

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



2024 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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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 2024.

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 Ombudsperson.

Common interest communities include condominiums, cooperatives, and planned communities. All share common features including: they are authorized by recorded HOA declarations of deed restrictions, covenants or conditions which creates mandatory membership associations, to govern and collects 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 (COA), 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 & 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 these subjects:

- 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.

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Advisory Council Meetings

The Common Interest Advisory Council met exclusively by Zoom, **five (5)** times rather than six (6). The Ombudsperson canceled the May 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 1,354, 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 attend.

Advisory Council Mentoring Services

The Common Interest Advisory Council requested and provided **one (1)** community Board with mentoring services. Two members of the Council resigned after many years of service, which, accounted for most of the Committee's makeup. The Ombudsperson Office and the Advisory Council is working to bolster this Committee's participation. Particularly through developing some educational opportunities such as the "*Basic Mediation Training*" to provide Committee members with the tools to provide Boards requesting mentoring effective and beneficial best practices to handle a many common issues.

Ombudsperson's Workshops/Meetings to Owners and Legislators

The Ombudsperson participated in **21** workshops and meetings in 2024, including:

- Many meetings with state and county officials to discuss the work of the Office and legislation affecting common interest communities.
- **Senator Stephanie Hansen, and Councilwoman Valerie George** HOA Leaders Forum: Panelist for her **POST legislation (Property Ownership for a Sustainable Transition Act)**. It prohibits new communities from prohibiting certain environmentally driven land uses, like clotheslines, vegetable gardens, rain barrels, and compost barrels. Six Speakers and 34 members of the public and Association management companies attended and discussed the legislation.
- **Troop 7 Community Association Meeting, Sussex County:** Gave a presentation introducing our Office.
- Delaware Association of Realtors, Policy Committee: presented on CICO services and a draft "*Registration Bill*" CICO presented to the Common Interest Community Ombudsman Advisory Council Legislation Committee.

- Multiple meetings of and presentations to HOAs throughout the state, including Brookside and Darley Green.
- Participated in the Ombudsperson's/CAI "*Joint Board Leadership Development Workshop*", presented as a hybrid-in-person and by Zoom.
- Southern Delaware Association for Racial Justice: banquet honoring principal financial supporters of this organization, and to enjoy the speech of Delaware's Congresswoman Lisa Blunt Rochester.
- Attended and staffed the DOJ Booth at the Delaware State Fair.
- Wilmington City Councilperson James Spadola's meeting on Civic Association and Common Interest Community Governance. It was attended by approximately 40 persons, mostly civic association members. CICO received favorable comments, not only from the sponsor, but also from, a Deputy Attorney General in attendance.
- Widener Law School Minority Student Cocktail Reception. Attended the CAI Delaware Legislative Action Committee Meeting "*DLAC*".
- CAI Annual Law Seminar
- Chesapeake Chapter Community Associations Institute Roundtable Breakfast
- CICO Paralegal attended HOA Leader Webinar on Reserves and Reserve Studies, Assessments Loans and More.

Statistics

Election Services Rendered

- We received and conducted election tracking for two (2) communities in 2024.

Reserves of Nassau
Brookside Homeowners Association

Complaints

- Formal Complaints: Received: **84**
 - 36 - Statutorily complete.
 - 48 - Incomplete (missing information but tracked by the office).
- Complaints Resolved: **82**
 - 39 - Statutorily complete complaints formally resolved awaiting closure.
 - 4 - Statutorily complete complaints formally resolved awaiting closure letter pending Ombudperson review and comments.
 - 39 - 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 2025: **8**
 - 1 - Active investigation.
 - 4 - Resolved and awaiting formal closure.
 - 3 - CICO continuing working towards resolution.

Emails

- Formal Email Inquiries: **456**

Responses to these 456 inquiries require time-consuming research or response. Responses may include detailed information and links to, or copies of, useful information or statutes.

- Informal Inquiries: **56**

Informal complaints: these are complaints from 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 for various reasons, either the matter was resolved with CICO involvement or complainant simply chose not to continue with the formal process.

- General Emails: **26,775**

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 - Successful mediation, active and awaiting closure.
- 7 - Successfully mediated (one included 7 complaints from one community) and as a part of the mediation agreements CICO provided additional education services. CICO prepared final comments, and invoicing prior to formal closure.

Mediated Cases resulting in additional CICO Community Education involving fees

- 7 - Resolved through a community education session with the CICO Office.
- 1 - Resolved with the entire Board's mandatory attendance of the CICO/CAI Board Leadership Development Workshop.

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 **one (1)** referral to the Advisory Council Mentoring Committee.

Some Highlights of 2024

Historically the Ombudsperson met with groups almost exclusively by telephone and group Zoom meetings. This was still true for 2024; with some of the Taskforce committee work wrapping up, there was a decrease in Taskforce meetings from 2023.

- Joint Ombudsperson's/CAI "*Board Leadership Development Workshop*" was reformatted as a hybrid in-person and virtual event and conducted successfully with CAI Keystone Chapter's assistance. In-person 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 Ms. Natalie Fountain, with the Human and Civil Rights Commission speaking on Fair Housing.
- The Office of the Ombudsperson with Chad Toms, Esq., an Advisory Council member, made several presentations about the "*Federal Corporate Transparency Act*," which required Common Interest Community association corporations to register with the Federal Financial Crimes Enforcement Network (FinCEN) of the U.S. Department of the Treasury, identifying the "*Beneficial Owner Information*" (BOI) of their directors. The 2025 Presidential administration directed that the Rule exclude U.S. corporations. Although the Rule is still on the books it is not being enforced at this time. The information it would have required of each director is what is on a driver's license.

Taskforces

The Ombudsperson participated in 4 New Castle County Taskforces and a CAI committee beginning in 2022 that continued into 2024. The Legislative bills resulting from these taskforces continue to be presented for Legislative Session.

- **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 piqued the interest of several Legislators to work on moving this forward in the 2025 session.

- **New Castle County's "[Neighborhood Improvement District](#)" (NID)** Taskforce to develop the innovative legislation that was enacted at 9 Del. C. Ch.35 to help communities struggling with problems that could be resolved by temporarily provided increased County resources through the creation of neighborhood improvement districts. A working group of County officials, lawyers and the Ombudsperson are creating model documents to implement NID creation and are working with a first community toward creating it for the first "NID."
- **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, asked the Ombudsperson to present the CIC Registration Bill for comment.

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 1300+ email recipients and anyone visiting the website to comment before it was 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 filled in 2024.

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 without charge.

Status of the Office of the Ombudsperson

- After discussing the creation of a database of Common Interest Communities based on Annual Franchise Tax Reports filings, the Ombudsperson drafted a bill and presented it to the Advisory Council Legislation Committee for review, in 2024. 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. New and consistent use of forms and early diversion of cases to free mediation reduced complaint handling times in 2024.
- 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 2024

Most Common Concerns Expressed by Homeowners

- 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.

- Defunct Boards with no members willing to stand for election.

- Small community = biggest disputes – We received many complaints about lack of "*Civility*." In response, we sent CAI's "*Civility Pledge*" to communities, and opened 2 inquiries into small communities dealing with owner discontent and cross-blaming between Board and owners.

- Many Communities do not have recorded bylaws. The lack of recorded Bylaws that are available to homeowners results in disputes that could be resolved if the parties reviewed the bylaws. 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.

- Complaints regarding elections continue 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 technology poses challenging issues in common interest communities including:
 - Public posting of homeowner's complaints to public forums such as Facebook
 - Cyber bullying
 - Posting photos of homeowners by other homeowners for "*Shaming*" or to show "*problems or violations.*" Especially when false.

Concerns Expressed by Common Interest Community Associations Boards

- Collecting delinquent assessments continues to be a common complaint. In 2024, 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 was posted for public comments, the Advisory Council has reviewed, made changes based on the public comments and the final draft is now posted on our website.
- 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.
- 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.
- Concerns Expressed by Owners in Common Interest Community Associations
- Homeowners shared some of the same concerns as Boards.
- Complaints of rules being "*arbitrarily and capriciously*" enforced were considered in Chancery Court several times in 2024. 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 as potential Consumer Fraud
- 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.
- Many complaints involved Sussex County water-runoff issues, and some involved owners disregarding the community's approved and recorded plat plans or 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 vote 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 will not remove pre-designed medians or arbitrarily change community approved plans due to homeowner post-sale discontent.
- 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 respond to the community's request for access to financial books and records or 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 2024

- 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 of the development is not complete after date transition was supposed to occur.
- Discrepancies in Quarterly assessment bills.
- Addressing a troublesome "*bullying*" board or officer.
- Avoiding receivership or stop Boards from shrinking when no volunteers step forward to replace a 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 where the community is located.
- Board members mistakenly insist that their community is not covered by the DUCIOA because the association is preexisting. Section 81-119 addresses this. It makes 27 sections of the DUCIOA apply to non-exempt communities. 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.
- "*Fly-by-Night*" 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 developers sometimes fail financially. Some original developers provide for a community association in the declaration but never create or activate the association. Years later, after the HOA is declared void for non-filing of Annual Franchise Tax Reports, property managers sometimes send owners 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.
- 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 by owners entitled to access them.

LEGAL DEVELOPMENTS IMPACTING COMMON INTEREST COMMUNITIES

Federal Legislation

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 had to 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 effective date was January 1, 2024, for the first filing, but existing corporations had until [January 1, 2025](#), to complete the first filing. The rule was intended to enhance FinCEN and other agencies' ability to protect U.S. national security and the U.S. financial system from illicit use. In late December 2024, the first filing date was extended and with the new presidential administration, was suspended for U.S. Corporations including common interest communities and has remained suspended in 2025. The Rule is still on the public record, but has not been enforced since late December, 2024.

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.

HOA Case Decisions

1205 COASTAL, LLC v. COVE OWNERS ASSOCIATION, INC., [C.A. No. S22C-07-002 CAK](#). (Del. Super. January 29, 2024)

Attorneys' Fees Sought Too Soon

The Owners Association sued the Unit Owner in Court of Common Pleas to collect delinquent assessments. The Court of Common Pleas decided the Association was entitled to recover the amounts the Unit Owner owed for assessments and related expenses, totaling \$72,000. While the case in Court of Common Pleas was still pending, the Unit Owner filed this new suit in Superior Court before the Court of Common Pleas ruled that the Association had the right to an additional \$30,000 for lawyer fees and Court costs, allowed by statute, DUCIOA § 81-316.

The Unit Owner delivered a check for the \$72,000 and argued it was all that was recoverable against the property, since that was an *in rem* award against the property. The Association rejected the check and claimed the additional \$30,000 was also owed for complete resolution of the claim as statutorily allowed *in rem*, and *in personam* damages but it should not have to file an *in personam* lawsuit to require the Owner to pay, since that Owner might also lack enough funds, and found a buyer for the condominium unit. The parties each moved for summary judgment.

The Superior Court noted "*This case pits the traditional practice of recording liens on real property with the Recorder of Deeds, against the more modern practice of creating liens on certain types of real property (e.g., condominiums) by statute.*" Owner argued that recorded liens on real estate create a lien *in rem* (against the property) while, statutory liens on real property only create liens *in personam* (against the person). The Unit Owner argued, only a recorded lien could be satisfied by an action against the real property, but a statutory lien would require a lawsuit against the person owing the money-the obligor. The Court ruled statutory liens that apply to the Property create both *in rem* and *in personam* liability and govern the outcome.

The Court ordered the Unit Owner to pay all the ordered payments as *in rem* liens, from the proceeds from the sale of the condominium.

Unjust Enrichment

The Unit Owner also argued an equitable claim of "*Unjust Enrichment*" against the Association. Superior Court explained the Delaware Supreme Court has ruled that a "*Declaration*" is a contract between the parties, and "*Delaware courts have consistently refused to permit a claim for unjust enrichment when the alleged wrong arises from a relationship governed by contract.*"^[42]

Superior Court dismissed the Owner's Unjust Enrichment claim.

Bad Faith

The Unit Owner next alleged the demands for sums greater than necessary to satisfy the recorded lien were made in "*bad faith*" with no factual or legal basis. The Unit Owner asked for punitive damages for "*fraudulent conduct and extortion of funds*" from the Unit Owner.

The Court treated the claim as one or for breach of the "*implied covenant of good faith and fair dealing*," which Chancery Court described:

The implied covenant is inherent in all contracts and is used to infer contract terms to handle developments or contractual gaps that neither party anticipated. It applies when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the expectations of the contracting parties assessed at the time of contracting. To prevail on an implied covenant claim, a plaintiff must prove a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff.

The Court found no merit to the Unit Owner's claim.

Attorneys' Fees and Costs

Each party asked for an award of attorneys' fees and costs against the other. Specifically, the Unit Owner sought fees under two sections of the DUCIOA:

- 25 Del. C. § 81-417(a)-If a "*person subject to this chapter fails to comply with any of its provisions or... the declaration or bylaws, any person... adversely affected by the failure to comply has a claim for appropriate relief. The court... may award court costs and reasonable attorneys' fees.*"

The Association responded – Common Pleas already ruled in its favor on the statutory lien in an amount well above the amount of the recorded lien, yet the Unit Owner sued in Superior Court only based on the recorded lien, to avoid its obligations under the statutory lien, knowing the decision of the Court of Common Pleas on attorneys' fees was still pending. So, the Association was the party damaged by Unit Owner's failure to meet its obligations under the Declaration and was harmed by Owner's lawsuit.

- 25 Del. C. § 81-316(a)-In its efforts under the DUCIOA to collect the amounts due under the statutory lien, Association is entitled to "*court costs and reasonable attorneys' fees incurred in attempting collection....*" In defending this action, Association litigated – beyond the Court of Common Pleas. The statute does not say only a prevailing "*plaintiff*" can recover

legal fees and costs. It allows for recovery by a defendant "*as a result of an administrative or judicial decision.*"

In Delaware, the general rule is each party bears its attorneys' fees and expenses of litigation unless there is a "*contractual or statutory basis for liability.*" A provision for personal liability for attorneys' fees in the Cove Declaration or DUCIOA is an enforceable contractual obligation against a record owner of a condominium unit. The court could order payment of reasonable attorneys' fees and costs if that is allowed by any provision of statute or contract.^[47] Both the Cove Declaration and DUCIOA entitle the Association to reasonable attorneys' fees and costs incurred in obtaining and collection of summary judgment.

Two Window Cases—Opposite Results: It Depends on the Documents...

SMERNOFF v. THE KING'S GRANT CONDOMINIUM ASSOCIATION, [C.A. No. 2020-0798-BWD](#) (Del. Ch., July 12, 2024)

Magistrates Report after trial:

Owners of a condominium unit in Fenwick Island sued their condominium association and council, seeking specific performance of the condominium's governing documents. According to the unit owners, exterior walls, windows, and doors are common elements that the council must maintain, repair, and replace; they sued for an order requiring the association to repair damaged exterior windows and doors protecting their unit. The association council disagreed, arguing the governing documents make unit owners responsible for maintaining, repairing, and replacing exterior windows and doors attached to their units. The Chancery Magistrate adopted the unit owners' interpretation of the governing documents and recommended judgment in their favor.

The Condominium was established under the Delaware Unit Properties Act ("*UPA*"); so the DUCIOA did not control the issue.

The Declaration specifies the boundaries of a Condominium:

The vertical boundaries of each unit are that the lowermost elevation is the top surface of the lowermost subfloor, and the uppermost elevation is the interior side of the roof ridge at the highest point of the roof. The highest point of the unit is the lower surface of the highest roof rafters or trusses. The horizontal boundaries of each unit as to depth and width are the space between the interior face of the wall studs.

The Declaration also states that unit owners are responsible for maintaining, repairing, and replacing "*all non-load bearing walls, floors and partitions and windows and door in such unit.*"

The Declaration defines Common Elements to include "all portions of the building which are not included in a unit;" "[a]ll supports and other foundation elements of the building not included in the unit;" and "[t]he roof, the exterior walls, excluding the chimney flue, the fire party walls between the units, and such component parts of walls, floors, ceilings and other structures and installation as are outside the unit boundaries...."^[16]

The UPA states that "[t]he maintenance and repair of the common elements . . . shall be carried out only as provided in the code of regulations[,]"^[17] and that "the common expenses shall be charged to the unit owners according to the percentage of the undivided interest of each in the common elements, as set forth in the declaration...."

The Council claimed that the windows are the responsibility of the unit owner and recommended Plaintiffs replace the windows at the Plaintiffs' expense.

The Court relied on these principles:

- "A condominium declaration and its accompanying code of regulations together form a contract between the unit owners under the statutory framework of the [UPA]." [Reed, 2005 WL 1924195, at *6.](#)
- "A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole." [Council of Dorset Condo. Apartments v. Gordon, 801 A.2d 1, 7 \(Del. 2002\).](#)
- "[A] court will prefer an interpretation that harmonizes the provisions in a contract as opposed to one that creates an inconsistency or surplusage." [GRT, Inc. v. Marathon GTF Tech., Ltd., 2012 WL 2356489, at *4 \(Del. Ch. June 21, 2012\).](#)
- "Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one." [DCV Hldgs., Inc. v. ConAgra, Inc., 889 A.2d 954, 961 \(Del. 2005\).](#)

The parties agreed that exterior walls, windows, and doors are Common Elements as defined in the Governing Documents.

The Court agreed with the Owners, that makes unit owners responsible for maintaining, repairing, and replacing "windows and door[s] in such unit." Interior windows and doors may be "in such unit," but exterior windows and doors are Common Elements that are "portions of the building . . . not included in a unit."^[68] Any other reading would render the words "in a unit" superfluous. Declaration §11.03(e) therefore does not shift liability for exterior doors and windows from the Council to the unit owners.

The Court rejected Defendant's reliance on [Council of Dorset Condominium Apartments v. Gordon, 801 A.2d 1 \(Del. 2002\)](#), in which the Delaware Supreme Court interpreted language similar

to Section 11.03(e) to "carve out . . . windows and sliding doors from the exterior items for which the Council bears responsibility." [Dorset, 801 A.2d at 6.](#)

Importantly, however, the declaration in *Dorset* defined a "Unit" to include 'the patio and or balcony connected to a Unit (*including all doors* leading to such patio or balcony), [*and*] *all windows* of a Unit.'"...(emphasis added). That "specific language exclude[d] the [exterior] windows and doors from the common elements" such that exterior windows and doors were, by definition, "in such unit." *Id.*

By contrast, here, the Declaration makes exterior windows and doors Common Elements, "which are not included in a unit." So, while the *Dorset* court found that language requiring the unit owners to maintain, repair, and replace "windows and doors *in such Unit*" included exterior windows and doors, the same is not true under the Declaration here.

Attorney's fees:

Both parties sought Attorneys' fees under Section 81-417(a) of the DUCIOA, which states:

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. The court, in an appropriate case, may award court costs and reasonable attorneys' fees.

25 *Del. C.* § 81-417(a). Although "Section 81-417 contemplates a lower standard for expense shifting than the "bad-faith exception" to the "American Rule," Fee-shifting under Section 81-417(a) is permissive, and the Court retains broad discretion to determine whether to shift fees. [Bragdon v. Bayshore Prop. Owners Ass'n, Inc., 251 A.3d 661, 667 \(Del. Ch. 2021\)](#). A case may be appropriate for fee-shifting where a party has "acted unreasonably" or in an "arbitrary and capricious" manner or has "engaged in unreasonable litigation conduct." That showing was not made in this case. Both requests for fee shifting were denied.

Second Windows Case

KUN JIANG v. HASLET PARK HOA and MASTRIANA PROPERTY MANAGEMENT, INC., [C.A. No. 2023-0780-LM.](#) (Del. Ch. July 31, 2024)

Plaintiff Kun Jiang sued Defendants Haslet Park HOA ("HOA") and Mastriana Property Management, ("Mastriana") the "Defendants," alleging:

- (a) failure to comply with governing documents, including the approval process for window installations that are not structural change or common elements.

- (b) violations of the DUCIOA for denying access to HOA board meetings, filing deed violation notices against Plaintiff's property, and imposing arbitrary fines without a proper hearing process.
- (c) breach of fiduciary duties for arbitrary, capricious, and unreasonable actions, including self-dealing in the HOA election;
- (d) Mastriana's "aiding and abetting" breach of the HOA's fiduciary duties.
- (e) Defamation.
- (f) Civil Conspiracy; and,
- (g) Intentional infliction of emotional distress.

At this early stage of the lawsuit, Defendants moved to dismiss all counts, but only the last three allegations were dismissed by the Magistrate since there is an "adequate remedy at law" for them. The Court stated:

Breach of Contract

Defendants' Motion to Dismiss Plaintiff's claim for breach of contract that viewing allegations most favorably to the Plaintiff, the allegations were enough to potentially recover damages. The Governing documents, when interpreted with 25 *Del. C.* § 81-302(a)(6), were found ambiguous. "A sufficient breach of contract claim only must contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.' To survive a motion to dismiss for failing to state a breach of contract claim, a plaintiff must show a contract exists, an obligation imposed by that contract was breached, and the breach resulted in damages." Plaintiff satisfied those requirements.

Breach of Fiduciary Duties

Defendants motion to Dismiss Plaintiff's claim for breach of fiduciary duties was DENIED. "It is well established that the directors owe their fiduciary obligations to the corporation and its shareholders. The Defendants are Delaware Corporations and Plaintiff is a member of the HOA. The harm alleged here is not unique to the Plaintiff and can occur to any member of the HOA. Therefore, the harm arising from the breach here can be attributable to the Defendants' breach of fiduciary duty."

Management "Aiding and Abetting" Breach of Fiduciary Duties

The Motion to Dismiss Plaintiff's claim for Management Agent Aiding and Abetting the Breach of Fiduciary Duties was DENIED. "The four elements required to succeed in a claim of aiding and abetting fiduciary duties are: '(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."^[20]

Chancery has "Exclusive Jurisdiction Over Corporate "Books and Records."

CHRIS FEDDER v. ASPEN/BRENNAN ESTATES PROPERTY MANAGEMENT, [C.A. No. 2024-0017-SEM](#). (Del. Ch. June 28, 2024)

Chris Fedder ("Plaintiff") filed a complaint against Aspen/Brennan Estates Property Management ("Defendant"). Plaintiff's lawsuit arose from a related proceeding before the Justice of the Peace Court, where the Plaintiff sued to compel access to books and records of his HOA under the Delaware General Corporation Law, 8 *Del. C.* §220. The Justice of the Peace explained that Chancery Court has "exclusive jurisdiction" over Section 220 complaints. Plaintiff sued in Chancery.

Plaintiff was self-represented and thus entitled to a review of his lawsuit in Chancery Court with "forgiving eyes." With "forgiving eyes," the Court summarized that the Plaintiff sought the following relief:

- (1) inspection of books and records under 8 *Del. C.* § 220,
 - (2) damages for alleged breach of contract, including punitive damages,
 - (3) removal of a lien against his real property (the "Property"), and
 - (4) declaratory judgment that fees and assessments were improperly charged to the Property and that the Property was no longer subject to HOA assessments.
- a. **Books and Records.** Despite pleading that he asked for books and records for "years," the Plaintiff did not plead that he met the strict form and manner requirements in 8 *Del. C.* §220. The Plaintiff did not plead or provide evidence he delivered a copy of a written demand, made under oath, and served on the Defendant management company.

"A plaintiff seeking books and records must first afford the company the opportunity to avoid litigation by making a written demand and allowing the company to comply. Section 220 requires the stockholder [or Plaintiff corporation Member] to make a 'written demand under oath' and direct [it] 'to the corporation at its registered office in this State or at its principal place of business.' A complaint seeking books and records under Section 220 will be dismissed where the plaintiff fails to demonstrate compliance with this procedure...."

- b. Where a complaint seeks damages for breach of contract a court of law has jurisdiction, not Chancery Court. Chancery Court is a court of "limited jurisdiction."

"Chancery can acquire subject matter jurisdiction over a cause in only three ways:

- (1) if one or more of the plaintiff's claims for relief is equitable,
- (2) the plaintiff requests relief that is equitable, or
- (3) subject matter jurisdiction is conferred by statute."

Court of Chancery Rule 12(h)(3) states...

"[w]henver it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action...To ascertain the true nature of a plaintiff's claims, the Court conducts `a realistic assessment of the nature of the wrong alleged and the remedy available in order to determine whether a legal remedy is available and fully adequate. Once the Court determines that it lacks jurisdiction, it should decline to address the remaining claims on their merits; but under 10i. § 1902, '[n]o civil action, suit or other proceeding brought in any court of this State shall be dismissed solely on the ground that such court is without jurisdiction of the subject matter, either in the original proceeding or on appeal.'"

As to contract interpretation, "a damages action for its breach sounds in contract and is available in a court of law...The Court of Chancery has jurisdiction to provide declaratory relief if it otherwise has jurisdiction over the matter...." An example is 10 *Del. C.* § 348 authorizing the Court of Chancery to interpret and enforce Declarations disputed by homeowners and a homeowners' association.

Since the Court had to dismiss the Records request suit for failure to follow Section 220, the Court was left only with claims in the realm of law courts over which Chancery, a court of equity, had no jurisdiction. The Court dismissed the remaining law claims giving plaintiff the option to bring them in court a of law.

Pickle Ball Case

SANDY RIVER PROPERTIES, LLC, and KATZ, v. CAPE SHORES HOA and ERICH, [C.A. No. 2023-0895-BWD](#). (Del. Ch. March 15, 2024)

Mr. & Mrs. Katz own Sandy River Properties, LLC, which is the titled owner of the Katz's home at Defendant/Association, Cape Shores HOA. Janice Erich is the President of the HOA.

Plaintiffs sued for the disturbances caused by noise and use of the tennis courts for pickle ball with up to 16 players using the four courts continuously between 8 AM and 8 PM during summer

season and most daylight hours throughout the year. Plaintiffs allege that the constant use of the courts for pickle ball violates several sections of the deed restrictions prohibiting "annoyance" to other owners in the community, and in apparent conflict with the declarations' easement of all owners to use the tennis courts for recreation, other than tennis.

The Defendants moved to dismiss the entire complaint for "failure to state a claim upon which relief could be granted," for various reasons, all but one of which were rejected by the Chancery Magistrate quoting:

- I. **Nuisance:** Defendants contend 'A private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of their land.' *Dayton v. Collison*, 2019 WL 4668157, at *5 (Del. Super. Sept. 24, 2019), aff'd, [250 A.3d 763 \(Del. 2021\)](#). According to Defendants, Sandy River 'is an entity . . . that cannot be deemed to have sustained a loss of enjoyment of the Residence or the injuries complained of in its Amended Complaint, but cited no authority for the assertion that an entity cannot sustain 'a loss of enjoyment of property.' A determination may be made whether an entity with a reversionary interest in property should be made a party to any claim for damages arising from nuisance, would have to wait for a later stage in the lawsuit.
- II. **Conflicting Sections of Deed Restrictions.** Declarations guaranteeing easements to all owners to use the tennis courts for 'recreation,' and sections allowing the association to regulate uses causing 'annoyance' to residents, potentially conflict, thus, the provisions are ambiguous."

The Court relied on decisions holding it is appropriate to deny a motion for summary judgment "[b]ecause the ambiguous and potentially conflicting provisions of the parties' contract present material disputes regarding their intent, which cannot be resolved at this early stage of the case."

- III. **Breach of Fiduciary Duty by Association.** The Owners claimed in the Complaint the association breached a fiduciary duty to the owners. The Court ruled against the owners, holding that the Amended Complaint failed to state a claim for breach of fiduciary duty because 'the Association does not owe fiduciary duties. Fiduciary duties are owed to, not by, the corporation.' *August v. Glade Prop. Owners Ass'n, Inc.*, 2023 WL 3359466, at *4 (Del. Ch. May 11, 2023), *exceptions den.*, 2023 WL 5423220 (Del. Ch.), and *exceptions den.*, 2023 WL 5431953 (Del. Ch.) [Summarized in 2023 Annual Report]."

As to the allegation that Pres. Erich breached her fiduciary duties by failing to act in good faith to regulate the use of the tennis courts, the Court held that duty lies with the Board, not the Association President.

“IV. **‘Overly Broad/ Injunctive Relief.** The demand for injunction was not sufficiently ‘specific or reasonably detailed.’ [O]n a motion to dismiss all that need be decided is whether a claim is stated upon which any relief could be granted. If it can, the nature of that relief is not relevant and need not be addressed.” [Microsoft Corp. v. Amphus, Inc., 2013 WL 5899003, at *20 \(Del. Ch. Oct. 31, 2013\)](#). For that reason, the Court decided it was premature to decide the scope of injunctive relief that could be granted at a later stage of the case. Only the Breach of Fiduciary Duty allegation was dismissed. The rest were to be determined after trial.”

Adverse Possession

SMITH, v. FEDERAL NATIONAL MORTGAGE ASSOCIATION (FANNIE MAE), [C.A. No. 2023-0653-LM](#). (Del. Ch. January 12, 2024)

Self-represented Plaintiff Smith sued seeking to "quiet title" due to adverse possession. The Defendant argued the Plaintiff did not state a claim for adverse possession since she cannot meet the statute's twenty-year occupancy requirement.

Plaintiff alleged she maintained the property, doing repairs, replaced a broken well pump, replaced piping in septic tank, replaced the nonworking HVAC system, paid property tax and *HOA fees including back HOA fees* and landscaping every other week. But she was never the record owner.

Plaintiff asserted the property was subject to Sheriff Sale in 2016 and was subsequently deeded to Federal National Mortgage Association ("Fannie Mae") as a "*buyback*" in 2017. She alleged she tried to buy the property since 2018. She alleged she obtained the property by adverse possession in February 2020.

Although "[t]he Court will view pleadings filed by pro se litigants with forgiving eyes... proceeding *pro se* will not relieve Plaintiffs of their obligation to 'allege sufficient facts to state a plausible claim for relief' or 'to present and support cogent arguments warranting the relief sought.'" ^[13]

The Court ruled Smith did not prove she reasonably had the right to recover under a claim for adverse possession because the elements of adverse possession statute (10 *Del. C. §§7901, et seq.*) require her to show she "openly, exclusively, notoriously, continuously and adversely" occupied the property in dispute for 20 years.

Enforcing Fence Deed Restriction

YU, TRUSTEE, et al. v. CAHILL, et al., [C.A. No. 2022-0014-SEM](#). (Del. Ch. September 6, 2024)

The Yus tried to enforce deed restrictions that governed their development since 1945 against new neighbors. The Yus, owners for 28 years sought a mandatory injunction ordering the new owners

of the property next door to remove a fence they constructed without required approval and in violation of the deed restrictions. The parties each filed a motion for summary judgment.

The Development, was managed, to some extent, by the Boulder Brook Civic Association (the "Civic Association"), which "monitors the activity of the neighborhood, helps with the snow removal, and helps neighbors that "have situations." The Civic Association is not a common interest community.

The Boulder Brook Restrictions were recorded in the Office of the Recorder of Deeds in 1945 and amended in 1997.

- Section 2 provides: "APPROVAL OF PLANS. No... fence, wall or other structure shall be commenced or erected...until reasonable plans and specifications have been submitted to and approved in writing by one third or more of the residents...."
- Section 7 prohibits the installation of any fence that is not "open" or is greater than four feet high.
- Section 9 has an "anti-waiver" clause which states in part:

"The failure to exercise any rights or remedies by the said Boulder Brook Civic Association or by any person having such right or remedy, upon the violation or breach of any of these restrictions or covenants, shall not be construed or interpreted as a waiver of such right or remedy, and shall not prevent any person from later exercising said right or remedy in connection with said violation or breach or any later violation or breach of these restrictions[.]"^[13]

Before or during construction, Petitioner/Dr. Yu went to the Respondent/Cahills to discuss his concern they were violating the Restrictions. The Cahills asserted there are three other fences in the Development.

Where cross-motions for summary judgement are filed and the parties do not argue issues of material fact are in dispute, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."^[54] Here, the Parties agreed to a decision based on the agreed-upon record for their competing motions for summary judgment.

To prevail, the Petitioners needed to prove, by a preponderance of the evidence: "(1) actual success on the merits of the claims; (2) that the [Petitioners] will suffer irreparable harm if injunctive relief is not granted; and (3) that the harm to the [Petitioners] outweighs the harm to the [Respondents] if an injunction is granted."^[55]

Petitioners had to show that the Restrictions are enforceable and were breached by the Respondents. The Court held they met that burden and rejected the Respondents' argument that the right to enforce the Restrictions was waived by the other three fences.

Although the Court held section 2 was so subjective as to permit the community to act arbitrarily and capriciously, The Court held section 7 had clear, specific criteria and was enforceable. The Court also held the Cahills provided no basis on which to overcome the anti-waiver provision, did not present, evidence that "more likely than not," there was a "knowing waiver."

In deed restriction cases, "irreparable harm is nearly presumed." The Court cited then-Vice Chancellor Steele who explained:

The [homeowners within a community with deed restrictions] knowingly enter into a social contract with the other lot owners when purchasing their land. This contract includes adhering to the Restrictions' restrictive covenants. Relying on the covenant, many lot owners have invested a large amount of time and money improving their lots, including building residences for themselves. Once a restriction is breached, the [homeowners association] can never again regain the sanctity of the covenant.^[69]

In weighing the economic harms between the parties the court observed: "Although injunctive relief may be an extreme remedy at times, it is appropriate when there would not be 'substantial economic harm' to the noncompliant homeowners."^[70] That is because '[e]quity will not reward a knowing breach of restrictions.'"^[71]

The Petitioners asked for attorney's fees under Title 10, Section 348 of the Delaware Code. This action was not, however, filed under Section 348, which has specific filing requirements under Court of Chancery Rule 174(c)(2). Nor does this action qualify for Section 348 treatment, which requires at least one party to be a homeowner's association or similar entity, if one exists (like the Civic Association), since the Civic Association was not a party in this lawsuit between neighbors.

The Magistrate recommended the Court order the Cahills to remove the Fence and pay Court costs.

SALAAM v. FUREY, [C.A. No. 2023-0252-LM](#) (Del. Ch., November 8, 2024)

Plaintiff Salaam tried to compel Defendant Furey to perform his obligations under the sales agreement for his purchase of her condominium unit and to close on the sale of the property. Ms. Salaam's condominium had a monthly association fee, which her listing agent understated on his website. Furey made an offer, with no-conditions, to buy the unit, as-is, knowing Plaintiff was behind in payments on her assessment by \$44,000. Her Resale Certificate, required by § 81-409 of the DUCIOA, correctly stated both the amount of the monthly assessment, and her delinquency. Purchaser refused to complete the settlement though Plaintiff provided a check for the full amounts unpaid at the settlement. Defendant relied on the seller's agent's incorrect statement of the monthly assessment for his refusal, and not the amount of the Resale Certificate, which he had for more than the 5 days allowed after receipt to cancel the sale.

The Court stated:

"For the Court to order specific performance of a contract for the sale of real estate, the ordering party must establish that 1) a valid contract exists, 2) the seller was able and willing to perform her contractual obligations, and 3) the balance of equity is in the seller's favor. Specific performance will not be granted to a party who is in default of a material obligation under the contract, unless that party is excused from performance of that obligation."

The Court held:

The material terms in a contract for the sale of real estate are the price, date of settlement, and the property to be sold. These terms also must be sufficiently definite.... The condominium association fee is not [a] material term to the contract as it does not relate to the price, settlement date, or the specific property to be sold. Even if it were argued that the condominium association fee is material to determine the price of the contract, the condominium association fee is not a negotiated amount between the parties and is more akin to the related costs in a real estate transaction such as real estate taxes and homeowners' insurance. These are fees owed to third parties that are outside a Seller's control.

Since the Seller turned down another offer for more money to accept defendant's cash offer, the equities fell on her side and the Court ordered the sale to be completed as agreed.

Appeals:

SALT MEADOWS HOMEOWNERS ASSOCIATION, INC., v. ZONKO BUILDERS, INC., [No. 94, 2023 312 A.3d 195 \(Del. 2024\)](#)

On appeal after trial in Superior Court, the Supreme Court affirmed the \$11.3 Million verdict against Zonko Builders for construction defects in a condominium community, for the reasons given by the Superior Court, as first reported in the Ombudsperson's 2021 Annual Report.

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 recommend eliminating 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 based on the two remaining factors: date of creation and amount of the annual assessment. We are also reviewing a 2021 proposed Amendment to UCIOA that would have a broader effect.

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 proposed an amendment modernizing the DUCIOA §81-315 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 is or 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, two positions remain 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 2024, 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 increase dramatically. Pre-pandemic meetings had between 0-6 members of the public 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. In 2024, we added an anchor location in New Castle County government building for members of the public to attend with member Advisory Council.

Selected Committee Activity

Collections; Legislation and Processes Committee

Among the most active committees is the Legislation and Collection Committee. In 2024 the Committee finalized the Second Edition of the 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. The Guide was the core of an educational workshop presented live and by Zoom in January 2025

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. Under the new proposal, associations would not have to file any form other than a specialized or supplemental Annual Franchise Tax form to register, nor pay any additional fee. This approach will avoid 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. Legislative Counsel reviewed the legislation, and a sponsor was identified.

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, information about 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).

These comments remain a true and focusing comment on the creation of and issues confronting common interest community association members.

The experience of the Office of the Common Interest Community Ombudsperson supports 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. 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 its own Workshops: "*Collecting Delinquent Assessments in JP Court Without a Lawyer*," "*Governance*" and "*Transition*." Similarly, in 2024 the Advisory Council presented CAI Joint Leadership Development Workshop, which was in Hybrid format, with in-person and Zoom participation. As the members of Common Interest Communities 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