PS Item 2
March 25, 2010
Worksession

MEMORANDUM

TO: Public Safety Committee

FROM: Michael Faden, Senior Legislative Attorney

SUBJECT: **Worksession:** Bill 42-09, Common Ownership Communities – Dispute Resolution

Bill 42-09, Common Ownership Communities – Dispute Resolution, sponsored by the Council President at the request of the County Executive, was introduced on November 17, 2009. A public hearing was held on January 12 (see hearing testimony on ©12-34, other comments on ©35-43, and Commission response to ©44-47).

Bill 42-09 would amend Chapter 10B by:

- modifying the composition of Commission on Common Ownership Communities;
- requiring community associations to notify members annually about Commission programs and the availability of dispute resolution;
- broaden the types of complaints subject to dispute resolution through administrative hearings by the Commission; and
- establish a special panel with authority to lift the automatic stay imposed when a dispute is filed with the Commission.

Issues

Many of the changes proposed by the Commission on Common Ownership Communities in this Bill have not been controversial, and Council staff recommends that they be enacted. The amendments in this Bill are briefly explained in the Legislative Request Report on ©8-9, the Executive's memo on ©10-11, the Office of Consumer Protection testimony on ©12-14, and the Commission on Common Ownership Communities (CCOC) testimony on ©15-16.

Those proposals that have produced opposition or proposals to modify them are listed below. For various comments and alternative proposals, see the hearing testimony and other comments on ©17-43. At the worksession Council staff will discuss each provision in the order it appears in the Bill and explain our recommendation.

1) Notice to residents (©2-3, lines 24-31) **Council staff recommendation:** approve as drafted.

2) Jurisdiction – common element maintenance (©4, lines 62-63) **Council staff recommendation:** insert significant before personal on line 63, approve as modified.

3) Jurisdiction – failure to enforce (©4, lines 64-65) **Council staff recommendation:** approve as modified by Commission amendment 1 on ©48.

4) Stay of Association action (©5-6, lines 90-120) **Council staff recommendation:** replace 5 with 10 on line 111; replace 15 with 20 on line 113; replace irreparable with undue on line 119; approve as modified.

5) Motion to dismiss (not in Bill) Several commentators argued that the law should be amended to require the Commission to hold a hearing on a motion to dismiss a complaint that could exceed the Commission's jurisdiction. **Council staff recommendation:** no amendment is needed because the law (§10B-11(b)) already allows the Commission to dismiss a complaint when "there are no reasonable grounds to conclude that a violation of applicable law or any association document has occurred". In staff's view, the Commission's implementing regulations could better spell out the grounds for dismissal and the process of considering the issue, including how it relates to the mediation which the Commission usually requires parties to undergo. Council staff would emphasize that the denial of a motion to dismiss should not be a separately appealable event, postponing further resolution of the underlying dispute.

6) Proxies (not in Bill) **Council staff recommendation:** insert Commission amendment 2 on ©48 regarding use of proxies in response to Williams letter on ©42-43.

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Bill No. 42-09
Concerning: Common Ownership Communities – Dispute Resolution
Revised: 11-12-09 Draft No. 1
Introduced: November 17, 2009
Expires: May 17, 2011
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: Council President at the request of the County Executive

AN ACT to:

(1) modify the composition of the Commission on Common Ownership Communities;
(2) subject community associations to certain annual notification requirements;
(3) make certain types of complaints subject to dispute resolution through administrative hearings by the Commission;
(4) establish a special panel with authority to lift the automatic stay imposed when a dispute is filed with the Commission; and
(5) generally revise County law regarding common ownership communities.

By amending
Montgomery County Code
Chapter 10B, Common Ownership Communities
Sections 10B-3, 10B-8, 10B-9, and 10B-12

By adding
Chapter 10B, Common Ownership Communities
Sections 10B-7A and 10B-9A.

Boldface	*Heading or defined term.*
Underlining	*Added to existing law by original bill.*
[Single boldface brackets]	*Deleted from existing law by original bill.*
Double underlining	*Added by amendment.*
[[Double boldface brackets]]	*Deleted from existing law or the bill by amendment.*
* * *	*Existing law unaffected by bill.*

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Sections 10B-3, 10B-8, 10B-9, and 10B-12 are amended, and Sections 10B-7A and 10B-9A are added as follows:

10B-3. Commission on Common Ownership Communities.

(a) The County Executive must appoint, subject to confirmation by the Council, a Commission on **Common Ownership Communities**. The Commission consists of 15 voting members.

(1) [Six] Eight members should be selected from **unit** or **lot owners** or residents of self-managed and professionally managed condominiums, self-managed and professionally managed cooperative housing corporations, and self-managed and professionally managed homeowners' associations, and may include members or former members of governing boards.

[(2) Three members should be selected from persons involved in housing development and real estate sales.]

[(3)] (2) [Six] Seven members should be selected from persons who are members of professions associated with **common ownership communities** (such as persons involved in housing development and real estate sales and attorneys who represent **community associations**, developers, housing management or tenants) [or investor-owners of units in common ownership communities], including at least one person who is a professional **community association** manager.

* * *

10B-7A. Notification requirements.

The **governing body of a community association** must, at least annually, distribute information in a form reasonably calculated to notify all **owners** about the

27 availability of **dispute** resolution, education, and other services to **owners** and
28 residents of **common ownership communities** through the **Office** and the
29 **Commission**. The **governing body** may satisfy this requirement by including with
30 any annual notice or other mailing to all members of the **community association** any
31 written materials developed by the **Office** to describe the **Commission's** services.
32 **10B-8. Defined terms.**
33 In this Article and Article 3, the following terms have the following meanings:
34 * * *
35 (2) **Common element** includes:
36 (A) in a condominium or cooperative, all portions of the
37 **common ownership community** other than the units; or
38 (B) in a homeowners' association, any real estate in a
39 homeowners' association community that is owned or
40 leased by the association, other than a unit; and
41 (C) in all **common ownership communities**, any other
42 interest in real estate for the benefit of **owners** which is
43 subject to the declaration.
44 [(2)] (3) * * *
45 [(3)] (4) **Dispute** means any disagreement between 2 or more **parties**
46 that involves:
47 (A) the authority of a **governing body**, under any law or
48 **association document**, to:
49 (i) require any person to take any action, or not to take
50 any action, involving a **unit** or **common element**;
51 (ii) require any person to pay a fee, fine, or assessment;
52 (iii) spend association funds; or
53 (iv) alter or add to a **common** [area or] **element**; or

54 (B) the failure of a **governing body**, when required by law or
55 an **association document**, to:
56 (i) properly conduct an election;
57 (ii) give adequate notice of a meeting or other action;
58 (iii) properly conduct a meeting;
59 (iv) properly adopt a budget or rules;
60 (v) maintain or audit books and records; **[or]**
61 (vi) allow inspection of books and records**[.]**;
62 (vii) maintain or repair a **common element** if the failure
63 results in personal injury or property damage; or
64 (viii) require any person who is subject to **association**
65 **documents** to comply with those documents.
66 **[(4)]** (5) **Dispute** does not include any disagreement that only involves:
67 (A) title to any **unit** or any **common** [area or] **element**;
68 (B) the percentage interest or vote allocable to a unit;
69 (C) the interpretation or enforcement of any warranty;
70 (D) the collection of an assessment validly levied against a
71 party; or
72 (E) the exercise of a **governing body's** judgment or discretion
73 **[**of a **governing body]** in taking or deciding not to take
74 any legally authorized action.
75 **[(5)]** (6) * * *
76 **[(6)]** (7) * * *
77 **[(7)]** (8) * * *
78 (9) **Unit** or **lot** includes:
79 (A) any physical portion of a **common ownership community**
80 with distinct property boundaries that:

81 (i) provides complete, independent living facilities for
82 one or more individuals,
83 (ii) contains permanent provisions for living, sleeping,
84 eating, cooking, and sanitation, and
85 (iii) is designated for exclusive ownership, control, or
86 occupancy by those individuals; and
87 (B) all legally enforceable rights and interests incidental to
88 individual ownership of real property in a **common**
89 **ownership community**.
90 **10B-9. Filing of disputes; exhaustion of association remedies.**
91 * * *
92 (e) [When] Except as provided in Section 10B-9A, when a **dispute** is filed
93 with the **Commission**, a **community association** must not take any
94 action to enforce or implement the association's decision, [except] other
95 than filing a civil action under subsection (f), until the process under this
96 Article is completed.
97 * * *
98 **10B-9A. Request for relief from stay.**
99 (a) At any time after a **dispute** is filed under Section 10B-9, a **community**
100 **association** may submit a request to lift the automatic stay required
101 under Section 10B-9 (e) to a hearing panel appointed under Section
102 10B-12, or if no hearing panel has been appointed, a special standing
103 panel authorized to consider requests for relief from stays.
104 (b) The special panel must consist of 3 voting members of the **Commission**
105 designated by the chair, and must include at least one representative of
106 each membership category.

107 (c) An association that requests relief from a stay must serve a copy of its
108 request on any other **party** named in the **dispute** by certified mail or
109 personal service. A certificate of service must accompany any request
110 submitted under this Section. A **party** served with a copy of the request
111 must file its opposition, if any, within 5 days after receiving service.
112 (d) If a request assigned to a special panel is not granted or denied within
113 15 days after the request was filed, the request must be treated as
114 granted.
115 (e) Except as provided in subsection (d), a request for relief from stay may
116 only be granted if the assigned panel finds that:
117 (1) enforcing the stay would impose undue hardship on the
118 **community association;** and
119 (2) lifting the stay will not result in irreparable harm to the rights or
120 interests of any opposing **party.**
121 **10B-12. Hearing Panel.**
122 * * *
123 (b) The chair must choose 2 members of the panel from the voting
124 members of the **Commission**. [They] The persons selected must
125 represent the 2 different membership groups of the **Commission**. [At
126 least one member must be a resident of a common ownership
127 community]. The 2 **Commission** members must designate the third
128 member from a list of volunteer arbitrators trained or experienced in
129 common ownership community issues maintained by the Commission.
130 The third member must chair the panel. If a suitable arbitrator is not
131 available, the chair of the Commission must [choose] designate the third
132 panelist from among the voting members of the Commission, and must
133 designate the chair of the panel.

134 * * *

135 **Sec. 2. Transition.** Until otherwise amended or superseded, a regulation
136 issued under Chapter 10B before this Act takes effect remains in effect to the extent
137 that the regulation is consistent with Chapter 10B, as amended by this Act. This Act
138 does not affect the term of any member of the Commission on Common Ownership
139 Communities serving when this Act takes effect.

140 *Approved:*

141

Philip M. Andrews, President, County Council Date

142 *Approved:*

143

Isiah Leggett, County Executive Date

144 *This is a correct copy of Council action.*

145

Linda M. Lauer, Clerk of the Council Date

LEGISLATIVE REQUEST REPORT

Bill 42-09

Common Ownership Communities—Dispute Resolution

DESCRIPTION: Modifies the composition of the Commission on Common Ownership Communities. Expands the Commission's subject-matter jurisdiction by broadening the definition of "dispute". Requires common ownership communities to provide information to their members about the Commission. Clarifies the Commission's authority to lift the automatic stay triggered by the filing of a complaint.

PROBLEM: Insufficient resident representation: Under current law, the Commission is composed of 15 members, of which 6 must be residents of common ownership communities, 6 must be professionals employed by such communities, and 3 must be real estate brokers or developers. Since the law also requires that every hearing panel must have a resident member, the 6 resident members must bear a larger burden of hearings than the 9 other members.

Lack of jurisdiction to deal with common problems: Some complaints filed with the Commission involve homeowner allegations of property damage attributable to their association's failure to maintain the common areas in good and safe condition. Other complaints focus on the failure of the association's governing board to take non-discretionary actions in response to complaints concerning violations of the community's rules. Although the Commission has in some instances accepted jurisdiction and decided such disputes under a broad interpretation of the existing law, its legal authority to do so has been questioned and is the subject of ongoing debate because of how "dispute" is currently defined in Section 10B-8(3). Since the Commission's quasi-judicial authority is limited to adjudication of "disputes," there is concern about the validity of some of its decisions and the consistency of its procedures.

Lack of information about the Commission: There is presently no requirement that the governing bodies of community associations ensure that their members are aware of the services available to them through the Commission. This lack of information tends to place individual homeowners at a disadvantage when

disagreements between those homeowners and their community associations arise.

Ability to lift the automatic stay: There is presently no clear mechanism for approving a community association's request to lift the automatic stay of action to implement a community association's decision. The stay is automatically triggered whenever any party files a complaint for consideration by the Commission.

GOALS AND OBJECTIVES: To make the Commission more visible and accessible to County residents; to clarify the authority of the Commission to adjudicate Certain kinds of disputes; to organize the Commissioners using two membership categories instead of three with a majority being classified as "owners or residents"; and to provide a mechanism for expedited consideration of requests for relief of the automatic stay.

COORDINATION: Office of Consumer Protection

FISCAL IMPACT: Minimal. The main proposal that could affect the CCOC's existing workload is the one that requires all regulated associations to inform their members of the CCOC. While this may result in increased complaints, it might also avoid many complaints through better education of both parties. It is likely that there will be increased requests for information from the public as the public becomes more aware of the CCOC, but it is impossible to estimate at this time to what extent that will require more, if any, staff time.

ECONOMIC IMPACT: Minimal

EXPERIENCE ELSEWHERE: None

SOURCE OF INFORMATION: Evan Johnson, Office of Consumer Protection, 240-777-3657; Peter Drymalski, Office of Consumer Protection, 240-777-3716

APPLICATION WITHIN MUNICIPALITIES: None in the Cities of Rockville and Gaithersburg; Chevy Chase Village; or the Towns of Chevy Chase, Garrett Park, Kensington, Laytonsville, Poolesville, Somerset, and Washington Grove

BILL

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OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Isiah Leggett
County Executive

RECEIVED
MONTGOMERY COUNTY
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2009 OCT 28 PM 4:16

MEMORANDUM

October 27, 2009

TO: Phil Andrews, President
Montgomery County Council

FROM: Isiah Leggett, County Executive

SUBJECT: Proposed Legislation Relating to the Commission on Common Ownership Communities

I am forwarding for Council's consideration a bill that modifies current law governing common ownership communities to implement recommendations of the Commission on Common Ownership Communities (CCOC) based on more than 17 years of experience under the original enabling statute. This bill would expand the CCOC's ability to respond to the types of complaints brought to it and enhance its ability to educate the County's 900-plus common ownership communities. I am also forwarding a Legislative Request Report for the bill.

The bill's proposed changes relate to five topics: (1) composition of the CCOC; (2) expansion of the CCOC's jurisdiction; (3) required notice regarding the CCOC; (4) lifting of automatic stays issued by the CCOC; and (5) technical amendments.

Composition of the CCOC

The bill specifies that eight members of the 15 member CCOC should be unit owners, lot owners, or residents of common ownership communities, instead of the current six. It also creates a single professional category for seven members who represent professions associated with common ownership communities (e.g., developers, real estate agents, attorneys, and community association managers) instead of the current real estate professional category for three members and community association professional category for six members.

Expansion of the CCOC's Jurisdiction

The bill defines the term "common element" to combine the separate terms of art used in condominium law (common element) and homeowners association law (common area). The bill gives the CCOC jurisdiction over disputes relating to: (1) the authority of a governing body to require any person to take or not take any action involving a common element, in

addition to its current authority over such disputes involving a "unit"; and (2) allegations of an association's failure to maintain or repair common elements if the alleged failure results in property damage or personal injury.

The bill also expands the CCOC's jurisdiction to include disputes involving the failure of an association to take action against a member when applicable law or the association's own rules requires it to act.

Notice about the CCOC

Despite its increasing prominence, the CCOC and its functions are still not well known throughout all the County's community associations. To help address this problem, the bill requires associations to notify their members on an annual basis of the education and complaint resolution services offered by the CCOC. The CCOC will prepare a simple form for the community associations to use for this purpose.

Automatic Stay

Current law specifies that once a dispute is filed with the CCOC, a community association must not take any action to enforce or implement its decision, except filing a civil action. Because this "automatic stay" provision has at times been controversial, the CCOC adopted a procedural regulation allowing associations to request that the stay be lifted. The bill would incorporate that procedure into the County Code and set the standard for ruling on such motions. To expedite these motions, if a hearing panel has not yet been appointed in the case, a special panel of the CCOC must rule on the motion within 15 days or it is deemed granted.

Technical Amendments

The bill defines the terms "unit" and "lot" to make it clear that these terms include all legally enforceable rights and interests that are incidental to ownership of real property in a common ownership community, and not just the real property itself. It also makes several additional miscellaneous technical changes.

If you have questions on any of the proposed changes, please contact Eric Friedman, Director, Office of Consumer Protection at 240-777-3719. Thank you for your consideration of this important bill.

Attachments: (2)

cc: Eric Friedman, Director, Office of Consumer Protection
Kathleen Boucher, Assistant Chief Administrative Officer

OFFICE OF CONSUMER PROTECTION

Isiah Leggett
County Executive

Eric S. Friedman
Director

BILL 42-09, COMMON OWNERSHIP COMMUNITIES – DISPUTE RESOLUTION TESTMONY OF DIRECTOR, ERIC FRIEDMAN, OFFICE OF CONSUMER PROTECTION

January 12, 2010

Good afternoon. I am Eric S. Friedman, Director of the Office of Consumer Protection. On behalf of the County Executive, I want to thank former Council President Andrews for sponsoring Bill 42-09 and the entire Council for its consideration of the Bill.

Bill 42-09 originated with the Commission on Common Ownership Communities (CCOC), which worked with our staff and the County Attorney's Office to address issues that have arisen in the nearly two decades that Chapter 10B of the County Code has been in effect. The CCOC also consulted constituent groups such as the Maryland Homeowners Association and Washington Metropolitan Chapter of the Community Associations Institute (CAI). Indeed, the Bill contains several changes suggested by CAI to earlier drafts. While the Bill would make some important changes in Chapter 10B, we don't believe it can be characterized as a major rewrite of the Chapter.

The core of the Bill is a moderate expansion of the types of disputes over which the CCOC has jurisdiction. To put these changes in context, I will briefly review the CCOC's complaint process. Filed complaints first go through the mediation phase, in which our staff forwards the complaint to the other party for a

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written response and assists the parties in trying to reach a resolution. If we are unsuccessful in bringing about a resolution, the parties are strongly encouraged to go to a formal mediation meeting conducted by two trained mediators from the Conflict Resolution Center of Montgomery County. Approximately 60% of filed cases are resolved at some point of the mediation phase. Those remaining unresolved are submitted to the CCOC at one of its monthly meetings. The CCOC determines if the case falls within one of the definitions of "dispute" over which it is given jurisdiction by Section 10B-8(3). If it is accepted for jurisdiction a hearing is scheduled. In the early 2000s, the Commission decided that it did not have jurisdiction over approximately 4% of the complaints that went beyond the mediation stage. That percentage is up to approximately 35% over the past two years. We believe that this increase is due to changes in the types of complaints filed and the Commission's conservative interpretation of the term "dispute" in Chapter 10B.

Bill 42-09 would expand one category of dispute and create two new ones. Those two new categories are narrowly drafted to cover particular situations. One would give the CCOC jurisdiction over complaints about an association's failure to maintain or repair common elements, but only when the repair or maintenance is required by law or an association document, and the failure to perform it results in property damage or personal injury. The other would give the CCOC jurisdiction in situations where the association is required by law or its governing documents to take action regarding a person who has failed to comply with the governing documents. Had the Bill been in effect the last two years, we believe the number of

cases in which the Commission decided that it did not have jurisdiction would have been reduced but far from eliminated.

The CCOC's educational efforts would be enhanced by the Bill's requirement that a community association annually provide its members information on the Commission and its services. Our Office will make available written materials that can be used in providing that notice.

The Bill also makes straightforward and hopefully non-controversial changes in the composition of the Commission and the automatic stay imposed by Chapter 10B, in addition to some technical changes.

We look forward to assisting the Council and Staff in their consideration of this legislation.

2

ADVISORY COMMITTEE ON CONSUMER PROTECTION

TESTIMONY OF CHARLES H. FLEISCHER, COMMISSIONER, COMMISSION ON COMMON OWNERSHIP COMMUNITIES, IN SUPPORT OF BILL No. 42-09

January 12, 2010

Thank you, Madam President.

I am pleased to testify in favor of Bill 42-09 on behalf of the Commission on Common Ownership Communities.

Perhaps I bring a unique perspective to the Bill, having served two full terms as a Commissioner. As a practicing attorney, I have also been appointed to chair a number of hearing panels and write the panels' decisions.

The Commission, with the help of staff and the County Attorney's office, worked for well over a year in developing the Bill. Most of the changes grow out of the Commission's hands-on experience in dealing with disputes. The changes will clarify the Commission's jurisdiction and allow the Commission to get on with the business of resolving disputes, instead of wrestling with the issue of whether it has jurisdiction.

I would like to focus on two specific changes the Bill would make.

Page 3, line 64, is a new provision that would authorize the Commission to hear disputes involving the failure of a governing body to require a homeowner to comply with association rules.

Let me give an example of an actual case that I am aware of.

A row of townhouse condominiums had a swale running behind them for draining storm water. A downhill unit owner added some landscaping features in violation of the condo association's covenants. The association should have required the downhill owner to remove or modify the landscaping features, but it did not. So every time it rained hard, an uphill owner's backyard and basement flooded.

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Under existing law, the Commission's jurisdiction to hear that kind of dispute is doubtful. Bill 42-09 would make clear that the Commission could take the case. That makes good sense. Otherwise the unit owner would have to incur the expense and formality of court proceedings. I call the Council's attention to the preamble of the existing statute, which finds an unequal bargaining power between associations and unit owners. Clarifying the Commission's jurisdiction in this area furthers the underlying purposes of the statute.

Another substantive provision begins at page 3, line 62. This would give the Commission authority to hear a claim that an association failed to maintain or repair a common element *if* the failure resulted in damage or injury to a unit owner or tenant.

The Commission does not want to second-guess an association's decision whether to replace the roof this year or next. In fact, that is a matter within the association's discretion and the Commission definitely does *not* have jurisdiction.

But suppose the roof has been leaking for years, causing water damage and mold in an owner's unit. The unit owner has repeatedly complained, but the association has done nothing. The Commission should be able to hear that kind of dispute as well.

Thank you for this opportunity to testify.

I would be happy to address any questions the Council may have.

# # #

#3

WRITTEN TESTIMONY TO THE PROPOSED REVISION TO SECTION 10B (CCOC) OF THE MONTGOMERY COUNTY CODE

SUBMITTED BY WASHINGTON METRO CHAPTER OF THE COMMUNITY ASSOCIATION INSTITUTE (CAI)

Presented by Jeremy M. Tucker

I. CCOC Composition Changes – 10B-3 (Line 3)

a. Proposed Change: Changing the composition of the Commission to majority homeowners and eliminating the separate classification of professional commissions (managers, attorneys, etc.).

b. CAI Unofficial Position: CAI is currently not taking a position on this proposed change to the composition of the Commission.

II. Notification Requirement – 10B-7A (Line 35)

a. Proposed Change: Mandating that annually, associations disseminate to their members information related to the CCOC dispute resolution and other services. Statute permits the notice to be provided with the annual meeting notice. Association shall bear all of the costs.

b. CAI Position - Subject to our comments and suggested revisions, CAI does not oppose this new provision.

c. Comments and suggested revisions:

i. Costs: CAI appreciates the Commission's addition of the "any written materials developed by the Office" to save the association the time, expense, and confusion with preparing the notice.

ii. "Disseminate" – To address possible cost concerns, many of CAI's manager members have asked that disseminate expressly include the permanent posting on the association's website or on a central bulletin board. The idea would be similar to the federal law requiring the posting of employees' rights in work places.

III. Definition of Dispute – 10B-8(3)-(4) (Line 58)

a. **10B-8(3)(A)(i) – (Line 62)**

i. Proposed Change. Expanding the definition of dispute to include, the authority of the governing body under law or the governing documents to require any person to take or not to take action regarding a common element. Previously, this provision only covered the unit.

ii. CAI Position – CAI supports this recommended change.

b. **10B-8(3)(B)(vii) – (Line 63)**

i. Proposed Change. Expands a dispute to include, the failure of the governing body, **when required by law or the association documents, to maintain or repair a common element if the failure results in personal injury or property damage.**

ii. CAI Position. CAI supports the revision with the inclusion of the damage limitation.

c. **10B-8(3)(B)(viii) – (Line 64)**

i. Proposed change. Expands the definition of a dispute to include, the failure of the governing body, **when required by law or the association documents, require any person who is subject to association document to comply with the documents.**

ii. CAI Position. CAI opposes this addition.

iii. Comments. In almost every conceivable instance this provision will run up against the business judgment rule. The most obvious example is noise complaints. One owner complains about the noise of another, but the Board chooses not to take enforcement action, and the complaining owner files suit. Arguably the additions in LINE 85 will prevent the Commission from accepting jurisdiction in this, and in almost every instance, but more significantly, Maryland law prevents the Commission from even considering almost any case brought under this provision.

- Because, in all about the rarest case, any dispute raised under this section will be barred by the business judgment rule, this provision is not an appropriate law, and will add nothing but confusion to the dispute resolution process.

IV. LIFT STAY PROCEDURE - 10B-9(A) – (Line 98)

a. Proposed changes: Permitting the Commission to rule on motion's to lift stay filed by the association and creates a balancing test, currently under the regulations, on the panel and rule on such motions.

b. CAI Position. CAI supports the suggested revision, subject to the concern below, and thanks the Commission for responding to the CAI's concerns. CAI has some concerns regarding how service of the request is made. This amendment requires more stringent service requirements for the Motion to Lift Stay, certified mail and personal service, than for any other pleading that may be submitted. Personal service of the complaint is not required. We do not believe that such a requirement is warranted and simply increases costs to the Association. Presumably, an Owner who has brought a complaint will have provided the correct address and will be responsive. CAI recommends that this provision be amendment to only require the Motion to Lift Stay be served by regular mail. Or, in the alternative, a procedure implemented to allow for alternative service in the case of evasion by the Owner.

V. ADDITIONAL CONSIDERATION – MOTION TO DISMISS FOR LACK OF JURISDICTION

a. Background. There is no formal procedure in 10B for having a complaint dismissed for lack of jurisdiction or appealing the CCOC's jurisdictional determination. When a complaint is filed, the parties go to "voluntary" mediation first, resulting in the accrual of legal fees, then, if mediation is unsuccessful, the CCOC, a 15 member body, determines whether it has jurisdiction to hear the dispute. This process can take around 6 months. When the CCOC accepts jurisdiction, a hearing before a 3 member panel is scheduled. On a number of occasions, the CCOC has made obvious mistakes when accepting jurisdiction and there has been no mechanism to appeal the issue before the hearing is held (according to CCOC staff, no panel has ever overruled a CCOC jurisdictional determination).

b. CAI Postion. CAI would like to see the adoption of procedures within 10B or the regulations permitting a party to file a Motion to

Dismiss at any time and that the Motion must be ruled on with a set period of days. Such a procedure would include the ability to appeal the CCOC's jurisdictional decision. A panel could be assigned to hear the appeal. CCOC Staff has indicated its support for the adoption of such procedures.

VI. Summary

CAI supports the majority of the changes to 10B, subject to the concerns highlighted above.

Dispute Resolution and Community governance
January 12, 2010
Remarks made before the County Council for Montgomery County, Maryland

Bill 42-09
Common Ownership Communities – Dispute Resolution

Summary of Comments from John S Williams

My name is John Williams, representing University Towers Condominium Association, for whom I served as board president for two years. While president, a number of formal complaints filed at the CCOC.

I want to suggest an improvement by which the commission may work more effectively with the boards of directors of communities. Specifically I am addressing the manner in which the commission accepts complaints from members of an association. There is little or no screening of a complaint as to either jurisdiction or as to whether the complainant has attempted any attempt to resolve the complaint within the community prior to filing.

When a homeowner in an association has a complaint, he ought to go through a process at the community level to resolve that complaint. We have a very good process at University Towers. The complainant goes to the manager, the community agent, and then to the board, and finally, if not satisfied with the board's action, to the Covenants Committee, which does not contain members of the board. This process tends to resolve disputes, supports the community governance, and lower tensions within the community.

However the complaints made to the commission while I was president all ignored this process. (although they did not say so in their complaint form). The very first that the board of directors heard of these complaints was a letter from the commission informing us that there was a formal complaint. This is not the way that the process should work. It undermines the community governance, hardens positions at the very beginning, and results in complaints that should not have been filed in the first place.

As an example, one complainant complained that the board of directors had improperly used its authority to accept a $1.9 million contract for pipe repairs, with the argument that improvements requires a 2/3 vote of the owners. (a repair does not need such a vote) The board first heard of this complaint in a letter from the commission. Two days later, the complainant posted 30 notices at all elevator entrances stating that the Department of Consumer Affairs of Montgomery County

was investigating the misappropriation of funds by the board of directors, and that residents should not pay their assessments.

This kind of process does not help community governance.

After mediation and a hearing, the complaint was resolved in the favor of the association. However, the acceptance of the complaint after half of the repair had been completed stayed all further repair work for months and cost the association tens of thousands of dollars.

Following this complaint, several complaints were filed. One complaint was filed that the board had approved a contract with a company owned by a member of the board. The complaint was filed only days after the board had approved this contract, which was for the amount of $1.00. This complaint was later withdrawn, but it aptly illustrates how quickly any member of the community may misuse this process to file an inappropriate complaint that disrupts community governance.

The Lesson:

It would be helpful if the CCOC were to respect and enable the community's own dispute resolution process, which is stipulated both in the Maryland condominium law and in the association's governing documents. Before it accepts a complaint, it could determine if in fact the community board had the opportunity to resolve the issue prior to the issuance of the formal complaint letter, which stays the board's decision.

When a complaint is filed, the commission sends the board president a letter stating that according to Montgomery County Code 10B-9 (e) , "When a dispute is filed with the Commission, a community association must not take any action to enforce of implement the association's decision.....". This gives pretty considerable power to any angry owner to immediately block a board's action regardless of circumstance, validity, jurisdiction, or the community's own dispute resolution process.

The University Towers responded to each complaint that the complainant had bypassed the community's dispute resolution process. This part of our response was ignored in all cases. It would have been helpful if the complaint had been remanded to the community's own dispute resolution prior to a stay by the commission.

FROM LIS

Top of the Park Condominium

8608 Bradford Road • Silver Spring, MD 20901
(301) 587-5726

January 27, 2010

Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

Re: Bill 42-09: Common Ownership Communities – Dispute Resolution

Dear Council Members:

Enclosed please find fifteen copies of Top of the Park Condominium Association's written testimony on the above-captioned bill.

Top of the Park strongly opposes the proposed expansion of the Commission on Common Ownership Communities' (CCOC's) jurisdiction and the notification requirement, believing it will:

- Impose additional needless costs on common ownership communities and their residents
- Unduly hamper the operation of common ownership community boards to the detriment of owners and residents
- By increasing the workload of the CCOC and its staff, lengthen the time and increase the expense of litigation to the disadvantage of both parties in a dispute.

Instead, we urge the Council and the CCOC to consider and implement means of improving and streamlining the hearing process, and offer a number of suggestions for accomplishing this in our written testimony.

If you have any questions regarding our testimony, please feel free to contact me directly (cell: 240-505-7141) or by email at lindadelaney@mindspring.com) or through our property manager, Marty Feldman at Zalco Realty (301-495-6600).

We appreciated the opportunity to present oral testimony at the January 12, 2010 public hearing, and hope that you will give serious consideration to our views and concerns.

Sincerely,

Linda Delaney

Linda Delaney
President, Board of Directors

Attachment

cc (w/ attachment):
Board of Directors
Marty Feldman

CCOC\cover letter-written testimony (1-27-10).doc

Testimony of

Top of the Park Condominium Association

on

Bill 42-09: Amending the Commission on

Common Ownership Communities

Top of the Park Condominium Association ("Top of the Park") is a 166-unit townhouse condominium located near the intersection of Sligo Creek Parkway and Piney Branch Rd. in Silver Spring, Maryland. Top of the Park was originally built in 1942, and remodeled and converted to townhouse condominiums in 1979/1980.

Based on our experience with the Commission on Common Ownership Communities' (CCOC's) complaint resolution process, Top of the Park strongly opposes expansion of the CCOC's jurisdiction and the proposed notification requirement, believing it will:

- Impose needless additional costs on common ownership communities and their residents
- Unduly hamper the operation of association boards to the detriment of owners and residents
- By increasing the workload of the CCOC and its staff, lengthen the time and increase the expense of litigation to the disadvantage of both parties in a dispute.

Instead, we urge the Council and the CCOC to consider and implement means of improving and streamlining the hearing process, and offer a number of suggestions for accomplishing this in our written testimony. And should proposed legislation be enacted, then we ask the Council to examine the impact of the expanded CCOC authority on residents and community associations after two years.

OBJECTIONS TO EXPANDED CCOC JURISDICTION

1. **There is no evidence that expanded jurisdiction is needed.** If there is a serious, widespread problem of associations breaking faith with their residents, we haven't heard about it – either in CCOC newsletters, or in the press, or from our property management company.

   The CCOC's own data indicates little need for and expanded definition of disputes. Of the 89 complaints resolved in calendar year 2009, only 9 were dismissed due to lack of jurisdictional authority, and only 2-3 at most would have been covered by the proposed amendments.[1]

2. **The definition of "dispute" could encourage frivolous suits.** Disputes would now include "failure to maintain or repair a common element if the failure results in ...property damage." (10B-8(4)(vii)) Our concern is that the term "property damage is too broad and vague. A resident could claim, for instance, that his/her property value is damaged if the

[1] Telephone conversation with Evan Johnson, CCOC staff administrator, January 11, 2010.

association doesn't paint their front door every year (rather than on the normal 5-7 year cycle), or demand expensive landscaping.

3. **The duty to maintain common elements takes no account of costs arising from resident's actions.** For example, a resident at Top of the Park asked that a tree (a common element) be removed since its trunk had, over time, grown and threatened to crack their deck.[2] The Board's position was that the deck was originally built too close to the tree and the tree's growth should have been reasonably anticipated. But under the expanded definition of "dispute" this situation could become a CCOC matter – and Top of the Park possibly be required to remove a 60 foot, 60+ year-old tree at a cost of $5,000 - $15,000.

4. **The definition of "dispute" could unduly hamper the reasonable exercise of a governing body's discretion to the disadvantage of residents.** Community associations charged with repair/replacement of common elements do so by reserving a portion of the homeowners' assessments (known as the reserves funds) and in accordance with a replacement schedule (commonly called a reserves study). Unanticipated repair/replacement needs or unexpectedly high costs can lead an association board, in their business judgment, to defer less urgent capital projects. However such discretion would no longer be possible under Sec. 10B-8(4)(vii). The result will be higher costs to residents – in the form of "special assessments," or higher annual assessments in order to build up a larger reserves fund cushion, or through interest charges if capital projects are financed by bank loans.

Similarly, expanding "dispute" to include a governing body's failure to compel adherence to an association's governing documents (10B-8 (4)(vii)) would unreasonably restrict a board's discretion. For example, Top of the Park's board has waived late charges on late payment of monthly condominium fees by residents facing temporary acute financial hardship or when the resident has died and his/her survivors are trying to sort out the estate. This type of assistance may no longer be possible since it could result in a "dispute."

Top of the Park has serious reservations about the need for and impact from the proposed expansion of the CCOC's dispute resolution jurisdiction. However, our major concern is the entirely new requirement that community associations must notify all owners each year of the CCOC's dispute resolution services.

OBJECTIONS TO THE NOTIFICATION REQUIREMENT

1. **Notification imposes an undue and extraordinary burden on community associations.** The proposed bill states that the notification requirement can be satisfied through "an annual notice or other mailing ...". (10B-7A) For no other service or type of resident is this form of individual mailing mandated. For example, landlords are not require to inform their tenants of the dispute resolution services available from the county's Landlord- Tenant Commission[3]. Even the CCOC itself doesn't shoulder this burden: notice of its Annual

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[2] All decks at Top of the Park are exterior additions built and maintained at residents' expense.

[3] As a staff member explained: "We expect that a tenant will learn about our service by going on our website." (Telephone conversation; January 26, 2010)

Forum (held Oct. 2009) could only be sent by email to a significantly smaller set of recipients due to "severe budget constraints."[4]

2. **Increased awareness will likely encourage the filing of trivial complaints – imposing a substantial financial burden on community associations and their residents.** The CCOC staff, in the legislative request report accompanying Bill 42-09, asserts: "While this may result in increased complaints, it may also avoid many complaints through better education of both parties." Frankly, we think this is a vain hope. There will always be residents disappointed with a decision a board makes. Increased awareness of the CCOC is far more likely to increase the number of complaints filed, whether or not the complaint is warranted.

Boards of directors take their fiduciary responsibility seriously. Most board members hold full-time jobs and aren't lawyers. So it is both prudent and necessary to obtain legal assistance when faced with litigation.[5] And that places boards in a dilemma – either incur legal costs, or accede to a resident's demand which then sets a precedent requiring the same expenditure for all residents. Even in situations where the complaint was deemed frivolous or unduly protracted due to misconduct, the CCOC often does not order the losing party to reimburse the association for the legal costs incurred.[6] But the real losers are all the other community residents, who bear the cost of unreimbursed legal costs or unwarranted expenditures to placate an aggrieved potential complainant.

The Top of the Park Board knows first-hand how expensive and time consuming it is to deal with a complaint filed at the CCOC. One complaint continued for 9 months before it was dropped by the resident; the second took 19 months to resolve. The legal costs incurred equaled approximately 1 month's condo fee for every resident!

In light of the likely increase in complaint volume, the 20% reduction in CCOC staff resources, and the cost (in both legal charges and board time and attention) of dealing with complaints filed at the CCOC, it is imperative that the CCOC dispute resolution process be improved and expedited. In the section below we offer a number of suggestions to achieve this goal.

WAYS TO IMPROVE AND EXPEDITE THE CCOC COMPLAINT PROCESS

Figure 1 (on the next page) depicts the steps in the typical CCOC dispute resolution process.

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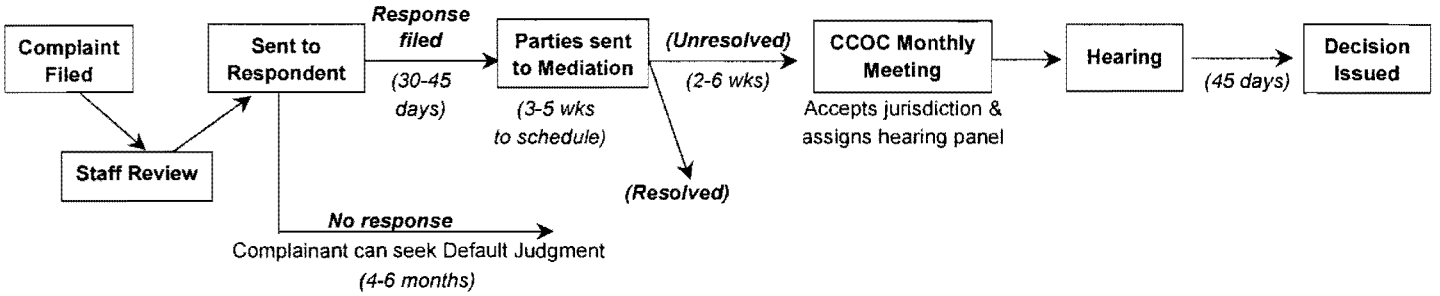
4 CCOC Monthly Meeting Minutes, October 7, 2009.

5 Since October 1, 2006, community associations are no longer required to be represented by legal counsel in disputes before the CCOC. Nonetheless, CCOC recommends obtaining legal representation and advice. The CCOC strongly encourages parties to attempt mediation of their dispute (by the Conflict Resolution Center of Montgomery County) before requesting a public hearing at the CCOC, and states: "Any document signed as a result of this mediation process may affect a party's legal rights. Parties are strongly encouraged to, and have the opportunity to, consult with their legal counsel prior to signing any agreement." (*CCOC Communicator*, Fall 2006, p. 2. Emphasis added.)

6 In *Harary v The Willoughby of Chevy Chase* (#373, 1998), the hearing panel found the complaint frivolous and absolutely without evidence to support the complaint, but ordered the complainant to only pay $500 of the $1170 attorney's fees. In *Livingstone v Parkside Community Association* (Case#23-08, decided Oct. 28, 2008), the hearing panel found "[the] filing of a complaint ...was objectively lacking in good faith", but ordered the complainant only to pay $2,450 of the $14,000 in legal costs incurred by the association.

Figure 1

CCOC Dispute Resolution Process



Given normal scheduling delays and routinely-granted requests for extensions and continuances, complaints that go to hearing typically take 9-18 months to resolve, and cases lasting over 2 years are not unusual.[7] Here are several ways to improve the process.

1. **Provide training in legal procedures and relevant property law to new CCOC commission members.** While commission members drawn from common community (real estate) profession will have professional experience in interpreting and applying property law and association governing documents, the members who are resident representatives may not have this knowledge and experience. Since the CCOC is a quasi-judicial body, these resident representatives should be given training in property law (e.g., Maryland condominium act, pertinent court decisions, past CCOC decisions and precedents, etc.).

2. **Don't allow multiple revisions to a complaint.** To be accommodating to a resident filing a complaint, the CCOC staff routinely accepts and incorporates changes to the original complaint. For example, the two complaints filed against Top of the Park were revised five times – changing the legal basis for the complaint, seeking different types of relief and/or new and higher damages. Top of the Park tried to settle the complaints prior to going to hearing, but we were chasing a moving target. And our legal costs kept mounting.

3. **The CCOC should determine whether to accept jurisdiction over a complaint prior to directing the parties to mediation.** Although mediation is supposed to be voluntary, in reality the parties are compelled to participate.[8] With one or more unwilling parties, the mediation effort is adversely compromised. Moreover, since there is still an opportunity for a hearing by the CCOC, the parties could be understandably reluctant to negotiate to a settlement. Knowing beforehand that the CCOC will not adjudicate the dispute would encourage reaching a resolution through mediation.

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[7] According to the CCOC staff, the elapsed time has been shorter in the past year; however, we cannot verify this claim since no case decisions have been posted on the CCOC website since April 2009.

[8] As the customary letter from the CCOC staff offering to arrange mediation states: "The Commission has the authority to penalize a party who unreasonably rejects mediation." And in *Vartan v Oak Springs Townhouse Association Inc.* (Case No.733-O, decided Sept. 21, 2005), the hearing panel cut the legal cost reimbursement (from $4,940 to $1,500) to Oak Springs because the association did not participate in mediation, even though the panel found: (a) the case was brought frivolously; (b) Oak Springs' failure to participate in mediation was not unreasonable; and (c) the panel could find no area of compromise that could have been reached through mediation!

4. The CCOC should be more selective in the complaints accepted for hearing. Examples of the types of complaints that should be rejected:

- If the issue is "settled law" (either by a prior CCOC or court decision)
- If the relief sought exceeds the CCOC's authority (for example, tort damages such as those sought and rejected in *Boone v Seneca Knolls*[9]), or is excessive in light of the damage alleged, or expressly barred by law or the association's governing document
- If the damage alleged is vague or *de minimus* (for example, "the association won't paint my front door and my property value is harmed"), and thus appears to be a "nuisance suit".

Since the complainant can file suit in the district or small claims court, or could be directed to mediation, the right to redress is not lost.

5. The CCOC should be fully informed in deciding to adjudicate a complaint. For instance, the commission members should at least read the complaint and respondent's reply before voting to accept the complaint.[10] Failing that, the case summary prepared by the CCOC staff should provide greater detail than a single paragraph about the controversy – such as the legal basis (in the governing documents, prior case precedents, etc.) for the complaint, the relief sought, the respondent's position on the facts or legal basis for the complaint, whether there is prior case law or commission decisions relevant to the case, etc.

6. Improve the mediation process. It was Top of the Park's experience that mediation provided by the county's Conflict Resolution Center was not helpful. The mediators were not lawyers nor conversant in property law, and had not read either the complaint or response. The discussion portion of the session was only one hour – not enough time to get to all the issues. And the mediators focused on facilitating discussion and striving for agreement on any matter, however tangential to the issues in the complaint, rather than resolving the issues in dispute.

There are ways to improve this process:

- ***Have mediation and adjudication be mutually exclusive.*** This way the parties would be more inclined to work to a resolution. Either the CCOC could determine the avenue to follow (by declining to accept the complaint and directing the parties to mediation), or let the decision rest with the respondent. (Since the complainant had the first choice in selecting a forum to hear his/her matter, so let the next choice be the other party's.)
- ***Limit mediation to appropriate cases or issues***. For example, where the complaint turns on an interpretation of or liability/responsibility under the community association's governing documents, such matters are rightly (and solely) in the CCOC's purview.

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[9] Case No. 81-06, decision issued Aug. 29, 2007.

[10] In one complaint involving Top of the Park (*Pearson v Top of the Park*, Case No. 01-07), the CCOC was about to vote on whether to accept the complaint until one of the commission members asked if any of the other members had read Top's reply – <u>and none had</u>. The Commission then voted to defer consideration to a later meeting.

- ***Assign mediators who are familiar with property law and/or community association matters***. Knowledgeable mediators could explain why a particular relief sought by a complainant or a defense proffered by respondent was contrary to legal precendent.
- ***Don't set an arbitrary time constraint on the mediation session***.

7. The CCOC should ensure that there is a controversy to adjudicate. A "controversy" involves not only the issue(s) but also two opposing parties. There seem to be a number of instances where one party does not appear at the hearing, and yet the hearing proceeds. For instance, in *Hudgins v Mutual 22 of Leisure World*[11] the complainant did not attend the hearing and therefore did not present testimony but the hearing panel required the condominium association to present its defense anyway. One of the complaints involving Top of the Park alleged an improper election due in part to mishandling of proxies by the secretary – and the complainant was the secretary. (In effect, the complainant was filing a complaint against themself!) It's our understanding that in civil proceedings if the other party fails to attend the case is dismissed not heard, and this same policy should be adopted by the CCOC.[12]

* * * * *

Boards like Top of the Park try to balance competing and conflicting resident demands, maintaining the property while holding down costs to the homeowners. The proposed amendments will make only this job more difficult. In a county with one of the highest housing costs in the nation, with community associations already in a cost squeeze from an increase in delinquent accounts, we don't believe it's in the best interest of our homeowners to further increase costs – the likely consequence of Bill No. 42-09.

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[11] Case No. 10-08, decision issued Nov. 7, 2008.

[12] The CCOC's Default Judgment Procedures (adopted Feb. 7, 2007) only addresses instances where the respondent does not respond to a complaint. The complainant may still be required to present a case before a hearing panel if damages or specific relief are sought.

BILL 42-09

MF
CC

THOMAS SCHILD
LAW GROUP, LLC

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Rockville, Maryland 20850

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January 29, 2010

The Honorable Nancy Floreen, President
County Council for Montgomery County
100 Maryland Avenue
Rockville, MD 20850

053886

2010 FEB -1 AM 10:1

Re: Comments on Bill 42-09
Common Ownership Communities - Dispute Resolution

Dear Ms. Floreen:

Thank you for the opportunity to testify before the Council on Bill 42-09 on January 12, 2010.

Our primary concern is that the two proposed jurisdictional additions for the Commission in Bill 42-09, to allow the Commission to hear disputes regarding maintenance of common elements and enforcement of covenants, fundamentally change the role of the Commission from what was originally intended, and interfere with the basic powers of governing bodies of community associations to manage their affairs.

In originally adopting Section 10B-1, the Council set forth that

> The Council finds that there is often unequal bargaining power between governing bodies, owners, and residents of homeowners' associations, residential condominiums, and cooperative housing projects. Owners and residents in these common ownership communities are in effect citizens of quasi-governments, which provide services in lieu of government services, levy assessments, and otherwise have a significant impact on the lives and property of owners and residents.
>
> Owners and residents in common ownership communities require the protection of democratic governance. In furtherance of this goal, the Council finds a need to regulate elections, budget adoption, enforcement procedures, and resolution of disputes with adequate due process protections. The Council also finds that the creation of a Commission on Common Ownership Communities will through regulation and education promote an equitable balance between the powers of governing bodies, owners, and residents.

With those findings in mind, it is clear that the Council intended the definition of disputes to apply to circumstances where Associations did not exercise their powers in accordance with the powers delegated to them, to address abuses of *authority* or *failures* of

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governance, and to provide a forum where the disparity of power between a governing body and an owner would be balanced.

But the Council did not intend for the Commission to second guess the managerial and operation decisions made by governing bodies, and expressed this limitation in Section 10B(4)(E) establishing that a dispute would not include a disagreement about the "judgment of a governing body in taking or deciding not to take any legally authorized action."

We urge the Council not to expand the jurisdiction of the Commission.

Enclosed are some additional comments regarding the Commission's operation that we hope the Council will consider as it further reviews amendments to Chapter 10 B.

Issue: The Commission exceeds its statutory authority with regard to the disputes it accepts.

There are two provisions of Section 10B-8 that the Commission has interpreted incorrectly over the years which have resulted in an expansion of jurisdictional authority to hear disputes that are not suited to be heard by the Commission.

In Section 10B-8(3)(a), a dispute is defined as any disagreement between 2 or more parties that involves "the authority of a governing body, under any law or association document," to require a person to take or not take an action involving a unit, to pay a fee, fine, or assessment, to spend association funds, or alter or add to a common area or element.

Section 10B-8(4)(E) provides that a dispute *does not include* any disagreement that only involves "the judgment or discretion of a governing body in taking or deciding not to take any legally authorized action."

The correct interpretation of these two provisions together is that the broad range of operational decisions made by a Board of Directors were not to be second-guessed by the Commission.

The definition from 10B-8(3)(a) is meant to provide a remedy where a Board has exercised judgment in an area where it has no authority under an association document or state law. For example if a Board of Directors ordered a unit owner to re-paint the bright orange interior walls inside his unit to a neutral color, Section 10B-8(3)(a) would provide a remedy for the unit owner, because it is clear that no governing document or state law would provide authority for a Board of Directors to regulate the interior of a unit.

The Commission has used Section 10B-8(3)(a) as a "catch-all" provision to take jurisdiction of disagreements where the subject matter authority of a Board was not called into question, by instead focusing on the correctness of the Board's decision-making process as it "exercised" its authority. That is, the Commission believes that if a unit owner is dissatisfied with a Board's action (or even no action), the Commission is entitled to determine whether the Board made

the "right" decision. This reflects the interpretation the Commission's interpretation of "authority" to be that if the Board didn't make the "right" decision (reach the same conclusion that the Commission reaches), the Board's action was not "authorized."

This type of review by the Commission is not supported by the reading of 10B-8(3)(a) and 10B-8(4)E together.

> ***Proposal***: (1) Amend Chapter 10B to include a requirement that a Complainant must make a prima facie showing that a Board's action is not within the subject matter of powers provided to a board by its governing documents or state law. (2) Amend Chapter 10B to require that for each case in which the Commission finds jurisdiction under Section 10B8(3)(a), the Commission must make an express finding that the subject matter of the dispute alleged by the Complainant was not within the Board's powers to decide.

Issue: The Commission's administrative intake procedures require parties to submit to jurisdiction and incur expense before the Commission has determined that it has jurisdiction, and the Commission's mediation practices should be independent of the quasi-judicial dispute resolution process established in Chapter 10B.

After a complaint is filed, the Commission strongly encourages parties to participate in mediation. The failure of a party to participate in mediation is a factor that the Commission considers in awarding attorneys fees. This process is followed without a determination by the Commission that it has jurisdiction of a dispute, and even where a party immediately responds to a complaint with a defense that the Commission is without jurisdiction, the Commission has deferred a decision on jurisdiction until after a mediation is attempted. There are instances where, after the parties have expended significant time and money for preparing cases for mediation, the Commission has subsequently declined to accept jurisdiction of a case.

Over the years, mediation has evolved as a Commission focus. Initially, disputes were mediated by DHCA staff, and in recent years by the Center for Conflict Resolution. The Center uses a model of mediation where mediators are not versed in community association issues and are do not familiarize themselves with facts of disputes; their focus is on having parties agree to a resolution of a dispute, regardless of whether the dispute is within the jurisdiction of the Commission, and regardless of whether the resolution complies with governing documents, state law, or general duties of fiduciaries. This is not consistent with the limited jurisdiction and quasi-judicial administrative process established initially by the County Council in Chapter 10B. If the Commission wants to focus on mediation, it should be independent of the quasi-judicial structure that permeates chapter 10B.

> ***Proposal***: (1) Amend Chapter 10B to include a requirement that the Commission consider the complaint and response and make a finding of

jurisdiction before it orders the parties to mediate. (2) Amend Chapter 10B to specifically provide for the availability of (i) a motion to dismiss for failure to state a claim within the Commission's jurisdiction and (ii) a motion for summary judgment, and provide for the opportunity for a hearing on the motions before the Commission accepts jurisdiction of a dispute. (3) Amend Chapter 10B to make the mediation process available as an option and to make it independent of the track for obtaining relief through a quasi-judicial hearing. (4) Alternatively, amend Chapter 10B to require that the County's mediators have expertise in community association governance.

Issue: Inconsistency in Hearing Practice and Procedure

Attorneys who practice before the panels have noted a significant variation among panels with regard to the knowledge and experience of panel chairs in the areas of common ownership community governance, administrative procedure, and Chapter 10B. Commissioners as well often have limited expertise in these areas. Consequently, hearings and decisions vary in the level of due process afforded the parties. These are matters of crucial importance because the Panels can impose significant obligations on the parties and the full enforcement power of the County and the Courts can be invoked. This type of quasi-judicial decision making must be exercised with thoroughness, accuracy, and neutrality, to ensure that the Panel actions are warranted and based on a documented fairly developed administrative record, within the authorized actions under Chapter 10B.

Proposal: (1) Amend Chapter 10B to include a requirement that the Commission adopt or develop a manual for Commissioners regarding principles of Common Ownership Community governance and administrative procedure, and require that Commissioners receive training in the areas of common ownership community governance and administrative procedure, and observe a hearing conducted by the Office of the Hearing Examiner. Training could be provided by County staff, consultants, or institutions that provide training in community association governance or administrative procedure. (2) Amend Chapter 10B to require that Panel Chairs demonstrate knowledge of principles of community association of governance and administrative procedure, by virtue of training, provision of legal services as a drafter of governing documents or advisor to community associations, and practice before administrative bodies, such as the Board of Appeals, the Planning Board, or the Maryland Office of Administrative Hearings.

Issue: Clarification of standards for Attorneys fees and costs

Chapter 10B currently *permits* an award of attorney's fees and costs where a party hinders the dispute resolution process. This analysis is in some regards subjective, and punitive. The

Condominium Act provides a simpler standard, that a prevailing party is *entitled* to its attorney's fees.

> ***Proposal:*** Amend Chapter 10B-13 to provide that a prevailing party shall be awarded its attorneys fees and costs.

As the Council considers Chapter 10B, it should also be aware that the executive regulations that have been adopted also merit careful review. In particular, the Commission's regulation 10B06.01.09 permits the Commission to retain jurisdiction of a dispute to monitor compliance with its order. Retaining jurisdiction delays a party's appeal rights, and allows issues to arise in enforcement that may not have been addressed in the opinion. We believe that it is important to articulate all aspects of the decision in the order, and to observe the finality of the decision as intended by conducting the hearing under the Administrative Procedures Act.

Please don't hesitate to contact me if you or other Council members need more information about the issues we have raised.

Sincerely,

Christopher Hitchens

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Faden, Michael

From: Robert Conn [connrobert@msn.com]
Sent: Thursday, February 04, 2010 3:57 PM
To: Faden, Michael
Subject: Bill No. 42-09

February 4, 2010

To: Montgomery County Council Public Safety Committee
Care Of: Mike Faden
Re: Bill No. 42-09, Common Ownership Dispute Resolution

From: Robert E. Conn, 3200 N. Leisure World Blvd. #501, Silver Spring, Md 20906; 301-598-1155

QUALIFICATIONS. I am a member of the Leisure World Community Corporation Home Owners Association, an umbrella organization over 29 separate condominium associations and other common ownership communities. I am also a member of the governing Board of one of these associations. I am familiar with the dispute resolution functions and procedures of the Commission On Common Ownership Commission (CCOC). I was not aware of the public hearing recently conducted regarding Bill No. 42-09, or I would have appeared and testified. Accordingly, I respectfully request the Committee to accept and consider this memorandum.

COUNCIL'S GOALS. The underlying goal of the Montgomery County Code, Chapter 10, which established the CCOC is to compensate for the "unequal bargaining power between governing bodies, owners, and residents" of common ownership communities. The Code recognizes that: "Owners and residents in common ownership communities require the protection of democratic governance." Section 10 B-1.

UNFAIR DEFAULT PROVISIONS AGAINST COMPLAINING OWNER PARTIES. Bill No. 42-09, while containing some meritorious clarifications, goes against the goal of Chapter 10 in the proposed amendment 10 B-9a, Request for Relief from Stay. Section 9 A d mandates that if a panel authorized to consider requests from associations to lift a stay of actions in favor of a complaining owner member does not act within 15 days, "the request must be treated as granted." We have all heard about default judgments against a party who fails to appear before a court or agency, but never because the court or agency fails to act within a specified time due to no fault of one of the parties. This unwise proposed provision tilts in favor of the association and against the complaining owner party, contrary to the goal of Chapter 10 to compensate for "unequal bargaining power" that the association has over an individual complaining member party.

Accordingly, proposed Section 9 A d should be deleted.

UNFAIR GROUNDS FOR LIFTING A STAY. Proposed Section 9 A e (1) & (2) provide the grounds for lifting a stay of an association action opposed by a complaining member party. The association needs to show that the stay imposes "unfair hardship" on the association. Unfairly, the association need only show that lifting the stay will not result in "irreparable harm" to the complaining member party. It would be easy to show not irreparable harm because "irreparable" harm or injury is very difficult to show. Courts and agencies have held that monetary loss alone does not constitute "irreparable " harm or injury. The grounds for lifting a stay should be even-handed. If "unfair hardship" on the association is adequate for lifting a stay, then not "unfair

hardship" on the member complaining party should be adequate. On the other hand, if no "irreparable harm" to the complaining member party is adequate for lifting the stay, then "irreparable harm" to the association should be adequate. A single standard should be sought; not a double standard favoring the association.

ARBITRARY OR CAPRICIOUS ACTION. The Bill proposes to amend Section 10 B-8 (4) (E to clarify the items excluded from the definition of a "Dispute" over which the CCOC has jurisdiction. The revised item would negate CCOC jurisdiction if the matter involved "the exercise of a governing body's judgment or discretion in taking or deciding not to take any legally authorized action." To be fair to the complaining member party, the following proviso should be added to the above-quoted phrase: "provided, however, that such judgment or discretion is not exercised in an arbitrary or capricious manner."

NO RETROACTIVITY. The rules of the game for any pending CCOC cases should not be changed mid-stream. There should be no ex post facto or retroactive effect by Bill No. 42-09 upon any pending cases. Accordingly, a new section should be added at the end of the proposed amendments as follows : "Section 3. Effective Date. The foregoing amendments shall not apply to any cases pending before the common ownership commission on the date of the enactment of these amendments."

CONCLUSION. It is respectfully submitted that the foregoing comments and suggestions would further the above-mentioned goals of the Council in creating the CCOC. That is, to compensate for the "unequal bargaining power between governing bodies, owners, and residents." Bill 42-09 should be amended as proposed above to protect "democratic governance" in accordance with the purposes of the Council in creating the CCOC. I am available to provide any further explanations or attend any proceedings of the Council's Public Safety Committee dealing with Bill No. 42-09. Thank you for accepting and considering this memorandum.

February 10, 2010

Michael E. Faden, Senior Legislative Attorney
Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

Dear Mr. Faden,

Please enter the following comments into the public record as my written testimony re. Council Bill 42-09.

The Council should be informed that I have filed a complaint with the Commission on Common Ownership Communities (CCOC) against the Board of Directors of the Leisure World Community Corporation (LWCC). I have charged them with violations of State and County laws and of their own by-laws; further I challenge their fiduciary responsibility and due diligence as trustees of the Leisure World Trust.

I am a property owner in Leisure World Mutual 17A. This gives me the status to be able to question actions by the LWCC Board of Directors. This ownership status makes me a recipient of the benefits of the Leisure World Trust and allows me to question their decisions as they pertain to efforts to alter the assets in the Leisure World Trust. I am not seeking to adjudicate the complaint through this testimony. I simply wish to show you some omissions in the bill and some changes that would have had an adverse effect upon my complaint.

10B-7A. Notification requirements – The Montgomery County Homeowners Handbook contains the statement: "Beyond these State and County laws, the association's self-governance takes place through its internal due-process procedure, alternative dispute resolution methods…." The complaint form of CCOC asks "Do your community's governing documents provide a procedure or remedy for resolving disputes?"
The expectation is clear that an Association should have an internal process for resolving disputes and that the CCOC is meant to be a second level of resolution. In Bill 42-09 I would suggest an additional phrase on line 28: communities **through their Homeowners Association and** through the Office … Through this addition the CCOC will be aware that its staff needs to assist associations if they must develop internal processes in order to be in conformity with the County law.

10B-8. Defined terms – The authority of an Association should not be absolute. The Association could have an interest in a particular issue and refuse to take an action that alters that interest. In Bill 42-09 I would suggest an additional phrase on line 74: authorized action **unless the decision would have an adverse effect upon the owners of the Association**.

10B-9A. Request for relief from stay – As I mentioned above, I have filed a complaint with the CCOC and obtained a stay on the alienation of the Medical Center. The merits of my complaint

are in mediation with the CCOC and, if desired, the Leisure World Board can appeal for relief from the judiciary system. This situation involves an administrative process on merits and a judicial process on the stay. This is an appropriate separation of powers and recognizes the unique responsibility of each governmental sector.
The proposed change blurs the jurisdictional lines. The complainant is seeking an administrative remedy from the CCOC, while the CCOC is also making a judicial determination on the justification for the stay. This dual role destroys the impartiality of the CCOC and raises serious questions as to why the Judiciary was removed from the process through Bill 42-09.

Time frame for response to service - My request for a stay was granted on October 28, 2009. It has been almost 3 ½ months since the stay and the Association has had that time to consider an appeal. If it does so now, under this law I would have 5 days to respond. The new bill creates a severe imbalance in the appeal process. At line 110 I would add that the Association will have 15 days to respond after receipt of the notice of a stay and the complainant will have 15 days to respond after receiving the certificate of service.

Decision by default – Line 112 states that, if the panel does not act on a request within 15 days, the stay is vacated. This provision is completely at variance with a complainant's expectation of justice. The panel can make a decision by not deciding and the end result of non-action is detrimental to the complainant's case. It is my firm belief that no governmental agency should be allowed to render a decision by inaction. It is one thing to accept the validity of sunset provisions in a law; it is another to have it refuse to exercise its duty to determine requests that come before it. On line 114 I would change the word "granted" to the word "denied."

Definition of terms – The terms on lines 117 and 119 need to be further defined. What are "undue hardship" and "irreparable harm?"

I trust that I have made my concerns about Bill 42-09 clear. If you have any further questions, please feel free to contact me by phone (301-598-4078) or by email (james-cronin@comcast.net)

Sincerely,

James E. Cronin

James E. Cronin
3330 N. Leisure World Blvd. #126
Silver Spring, MD 20906

LEISURE WORLD
COMMUNITY
CORPORATION

3701 Rossmoor Boulevard Silver Spring, Maryland 20906 (301) 598-1000

March 23, 2010

Hon. Phil Andrews
Chair, Public Safety Committee
Montgomery County Council
100 Maryland Avenue
Rockville MD 20850

Hon. Roger Berliner
Member, Public Safety Committee
Montgomery County Council
100 Maryland Avenue
Rockville MD 20850

Hon. Marc Elrich
Member, Public Safety Committee
Montgomery County Council
100 Maryland Avenue
Rockville MD 20850

Michael Faden, Esq.
Senior Legislative Attorney
Montgomery County Council
100 Maryland Avenue
Rockville MD 20850

Re: Montgomery County Council Bill No. 42-09, concerning Common Ownership Communities - Dispute Resolution

Dear Council Members Andrews, Berliner, and Elrich and Attorney Faden:

I am writing you on behalf of the Leisure World Community Corporation (LWCC) and its Legislation and Taxation Advisory Committee, to express the position of Leisure World in favor of Council Bill No. 42-09 with amendments.

Leisure World is a community in Montgomery County with over 8,000 residents in 27 different condominium associations, one cooperative, and a homeowners association, with the LWCC as an umbrella association with jurisdiction over trust property jointly owned by these 29 common ownership communities. Thus, Leisure World has a great interest in the CCOC and amendments to its governing statute.

Bill 42-09 would change the composition of the Commission on Common Ownership Communities (CCOC) by increasing the number of members who are unit owners in condominium associations such as those in Leisure World. We support that change.

This bill would also require that condominium associations inform their unit owners annually about the existence of the CCOC and its jurisdiction over disputes between unit owners and condominium associations. Again, Leisure World supports that, encouraging the CCOC to provide the material to be sent to unit owners to ensure uniformity and accuracy.

We also agree that it would be useful to amend the CCOC statute to clarify that its jurisdiction extends to common elements.

Leisure World's Legislation and Taxation Advisory Committee has spent the most time and study on the provisions in Bill No. 42-09 that would change the way in which the CCOC handles automatic stays that are imposed when a dispute is filed with the CCOC. Currently, if a dispute is filed, a common ownership community association may not take any action to enforce its decision or decisions that is or are the subject of the complaint until the CCOC completes its handling of the complaint. That can often take a long time and can sometimes be an unfair and unreasonable burden on the association and the other unit owners, other than the complainant.

Bill No. 42-09 would provide for a new method to deal with requests for lifting automatic stays. The CCOC would establish a special standing panel just to hear such requests. Presumably, this panel would be able to hear and resolve requests to lift automatic stays more quickly than the current system, where the CCOC has to do that.

Leisure World supports these proposed changes in the method of resolving requests for lifting automatic stays, but with several amendments that we feel would improve Bill No. 42-09 and which we hope your committee will consider adopting.

On page 6 of the bill, line 111, we recommend changing the "5 days" notification period to "5 business days," in order to provide a fairer period. For the same reason, we recommend amending line 113 from "days" to "business days."

Further, we recommend that the standard to be applied to decide if automatic stays should be lifted, as described in proposed section (e) on page 6, lines 115 through 120, be modified. It is unfair to apply different standards to the association ("undue hardship") than to the opposing party ("irreparable harm"). Instead, we would suggest language that would apply equally, such as having the panel decide whether or not to lift the automatic stay based on its judgment of the effects of the continuation or lifting of the stay on both parties, or a balancing of the equities.

There are some clarifications of the CCOC statute that we recommend also be considered:

The present section 10B-9 provides that party may not file a dispute with the CCOC until there has been a good faith effort to exhaust remedies provided in the association documents. The party must wait until 60 days after initiation of the association procedure. However, the

association must notify the party that it can file with the CCOC when it finds a dispute exists and it must wait 14 days after such notification before it can enforce its decision.

Presumably, the association knows a dispute exists once its procedure is invoked and it then gives the notification. However, the party cannot file with the CCOC for 60 days, while the association can make a finding and move to enforce its decision after 14 days, within such 60 day period. The result is that the party cannot file until after the association enforces its decision.

However, the current law provides that the association cannot enforce a decision once the party files with the CCOC. But under the above scenario, such provision is meaningless. To make it effective, the current law should be amended to provide that an association decision cannot be enforced until the party has had an opportunity to file with the CCOC and has failed to do so.

Further, the proposed amendment provides that a request to lift a stay will be heard by a hearing panel if one has been appointed, and if not, by a special standing panel. However, it is provided that if the request before that latter panel is not acted on within 15 days (we recommend that be changed to 15 business days), the request is granted. We believe the bill should be clarified to assure that the "15 day" standard for resolving the lifting of a stay apply to both a hearing panel and a special hearing panel.

One other point: The CCOC has limited jurisdiction and we understand that its practice has been to dismiss cases which it believes lie outside its jurisdiction, but without a hearing and decision on such dismissal. This appears to us to be a poor result because parties are entitled to know the rationale behind such decisions. We believe the CCOC should be required to issue a written decision explaining its decisions when it rules that it does not have jurisdiction over a case, with a hearing on this issue if the CCOC decides that would be helpful in reaching its decision.

On behalf of Leisure World, we thank you and your committee for your consideration of our views on Bill No. 42-09.

Sincerely,

Marian A. Altman, Chair
Leisure World Community Corporation

cc: Hon. Nancy Navarro; Hon. Nancy Floreen; Hon. George Leventhal; Hon. Duchy Trachtenberg; Hon. Marc Elrich; CCOC Chair, Peter Drymalski

Ashton Pond Community Association (APCA)
P. O. Box 3
Ashton, Maryland

January 9, 2010

Subject: APPEAL TO THE MONTGOMERY COUNTY COUNCIL RE: BILL NO. 42-09

Submitted on behalf of the Ashton Pond Community Association

Request: Revision to the language of Chapter 10B-17. Voting procedures. (d) *Proxy or power of attorney.*

Purpose: Remove the ambiguity of whether a power of attorney is exempt from the rule that it must be "appointed to vote as directed" in "an election for a governing body." As written, that rule only refers to "a proxy that is not appointed to vote as directed..."

Suggestion: Amend the language of this section, second sentence, to read, "However, a proxy <u>or power of attorney</u> that is not appointed..." Alternatively, if that is not the intention of the law, then specifically exempt a power of attorney by adding a new third sentence, "<u>A power of attorney that is not appointed to vote as directed may vote in an election of a governing body.</u>"

It might also be reasonable to distinguish between a limited power of attorney and a general power of attorney to act in all matters (not just at association meetings). For example, someone holding a general power of attorney for someone incapable of handling their own affairs should be able to vote at association meetings without specific direction. The following is possible wording:

> Sec. 10B-17(d) *Proxy or power of attorney.* Any proxy or power of attorney valid under state law is valid at any association meeting. However, a proxy <u>or limited power of attorney</u> that is not appointed to vote as directed must be appointed only to meet a quorum or vote on matters other than an election for a governing body. If a proxy <u>or limited power of attorney</u> form must be approved before it is used, the approving authority must not unreasonably withhold its approval. <u>A general power of attorney to act in all matters (not just at association meetings) need not be appointed to vote as directed.</u>

Background: Our homeowners association bylaws allow absent members to appoint a power of attorney to cast votes in their stead. A dispute has arisen between members, on the one hand, who read 10-B17(d) narrowly and claim that, if the intention of the law was to limit a power of attorney to the same degree as a proxy, the law would have so stated. On the other hand, members read 10-B17(d) broadly and hold that, the intent of the law was to limit vote gathering and electioneering abuse, and since all votes cast by a limited power of attorney are proxy votes, they must be directed in an election of a governing body.

Commission on Common Ownership Communities: Our homeowners association sought advice from the CCOC. On November 25, 2009, Mr. Drymalski responded, in part:

> *The Commission has never dealt with this argument before, therefore I cannot say how the Commission might rule.*
>
> *My own individual opinion is that the power of attorney should not be used as a way of evading restrictions on proxy ballots and thereby to circumvent the law. If the Association drafts "powers of attorney" to be used in this particular election, which are intended to be used in place of proxies and which are not directed, then I think the validity of those powers of attorney is questionable.*
>
> *Peter Drymalski*
> *CCOC staff*

Thank you for your consideration of this proposal.

Sincerely,

Paul Williams
APCA President
pvwmd1@gmail.com
(301) 774-3043

COMMISSION ON COMMON OWNERSHIP COMMUNITIES' RESPONSE TO SUBMISSIONS TO THE RECORD ON BILL 42-09

The Commission on Common Ownership Communities (CCOC), submits these responses to the submissions to the record of other parties, in order to assist the Council and Staff in their consideration of Bill 42-09.

RESPONSES TO POSITIONS OF THE WASHINGTON METRO CHAPTER OF THE COMMUNITY ASSOCIATION INSTITUTE (CAI)

Notification Requirement 10B-7A – Line 35

CAI Position: Make clear that "annually distribute" includes a permanent posting on a website or on a central bulletin board.

CCOC Response: The Commission is troubled by this proposal, particularly the central bulletin board suggestion. In these days of e-communication, the Commission believes annual notices are not costly.

Definition of Dispute 10B-8(3)(B)(viii) – Line 64

Expand the definition of dispute to include the failure of the governing body, when required by law or the association documents, to require any person who is subject to association documents to comply with the documents.

CAI Position: Oppose

CCOC Response: The CCOC disagrees that this provision runs afoul of the business judgment rule or the similar exception to jurisdiction embodied in lines 72-75 of the Bill. This new basis of jurisdiction would apply only when law or an association document requires the governing body to require a person to comply with association documents. By definition, this provision does not apply when a matter only involves discretion, so there is no conflict with the business judgment rule or lines 72-75. CAI has not provided justification to delete this provision, but the CCOC is open to suggestions for language to provide more focus for this basis of jurisdiction.

Lift Stay Procedure 10B-9(A) – Line 98

CAI Position: Allow motions to be served by regular mail instead of certified mail or personal service. In the alternative, CAI would like a procedure for alternative service in the case of evasion by the other party.

CCOC Response: The CCOC is flexible on these provisions, but would like service that provides proof of delivery because the other party has only 5 days from receipt to respond to the motion and the CCOC panel is to make a ruling within 15 days of the motion.

CAI Additional Consideration – Motion to dismiss for lack of jurisdiction

CAI Position: Put procedures in Chapter 10B or the CCOC's Executive Regulations permitting a party to file motions to dismiss at any time and giving the CCOC a set time period to rule on the motions. The procedure should also include the ability to appeal the Commission's jurisdiction decision.

CCOC Response: The comments on Bill 42-09 act as if the CCOC is unusual in that a rigorous jurisdictional determination is not made when a complaint is filed, but the CCOC procedures are not unlike those of other County quasi-judicial entities. It is standard practice for complaints to first be investigated and mediated at the staff level before they move onto a commission for a formal determination of jurisdiction and a hearing. As with other County commissions, a majority of CCOC complaints are successfully resolved at the staff level without Commission involvement. Nevertheless, the CCOC is not opposed to a motion to dismiss procedure for allegations of lack of jurisdiction. Indeed, the APA already authorizes the filing of such motions. The CCOC is willing to work to flesh out this procedure in its Executive Regulations and does not believe it should be incorporated into the statute.

The CCOC also does not believe a motion to dismiss procedure needs to include the ability for an internal appeal of the CCOC's jurisdictional decisions. Current procedures already provide for review of such decisions. It the CCOC denies jurisdiction, a case is ended and a party may appeal that decision to the courts or file a request for reconsideration with the Commission. If the CCOC accepts jurisdiction, the case is assigned to a hearing panel of a panel chair and two commissioners. Subject matter jurisdiction is always at issue in a case and a party may raise an alleged lack of jurisdiction to the panel. Indeed, panels have made their own independent determinations of jurisdiction.

There appears to be an assumption in CAI's testimony, as well as other submissions to the record, that the CCOC often makes improper jurisdictional decisions. This is a classic case of assuming a fact not in evidence. The most relevant fact in evidence is that a court has never reversed a CCOC decision due to a finding that the Commission lacked subject matter jurisdiction over the dispute. The Commission certainly doesn't claim to be perfect in its jurisdictional determinations or other decisions, but it takes its decisions very seriously and jurisdiction is often decided after spirited discussion or debate. In the absence of even one court reversal of a jurisdictional decision in the 19 year history of the Commission, claims that the Commission makes poor jurisdictional decisions have to be understood as the personal opinions of attorneys and parties who may have been on the losing side of a decision.

RESPONSES TO ISSUES RAISED BY OTHER PARTIES

Besides echoing much of CAI's testimony, Attorney Christopher Hitchens suggests that Chapter 10B be amended so that the prevailing party automatically be awarded attorney fees. The CCOC strongly opposes this suggestion and believes that adopting it would spell the doom of the CCOC program as parties wouldn't file cases when faced with the certain risk of having to pay the other side's attorney fee if they lose.

Mr. Hitchens and his client, Top of the Park Condominium, also suggest that Chapter 10B be amended to require specified training or qualifications of commissioners and panel chairs. The Commission, its Staff, and the Office of the County Attorney already provide training to new commissioners, and the Commission reviews panel chairs both before and after appointment. The record does not support a claim that panel chairs or commissioners are unqualified or untrained. Only a handful of panel decisions have been overturned by the courts in the CCOC's 19 year history. In each such case we can think of, the panel chair who wrote the reversed decision was a long term, well-respected chair and/or one actively engaged in the practice of homeowners association law.

Both Mr. Hitchens and Top of the Park Condominium also raise issues about the quality of mediations conducted by the Conflict Resolution Center of Montgomery County (CRCMC). The CCOC is proud of its multiyear relationship with CRCMC. Surveys of those having gone through CRCMC-conducted CCOC mediations show that 83% of respondents agree or strongly agree that they are satisfied with the process of mediation and 74% agree or strongly agree they are satisfied with the results of mediation.

Top of the Park Condominium makes a number of other points in its submission, as well. It suggests on one hand that Bill 42-09 expansion of "dispute" won't affect many cases, while it argues on the other hand that the added definition of dispute will result in frivolous complaints and hamper communities. The Commission believes the former is the correct position, but we disagree with Top of the Park's assertion that the Bill is not worthwhile if it leads to just a few more cases per year being heard instead of dismissed. The Commission also believes that limiting its maintenance of common elements jurisdiction to cases resulting in personal injury or property damage is sufficiently narrow, and CAI agrees with that position.

Top of the Park is also concerned about the burden and cost of the Bill's notification requirement. As we noted previously, email would meet the requirement in a very inexpensive manner.[1]

Top of the Park suggests its own experience shows the Commission's dispute resolution process is already overwhelmed and, therefore, too slow and costly. It cites a case that took 19 months. It neglects to say that the CCOC accepted jurisdiction of that case

[1] Top of the Park is also misinformed in claiming that landlords are not required to inform their tenants of the Landlord-Tenant Commission, in fact, Chapter 29 of the County Code requires every lease and notice to vacate to inform tenants they may contact OLTA for information and assistance.

within eight months after it was filed and scheduled a hearing for the following month. From that point, one or both of the parties' attorneys requested and received four continuances before the case was finally settled on the day before the oft-rescheduled hearing was to finally occur. Moreover, the Commission is confident that with the continued support of the Office of Consumer Protection, the County Executive, and the Council, it can handle an increase in future workload, whether due to the Bill or not.

The Commission also takes issue with Top of the Park's suggestion that we are not fully informed when deciding whether to accept jurisdiction of a case. The case summary and attached documents provided by staff normally provide ample information to make a decision, but if we feel more information is needed we do not hesitate to ask for it.[2]

The submission of John S. Williams of University Towers Condominium Association is concerned that complainants should first use the association's dispute resolution process before a complaint is opened with the Commission. The CCOC shares that concern and issued a detailed statement of policy on this very point on April 1, 2009. The policy fleshes out Chapter 10B-9(b) (c), and is on our website www.montgomerycountymd.gov/ccoc.

Staff has reviewed the governing documents on file for University Towers and has not found a written process as described in the Commission's policy. If they've missed one, we believe there would be a question whether it applied to the type of complaints filed against University Towers. Nevertheless, the Commission is sympathetic to Mr. Williams' concern that the first the board heard of the complaints was a letter from Commission Staff. That is why our policy statement specifies: "If the association has not adopted a written dispute resolution procedure that applies to the type of dispute the complainant wishes to present, the CCOC expects that the complainant will have given written notice to the board of directors of the dispute and a reasonable opportunity to respond before filing the complaint with the CCOC."

Finally, Paul Williams, President of the Ashton Pond Community Association, has brought up a concern about the wording of 10B-17(d) proxy or power of attorney. The Commission supports his proposal to close a loophole in that section and require that powers of attorney drafted fur use in an association election must designate the names of the candidates for whom they are to be used. We plan to submit language to do that in the near future.

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[2] Indeed, the Pearson case, mentioned by Top of the Park, proves this point. Contrary to Top of the Park's implication, the reply that not all Commissioners had read wasn't the association's reply to the complaint (which had been previously provided and read) but rather Top of the Park's lengthy reply to Staff's case summary and recommendations on jurisdiction, which it filed only two days before the meeting and wasn't received by the Commission until the meeting. Given its full agenda for that evening, the Commission decided it couldn't do justice to the lengthy submission at that time, and continued the matter to its next meeting, while also providing the other side an opportunity to respond to Top of the Park's submission.

CCOC amendments

1) Amend ©4, lines 64-65 as follows:

(viii) exercise its judgment in good faith concerning the enforcement of the **association documents** against [[require]] any person [[who]] that is subject to [[**association documents** to comply with]] those documents.

2) Insert amended §10B-17(d) as follows before ©7, line135:

10B-17. Voting procedures.

* * *

(d) Proxy or power of attorney. Any proxy or power of attorney valid under state law [[is valid]] may be used at any association meeting. However, a proxy and any power of attorney [[that is not appointed to vote as directed]] created only for the purpose of a governing body's election must be appointed only to meet a quorum or to vote on matters other than an election for a governing body unless the proxy or power of attorney contains a directed vote on the election. If a proxy or power of attorney form must be approved before it is [[used]] cast, the approving authority must not unreasonably withhold its [[approval]] consent. A general power of attorney valid under state law may be used for any purpose at an association meeting that is consistent with the provisions of the general power of attorney, including for an election of the governing body.

* * *

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