 2023 By the Numbers | 9 |
| Advisory Council Meetings | 9 |
| Advisory Council Mentoring Services | 9 |
| Ombudsperson's Workshops/Meetings to Owners and Legislators | 9 |
| Election Services Rendered: 2 | 10 |
| Complaints | 11 |
| Emails | 12 |
| Successful Mediation Referrals to Court of Common Pleas' "Community Mediation Program". | 12 |
| Requests for Mentoring | 12 |
| Some Highlights of 2023 | 13 |
| Outreach was dominated by Zoom | 13 |
| Taskforces | 14 |
| Ombudsperson Continuing Legal Education and Training | 14 |
| Ombudsperson's Website | 15 |
| Advisory Council | 15 |
| Advisory Council Education Committee. | 15 |
| Status of the Office of the Ombudsperson | 15 |
| Concerns Expressed to the Office in 2023 | 17 |
| Most Common Concerns. | 17 |
| Concerns Expressed by Common Interest Community Associations Boards | 18 |
| Concerns Expressed by Owners in Common Interest Community Associations | 19 |
| Concerns Expressed by Declarants | 20 |
| Miscellaneous Issues in 2023 | 20 |
| | |
| Legal Developments Impacting Common Interest Communities | 23 |
| Federal Legislation and Regulation | 23 |
| The Federal "Corporate Transparency Act" (CTA) | 23 |
| State Legislation | 24 |
| Case Decisions | 25 |

| | |
|---|--------------------|
| HOA Decisions | 25 |
| Condominium Cases | 42 |
| Recommendations for Changes to Delaware Law or Court Rules to Improve Regulation and Operation of Common Interest Communities | 45 |
| Eliminate Exemption of Small and Small Assessment Common Interest Communities. | 45 |
| Still Under Study by the Legislation Committee of the Advisory Council: | 46 |
| Declarants To Provide a Summary of The Budget During the Period of Declarant Control | 46 |
| Reserves for Planned Subdivision Communities | 46 |
| Common Interest Community Registration | 47 |
| Notice of Filing Liens for Delinquent Assessments | 47 |
| Audits for Planned Subdivision Communities | 48 |
| Earlier Disclosure of Governing Documents to Purchasers | 48 |
| Transition/Turnover Requirements. | 48 |
| Collections Policy | 49 |
| Registering Community Association Managers. | 50 |
| More Education of Real Estate Sales Agents About Common Interest Communities | 50 |
| Advisory Council | 51 |
| Advisory Council Activity. | 52 |
| Selected Committee Activity | 52 |
| Collections; Legislation, and Processes Committee. | 52 |
| Mechanism to Register Communities | 52 |
| Conclusion | 54 |

INTRODUCTION

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 unit developments" (or subdivisions of single-family homes), to understand their rights and responsibilities and the processes available to them. Where possible, the Ombudsperson tries to resolve disputes among members of the common interest community, without resort to the judicial system.

The Act requires the Ombudsperson to submit an annual report each year. 29 Del. C. §2544 (16). This report covers 2023.

What is an Ombudsperson?

An Ombudsperson receives, investigates, and reports on complaints, and tries to resolve problems fairly.

The Common Interest Community Ombudsperson is a Deputy Attorney General within the Delaware Department of Justice. The Ombudsperson's statutory charge is to "assist (those involved in 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." 29 Del. C. §2544 (2).

Communities Served by the Office of the Common Interest Community Ombudsperson (CICO).

Common interest communities include condominiums, cooperatives, and planned communities. All share common features including they are authorized by recorded declarations of deed restrictions, covenants or conditions; creating mandatory membership associations, to govern and collect mandatory; enforceable annual assessments for the maintenance of common areas or common elements of the community such as streets, streetlights, open space, storm water management ponds, and amenities such as playgrounds, 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 despite their size or when 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 like real estate professionals, lawyers, and Association managers.

The Need Addressed by the Office of the Ombudsperson.

The General Assembly created the Office "to assist common interest communities to understand their rights and responsibilities and to resolve disputes without recourse to the judicial system."

Overview of the Services Available Through the Ombudsperson.

The Ombudsperson has the powers and duties assigned in 29 Del. C. §2544 (1)-(20). They fall into 5 functions:

- **Create** processes, forms, and rules for: a model Internal Dispute Resolution (IDR) process for communities to adopt or adapt; Alternative Dispute Resolution (ADR) procedures for communities; a "Contact and Complaint" form to engage the Office; model Fair Election Procedures; and others. 29 Del. C. §2544 (5) (8) (14).
- **Educate** members of Common Interest Communities throughout the State. In addition to workshops, meetings, and public presentations, the Ombudsperson responds to more emails and phone calls asking for help "in understanding the rights and responsibilities and the processes available according to the law, regulations and documents governing the respective common interest community." 29 Del. C. §2544 (3) (4).

- **Mediate**, arbitrate, and supply other Alternative Dispute Resolution (ADR) options when the parties consent. If the parties agree, the parties may bypass our complaint process entirely. The parties can agree in writing to have our Office refer the matter to the Court of Common Pleas' "Community Mediation Program" which provides free mediation if our Office makes the referral. This Mediation is without charge, unlike mediation, arbitration and binding arbitration through our Office which does cost fees.
- **Investigate** "potential violations of the law, regulations or documents governing a common interest community" first by reviewing complaints not resolved at the Association level through the statutorily required "Internal Dispute Resolution" and, when necessary, issuing subpoenas and referring meritorious allegations of violations to law enforcement. 29 Del. C. §2544 (10) (12)
- **Election Services** include providing vote monitoring, vote counting, and other services to promote fair elections to homeowners' associations. 29 Del. C. §2544 (6).

An **Advisory Council** also supports and advises the Ombudsperson about the following subjects: 29 Del. C. §2546 (f) (1) (a-e).

- Mechanisms to increase the collection rate for common interest community assessments,
- Developing conflict resolution procedures within common interest communities,
- The feasibility of mandatory mediation, arbitration, or other forms of ADR for disputes not able to be resolved within common interest communities and, if possible, how to implement a process,
- Developing mechanisms for the registration of common interest communities with the State or other political subdivision, and
- Any other topic the Council considers appropriate.

2023 ANNUAL REPORT

2023 By the Numbers

Advisory Council Meetings

The Common Interest Advisory Council met exclusively by Zoom, **five (5)** times rather than six (6). The Ombudsperson canceled the November meeting. However, public participation continues to soar from single digits to an average of 50-70 attendees and is expected to grow. Our email list has grown to 1,166, letting the Office maximize participation. The increase in public participation is attributable to the shift to online meetings and the corresponding ease with which members of the public can go to them.

Advisory Council Mentoring Services

The Common Interest Advisory Council requested and provided **four (4)** community Boards with mentoring services.

Ombudsperson's Workshops/Meetings to Owners and Legislators

The Ombudsperson participated in **40** workshops and meetings in 2023, including:

- Many meetings with state and county officials to discuss the work of the Office and legislation affecting common interest communities.
- Senator Stephanie Hansen's HOA Leaders Forum: PowerPoint presentation at Hodgson Vo-Tech to about 20 homeowners' association board members, and Sen. Hansen.
- New Castle County Board of Realtors, invited Recorder of Deeds, Mike Kozikowski and the Ombudsperson to present to its Policy Committee about his "Title Theft" prevention software. Meeting included Council President Karen Hartley-Nagle.
- Community Association Institute (CAI) Chesapeake Chapter "Transition from Developer to Owner Control."
- Multiple meetings of and presentations to HOAs throughout the state, including Millpond, Riverbend, Richfield, and others.

- Participated on the NCCo Taskforce on Condominium Structural Integrity issues. These meetings occurred monthly. The Ombudsperson attended 10 meetings through 2023 and many discussions.
- Participated on the NCCo Recorder of Deeds Taskforce on creating a "Community Association Portal" or "CAP" for free access to recorded documents of Common interest Communities. The Ombudsperson went to 5 meetings through 2023.
- Participated in the Ombudsperson's/CAI "Joint Board Leadership Development Workshop," by Zoom for the first time.
- SHARP Zoom: met with a group of homeowners from an umbrella organization of Sussex communities containing 4,000 claimed unit owners to hear their questions about the effect of 2021 legislation extending two sections of DUCIOA to pre-existing communities: §81-308A, Executive Board Meetings, and §81-314, Surplus Funds collected through assessments, being refunded to the owners, if not applied to reserves funds or common expenses.
- Attended and staffed the DOJ Booth at the Delaware State Fair.
- Spoke at Rep. Bush's and Kent County Levy Court Commissioner Joanne Masten's meeting with about 40 residents of Heritage Trace HOA, with DE State Police Community Liaison Officers, and DelDOT to discuss community complaints with construction delays and development issues focusing on road and top coating due to continuing construction in community.
- Presented at the request of the CAI Chesapeake Chapter at the Regional Expo in Ocean City, MD.
- Went to the first CAI Delaware Legislative Action Committee Meeting "DLAC".

Election Services Rendered: 2

- We received and conducted election tracking for **two (2)** communities in 2023.

Retreat at Millstone.
LeParc Condominiums.

Complaints

- Formal Complaints: Received: **77**
 - 43 - Statutorily complete
 - 34 - Incomplete (missing information but tracked by the office)
- Complaints Resolved: **240**
 - 8 - Statutorily complete complaints formally resolved awaiting closure
 - 20 - 2023 Statutorily complete complaints formally received, resolved, and closed in the same year
 - 194 - Statutorily complete complaints that were from prior years that were formally resolved and required administrative closing.
 - 18 - Incomplete complaints to be closed, consumers did not remedy the complaint deficiencies within 30 days of notification of statutory requirements, chose to not continue their complaint, or the matter was resolved without further involvement of the CICO Office.
- Statutorily complete complaints continuing into 2024: **15**
 - 1 - Active investigation
 - 8 - Mediations scheduled for 2024
 - 6 - CICO continuing working towards resolution

Emails

- Formal Email Inquiries: **452**

Responses to these 452 inquiries require time-consuming research or response. Responses include detailed information and links to, or copies of, useful information or statutes.

- Informal Inquiries: **57**

Informal complaints: these complaints are people who email and receive more communication than a single formal email inquiry response. These informal complaints are tracked separately to prepare for formal filings – these complainants did not continue and file a formal complaint due to various reasons, either the matter was resolved with CICO involvement or complainant simply chose not to continue with the formal process.

- General Emails: **25,769**

Individuals seeking general information and administrative matters that do not require significant research.

Successful Mediation Referrals to Court of Common Pleas' "Community Mediation Program"

- The Ombudsperson's Office made 12 referrals to the Court of Common Pleas' "Community Mediation Program."

4 mediated and closed.

1 failed mediation, active and awaiting closure.

7 mediations scheduled for 2024.

Requests for Mentoring

Experienced Community Association board members serving on our Advisory Council can give boards practical, non-legal information, and suggest options and best practices to boards, under the supervision of a lawyer member of the Advisory Council, on request, by completing a "Contact & Complaint" form.

- **Mentoring Requests:** The Ombudsperson's office made four (4) referrals to the Advisory Council Mentoring Committee.

Some Highlights of 2023

Outreach was dominated by Zoom

The Ombudsperson met with groups almost exclusively by telephone and group Zoom meetings. There were 27 group meetings in 2023, slightly lower than the numbers before the pandemic. The Ombudsperson made presentations, workshops and meetings including:

- Presented to the Delaware State Bar Association's Real and Personal Property Committee, Short Topics Seminar with other lawyers who are members of the Common Interest Community Advisory Council, Chad Toms, Esq., and William Brady, Esq.
- Advisory Council's Workshop on "Governance" in common interest communities. One Hundred twenty-seven members of the public went to this free event. Community Associations Institute-Keystone Chapter recorded the workshop and made it available without charge on its website.
- Joint Ombudsperson's/CAI "Board Leadership Development Workshop" was reformatted as a hybrid in-person and virtual event and conducted successfully with Keystone Chapter's assistance. Live attendees received breakfast and lunch. Virtual attendees took part by Zoom and received their written materials by mail before the workshop.
- Advisory Council presented speakers including: (1) former President of the Community Associations Institute, Mitch Frumkin, P.E., a Professional Engineer and Reserve Specialist, about the Champlain Towers collapse; and (2) Dawn Bauman, Senior Vice President of Government and Public Affairs and the Executive Director of the Foundation for Community Association Research.
- New Castle County Council member Lisa Diller and Counsel to New Castle County Council Michael Migliore, Esq. presented to the CIC Advisory Council about the County's Neighborhood Improvement District Legislation.

Taskforces

The Ombudsperson took part with 3 New Castle County Taskforces beginning in 2022 but continuing into 2023:

- **New Castle County's Condominium Structural Integrity Taskforce** to develop a [County ordinance requiring structural inspections](#), reserve studies, reserves, and repairs by credentialed people to prevent catastrophic collapses like that of Champlain Towers in Surfside Florida in 2021. This Taskforce also produced a Draft Amendment to the DUCIOA section 81-316 to modernize its treatment of reserves, and assessments. This bill is being considered for the 2024 Legislative Session.
- **New Castle County Recorder of Deeds' online "Community Association Portal" (CAP)** Taskforce to provide a single starting point for homeowners seeking important information, including free access to recorded governing land documents, and access to County services.
- **New Castle County's Taskforce** to develop the innovative "[Neighborhood Improvement District" \(NID\)](#) legislation to help communities struggling with problems that could be resolved by temporarily provided increased County resources through the creation of neighborhood improvement districts. This bill SB286 is being considered for the 2024 Legislative Session.
- **New Castle County Low Income Housing Taskforce:** Michael Migliore, Esq. Counsel to Council, and Councilwoman Kirkpatrick invited the Ombudsperson to join them in a low-income housing study, to contribute information about common interest communities and their potential role in low-income housing.
- **CAI Delaware Legislative Action Committee:** (Phoebe Neseth, Esq., Executive Director, CAI Government Affairs, contacted the Ombudsperson to attend the first DLAC) meeting on December 6, 2023.

Ombudsperson Continuing Legal Education and Training

- Attended Community Associations Institute's Annual Law Seminar by Zoom 3+ days.

Ombudsperson's Website

- The updated, edited, and formatted "cookbook" inspired ["Manual for Collecting Delinquent Assessments-Without a Lawyer"](#) and a comment page were installed on the Ombudsperson's Website. We invited our 1100+ email recipients and anyone visiting the website to comment before it is finalized for the website.
- We posted a [weblink list of illegal, invasive plant species](#) developers and community associations should be wary about adding to their communities, as these have been banned by Delaware law. The site shows pictures of the offensive invasive species to help users and offers similar native plant alternatives.

Advisory Council

- New Castle County's designated appointee to Advisory Council resigned in 2022. The position was still open in 2022 and 2023.

Advisory Council Education Committee

- We continued sharing information about educational workshop programs with both the Chesapeake and the Pennsylvania Chapters of CAI.
- CAI's Keystone Chapter, through its Executive Director, (Advisory Council member Tony Campisi) began to support our Zoom presentations, including advertising events and freely distributing digital materials. CAI Keystone Chapter has also made videos of recorded educational programming accessible to Delawareans for free.

Status of the Office of the Ombudsperson

- We began discussions about the creation of a database of Common Interest Communities based on Annual Franchise Tax Reports filings. The project is a statutory charge to the Advisory Council: "...development of mechanisms for the registration of common interest communities with state or other political subdivisions." 29 Del. C. §2546 (f).
- CICO paralegal Amanda Lord has increased efficiency in the Office and significantly decreased response times for complaints and other inquiries.

- We created a new website link to Education and Resources linking to the Keystone CAI webpage for on demand education and free access to our "Governance Workshop" recording.
- In response to frequent questions about communities transitioning from developer control, we created written materials to answer basic questions and included a link to CAI's "[Best Practices Report No. 7, Transition to Owner Control](#)" which is available free through a website link.

Concerns Expressed to the Office in 2023

Most Common Concerns

- Board refusal to provide access to books and records of the community on written request and 5 days' notice remains the top category of complaint. This includes reports of refusal of outgoing boards to provide the association's books and records of the prior board to the incoming elected board.
- Complaints around bylaws were the next most common category of complaints. Such complaints included:
 - Bylaws not available to owners
 - Bylaws not followed by boards
 - Developers failing to create bylaws when the community was under their control
 - Improper amendments
 - Selective enforcement
- The DUCIOA requires bylaws to be recorded even if the community is otherwise exempt from the DUCIOA. The DUCIOA also requires common interest communities to have bylaws even if they are not corporations.
- Boards filing late responses to Ombudsperson's Internal Dispute Resolution Complaint forms continues to be a common complaint.
- Complaints regarding elections continues to be a reoccurring topic. These include complaints about:
 - Electronic Voting
 - Proxies
 - Resignations and appointments
 - Secret ballots
 - Refusal or failure to conduct Annual elections of board members
 - Quorum requirements
 - Requiring Signature "verification" despite absence of authority for signature comparison
 - Refusing candidates to stand for election for unauthorized reasons
 - Waiving elections for unauthorized "appointing" directors without elections
 - Concerns surrounding ballot validation post-election

- Election of more board members than allowed in the governing documents
- Requiring that proxy votes be sent to a Board member candidate without authorization in the bylaws.
- Violations of privacy – today's technological age poses challenging issues in common interest communities including:
 - Public posting of homeowner's complaints to public forums such as Facebook
 - Cyber bullying
 - Posting of photos of homeowners by other homeowners to show "problems or violations."

Concerns Expressed by Common Interest Community Associations Boards

- Collecting delinquent assessments continues to be a common complaint. In 2023, we continued a long process of updating our "Guide to Collecting Delinquent Assessments, without a Lawyer" which was underway shortly after the Justice of the Peace Court modernized several important Court forms. The latest version is posted for public comments, the Advisory Council has reviewed, made changes based on the public comments and the draft is being finalized for posting.
- Requests for guidance about "terminating" their common interest community. It is discussed in the DUCIOA at 25 Del. C. §81-218. "Termination of common interest community." Assistance from a private practice lawyer is recommended.
- Enforcing deed restriction against storing boats, jet skis, travel homes, recreational vehicles, commercial vehicles, and other items prohibited in the Governing documents, on a unit owner's property.
- Owners persistently and repeatedly refusing to pay annual assessments or to correct properly issued violations until suit is filed.
- Owners of the Board recording meetings without prior notice or consent.
- Requiring owner-volunteers on landscaping to sign a waiver of Association liability, vs buying a minimal Workers Compensation insurance policy limited to volunteers.

Concerns Expressed by Owners in Common Interest Community Associations

- Homeowners shared some of the same concerns as Boards.
- Complaints of rules being applied arbitrarily and capriciously enforced were the ruled on in Chancery Court several times in 2023. Boards must not act arbitrarily and capriciously, or they may even risk personal liability for the lawyers' fees of the complaining owner in addition to liability to enforce the action.
- False resale certificates containing materially false information, in circumstances that show a likely "knowing misrepresentation." We refer these to the DOJ Consumer Protection Unit.
- Cancellation or suspension of amenity access for delinquent assessments or other violations.
- Failure to properly propose and approve budgets.
- Failure of declarants to establish reserve funds for condominiums.
- ARC denials for fencing that contradict deed restrictions or what already exists in the community or that conform to county code.
- Many complaints involved Sussex County water-runoff issues, and some involved owners disregarding the communities approved and recorded plat plans and changing approved grading that affects flooding on others' property. County Engineering, the Conservation District Watershed Stewardship Division, and DNREC when contacted, can help resolve some runoff issues.
- We receive and process requests for election services, mostly limited to monitoring and vote counting.
- Owners complained that their board refused the Ombudsperson's recommendation of informal "Meet and Confer" discussions rather than full formal board hearings.

Concerns Expressed by Declarants

- Declarants explained to several communities that during Declarant control, they will not lay the top asphalt coat on roads until construction requiring heavy machinery for construction deeper in the community is completed, since the heavy machinery tears-up the topcoat of asphalt. However, when they receive complaints, they may send a team to repair deep potholes that develop before the roads are finished. We recommend the community contact the developer, then the county monitoring the construction, and DELDOT for its authority over publicly dedicated streets.
- Developers often control the community association (during the "period of Developer Control") and the board of their construction corporation. This may impose on the developer a fiduciary duty to act in the best interest of the community association, as explained in the Nieves v. Insight opinion summarized the 2019-2020 Annual Report at page 52. Sometimes this is the alleged basis of the Developer Controlled Boards' refusal to provide access to the community's request for access to financial books and records of where the assessment monies are kept and how they are spent. Developers and Homeowners sometimes disagree on what records are to be produced as a result of this fiduciary duty.

Miscellaneous Issues in 2023

- Door-to-door salespersons trespassing past posted "No soliciting" signs, and not wearing identification cards required by the "[Door-to-Door Salesperson Identification Card Act](#)," and the [Division of Revenue](#). The Ombudsperson forwarded complaints to the Consumer Protection Unit.
- Transition or development is not complete after date transition was supposed to occur.
- Discrepancies in Quarterly assessment bills.
- Addressing a troublesome "Bullying" Officer.
- Avoiding receivership or stop Boards from bailing when no volunteers step forward to replace retiring sole director to serve on board.
- Court of Common Pleas' Community Mediation Program for mediation without lawyer fees or our Office's fees or mediation or arbitration

- Assessments – Boards improperly increasing the Annual Assessments.
- New owners complain the board has no reserves, no meetings, and budgets make no sense.
- New owners can't find contact information about their HOA. This information can be found in the Division of Corporations in a communities' Annual Franchise Tax Report. No access to governing documents, these recorded Declarations and Bylaws can be accessed at the Recorder of Deeds Office in the County the community is located in.
- Board members mistakenly insist that their community is not covered by the DUCIOA because the association is preexisting. Section 81-119 address this. A word-searchable, and hyperlinked copy of the [DUCIOA](#) is available on our website.
- Owners ask if reserves are required for all common interest communities. We quote the DUCIOA that reserves are required only for condominiums unless the declaration requires reserves. We note reserves are a best practice for all common interest communities, to avoid special assessments.
- Many communities are "void" for non-filing or nonpayment of "Annual Franchise Tax Reports." They cannot contract in the corporate name or even sue for collection of delinquent assessments. We refer them to Division of Corporations whose staff are knowledgeable and very helpful in working with community associations getting back on track and even retroactively reinstating the community.
- Board not enforcing declarations. We explain the "[Procedure for Filing a Complaint](#)" and refer to our website.
- Board making one-sided ARC rules based on "aesthetics," which are likely "arbitrary and capricious" under current Delaware Chancery Court legal opinions.
- Board "shaming" delinquent owners by publishing their names and delinquency. We provide complainants informational articles advising against shaming as counterproductive and a likely violation of privacy rights.
- Theft allegations unsupported by facts in an e-mail. We take the allegations of theft seriously but require either a report to a police detective unit or following our "[Procedure for Filing a Complaint](#)" with reasonable substantiation. Telephone calls, letters and emails are not enough.

- "Gypsy" paving contractor's take HOA residents' money, do a poor job, in winter repaving driveways. We consult DOJ Special Investigations Unit and recommended filing a police report.
- "Re-Wilding" grassy areas in HOAs. This is discussed in articles and complaints in our Office when individual homeowners, without ARC approval allow the grass, wildflowers etc., to grow in their yards, usually in violation of County or community maintenance requirements. Most are addressed at the County and municipal levels.
- Original developer collapsed financially. Some original developers provided for a community association in the declaration, but never create or activate the association. Years later, after the HOA was declared void for non-filing of Annual Franchise Tax Reports, property managers sometimes send notices of delinquency in paying assessments. Each developer we have contacted assured us the HOA will be reconstituted or replaced and the owners will be informed of the Association and their obligations under the recorded declaration of deed restrictions. We also ask each developer to provide a copy of recorded bylaws once they are adopted, as required by the DUCIOA.
- Pet owners permitting urinating on an upper floor balcony, letting it fall through balconies below and onto the patio of the lowest level owner. We hear of related issues in larger condominiums where the upper floor owners let their dogs do their business in the elevators, at least until the owners are smacked with fines and cleanup costs.
- New complaints continue of board refusal to provide access to books and records, especially financial records, and statements asking for access from owners entitled to access them.

LEGAL DEVELOPMENTS IMPACTING COMMON INTEREST COMMUNITIES

Federal Legislation and Regulation

The Federal "Corporate Transparency Act" (CTA)

This regulation was issued on September 29, 2022, by the Financial Crimes Enforcement Network (FinCEN) of the U.S. Department of the Treasury. It is a final rule implementing the Act's "[beneficial ownership information](#)" reporting provisions. Starting in 2024, many corporations and other entities created in or registered to do business in the United States must report information about their "beneficial owners" – the individuals who own or control a company – to FinCEN. FinCEN published a [Small Entity Compliance Guide](#) to help the small business community in complying with the "beneficial ownership information" (BOI) reporting rule.

The Guide is intended to help businesses determine if they must report their beneficial ownership information to FinCEN. It seems to require Common Interest Communities (including condominiums, cooperatives, and planned unit subdivisions or HOAs) that file papers with the Secretary of State, and other companies, to report corporate information to FinCEN, including identification, contact information and photographic images, supported by documentation, like a driver's license, passport, or state issued identification cards for directors of HOA's and other common interest communities.

The effective date is January 1, 2024, for the first filing, but existing corporations have until January 1, 2025, to complete the first filing. The rule will enhance FinCEN and other agencies' ability to protect U.S. national security and the U.S. financial system from illicit use.

A Federal District Court Ruled the CTA Unconstitutional - But Compliance Is Still Required for Most Reporting Companies

On March 1, 2024, the U.S. District Court for the Northern District of Alabama ruled that the CTA is unconstitutional on the grounds that it exceeds Congress' enumerated powers, including its authority over foreign affairs, the Commerce Clause, the taxing power, and the Necessary and Proper Clause.² The court enjoined the government from enforcing the CTA against the specific plaintiffs in the case - the National Small Business Association (NSBA) and one of its individual members. The government filed an appeal with the Eleventh Circuit on March 11,

2024, and while there are other pending federal cases that challenge the constitutionality of the CTA, it will likely take time for the courts to resolve the issue nationwide.

Existing corporations still have until January 1, 2025, to complete the first filing.

State Legislation

There were several bills filed in the General Assembly of interest to the Common Interest Community in 2023, but none of them were passed or enacted:

- **SB 130: An Act to Amend 25 Del. C. Relating to Restrictive Covenants.** The legislation would preclude associations from regulating the use of clotheslines. The legislation also would amend statutes related to solar panel regulations. It failed to pass.
- **SB 103: An Act to Amend Title 16 Del. C. Relating to Electric Vehicle Charging Infrastructure for Residential Dwellings.** This legislation would require all newly constructed single and multiple family rooms to include infrastructure for electric vehicle charging stations. It failed to pass.
- **HB 13: An Act to Amend 29 Del. C. Relating to Electric Vehicles.** This legislation would instruct the Delaware Department of Natural Resources and Environmental Control, and the Delaware Department of Transportation to study the availability of residential electric vehicle charging stations. It failed to pass.

Case Decisions

HOA Decisions

Several of the digested cases are long or address many subjects. The Westover case has extensive quotes that discuss evaluation of "Arbitrary and Capricious" enforcement of Deed restrictions by boards, especially those challenged on the grounds of violation the "harmony": of appearance of a community, which is threaded through several of the following decisions.

VILLAGE OF WESTOVER HOA v. ODWIN, [C.A. No. CPU5-22-000206](#). (CCP March 2, 2023)

The Village of Westover HOA ("Plaintiff") sued the Odwins (collectively "Defendants") in this Debt lawsuit to recover unpaid assessments. The Defendants are the heirs of the deceased owner of the property. The Declaration of Maintenance Obligations for Village of Westover ("Declaration") is the recorded document that authorizes Plaintiff to subject unit owners within Westover to maintenance obligations. The Declaration permits Plaintiff to collect assessments from unit owners, and any assessments not paid are considered delinquent. Unpaid assessments totaled over \$7000 when suit was filed. Deceased -owner/wife had a "life estate" in the home, and the remaining heirs each had a ¼ "future Estate" in the home as "remaindermen."

When a life estate is established, the life tenant has the right to the use and enjoyment of the property. The life tenant's rights to the property may not be encroached upon by the remainderman. As the owner for life, a life tenant is responsible for maintaining the property and "to pay expenses such as taxes, water, sewer and the like."

The Court concluded Codefendants cannot be personally liable for the unpaid assessments simply because they hold a future ownership interest in the Property. But, if Plaintiff has a right to place a lien against the property, if Codefendants' future interest materialize, that lien could be enforceable against them.

Additionally, the Declaration does not list the homes' Lot number among those subject to the maintenance obligations. There was also no testimony to explain why the homes' Lot number was excluded from the lot numbers in the Declaration or to explain why it would be subject to the Declaration despite its apparent exclusion. Because of the failure of proof, the Court found the defendants owed no Assessment to the HOA.

RBY&CC EAST SIDE HOA, v. BEEBE, [C.A. No. 2022-0433-SEM](#) (Del. Ch. June 9, 2023.)

A homeowners association sued to enforce the deed restrictions which bound the community since 1975. The association alleged new homeowners flouted the restrictions by (1) failing to follow their approved plans for grading and (2) installing a wooden structure without approval. To remedy the violations, the association petitioned Chancery Court for an injunction requiring the homeowners to regrade their property and remove the structure. The homeowners disputed the claims and argued that the deed restrictions are unenforceable, arbitrarily applied to them, or waived by the association. Both sides asked for statutory fee shifting for having to litigate their dispute.

After trial, the Chancery Court Master¹ decided (1) the restrictions are enforceable and were reasonably enforced by the association, (2) the homeowners violated the restrictions, (3) the homeowners proved none of their affirmative defense, and (4) injunctive relief and fees should be awarded in the association's favor.

The Architectural Review Committee identified documents missing from the submission: "a placement survey, drainage plan, a final grading plan and a landscape plan." The ARC noted that "[a] plan of the intended final grading and how storm water will be managed is extremely important."

To remedy these deficiencies, Defendant Beebe submitted his hand-drawn drainage plan sketch and landscape plan sketch to the ARC. The plans did not depict any retaining wall or landscape barrier in the Property's backyard. With the ongoing uncertainty as to the Homeowners' plans the ARC recommended that the Homeowners "be put on notice that any changes to the plan as submitted and reviewed will require [the Homeowners] to resubmit." The project was eventually approved. The Homeowners were required to submit an "As Built" Survey & "Certificate of Occupancy" upon completion of the construction. The "as built" plans did not conform to the approved plans for landscaping and the wooden structure they disclosed.

The restrictions in this case are commonly called "architectural review covenants," because they require prior review and approval of plans for improvements. These covenants are "neither new nor uncommon in Delaware" but they "must be carefully evaluated because their arguably subjective nature introduces the risk of arbitrary and capricious application."

¹During 2023 the Court of Chancery changed the title of the "Masters" in Chancery to "Magistrates." This Report uses the term that appears in each decision summarized.

The Association bears the burden of proving the Restrictions (1) are enforceable, (2) were not arbitrarily or capriciously applied to the Homeowners, and (3) were violated by the Homeowners. The Association also bears the burden of proving entitlement to injunctive relief. The Homeowners bear the burden of proving their affirmative defenses of unclean hands and waiver. Whichever party prevails on their claims is then entitled to statutory fee shifting unless the non-prevailing party can show an exception thereto.

The Restrictions are enforceable.

For deed restrictions to be enforceable under Delaware law, they must serve a legitimate purpose and give homeowners enough notice of what conduct would be appropriate. "Fundamental fairness requires that a property owner be given notice, whether written or de facto, of the specific requirements to which their building plans must conform for those plans to receive... approval." *RBY&CC EAST SIDE HOMEOWNERS ASSOCIATION, INC. v. Beebe* (2023)

As explained by Vice Chancellor Noble, "adequate notice means communicating the demands of compliance, whether that be a 10-foot-setback or a certain architectural style. Restrictive covenants which are too vague to serve these functions of notice and fairness are unenforceable." That is because "if the language of a restrictive covenant is so vague that it does not provide "clear, precise, and fixed standards of application," there is a risk of arbitrary or capricious decision-making by the entity reviewing the homeowner's request. In such cases, the restriction will be deemed unenforceable by the court." When reviewing the Restrictions for enforceability, I am guided by contract-interpretation principles. "Interpreting deed restrictions is a matter of contract interpretation, and provisions are construed by determining original intent from the plain and ordinary meaning of the words." In doing so, I must review the Restrictions "as a whole." *Beebe* (2023)

The Homeowners argue that the Restrictions are unenforceable because they "vest absolute, discretionary authority in the Association and/or ARC to approve a property owners' building plans, landscaping plans, and grading plans subject to the ARC's 'opinion' as to 'aesthetic,' 'desirability,' 'suitability,' 'safety,' 'health,' and other standards." This type of language has been questioned by this Court. But the mere presence of these buzzwords in deed restrictions does not render them unenforceable. For example, Vice Chancellor Noble ...explained that although "restrictions based on abstract aesthetic desirability are impermissible ...our courts regularly enforce architectural review provisions designed to ensure the overall harmony of appearance within a community, when that community possesses a 'sufficiently coherent visual style' enabling fair and even-handed application." Such represents the type of "built-in, objective standards that would enable otherwise

aesthetic restrictions to be applied in an evenhanded manner or to be used as a guideline by lot owners in designing their residences." Beebe (2023).

Here, the Restrictions have built-in, objective standards permitting evenhanded application. Those standards are both procedural and substantive. On the procedural side, the Restrictions provide, with specificity, what type of construction requires prior approval and how to seek such approval: by submitting "complete and comprehensive plans and specifications, prepared by a competent residential draftsman, showing the nature, kind, shape, height, materials, floor, elevation, foundation and footing plans, exterior color scheme, location and frontage of the lot, approximate cost of such building, structure, or other erection, and the grading and landscaping plan of the lot to be built upon or improved." Beebe (2023)

That procedure then informs the substantive side, where the ARC is charged with determining whether the plans are "suitable or desirable, in its or their sole opinion, for aesthetic, safety, health, police or other reasons," taking into account "such factors which in its or their opinion would affect the desirability or suitability of such proposed improvements, erection, alteration, or change." The scope of review, which includes aesthetics among other reasons, relates back to the types of plans and specifications required. It also works in tandem with the Materially Affects Provision, which provides " the elevation of a lot will not be changed so as to materially affect the surface elevation or natural drainage of surrounding lots." All these provisions must be read together. Although doing so does not free the Restrictions from all subjectivity, it provides enough objectivity that the Restrictions are not unenforceable on their face. Beebe (2023)

ALAPOCAS MAINTENANCE CORP., v. WILMINGTON FRIENDS SCHOOL, INC., [No. 294, 2022](#). 303 A. 3d 36 (Del. 2023.)

This is the Delaware Supreme Court appeal involving the application of deed restrictions to a school's proposal to expand its existing facilities on a 21-acre lot the school owns in an otherwise residential neighborhood. The Chancery Court decision was summarized in the 2022 Annual Report.

The homeowners' association denied the school's proposal to expand the school on the ground it was not in "harmony" with its surroundings and would harm the view from neighboring properties because the proposal would increase the lot's developed areas and decrease green space. The Court of Chancery entered judgment for the school, reasoning the deed restrictions on which the homeowners' association relied could not be applied in a reasonable and non-arbitrary way to impose density limitations or open space requirements on the school. The Supreme Court agreed with the Court of Chancery's analysis and affirmed, holding:

- "Deed restrictions that limit the use of real property are construed strictly, with any ambiguity being resolved in favor of the landowner."
- Enforcement of harmony criteria must meet the conditions that (1) the community has a "sufficiently coherent visual style" which makes plain to reviewing authority whether a proposal would "disrupt the visual harmony" which can be determined on a "reasoned, non-arbitrary basis;" (2) "permission must not be withheld unreasonably, and the reviewing authority bears the burden of showing that its actions were reasonable."
- "The Court of Chancery considered both categories of cases involving harmony standards and correctly applied those legal standards to the undisputed facts before it."
- "The harmony standard cannot be applied objectively to create a density requirement applicable to the Friends School Tract."
- "The Court of Chancery held that the harmony standard could not be applied in a reasoned, non-arbitrary manner to impose density restrictions on the Friends School Tract because there was no visual, objective reference to which the property owner or the Board could refer in applying that standard in that way to the Friends School Tract."

Friends of Plantations East, v. Plantations East Homeowners Association, Inc., [C.A. No. 2023-0542-BWD](#) (Del. Ch. 2023).

Plaintiffs, a group of owners in their community, sued as "Friends of Plantations East" ("Owners") filed a Complaint for Declaratory Judgment and Injunctive Relief (the "Complaint"), against their Homeowners Association, ("HOA") to challenge the board's "ballot solicitation" to the owners to switch the community from liquid propane to natural gas. [The change might require owners to change equipment at some expense.]

The owners argued that the ballot solicitation violated 1.) their Governing documents; 2.) the DUCIOA, §81-310 (f) "action taken by ballot without a meeting;" or 3.) Delaware General Corporation Law section 8 Del. C. §228.

The Court determined that §81-310 (f) of the DUCIOA did not apply to the Association, since the community is exempt from the DUCIOA because it has 20 or fewer units. The Court determined that the General Corporation Law, 8 Del. C. §228 allowed the action because that section applies "Unless otherwise provided in the certificate of incorporation..." and the certificate of incorporation does not explicitly disallow action by written consent, as used in the Ballot Solicitation. The Motion for Preliminary Injunction was denied.

Re: Stephen M. Hague, et al., v. Bay Landing POA, [C.A. No. 2020-0361-BWD](#) (Del.Ch, April 14, 2023.)

This is the Vice Chancellor's letter ruling on Plaintiff's exceptions to the Chancery Master's Final Report (the "Report"). Plaintiffs are homeowners in a residential property development, Bay Landing. The Defendant is the homeowners' association for Bay Landing (the "POA").

The Plaintiff's requested declaratory judgment they are not bound by the deed restrictions in Bay Landing, because when they bought their land, there were no deed restrictions recorded in the Recorder of Deeds Office, none were referenced in some deeds. The deed restrictions were properly recorded after the Plaintiff owners bought their property, though some plaintiffs may have been aware that deed restrictions were mentioned in their title search. The recommendation in the Report that the Court enter partial summary judgment was not adopted. The matter was remanded to the Master for trial. Of note the Court explained:

The movant bears the burden to demonstrate entitlement to summary judgment, and generally a plaintiff will have to carry the burden of persuasion at trial. This, however, is a partial summary judgment request for a negative declaratory judgment: that restrictions do not apply to the Plaintiffs' properties. Plaintiffs assert that all community's covenants, conditions, and restrictions (the "deed restrictions") are unenforceable against them because of defects in notice and recordation.

It is the Defendant that attempts to place, and presumably enforce, restrictions on the Plaintiffs' free use of their properties. There exists a "well-settled legal policy which favors the free use of land," and "the burden of establishing the existence of and the right to benefit from a restrictive covenant is placed upon the person who asserts its protection." Accordingly, one issue raised by the Plaintiffs in exception to the Report contends that the Master incorrectly allocated the burden of persuasion to them.

To establish an express servitude, like deed restrictions, its proponent "must show the restriction touches and concerns the land, the original covenanting parties intended to establish the restriction, and that the purchasing party was on actual or constructive notice of the restriction."

At issue here is the question of notice, which may be either actual or constructive. "Actual notice is an awareness of the alleged restriction by the purchaser at the time of purchase." Constructive notice is imputed where the restrictions are properly recorded prior to the conveyance.

The Court ordered that "briefing and consideration thereon shall be continued pending a final post-trial report, unless the Master deems justice requires otherwise."

AUGUST v. THE GLADE PROPERTY OWNERS ASSOCIATION, [C.A. No. 2020-0834-BWD](#). (Del. Ch. May 1, 2023)

Part I. This and the following long opinion cover many topics making it instructional about the law of DUCIOA, Corporations, Community Associations, voting irregularities, and Court of Chancery. The Master in Chancery's report and rulings on Counts II and III are summarized in a second long opinion issued 10 days after this, which is summarized below.

Master's Report on competing Motions for summary judgement on Count I: Rental Restrictions Amendment.

Plaintiff August is a pro se homeowner in the Holland Glade community in Rehoboth Beach, (the "Community"), a common interest community covered by the DUCIOA. The Community is maintained by The Glade Property Owners Association, Inc. (the "Association"). In 2020, Plaintiff sued alleging dozens of grievances against the Association and its association manager, "SeaScape," including Count I, challenging a 2019 amendment to the Community's "Declaration" of Covenants, Conditions and Restrictions imposing occupancy and rental restrictions on homes in the Community (the "Amendment"). Ms. August alleged approval of the restrictions through a "puppeteered election" using "sham voting procedures," resulting in an "unconscionable, discriminatory, arbitrary, and unenforceable" Amendment. The Master disagreed.

The Master began by explaining "what law applied" to the Association. As a Delaware corporation and a common interest community, the Association is governed by both "external authorities" like Delaware General Corporation Law ("DGCL") and the DUCIOA; and "internal authorities" including the Declaration, a certificate of incorporation ("Certificate"), corporate bylaws ("Bylaws"), with the Declaration and Certificate, and Bylaws comprising the "Governing Documents."

The Master continued describing selected powers and duties stated in the Governing Documents:

- The Declaration states that each owner of any property subject to the declaration automatically becomes a member of the association. The Declaration also states:
 - Members have the right to vote on all matters coming before the membership.
 - Members' Units have one vote for each unit conveyed to them in "fee simple" title recorded in the Record of Deeds Office.
 - An amendment must be approved by the affirmative vote of at least 66% of the members of record entitled to vote in-person, by proxy, or by mail ballot when canvassed.

- The Certificate of Incorporation:
 - Empowers the association to "perform, administer, and enforce the covenants, conditions, restrictions, and other provisions...in the Declaration, the rules and regulations promulgated by the corporation."

- The Bylaws:
 - Define voting rights: the person casting a vote for a unit must be identified on a deed recorded in the office of the Recorder of Deeds or as a trustee of a trust that is owner of that unit.
 - Members have the right to vote at every meeting by proxy signed by the Member, within three years of its date or by absentee ballot on a form approved by the board.
 - The Board may close the membership books or fix a record date for voting members.
 - Proxy and absentee ballots should be received at the management office not later than one week before the meeting.
 - Absentee ballot voting is allowed for any matter according to the quorum and voting requirements.
 - The board shall provide members entitled to vote with an absentee ballot for all matters it knows shall be put to a vote at a meeting.
 - A majority of the members voting is required unless stated otherwise in a specific section of the Declaration or Bylaws.

The Amendment added definitions of a "Family" qualified to be living as a single-family unit, and not counting residential guests of an owner. It also stated a new requirement that "No residence may be used as a rooming house, motel, hotel, or otherwise for transient tenants who temporarily reside in or lease the residence (or portion thereof, which of itself is Prohibited)."

- The Amendment:
 - Includes rules and regulations governing leases. "A residence may be leased no more than once in any 12-month period."
 - The minimum initial term shall not be less than three months.
 - Another section of the Amendment includes an enforcement mechanism: "If any owner or tenant is in violation of any provision of the governing documents, the board may levy and in some circumstances authorize the board to bring a lawsuit in its own name or in the name of the owner or both, to terminate the lease and have the tenant evicted or recover damages limited to full amount of rent paid due to owner tenants."

The members approved the Amendment by ballot without a meeting after receiving many reminders. 70% of the voting power in the community approved the Amendment by returning signed ballots under instructions. The Amendment was recorded in the Office of the Record of Deeds.

About one year after the Amendment was recorded, Plaintiff filed the Complaint challenging the Amendment.

The Court appointed Master-in Chancery held that Plaintiff had "standing" to challenge the Amendment, under the Delaware General Corporation Law, 8 Del. C. §225 (b) rather than the DUCIOA. The DGLC section allows a member of a nonstock corporation to challenge voting results, letting Chancery Court determine the results of any vote of members about matters other than the election of directors or officers.

Next, the Master determined whether and how much of the DUCIOA applied, considering the Association is a pre-existing community. Quoting the decision in [Bragdon v. Bayshore Property Owners Association, 251 A.3d 661-674 \(Del. Ch. 2021\)](#), (Previously digested in CIC Annual Report for 2020), the Court held "The DUCIOA states that 'except as provided in the sub-chapter' its provisions apply" to all common interest communities created within this State after its effective date of September 30, 2009." The Master quoted section §81-119 "enumerating" 27 sections of the DUCIOA applicable to non-exempt, pre-existing planned communities.

The Master explained, under §81-119, other than the "Enumerated Provisions" the DUCIOA does not apply to pre-existing communities, unless the community opted-in by adopting all or part of it. While the "Enumerated Provisions" apply unless expressly conflicting with provisions in the governing documents of a pre-existing community, "the "Enumerated Provisions also do not invalidate existing provisions of the governing documents that do not conflict with "the DUCIOA. Bragdon, 251 A.3d at 674." The Master determined the community was an exempt "pre-existing" community under the DUCIOA. "Therefore, challenges premised on noncompliance with provisions of the DUCIOA other than the Enumerated Provisions cannot succeed."

- The Master ruled voting without a meeting was allowed by the DUCIOA §81-310 (f) (1-2).
- The Master overruled Plaintiff's objection that she spoke at the open meeting, but her comments were "ill received" by the Chair during the meeting. Nor did the President's opinion expressed during the meeting violate any section of the voting requirements of the DUCIOA.
- Nothing in the DUCIOA was violated by the Manager's involvement in the balloting, voting, reminders, or ballot counting. The DUCIOA at 25 Del. C. §81-302 (a) (3) allows the association to "hire... managing agents, and other employees.... And the Bylaws empower the board "to appoint agents...clerks assistants...."

The Master ruled on five allegations that the Amendment was not approved by the required vote of the members:

- The approval requirement of the DUCIOA, §81-309 was satisfied.
 - Plaintiff's challenge to the percentage of approval in reliance on §81-217 (f), set at 80% for changing uses or behavior or the number of other people who may occupy units could not succeed since §81-217 (f) is not an Enumerated Provision applicable to pre-existing communities by 81-119. The Declaration controlled and was satisfied by the required percentage of members entitled to vote.
 - Plaintiff alleged that 35 ballots were counted with only one signature when two were required. The Master ruled this failed because section 81-310 (a) states that if only one of several owners of a unit is present at a meeting of the

association, that owner has the right to cast all the votes allotted to that unit.

- One ballot was identified by Plaintiff as having been cast by a non-owner. The Master ruled that disallowing that vote did not change the outcome.
- Plaintiff alleged that the board improperly voted seven ballots for "common lots" and that was "self-dealing." The Association provided evidence it only owned two lots, and the Plaintiff did not pursue the argument further.
- Plaintiff contended the vote on the Amendment was invalid because signatures on the ballots were not "verified." However, Plaintiff did not identify any statute or provision of the governing documents requiring that signatures on ballots be verified. The Master noted it was not aware of any, "Accordingly, this challenge also fails."
- The Master ruled against the allegation the amendment was "facially invalid." This requires the challenger to show that the amendment violates the law. Plaintiff argued the definition of "family" in the Amendment is discriminatory, in violation of State and Federal Fair Housing Laws, and that the enforcement procedure authorizing the Association sue a tenant in the name of the property owner or the association violates the law.
 - The Master ruled the Amendment does not discriminate because of any protected class under the State Fair Housing Act, targeting disabled and elderly owners or children. The Master ruled the Amendment includes those people in the definition of "Family" rather than excluding them.
 - The Master noted while §5703 of the Landlord-Tenant Code does not permit an HOA to start eviction proceedings, DUCIOA §81-302 (c) lets an association enforce any rights against a tenant that the landlord could lawfully have exercised under a lease.

The Master concluded that Plaintiff presented no valid procedural or substantive basis for challenging the Amendment or overcome the Association's showing that it had the right to summary judgment. The Chancery Master recommended Plaintiff's motion for summary judgment be denied and the Defendant's motion for judgment be granted on Count I.

The Master's Report was reviewed and affirmed by the Vice Chancellor and the Supreme Court on appeal.

August-Part II-Counts II and III

JENNIFER AUGUST v. THE GLADE POA and SEASCAPE PROPERTY MANAGEMENT, INC., [C.A. No. 2020-0834-BWD.](#), (Del. Ch. May 11, 2023).

Master's Final Report, Part II: Counts II and III

The Master's second Final Report was issued 10 days after the "May 1 Final Report" which considered only Count I. This Final Report resolves the competing motions for summary judgment on Counts II and III. Though the Master in Chancery reserved several matters for Trial, this summary focuses on decisions supported by the law cited or quoted in the opinion.

A. Claims Against the Board

Plaintiff alleged claims against "The Board of Directors and Officers of the Association, Inc...." Despite alleging unnamed members of the Board breached their fiduciary duties, Plaintiff did not name any individual director or officer of the Association as a defendant.

The Master held: "A board of directors is not a legal entity that can be sued separate and apart from the corporation," citing 19 Am. Jur. 2d Corporations §1848 and 19 C.J.S. Corporations §539.

Plaintiff responded the DUCIOA §81-325 states "a person may bring suit against the association or the executive board as a whole in any cause by service in accordance with the otherwise applicable rules authorizing service on the form of legal entity of the association." 25 Del. C. §81-325.

The Court explained §81-325 is not an "Enumerated Provision" applicable to pre-existing communities including the Association, by 25 Del. C. §81-119. See also the Master's May 1, Final Report at 18-19 ("When does the DUCIOA apply?"). Even if §81-325 applied, "in accordance with the otherwise applicable rules authorizing service on the form of legal entity of the association, it does not authorize a plaintiff to seek personal liability against individuals who have not been named in a complaint and served with process.... In short, because Plaintiff has not named any individual director or officer as a Defendant in this action, her claims against the "Board" for breach of fiduciary duty must be dismissed."

B. Claims Against the Association for Breach of Fiduciary Duty

Plaintiff's claims of breach of fiduciary duty against the Association also "miss the mark" because...the Association does not owe fiduciary duties. Fiduciary duties are owed to, not by, the corporation." Citing [In re Solera Ins. Coverage Appeals, 240 A.3d 1121, 1135 \(Del. 2020\)](#) ("The corporation itself does not owe fiduciary duties")..."Fiduciary duties are owed by the directors and officers to the corporation and its stockholders." [Gaffin v. Teledyne, Inc., 611 A.2d 467, 472 \(Del. 1992\)](#) ("The only defendant is the corporate entity . . . so there are no fiduciary duty claims.").

C. Claims Against the Association for Violating the DUCIOA and Governing Documents

Plaintiff alleged that the Association (1) did not maintain Community property; (2) improperly managed the Association's finances; (3) improperly delegated responsibilities to Committees of the Board; and (4) violated procedures governing Board meetings.

Section 81-417 of the DUCIOA, which is an "Enumerated Provision" in §81-119, provides "if a declarant or any other person subject to this chapter fails to comply with any of its provisions or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief." 25 Del. C. §81-417. Whether Plaintiff has standing to bring each of her challenges depend on if she is a "person . . . adversely affected by the [Association's] failure to comply" with the legal requirements she identified.

1. Failure to Maintain Common Property.

The Declaration States "the Association shall be responsible for the management, maintenance and operation of the Common Property and the Association Property, including all landscaping of the Common Property and Association Property, including, all sodding, irrigation, and the planting and care of trees and shrubbery."

The Master could not conclude on the current record that the actions the Association took were enough to fulfill its maintenance obligations, nor whether Plaintiff is "adversely affected" by the maintenance issues. The Master recommended denying summary judgment and going on to trial.

2. Association Finances.

Plaintiff alleged the Association violated the DUCIOA and Governing Documents in managing the Association's finances by:

- (1) failing to audit the Association's financial records. Plaintiff cited DUCIOA §81-306 (a) which only requires annual audits of condominiums and cooperatives, but not Planned Unit Developments like the Association. This section did not apply to the Association. Since there were no Audits, the Association was not required by the DUCIOA to keep records of audits.
- (2) improperly delegating financial responsibilities to SeaScape. Plaintiff alleged the bylaws vest the Association's Treasurer, not its property manager, with responsibility to manage the Association's finances. However, the Declaration expressly authorizes the Association to hire a real estate or property manager to help with the Board's management duties. The Declaration also required the treasurer to have "custody of the funds and securities." The issue was reserved for trial.
- (3) failing to return common "surplus funds," and failing to use or return reserve funds to the Members was also reserved for trial.

3. Delegation to Committees.

Plaintiff challenged the board's "use of intermediaries," including Association committees, "who have been permitted to write their own 'Charter' and exert practical and management control to abdicate the defendants' official duties..." The Master noted the use of committees is authorized by the Declaration and bylaws, but it was desirable to have a more complete record afforded by trial.

4. Board Meeting Procedures.

Plaintiff alleged the Board improperly (1) excluded Members at executive sessions of the Board; and (2) failed to timely provide agendas for Board meetings.

First, the Master noted §81-308A of the DUCIOA, which is an "Enumerated Provision" that applies to the Association, states: "All meetings of the executive board shall be open to the unit owners except for executive sessions held for purposes of:" four statutorily specified purposes not alleged by the plaintiff. 25 Del. C. §81-308A (c). "Since the statute expressly authorizes the Board to hold executive sessions, and Plaintiff failed to identify any specific instance where doing so violated Section 81-308A(c)(i)-(iv), this challenge fails."

Second, Plaintiff alleged the Board did not properly notice meeting agendas. The master quoted §81-308A(b) and summarized that "...notice of Board meetings must be provided not fewer than 10 and not more than 60 days in advance of a meeting and must be accompanied by an agenda. But because Plaintiff has not identified any specific instances when agendas were not timely provided, this challenge similarly fails."

D. Claims Against Seascope.

1. Breach of Fiduciary Duty.

Plaintiff alleges a claim against SeaScope for breach of fiduciary duty. Fact issues remained as to whether Seascope owes fiduciary duties to the Association.

"A fiduciary relationship arises in a situation where one person reposes special trust in, and reliance on, the judgment of another, or where a special duty exists on the part of one person to protect the interests of another. In contrast, a straightforward, arm's-length commercial relationship arising from contract does not give rise to fiduciary duties." ...Delaware courts are reluctant to recognize a "special" nature in relationships but have recognized such a relationship in limited circumstances involving "express trustees and corporate

officers and directors, as well as general partners; administrators or executors; guardians; and, in special circumstances, joint venturers or principles and their agents."

SeaScape's relationship with the Association is governed by contract, but the Master found that is not dispositive; SeaScape's management agreement also clarifies that it is an "agent" acting on behalf of the Association. Whether SeaScape holds a position of trust sufficient to create fiduciary duties is a question of fact the Master could not resolve at this stage. However, the Master continued:

"Assuming SeaScape owes fiduciary duties to the Association, a claim for breach of duty premised on SeaScape's mismanagement of the Association's finances would be derivative in nature... (noting that claims "alleging financial mismanagement that would harm the corporation as a whole" are "derivative in nature under Delaware law"). Plaintiff is not represented by counsel and therefore cannot bring derivative claims on behalf of the Association... ("A derivative action may not be brought pro se.").

Any Fiduciary Duties owed to the Board were not owed to Plaintiff. SeaScape's fiduciary duties – if any are owed – are owed to the Association, not to Plaintiff individually...("Corporate directors do not owe fiduciary duties to individual stockholders; they owe fiduciary duties to the entity and to the stockholders as a whole.")..."Directors' fiduciary duties run to the corporation and to the entire body of shareholders generally, as opposed to specific shareholders...."). Nothing in the record, or even in Plaintiff's pleadings, supports the notion that Nichols acted disloyally to favor his own interests over the interests of the Association or its Members as a whole.

2. Aiding and Abetting Breach of Fiduciary Duty

Plaintiff alleged SeaScape aided in the board's breaches of fiduciary duty, but rejected the claim explaining:

To prevail on a "claim for aiding and abetting breach of fiduciary duty, a plaintiff must prove four elements: (i) the existence of a fiduciary relationship, (ii) a breach of the fiduciary's duty, (iii) knowing participation in that breach by the

defendants, and (iv) damages proximately caused by the breach."

The Master found Plaintiff's claim fails because there was no underlying fiduciary breach. The Association does not owe fiduciary duties, and the Complaint does not identify the directors and officers of the Association who allegedly breached their fiduciary duties.

Without an underlying breach, the aiding and abetting claim failed. Because plaintiff did not state a claim for breach of a fiduciary duty, the aiding and abetting claim failed a lacking a predicate breach.

3. Breach of Contract

Plaintiff alleged SeaScape breached its contract. The Master concluded the allegations failed because Plaintiff is not a party to the Association's contract with SeaScape, nor can she pursue a derivative breach of contract claim against SeaScape on behalf of the corporation while appearing pro se.

ACADEMY HILLS PHASE IV MAINT., CORP. v. ROGERS, [C.A. No. N22C-02-167 CLS.](#) (Del. Super., May 25, 2023.)

This litigation arises from a default judgment ("Judgment") awarded to Plaintiff Academy Hills ("Academy Hills") for unpaid "HOA" assessment fees. Defendant Rogers took title to the home ("the Property") in 2005. Rogers later transferred the Property to herself, and her family members in 2013. Defendants did not pay HOA fees on the Property resulting in a delinquency of \$3,000+.

Defendants alleged they did not live at the Property. But they remained personally obligated for payment of the mortgage, property taxes, and assessments levied by Academy Hills. The Deed recorded for the Property lists it as the defendants' address; it remained their mailing address; and they presented no other address nor any reason to believe their address changed. HOA bills were forward to the Property but were not paid. There was an original mortgage on the property totaling around \$300,000 principal balance and a Federal Tax Lien.

Academy Hills filed a Complaint in rem ("against a thing" and not "in personam" or "against a person," like a debt action), in 2022. Notice to all lienholders was mailed by Academy Hills in 2022. Academy followed all procedures to make Service of Process to foreclose on the house and obtained a judgment of foreclosure.

The lawsuit was filed following the DUCIOA §81-316 (a) which allows a suit to collect delinquent assessments against land or a house ("real" property-in rem) instead of the "personal property" of the delinquent owners.

The Property was sold by Sheriff's Sale at public auction. After the buyer filed a Writ of Possession to remove one owner, the owner came forward for the first time through his attorney, responded to the notice and moved to set aside the Sheriff's Sale. A bank with a mortgage interest stepped in and joined the motion to set aside the Sheriff sale. They alleged there was no right to sell the home because the law required selling personal property first, before selling real property. This proved correct.

Academy Hills claimed it did not have to comply with the requirement of execution on personal property in 10 Del. C. §4901 because Academy Hills filed suit in rem against the Property under the procedures in the Delaware Uniform Common Interest Ownership Act ("DUCIOA"), 25 Del. C. §81-316. However, defendant explained according to 25 Del. C. §81-120, if a planned community existed before the effective date of the Act, (2009) and the "average annual expense of each unit does not exceed \$500," the community is subject only to certain subsections of the DUCIOA unless its bylaws or declaration were changed. Section §81-316 is not among the sections "Enumerated" under §81-119 to apply to an exempt preexisting community. So, defendants argued Academy Hills could not proceed with an in rem action under the DUCIOA §81-316. Since the annual assessment was below \$500 per year, and §81-316 did not apply to Academy Hills. The Court agreed the complaint in rem could not move forward, and Academy Hills had a duty to try to levy personal property before proceeding to a Sheriff's sale. Defendant's Motion to Set Aside Sheriff's Sale was GRANTED.

Condominium Cases

WYNNWOOD CONDOMINIUM ASSOCIATION v. MALIN, [C.A. No. CPU4-22-001873](#), (Ct. Com. Pl., New Castle County, April 18, 2023).

Wynnwood Condominium Association ("Plaintiff") filed a debt action against Malin ("Defendant") alleging Defendant rarely paid monthly condominium fees required by the Condominium Declaration and Code of Regulations governing owners of Wynnwood Condominiums.

Defendant countered that Plaintiff's purported amendment of the Code of Regulations letting Plaintiff charge late fees and interest on unpaid assessments was invalid as it did not meet requirements set forth in both the Code of Regulations and the Declaration.

The parties agreed that the amendment letting the Association charge interest and late fees was adopted by a vote of Association Council during a regular meeting. The Association claimed that the declaration conflicted with the Code of Regulations on the approval of the amendment.

The Court held that the Uniform Property Act set the minimum standard for adopting amendments not the maximum. The UPA states that "the Council has authority to make, alter, amend, and repeal the code of regulations, subject to the right of a majority of the unit owners to change any such actions." A "majority" is defined as "more than 50 percent in the aggregate" of the unit owners. The UPA does not prohibit an entity from setting a higher standard to enact amendments.

The Wynnwood Regulations state that "the Council may from time to time amend the Code of Regulations, subject to the requirements for amendments set forth in the Declaration." The Declaration states that "... except as otherwise expressly provided, this Declaration may be amended upon the affirmative vote of sixty-seven percent (67%) or more of the total vote of all the unit owners. The Code of Regulations may be amended as therein provided and in accordance with the Unit Property Act."

The Court found it "clear from the language of that UPA that a majority vote of the unit owners, and not a majority vote of the council is what is required for an amendment." The Code of Regulations and the Declaration go further, by requiring an affirmative vote of sixty-seven percent (67%) or more of the total vote of all the unit owners. The amendment was adopted by the Council during a regular meeting – it was never put to a vote of the unit owners.

Malin's motion to amend her counterclaim was granted to add this as a defense to foreclosure.

KABLAOUI, v. GERAR PLACE CONDOMINIUM ASSOC., [No. 21, 2023](#). (Del. August 16, 2023).

As digested in the Ombudsperson's 2022 Annual Report, this was a dispute about whether condominium windows were "common property" or "limited common property" according to the Governing documents. Chancery Court ruled the condominium Code of Regulations made the unit's windows "common property" and thus the responsibility of the Condo Association. The Association declined to replace the windows and directed the owner not to remove the windows he wanted to replace. Chancery ruled the Association's reading of the Governing documents was correct, so the Owner could not replace windows in his unit. The Owner appealed to the Supreme Court.

The Delaware Supreme Court determined that the final judgment of the Court of Chancery should be affirmed based on the law and principles assigned by the Court of Chancery in its ruling dated December 21, 2022, and affirmed the Chancery Court Opinion.

VITO v. WATERSIDE POA, et al. v. PHILADELPHIA INDEMNITY INSURANCE CO., et al., and WATERSIDE POA v. LLOYD'S, [LONDON,C.A. No. S21C-08-006 CAK](#), (Del. Super., December 11, 2023).

Plaintiff, Michael Vito, owns a condominium unit in "Canal Woods." In 2016, Plaintiff's neighbor noticed signs of a water leak from the roof at another unit which caused mold on Plaintiff's walls. Vito discovered his loss November 4, 2016, and made a claim to insurer PIIC almost immediately. The claim was adjusted and denied, although Vito did not learn of the denial until 2019. PIIC claimed it mailed a denial letter but no one else received it. Insurer Lloyds was notified almost two years after Vito realized the loss occurred. Lloyds denied the claim in relatively short order. Vito sued in 2021. Plaintiff sued Waterside and PIIC, and PIIC sued Lloyd's.

Both insurers raised statute of limitation defenses. Lloyds raised late notice and the policy's one year limitation defenses. The Court dismissed all claims against Lloyds.

Of note the Court held as to PIIC:

...an insurance carrier has a high duty and burden to make sure its denials are communicated to be effective. An insurer cannot rely upon a denial that was not received... Insurance carriers when denying claims pursuant to agreed upon and paid for policies must effectively deny claims. When they have no proof that an insured or its agent ever received the missive of denial it is not effective.

The Court ordered all contract claims against PIIC to trial, except for a statutory claim for Unfair Insurance Practices Act violation and Plaintiff's claims against Waterside.

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 "Legislation-Change of Law Committee" is considering several proposals for changes to law or Court rules. Besides the subjects the Committee selects, the Ombudsperson submits subjects for study for consideration, as issues are uncovered.

Eliminate Exemption of Small and Small Assessment Common Interest Communities.

Advisory Council's Legislation Committee is studying whether to eliminate exemption of small and small-assessment communities. Several sections exempt both new and preexisting communities from most of the DUCIOA if they have no more than 20 units.

This change would remove the exception for small condominiums and cooperatives (81-117). Removing this would ensure DUCIOA is applicable to all communities of any size. However, applicability of DUCIOA would still be assessed based on the two remaining factors: date of creation and amount of the annual assessment.

Still Under Study by the Legislation Committee of the Advisory Council:

Recommendations identified in the 2022 Annual Report remain recommendations for study and change. They are restated below, with these additions or changes.

Declarants To Provide a Summary of The Budget During the Period of Declarant Control

Section 81-324 (a) "Adoption of a Budget." The DUCIOA "exempts a declarant-in-control from reporting a summary of the budget, including any reserves..." to the community, a departure from the Uniform Common Interest Ownership Act (UCIOA) on which it is based. The italicized words in the quote from the DUCIOA below are not in the UCIOA:

Within 30 days after adoption of any proposed budget after the period of declarant control, the executive board shall provide to all unit owners a summary of the budget, including any reserves and a statement of the basis on which any reserves are calculated and funded.

This exception is not in the UCIOA. This change would give owners a basis for understanding the expenses the Association will face after transition to owner control as the elected Board develops budgets and reserves for setting assessments.

Reserves for Planned Subdivision Communities

The complete, catastrophic collapse of the Champlain Towers Condominium in Florida, resulting in one hundred horrible deaths raised nationwide interest in examining reserves to support inspection and repairs of structures to avoid such catastrophes. The DUCIOA requires budgets for condominiums and cooperatives to include reserve funds for repair and replacement of common elements, §81-324 (a), and reserve studies prepared by experts must be fully funded. Owners in noncondominium, cooperative and, planned subdivision communities with significant, expensive amenities (e.g., swimming pools, club houses, playgrounds, roads, streetlights, etc.) expressed concern that their community is not funding (or adequately funding) a "repair and replacement reserve" account, as required by the DUCIOA or the Unit Property Act for condominiums. Concerned owners expect large, unaffordable, special assessments. They seek changes to the DUCIOA compelling the Association to establish and fund reserves.

The Taskforce on Condominium Structural Integrity discussed a new County ordinance requiring periodic inspections of structures of concrete and steel buildings, and modernization of DUCIOA §81-316 dealing with Reserve studies that would require all common interest communities, to have reserve studies prepared by credentialed staff, according to national standards, and recorded in the recorder of deeds offices; abandoning the "component style" assessment percentage for "adequate funding" calculated by credentialed reserve specialists, among other improvements.

Common Interest Community Registration

The Ombudsperson Act charges the Advisory Council with advising the Ombudsperson about "development of recommendations for the registration of common interest communities with the State or other political subdivisions." 29 Del. C. §2546 (f) (1) (d). This would help the Office of the Ombudsperson by providing contact information for every common interest community. The Secretary of State's Annual Franchise Tax Reports to the Division of Corporations are not available in digital format for an easy solution nor an alternative to separate registration. There is no simpler way to identify the estimated 3000+ common interest communities from the 1.5 million corporations whose Annual Franchise Tax reports are filed online with the Division of Corporations. The Ombudsperson proposed accepting the Annual Franchise Tax reports of common interest communities as their "registration" but requiring more information, including: an email address for the community or a responsible officer, (which is required for online filing of an AFTR). The Div. of Corporations stores AFTR records only in unsearchable image files.

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 home. Some report that the homes of owners 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 various reasons. Notice to the homeowner that a lien will be recorded creates an opportunity for resolution that may avoid the cost of recording a lien, and mounting fees, penalties, and interest. Nothing now prevents or requires providing notice of recording a lien against a property. Requiring HOAs to give the homeowners notice will ensure that everyone knows their rights and responsibilities and, in the case of an error, will give homeowners a chance to correct those errors before there is a risk of a Sheriff's sale.

Legislation in other states includes this among other protections already available under DUCIOA.

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 during the intervening years. §81-306 (6). Owners in noncondominium/cooperative communities like "Planned Unit Developments" reported problems of improper financial accounting by declarants and sometimes theft by a treasurer. In another complaint a community commissioned an audit, but the CPA declared the books and records "un-auditable." Audit requirements could extend to non-condominium/cooperative communities and are considered a best practice. The Advisory Council presented a CPA as a speaker at an Advisory Council meeting to address concerns about the expense of audits to smaller and self-managed communities, including a recommendation to consult with smaller CPA firms and asking about their experience with smaller community association audits.

Earlier Disclosure of Governing Documents to Purchasers

The DUCIOA requires that sellers provide copies of governing documents and other important information to purchasers by the date of signing contract to buy a home in a common interest community in §81-408 (a); §81-409 (a). Many homeowners report complete unawareness of bylaws and limitations on free use of their property agreed to by buying in a common interest community. While many realtors provide these documents earlier and explain the content and significance of the documents and the restrictions, others, including developers, may not. Others have asked if they must be paper documents or can be emailed. Providing documents well before the date of signing, 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 Advisory Council was undertaking a project to draft a Transition Manual to help acclimate new Boards and owners on the responsibilities of managing a community after transition from developer to owner control. That process was terminated when in 2022, the CAI "Best Practices Report No. 7" was updated to "Transition from Developer to Owner Control." This offering can be Delaware-ized. This addresses many best practices for transition. The DUCIOA says little about requirements for the declarant to prepare the first homeowner elected board to take control of the Association after the period of declarant control. The DUCIOA, when it applies, 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 used to report the declarant simply "handed over the keys" to a representative of the Association after the period of declarant control.

Boards of many communities, new and preexisting, are unaware of essential business practices including:

- The need for filing state and federal nonprofit franchise tax forms to maintain their nonprofit or corporate status.
- Required Internal Dispute Resolution statutory processes.
- Collection procedures, some unique to Delaware.
- Many other governance issues.

Some states require declarants to provide training by recognized certifying groups like CAI and others, at no charge to new board members during declarant control, and the first Owner elected board.

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 for transition/turnover, including a checklist of documents and information the developer must provide, and a negotiated contract for transition and others.

Best practices of the best declarants involve homeowner involvement on committees, as required by the DUCIOA, and introduce newly elected boards (and those interested in running for the board seats) to running a community through training and transparency to see how the association must run. Most agree that the best run communities had the best transition periods. Some jurisdictions, including counties in Maryland, require board members to go to an educational session like the Ombudsperson's Joint CAI "Board Leadership Development Workshop," or certify they have taken online courses.

Collections Policy

Two attorneys provided a draft of a "Collections Policy" and a draft of legislation requiring a collections Policy to guide boards in a uniform procedure for collection that protects owners from selective or discriminatory practices, and the Association from claims of discrimination, while allowing the certainty of next steps in collection delinquent assessments. This proposal is under review by the Advisory Council's Legislation Committee.

Registering Community Association Managers

Complaints revealed instances of community association managers giving false or inaccurate information to owners and potential owners and several instances of "borrowing" Community association funds for personal purposes. CIC Association managers are not licensed like real estate property managers. The Ombudsperson has recommended and sought comment from Community Associations Institute and has asked the Advisory Council to explore minimal registration requirements including background checks, certificates from respected education programs, experience requirements, bonding and insurance requirements, and supervision by the Division of Professional Regulation. Two states with Ombudsperson's programs only established registration requirements after two-million dollars of association assessments were embezzled by association managers. Bonding and background checks came too late in those states.

More Education of Real Estate Sales Agents About Common Interest Communities

The Ombudsperson receives several complaints each year that the purchaser told the real estate agent or sales representative they did not want an HOA community, or they were never informed that they were buying into a Common Interest Community, until they received an invoice for the annual assessment. Our Office refers complainants to the Real Estate Commission, and the DOJ's Consumer Protection Division but the persistence of this kind of complaints suggests greater sales agent training is required. Our Advisory Council Education Committee is developing educational programs for Continuing Education of agents about the Office of the Ombudsperson, and special information specific to Common Interest Communities.

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 the real estate sales and development industry

A list of the members of Council is available online. Advisory Council now consists of knowledgeable, interested, skilled and hard-working representatives of different parts of common interest communities from unit owners, board members, city and county officials, the Division of Corporations, educators, and developers.

The Council is nearly complete. Because of resignations, one position remains unfilled.

The Advisory Council formed committees to study the topics assigned by the Act. In 2018 the Council reorganized the Committees around common functions and created Mission Statements. The standing committees are:

- Collections; Legislation; and Processes Committee
- Community Conflict Resolution/ADR Committee
- Community Registration Committee
- Office Operation Committee
- Education Committee
- Mentoring Committee

Advisory Council Activity

The Council met **five** (5) times in 2023, with a quorum at all meetings. The meeting schedule is on the Ombudsperson's website. All meetings were conducted remotely via Zoom. The switch to remote meetings has caused public attendance at meetings to go up dramatically. Pre-pandemic meetings had between 0-6 members of the public go to in-person. Since moving to the virtual, Zoom platform we regularly have 38-70 members of the public attend. This has greatly increased the value of the time the Council reserves for public comment at each meeting.

Selected Committee Activity

Collections; Legislation, and Processes Committee

Among the most active committees is the Legislation, and Collection Committee. In 2023 the Committee completed an update to the Posted manual on "[Collecting Delinquent Assessments Without a Lawyer](#)," a guide for associations and members, focusing on personal debt lawsuits in Justice of the Peace Court without hiring a lawyer. The second edition has updated links to the updated Court forms, and more text. The draft was posted to the Ombudsperson's website, for public comment. Comments are being edited into the final version. This Guide has been available on Ombudsperson's Website in electronic format, with live links to many forms and videos, and is available for download to personal computers. Shortly after the first edition was published, the Justice of the Peace Court replaced several key forms, so an update was needed and should be finalized in 2024. The Guide was the core of an educational workshop in each county beginning in 2018.

Mechanism to Register Communities

The Committee for Development of Mechanisms for Registration of common interest communities is focusing on the information already available at the Division of Corporations Annual Franchise Tax Report filings. Most common interest community associations are corporations. They must already file Annual Franchise Tax Forms to maintain their corporate status. These forms include the proper name of the association and must list officers and directors. A discussion with the Department of State was unsuccessful in identifying a digital database to avoid the expense to taxpayers and community associations of a separate bureau to register common interest communities. Using this approach, associations would not have to file any form other than an Annual Franchise Tax form to register, nor pay an 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. Draft legislation is circulating for comments on this approach.

The Office of the Ombudsperson considers this a high priority, to announce the existence of the Ombudsperson's website, educational opportunities, the necessity of an IDR process, new legislation, and reminders for such requirements like filing the Annual Franchise Tax Report forms-state and federal, registering under the Corporate Transparency Regulation of Fin Cen, passed in 2022, and recording bylaws, among others. Legislation is probably needed to provide the information and require the few non-corporate community associations to file with the Division of Corporations.

CONCLUSION

Vice Chancellor Parsons made these comments about Common Interest Communities more than a decade ago, in 2010:

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 homeowner's 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 homeowner's 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 homeowner's 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 homeowner's association, like the annual meeting.

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

The experience of the Office of the Common Interest Community Ombudsperson reveals the truth of Vice Chancellor Parson's comments. Many issues worry, concern, and anger those in the Common Interest Community, whether declarants and developers, or members of associations/owners, or the associations' boards. Many concerns and misunderstandings result from not reading or understanding the governing documents. Both the board or the homeowner, and sometimes the declarant, may be guilty of this.

The Act's requirement of Internal Dispute Resolution (IDR) is beneficial. It requires a complainant and the board to read, cite, and quote the provision violated. Often this seems to resolve the complaint by exposing the misunderstanding of the governing documents.

Only one set of bylaws reviewed by our Office contained a process that owners could use to address issues with Boards or Declarants leading to "notice and opportunity to be heard," and independent review. The IDR process helps fill that role. Communities are now including the Ombudsperson's IDR process whether they are new or reviewing their governing documents.

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 for remedying violations of the laws and governing documents.

Educational and training opportunities for boards were minimal in Delaware. But because of the Act, CAI made its first joint "Board Leadership Development Workshop" presentation in 2015. It has been offered every year since. These are the best-attended workshops of the CAI Keystone Chapter, which received an award from CAI for the Joint presentation with the Ombudsperson's Office. The Advisory Council presented three of its own Workshops: "Collecting Delinquent Assessments in JP Court Without a Lawyer," "Governance" and "Transition." Similarly, the Advisory Council presented a Governance presentation in 2023 and the CAI Joint Leadership Development Workshop, which was in Hybrid format, with in-person and Zoom participation. The Council planned more workshops for 2023, but could only present one, due to needed changes to the Collections Manual, now nearing completion. As the members of the Common Interest Community pay more attention to the governing documents, problems in communities should go down.

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 issues.

Respectfully submitted,

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Common Interest Community Ombudsperson