

MEMORANDUM

September 5, 2013

TO: Planning, Housing & Economic Development Committee

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: **Worksession:** Bill 19-13, Common Ownership Communities – Administrative Hearing – Attorney’s Fees

Expected Attendees: Peter Drymalski, Office of Consumer Protection
CCOC Representative

Bill 19-13, Common Ownership Communities – Administrative Hearing – Attorney’s Fees, sponsored by Councilmember Leventhal, was introduced on June 18. A public hearing was held on July 9, 2013.

Background

The Commission on Common Ownership Communities (CCOC) was established by Chapter 10B of the County Code, effective on January 1, 1991. The CCOC is comprised of 15 voting members appointed by the Executive and confirmed by the Council. Eight of the voting members must be residents of common ownership communities and 7 must be professionals associated with common ownership communities. The CCOC was created to advise the County Executive and the County Council on ways to handle common ownership of property in communities; promote public awareness of the rights and obligations of living in common ownership communities; resolve disputes between community associations and their members and residents; and maintain property values and quality of life in community associations.

The CCOC has jurisdiction to resolve a complaint filed by a community association against a member or filed by a member against a community association or another member to enforce the association documents or a State or County law regulating common ownership communities. The CCOC’s jurisdiction to hear these disputes is non-exclusive; a party may file a civil action in Court to resolve the dispute *de novo* at any time before a CCOC decision is issued. Once a CCOC decision is issued, the Court’s jurisdiction is limited to judicial review of the agency’s decision. The Office of Consumer Protection provides staff support for the CCOC. A comprehensive guide to the CCOC dispute resolution process can be reviewed on the internet at <http://www6.montgomerycountymd.gov/content/ocp/ccoc/pdf/staffsguidenovember2012.pdf> . The dispute resolution process includes voluntary mediation, and if necessary, an adjudicatory hearing before a 3-member panel comprised of 2 voting members of the CCOC and a volunteer attorney knowledgeable about community association law. A panel decision is binding on the parties, subject to judicial review.

Bill 19-13 would expand the authority of the Commission on Common Ownership Communities to award attorney's fees to a prevailing party in certain disputes. Under current law, the Commission can award attorney's fees to any party if the opposing party acts in bad faith or if the association documents permit the award of attorney's fees. Since the association documents normally only permit an award of attorney's fees to the association if it prevails in a case enforcing the association documents, a unit owner or occupant who prevails in a case against the association is rarely eligible for an award of attorney's fees. Bill 19-13 would permit the Commission to award attorney's fees to a unit owner or occupant who prevails in a dispute to enforce the association documents or a State or County law regulating common ownership communities.

The Bill would expire on September 1, 2016 in order to permit the Council to evaluate the Commission's new authority.

Public Hearing

Two residents of Leisure World, Paul Bessel (©4-6) and Jordan Harding (©7) testified in favor of the Bill at the July 9 public hearing. Both Mr. Bessel and Mr. Harding testified that the Bill would level the playing field for unit owners and residents in disputes against a community association. Ronald Bolt, Co-Chair of the Maryland Legislative Committee of the Washington Metropolitan Chapter Community Associations Institute, (©8-9) opposed the Bill and challenged the assertion that most association documents provide for attorney's fees to be awarded to the association for enforcing the documents. Mr. Bolt suggested that the Bill be amended to permit an award of attorney's fees to either party without regard to the association documents.

Issues

1. What has been the recent experience of the CCOC in resolving disputes?

Maryland follows the "American Rule" with regard to awarding attorney's fees to a prevailing party in litigation. Absent an agreement or a statute authorizing the award of attorney's fees, the costs and expenses of litigation, other than the usual and ordinary Court costs, are not recoverable in an action for compensatory damages. See, *Hess Constr. Co. v. Board of Educ.*, 341 Md. 155 (1996). County Code §10B-13(d) is a statute that authorizes the award of attorney's fees to a prevailing party under certain circumstances. Bill 19-13 would expand the circumstances the CCOC could award attorney's fees. A prior agreement by the parties, such as the association documents, can also authorize the award of attorney's fees to a prevailing party in a dispute.

The Office of Consumer Protection reviewed the 325 cases that have been closed since 2010. See the June 19, 2013 staff memo from Peter Drymalski at ©10-12 and the 2010 to 2012 Closed Case Stats at ©13. Since 2010, 73% of the cases were filed by a unit owner and 27% were filed by an association. 72 or 22% of these cases were resolved by the CCOC after a formal hearing. An association prevailed on 68% of the cases and a unit owner prevailed on 32%. The staff noted that associations settle 70% of the cases they file, but unit owners only settle 54% of the cases they file. The CCOC staff noted that the panel awarded attorney's fees to a prevailing association in 4 of the most recent 37 decisions for a total award of \$20,612. The CCOC did not award attorney's fees to any of the prevailing unit owners. The lack of fee awards

to prevailing unit owners is likely a result of current law, which only authorizes the award of attorney's fees if the association documents so provide unless one of the parties has acted in bad faith. Although fee awards to a prevailing association occur, they are rare.

2. What is the purpose of a statute authorizing an award of attorney's fees to a prevailing party?

The most commonly used statute authorizing an award of attorney's fees is 42 U.S.C. § 1988, which was enacted by Congress to permit a court to award attorney's fees to a prevailing plaintiff in an action enforcing a Federal civil rights law. The purpose of this fee shifting law was to encourage private parties to enforce civil rights laws as a "private attorney general." A statutory right to be reimbursed for the cost of hiring an attorney, if successful, makes it easier for a plaintiff to retain an attorney. A potential award of attorney's fees against a defendant also raises the stakes in the case and can encourage settlement by the defendant. However, the same statute can discourage a plaintiff from settling a case since the plaintiff may have less to lose if the attorney only expects to be paid by the client if the plaintiff wins.

An association document that was agreed to by a unit owner when purchasing the unit can be the basis for an award of attorney's fees. The current County law authorizing a fee award under these circumstances recognizes this. If the County Code did not authorize the CCOC to make a fee award when the association documents authorize it, an association may be less likely to opt into the CCOC dispute resolution system for a simple fee collection case. The association may choose to bypass the CCOC and file suit in court where the fee award could be obtained.

3. How would Bill 19-13 affect the current dispute resolution process?

The Legislative Committee of the CCOC analyzed the Bill in a memorandum dated July 8, 2013 (©14-16). The Legislative Committee discussed several theories on how the Bill could affect the current dispute resolution process. Authorizing the CCOC to award attorney's fees to a prevailing unit owner would increase the likelihood that an owner retains counsel. Professional evaluations of a case by an attorney for the owner may facilitate early settlement by making a client better understand the strengths and weaknesses of the case. However, more attorneys involved in a dispute can also increase the costs for both parties by increasing pre-hearing discovery and lengthening hearings.

The Bill would level the playing field for disputes arising under association documents that permit the association to receive attorney's fees, but would create an unlevel field for those disputes arising under association documents that do not. The CCOC staff believes that most association documents provide for attorney's fees for the association, but the Washington Metropolitan Chapter Community Associations Institute challenged this assumption at the public hearing.¹ An award of attorney's fees to an association is rare. The CCOC has only awarded attorney's fees to an association in 4 of the last 37 decisions in the last 3 years. The CCOC has not awarded fees to an owner in the last 37 decisions.

¹ CCOC staff estimates that there are 1024 community associations registered in the County, but has not done a review of the association documents to determine the percentage that provide for an award of attorney's fees.

4. What are the reasonable alternatives for fee shifting by the CCOC?

- A. *Make no change to the current law.* The burden should always fall on the party that wants to amend the current law to show a problem. Although there is an inequity in the current law, it is not clear that this has caused a significant problem. There have only been 4 awards of attorney's fees to an association in the last 37 decisions for a total award of \$20,612. Since 2010, 73% of the cases were filed by a unit owner and 27% were filed by an association. The CCOC's lack of authority to award attorney's fees to a unit owner does not appear to have discouraged unit owners from using this dispute resolution process.
- B. *Enact the Bill as introduced.* The Bill would level the playing field for disputes arising under association documents that permit the association to receive attorney's fees, but would create an unlevel field for those disputes arising under association documents that do not. The Bill would increase the likelihood that a unit owner hires an attorney in a dispute.
- C. *Amend the Bill to authorize fees for any prevailing plaintiff in a dispute to enforce the association documents.* The CCOC supported this alternative.² See the September 3, 2013 CCOC staff memo at ©17-18. The CCOC supports an amendment that would level the playing field by authorizing an award of attorney's fees to any prevailing party who files a dispute to enforce the association documents without regard to the language of the association documents. The CCOC also supports retaining its authority to award fees against any party, even a prevailing party, who unreasonably refuses to mediate or unreasonably delays the case. Finally, the CCOC asked for authority to award only partial fees to a prevailing party based upon the degree of success.³

The CCOC position could be accomplished by amending lines 4-19 as follows:

- (d) The hearing panel may award costs, including [a] reasonable attorney's [fee] fees, to any ~~[[prevailing]]~~ party if:
 - (1) [another] the ~~[[losing]]~~ other party:
 - [(1)] (A) ~~[[filed or maintained a frivolous dispute, or filed or maintained a dispute in [other than good] bad faith;~~
 - [(2)] (B) ~~[[unreasonably refused to [accept] participate in mediation of a dispute, or unreasonably withdrew from ongoing mediation; or~~

² We did not receive a position statement from the Executive at the time this packet went to publication. However, we will issue an addendum with the Executive's position if we receive it before the worksession.

³ Council staff believes the CCOC already has the authority to award a partial fee based upon its authority to award "reasonable attorney's fees."

- [(3)] [(C)] (B) substantially delayed or hindered the dispute resolution process without good cause[.]; or
- (2) [The hearing panel may also award costs or attorney's fees if] [[an association document so requires and the award is reasonable under the circumstances; or
- (3)] the prevailing party [[is an owner or occupant of a dwelling unit who]] filed the dispute to enforce the association documents or a State or County law regulating common ownership communities.

D. *Amend the Bill to repeal the CCOC authority to award attorney's fees unless a party has acted in bad faith.* This alternative would level the playing field between unit owners and associations by repealing the CCOC's authority to award fees to an association based upon the association documents. This alternative would probably decrease the use of attorneys by both sides in a dispute. An association that plans to seek attorney's fees based upon the association documents would have to bypass the CCOC and go straight to Court. Since only 22% of the cases are resolved by a formal hearing, the CCOC dispute resolution process would continue to be useful for its mediation and its right to an adjudicatory hearing on small claims.

Since the CCOC has only awarded attorney's fees to an association in 4 of the most recent 37 decisions in the last 3 years, repealing the authority to do so would eliminate the perception of unequal treatment while not significantly affecting the dispute resolution process.

This alternative could be accomplished by amending lines 4-19 as follows:

- (d) The hearing panel may award costs, including [a] reasonable attorney's [fee] fees, to any [[prevailing]] party if the other party:
- (1) [another] [[the losing party:
- [(1)] (A)] filed or maintained a frivolous dispute, or filed or maintained a dispute in [other than good] bad faith;
- [(2)] [(B)] (2) unreasonably refused to [accept] participate in mediation of a dispute, or unreasonably withdrew from ongoing mediation; or
- [(3)] [(C)] (3) substantially delayed or hindered the dispute resolution process without good cause[.] [[;

- (2) [The hearing panel may also award costs or attorney's fees if] an association document so requires and the award is reasonable under the circumstances; or
- (3) the prevailing party is an owner or occupant of a dwelling unit who filed the dispute to enforce the association documents or a State or County law regulating common ownership communities]].

5. What is the fiscal and economic impact of the Bill?

OMB estimates that the Bill would have no fiscal impact. Finance estimates that the Bill would have a minimal economic impact due to the small amount of homeowners and associations that would be involved in these cases. The Fiscal and Economic Impact Statement is at ©19-23. Council staff agrees with this analysis.

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Bill No. 19-13
Concerning: Common Ownership
Communities – Administrative
Hearing – Attorney's Fees
Revised: June 6, 2013 Draft No. 2
Introduced: June 18, 2013
Expires: December 18, 2014
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: _____
Ch. _____, Laws of Mont. Co. _____

**COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND**

By: Councilmember Leventhal

AN ACT to:

- (1) expand the authority of the Commission on Common Ownership Communities to award attorney's fees to a prevailing party in certain disputes; and
- (2) generally amend the law governing common ownership communities.

By amending

Montgomery County Code
Chapter 10B, Common Ownership Communities
Section 10B-13

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

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

Sec. 1. Section 10B-13 is amended as follows:

10B-13. Administrative hearing.

* * *

(d) The hearing panel may award costs, including [a] reasonable attorney's [fee] fees, to any prevailing party if:

(1) ~~[another]~~ the losing party:

~~[(1)]~~ (A) filed or maintained a frivolous dispute, or filed or maintained a dispute in ~~[other than good]~~ bad faith;

~~[(2)]~~ (B) unreasonably refused to ~~[accept]~~ participate in mediation of a dispute, or unreasonably withdrew from ongoing mediation; or

~~[(3)]~~ (C) substantially delayed or hindered the dispute resolution process without good cause~~].~~;

~~(2)~~ [The hearing panel may also award costs or attorney's fees if] an association document so requires and the award is reasonable under the circumstances; or

~~(3)~~ the prevailing party is an owner or occupant of a dwelling unit who filed the dispute to enforce the association documents or a State or County law regulating common ownership communities.

The hearing panel may also require the losing party in a dispute to pay all or part of the filing fee.

* * *

Sec. 2. The Amendments to Section 10B-13 contained in Section 1 of this Act apply to any dispute filed with the Commission after the date this Act takes effect.

Sec. 3. The Amendments to Section 10B-13 contained in Section 1 of this Act expire on September 1, 2016.

LEGISLATIVE REQUEST REPORT

Bill 19-13

Common Ownership Communities – Administrative Hearing – Attorney's Fees

DESCRIPTION: Bill 19-13 would expand the authority of the Commission on Common Ownership Communities to award attorney's fees to a prevailing party in certain disputes.

PROBLEM: Under current law, an association is often eligible for an award of attorney's fees if it prevails, but a unit owner or occupant is not.

GOALS AND OBJECTIVES: Level the playing field between the association and a unit owner or occupant in a dispute before the Commission.

COORDINATION: Office of Consumer Protection and the Commission on Common Ownership Communities.

FISCAL IMPACT: To be requested.

ECONOMIC IMPACT: To be requested.

EVALUATION: To be requested.

EXPERIENCE ELSEWHERE: To be researched.

SOURCE OF INFORMATION: Robert H. Drummer, 240-777-7895

APPLICATION WITHIN MUNICIPALITIES: To be researched.

PENALTIES: Not applicable

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Montgomery County Council
Bill 19-13, Common Ownership Communities - Administrative Hearing - Attorney's Fees
Public Hearing on July 9, 2013

Testimony of Paul M. Bessel, individual

My name is Paul M. Bessel. I live in Leisure World in Silver Spring, Maryland and I am testifying as an individual, not representing any organization or anyone other than myself.

I am testifying in support of Bill 19-13, a bill that would provide citizens with the same ability to obtain attorney's fees in CCOC cases that is now available to opposing parties in such cases.

In October 2009, a resident of Leisure World filed a complaint with the CCOC, alleging that the Board of Directors of the Leisure World Community Corporation had violated the law by improperly closing some of its meetings. The CCOC issued a decision on that complaint in January 2011. The CCOC concluded that the complainant was correct in his allegations that the Leisure World Board had violated the Maryland Homeowners' Association provisions governing when and how a meeting of the Board may be closed.

Despite the fact that the Leisure World Board was found to have violated the law, and the fact that the CCOC found further sanctions were not needed because the Leisure World Board had changed its procedures during the course of this case — because of the filing on the CCOC complaint, the Leisure World Board still asked the CCOC to impose on the LW resident all the attorney's fees that had been paid by the Leisure World Board in its opposition to the Leisure World resident. Fortunately, the CCOC did not agree to this demand of the Leisure World Board.

However, this is a clear demonstration of how a homeowners association uses the current law concerning CCOC attorney fee issues to, in effect, threaten a citizen. Some people already find it difficult to pay the \$50 filing fee the CCOC charges, as well as paying a lawyer to support them in what may well be valid and helpful challenges to their homeowners association. To have the additional "sword of Damocles" hanging over them of having to pay the other party's attorney as well as their own attorney, can and very likely has caused citizens to forego their rights and not file perfectly appropriate CCOC cases.

I, myself filed a complaint with the CCOC against the Leisure World Board of Directors in December 2010, and a fellow resident of Leisure World filed a supporting CCOC complaint against the Leisure World Board.

As soon as I filed my complaint, the Vice Chairman of the Leisure World Community Corporation Board of Directors threatened me with severe financial consequences if I did not withdraw my CCOC complaint. I did not give in to that pressure, and when that individual ran for reelection I ran against him and defeated him by a very large margin. As a lawyer, I knew immediately that this threat was based on ignorance and misinterpretation of the law.

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However, this points out how homeowners associations and their leadership can and do attempt to intimidate individual residents who assert their rights.

By the way, our complaints were resolved through negotiations, which resulted in many improvements in the procedures used in our community, as described in a memo that concluded the case:

- (1) allowing residents to speak to the Board before the Board votes on agenda items (rather than expressing views on an item only after the Board had voted on it)
- (2) including residents' written comments in agenda packets rather than leaving decisions on individual letters up to one person
- (3) allowing private clubs to decide their membership policies rather than having the LW Board decide them
- (4) videotaping Board meetings so residents who were not present could view them
- (5) having a residents' committee supervise the Leisure World newspaper and eliminating censorship of articles that disagreed with management policies
- (6) clarifying the budget so it is more transparent and understandable by residents
- (7) no longer asking Board members to vote on issues that were just presented to them minutes before a vote
- (8) requiring the leaders of Leisure World to obtain training in how to properly run meetings
- (9) most relevant here — an agreement by the then-leaders of Leisure World that they would no longer attempt to intimidate residents who avail themselves of the right to file CCOC complaints by attempting to impose the opposing party's legal costs on the resident..

As noted above, a friend and fellow Leisure World resident filed a CCOC complaint about the same time as mine. He and I were (he has since passed away) both lawyers (retired) so we were willing and able to handle our own cases without undue financial difficulty in presenting our cases. However, the mere threat that we might have to pay the lawyers of the party opposing us — the party that we were absolutely convinced was wrong — was a very serious consideration. There are probably many residents of condominiums and other common ownership communities, who have very legitimate claims but who do not file them with the

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CCOC because of the costs involved, as well as the potential additional costs of having to pay for the opposing party's attorney fees.

Bill 19-13 would fix this problem. It would balance the issue of attorney's fees so the standard would be the same for both complainants and respondents. This is fair and it is good policy. Often individual residents of homeowners and condominium and cooperative associations will become aware of problems in their communities, including clear violations of law.

For example, just a couple of weeks ago I was present at a Leisure World committee meeting where the chairman of that committee stated publicly that the committee would go into secret session to vote on an issue. It was only when I pointed out that would be a violation of the law that the committee instead voted in open session. This was precisely the issue on which the CCOC ruled against Leisure World in the case I mentioned earlier, in 2011.

I was also told by one of the Leisure World board leaders that there was a closed meeting of a Leisure World committee in 2012, based on a unilateral decision that it would be better to discuss the way the committee was operating in secret, even though, again, that was a violation of state law.

These types of violations of law appear to take place in Leisure World, and probably other common ownership communities, all too often. Those of us who live in them need to be able to file complaints with the CCOC to correct these problems without having to fear that we will be hit with huge costs simply for trying to help our communities.

The law that established the CCOC, Montgomery County Code, Section 10B, in its very first sentences reads:

"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," and the CCOC was created to, "promote an equitable balance between the powers of governing bodies, owners, and residents."

Adoption of Bill 19-13 will further these goals of promoting an equitable balance between the powers of residents of common ownership communities and the governing bodies of those communities, and their often high-priced lawyers.

Thank you for your consideration of my comments.

**STATEMENT OF FORMER MAYOR JORDAN HARDING
ON MONTGOMERY COUNTY COUNCIL BILL 19-13
COUNCILMAN GEORGE LEVENTHAL SPONSOR**

I am Jordan Harding, a resident of Leisure World of Maryland, an active adult community of over 8,000 located in Silver Spring. The community is governed by a Home Owners Association and is in effect a quasi-governmental organization. In recent years, three complex, protracted and important complaints have been filed against the Leisure World association with the Commission on Common Ownership Communities dealing with a wide-range of serious issues. One case went to hearing with attorneys and two cases were settled by mediation without attorneys, however both complainants were in fact attorneys. The CCOC does not require the parties to have attorneys. In the case at hearing the association spent some \$20,000 and complainant spent \$3,000 in legal fees. Complainant essentially prevailed but the association was not liable for attorney or filing fees.

This bill will level the playing field for unit owners in cases where both parties retain attorneys. The Circuit Court has ruled that under present Code language, the CCOC cannot award attorney fees to prevailing association members if the association's documents/by-laws do not hold the association liable. Chapter 10B-13(d) needs amendment to cure this fault. It is extremely difficult to change association by-laws because of formidable voting requirements under State law and status quo association boards of directors that resist both change and reform.

HOAs have used their considerable financial resources to intimidate and discourage unit owners from filing disputes with the CCOC. Associations can draw on their large budgets to pay for their legal expenses at the CCOC or in the courts. The very unfair result is that an association member pays his share of association legal fees to defend against his own case.

The bill retains CCOC discretionary authority to award attorney fees in cases that warrant application and the sunset provisions of the bill give ample time for the County Council to evaluate the success of the amendments.

July 8, 2013

Montgomery County Council
c/o Ms. Nancy Navarro, President
100 Maryland Avenue
Rockville, Maryland 20850

**Re: Bill 19-13, Common Ownership Communities – Administrative Hearing –
Attorney’s Fees**

Dear Council members:

I serve as co-chair of the Maryland Legislative Committee of the Washington Metropolitan Chapter Community Associations Institute (“WMCCAI”). WMCCAI is a 501(c)(6) organization that serves the educational, business, and networking needs of the community association industry in Maryland, Virginia, and the District of Columbia. Members include professional managers and community association volunteer leaders from condominium, cooperative and homeowners associations as well as those who provide products and services to associations. I am writing to provide the Chapter’s comments on the referenced Bill.

Bill 19-13 would expand the authority of the Commission on Common Ownership Communities (CCOC) to award attorneys’ fees to homeowners who are a “prevailing party” in certain community association disputes decided by the CCOC. Per County Code Section 10B-13(d), the CCOC currently can award fees if a party files a frivolous dispute or proceeds in bad faith, unreasonably refuses to participate in mediation, delays or hinders the process, or the association governing documents require an award of attorneys’ fees.¹

¹ Section 10B-13(d) provides as follows:

“The hearing panel may award costs, including a reasonable attorney's fee, to any party if another party:

- (1) filed or maintained a frivolous dispute, or filed or maintained a dispute in other than good faith;
- (2) unreasonably refused to accept mediation of a dispute, or unreasonably withdrew from ongoing mediation; or
- (3) substantially delayed or hindered the dispute resolution process without good cause.

The hearing panel may also award costs or attorney's fees if an association document so requires and the award is reasonable under the circumstances. The hearing panel may also require the losing party in a dispute to pay all or part of the filing fee.”

According to the Bill's accompanying memorandum, "association documents normally only permit the award of attorney's fees to the association." Thus, the Bill is aimed at "leveling the playing field."

However, the Bill could actually create an unequal balance in favor of owners. It should be noted that many association documents do not contain a provision for the recovery of attorneys' fees in an enforcement action. As a result, the proposed Bill would place owners in a better position than their associations. Under the proposed Bill, a prevailing owner in a dispute to enforce the association documents, or State or County law, would be entitled to attorneys' fees even if the governing documents are silent on the issue. A prevailing association, on the other hand, would not have the same right of recovery. An association which seeks to enforce the association documents or law against an owner would be entitled to recover attorneys' fees only if the governing documents expressly require it. Thus, the owner is not put in an equal position; the owner is put in a better position.

Even where there is an attorneys' fees provision in the documents, the provision is subject to interpretation by the CCOC, in a CCOC proceeding. To award fees to an association, the CCOC must interpret such provisions to require attorneys' fees in administrative proceedings, such as a CCOC case.²

Accordingly, if the County Council decides to amend the Code to "level the playing field," the Code should be amended to allow either side to recover attorneys' fees, without regard to the party's status as the association or the owner. Thank you for your consideration.

Sincerely,


Ronald M. Bolt

cc: Matt Rankin, Executive Director,
Washington Metropolitan Chapter Community Associations Institute

Ruth Katz, Esq., Co-Chair, Maryland Legislative Committee

² See, e.g., *Guide to the Procedures and Decisions of the Montgomery County Commission on Common Ownership Communities*, November, 2012, p. 24 ("If there is no 'misconduct' the CCOC can only award attorney's fees if the association's own documents clearly require them in the type of case before the CCOC.").

June 19, 2013

TO: CCOC Legislative Committee

FROM: Peter Drymalski, CCOC Staff

RE: Attorneys and Attorney Fees

In order to assist the CCOC with evaluating the need for changes to Chapter 10B regarding the CCOC's authority to award attorney fees, the staff has reviewed both CCOC general complaint statistics and CCOC formal decisions.

A. Disputes Resolved through Public Hearings

We reviewed 37 of the CCOC's most recent Decisions and Orders, going back for the last 3 years.

26 of the cases were filed by homeowners and 11 by associations.

In 4 of the cases (10%), the homeowners were represented by attorneys; and in 14 of the cases (38%), the associations were represented by attorneys.

Associations won 27 (73%) of the decisions; homeowners won 7 (19%) of the decisions, and the remaining 3 were settlements or split decisions.

In 4 of the 37 decisions, the CCOC awarded attorney fees to the association for a total of \$20,612. The CCOC did not award any attorney fees to homeowners.

B. Review of Recent Closed Cases

We also reviewed 84 cases closed in the last two years, 14 of which were resolved by the CCOC in public hearings and the remainder of which were resolved by settlements and mediations.

In 12 of the cases (14%), the homeowners were represented by attorneys; associations were represented by attorneys in 31 cases (37%).

C. 3-Year Cumulative Case Reviews

We have also reviewed 325 cases closed since 2010. 236 (73%) of these were filed by homeowners and 89 (27%) by associations.

72 (22%) of these cases were resolved by the CCOC through formal hearings. Associations won 49 of those decisions (68%) and homeowners won 23 (32%). Most of the remaining cases were settled.

It should be noted that associations settle 70% of the complaints they file, but homeowners agree to settlement in only 54% of the complaints they file.

If settlements and favorable CCOC Decisions are counted together as "favorable results", then associations receive favorable results in 91% of all cases they file but homeowners receive favorable results in only 60% of the cases they file.

D. Staff Opinions

The staff believes there are several reasons for the disparities between the results obtained by homeowners compared to those obtained by associations.

1. Current law allows the CCOC to award attorney fees to a prevailing party only if the association documents require an award of fees. Most associations' documents state that if the association must take legal action to enforce the documents then the losing member must reimburse it for such costs, but few, if any, association documents state that if the member

successfully sues to enforce the documents, then the losing association must reimburse the member for his fees and costs.

2. Association complaints tend to be much simpler and easier to prove. Usually they involve architectural or maintenance violations, and can be shown with photographs and copies of rules. Member complaints tend to involve multiple issues, such as elections, conflicts of interest, budgets, inconsistent rule enforcement, etc., and they cannot be proven through photographs but require multiple documents and extensive witness testimony.

3. Associations tend to have the assistance of professional property managers and lawyers, who are more familiar with the contents of the governing documents, applicable laws, and prevailing best practices. Many of them have experience in the court or the CCOC systems. Members tend to be novices with no prior experience proving a case and without expert assistance and relevant training.

4. Associations benefit from a rule of law known as the "Business Judgment Rule," which, generally speaking, declares that the decisions of boards of directors are *presumed to be valid*, and the legal burden of proving them to be otherwise is on the person suing. This is a challenge that the average association member has trouble meeting.

For general information on attorney fee awards by the CCOC through 2008, see attached article from the CCOC newsletter.

CUMULATIVE CLOSED CASE REVIEW 2010-2012

CASES FILED BY:	2010	2011	2012	Total
<i>HOA</i>	<i>27 (20%)</i>	<i>28 (31%)</i>	<i>34 (33%)</i>	<i>89 (27%)</i>
<i>Members</i>	<i>105 (80%)</i>	<i>61 (69%)</i>	<i>70 (67%)</i>	<i>236 (73%)</i>
<i>Total</i>	<i>132</i>	<i>89</i>	<i>104</i>	<i>325</i>
CCOC DECISIONS	32 (24%)	25 (28%)	15 (14%)	72 (22%)
In HOA favor	21 (66%)	18 (72%)	10 (67%)	49 (68%)
In Member favor	11 (34%)	7 (28%)	5 (33%)	23 (32%)
DISPUTES SETTLED	71 (54%)	47 (53%)	71 (68%)	189 (58%)
Filed by HOA	21 (78%)	15 (54%)	26 (75%)	62 (70%)
Filed by Member	50 (48%)	32 (52%)	45 (64%)	127 (54%)
NO JURISDICTION	23 (17%)	12 (13%)	11 (11%)	46 (14%)
Filed by HOA	1 (4%)	2 (17%)	0 (0%)	3 (7%)
Filed by Member	22 (96%)	10 (83%)	11 (100%)	43 (93%)
FILED BY HOA AND FAVORABLE OUTCOME	26 (96%)	22 (79%)	33 (97%)	81 (91%)
FILED BY MEMBER AND FAVORABLE OUTCOME	61 (58%)	38 (62%)	49 (70%)	148 (63%)

POST-AMENDMENT (July, 2010) RESULTS

TOTAL CASES FILED: 27

By HOA: 9 (33%)

By Member: 18 (67%)

FAVORABLE OUTCOMES FOR HOAs : 5 settled, 3 favorable decisions = 89%

FAVORABLE OUTCOMES FOR MEMBERS: 11 settled, 1 favorable decision = 67%

(No jurisdiction = 3, all filed by members = 17% of all member complaints)

DECISIONS: 6 total, 4 in favor of associations, 2 in favor of members.

(22% of all cases filed were resolved by CCOC panels.)

MEMORANDUM

TO: Peter Drymalski

FROM: Legislative Committee of the CCOC

July 8, 2013

Re: Bill 19-13

The Legislative Committee of the CCOC ("THE Committee") has been asked to consider the above noted proposed legislation. We have done so and have also considered feedback from certain volunteer panel chairs.

I. RECOMMENDATION

The Committee recommends that the Council table further consideration of Bill 19-13 until all interested parties have had an opportunity to address the possible unintended consequences of the legislation and whether they can be avoid through a refinement of the present language. The Committee believes it would be beneficial if the sponsors of the bill work with the CCOC to craft a bill that reflects the CCOC's experience in addressing issues of equity and fairness between associations and property owners.

II. BACKGROUND

Bill 19-13 ("the Bill") would provide a CCOC Panel with the right to award an owner or occupant ("Owners") attorneys' fees where they prevail in their efforts to enforce an association's governing documents. The Bill attempts to level the playing field between common ownership associations ("Associations") and Owners. Associations are represented by counsel far more often than Owners and the governing documents of most Associations provide for a mandatory award of attorneys' fees when the Association enforces those governing documents. It often is the case that Associations have "deeper pockets" than their individual members, which gives them a greater ability to pursue a case through the court system. Lastly, Associations often have a professional understanding of the merits of a particular case, enabling them to avoid unfavorable litigation and successfully prosecute other cases.

Chapter 10B of the Montgomery County Code ("Chapter 10B") presently allows for an award of attorneys' fees to an Owner in the event of the Association's frivolous defense or filing, bad faith, unreasonable refusal to accept mediation of a dispute or hindering of the dispute resolution process without good cause. The basis of an attorneys' fees award thus hinges upon some form of wrongful conduct on the part of the Association. The Bill will allow for an award of attorneys' fees to an Owner, without a finding of wrongful conduct on the part of the Association; all that is required is a finding in favor of the Owner on the merits of his enforcement action.

III. ANALYSIS and DISCUSSION

The Committee is divided in its support for the Bill. Some members suggest that increasing the likelihood of an award of attorneys' fees to an Owner will encourage Owners to secure counsel. This will allow Owners to secure a professional evaluation of the strengths and weaknesses of their case, which may in turn avoid meritless filings and in other cases facilitate early settlements. Other Committee members suggest that providing for attorney's fees may create false hope for claimants and encourage litigation. Since the award of attorney's fees is only if the Owner "filed the dispute" then the Bill might encourage "a race to the Courthouse" thus causing rather than avoiding CCOC filings. The Committee suggested that a pro bono or discounted legal fee program could be established that would enable Owners to secure attorney consultations prior to filing; such a program might be coordinated with the County's Bar Association.

Concern was raised that the increased prospect of attorneys' fee awards against Associations might draw the ire of mortgagors and insurers. The thought is that an award of attorneys' fees against an Association could result in a special assessment being levied by the Association, and precarious Owners presented with their share of this assessment pushed into default. Additionally, to the extent that any award against an Association might be covered by insurance, then an insurer might want to spread this risk by increasing premiums, resulting in an increased cost for all Owners.

The mechanics of the Bill were also discussed. Since the proposed new language is not mandatory, as most statutory and contractual attorneys' fee provisions are, the Panel has the authority to award attorney fees to a prevailing party seeking to enforce association documents but is not required to do so. Accordingly, a Panel is left without any guidance as to when, if at all, to exercise its authority. If wrongful conduct on the part of the Association is going to be the trigger for the exercise of this authority, then what have we truly added to Chapter 10B? Adding a discretionary attorney fee provision without providing the criteria under which the Panel is to exercise that authority does a disservice to the Panel. One Committee member suggested that the award of attorneys' fees should be mandatory and the sole criteria that of "prevailing party", which is a term that has been interpreted by Courts. If the intent of the Bill is to make an award of attorneys' fees mutual and mandatory then the proposed revision of the law should state as much.

Another Committee member was concerned that the Bill is a subversion of the American Rule of attorneys' fees. The member opined that if the Council is subverting the American Rule in the context of Chapter 10B, perhaps the Council should also provide for an award of attorneys' fees to prevailing party in a myriad of other ways and contexts in which disputes are heard. The Committee discussed whether there exists a specific public policy rationale in favor of awarding attorneys' fees with respect to Chapter 10B (i.e.- in essence a private attorney general rationale) and whether such a rationale would exist if association documents were not, in fact, being enforced.

Any underlying problem of unequal awards of attorneys' fees may stem from the fact that Associations have been able to alter the American Rule by the drafting of their governing documents. Since it is the governing documents that result in many awards, perhaps a grass roots process should be engaged, association by association, to change those documents? If the majority of the Association members do not want to effectuate such a change then Associations will argue that the Council should not foist such a change upon them. While we may believe these governing documents are contracts of adhesion and purchasers have no choice but to accept and comply with them, this should not affect the right and ability of those who are already members to change those documents. However, this argument ignores

the reality that many Owners are not actively involved in their association's governance and it is exceedingly difficult to drum up sufficient membership interest to modify governing documents.

Certain Committee members suggested the Council pursue a statute that would provide that an attorneys' fees language in governing documents be read as mutual beneficial to Owners and Associations. Thus, if a Declaration provided for an award to an association if it was enforcing governing documents, or rules passed by the Board of Directors pursuant there, then the statute would be read as providing an award to Owners if they were seeking such enforcement. Such a statute would go much further than the Bill, and would, of course, be subject to many of the same concerns raised in this Memorandum.

The apparent disparity between Associations and Owners with respect to awards of attorneys' fees can also be addressed by Panels on a case by case basis. Even if the Association has the right to attorney fees by virtue of its governing documents, that award must be reasonable in the discretion of the Panel.

IV. CONCLUSION

The Committee appreciates the concerns that prompted the Bill. The Committee believes that the policy issues presented and the ramifications of the Bill merit further consideration and debate. Additionally, the mechanics of the Bill require further work. The Bill in its present state may cause more issues and problems than it resolves. If any Bill is presented it should contain a sunset provision so that the effect of the Bill during its pendency can be studied.



COMMISSION ON COMMON OWNERSHIP COMMUNITIES

100 Maryland Avenue, Room 330, Rockville, Maryland 20850

240-777-3636/240-777-3768 Fax

September 3, 2013

TO: Bob Drummer, Esq., County Council Staff

FROM: Peter Drymalski, CCOC Staff *PDP*

RE: Council Bill 19-13

The Commission on Common Ownership Communities supports Council Bill 19-13 if it is amended so that it applies to all parties equally and allows a degree of flexibility to the Commission's hearing panels in awarding fees.

The Commission believes that Bill 19-13 provides a measure of equality. Under the existing law and many association documents, the Commission has been able to award legal fees only to prevailing associations and never to prevailing owners. Such a result creates the impression that the County cannot be fair to both parties.

However, the Commission recommends that the bill be amended so that all parties—whether owners, occupants or governing bodies—who file complaints to enforce the association's documents or relevant laws, be eligible for awards of attorney fees. This will help to ensure all parties are treated the same way.

Secondly, the Commission recommends that the bill be amended so that its hearing panels have the discretion to allow a partial award of attorney fees in certain situations. For example, if the complaining party raises several issues but prevails on only one or two of them, the hearing panel can award attorney fees proportionately. Similarly, if the complainant ultimately prevails on the issues raised, but has unjustifiably delayed the proceedings or unreasonably rejected mediation, the panel can take that into account as well in setting the fee. (Under the current draft, the right to award fees against a party who commits "misconduct" in the course of the CCOC proceeding is limited to fees assessed against a *losing* party, not against a prevailing party who might be guilty of the same type of misconduct.)

If you have any questions or need additional information, please advise.
Our draft amendment is attached.

Council Bill 19-13:
Suggested Amendment from the CCOC

Section 10B-13(d)(3) of Bill 19-13 should read:

(d) The hearing panel may award costs, including [a] reasonable attorney's [fee] fees, to any prevailing party if:

(1) [another] the losing party: [filed a frivolous dispute, unreasonable rejected mediation, or substantially delayed the dispute resolution process, etc.]

(2) . . .

(3) the prevailing party filed the dispute to enforce the association documents or a State or County law regulating common ownership communities. In considering whether to make an award of reasonable attorney fees under this subsection, the hearing panel may take into account the extent to which the complainant prevailed on all issues the complainant raised in the dispute and the factors listed in subsection (1) of this section.



ROCKVILLE, MARYLAND

MEMORANDUM

July 8, 2013

TO: Nancy Navarro, President County Council

FROM: Jennifer A. Hughes, Director, Office of Management and Budget
Joseph F. Beach, Director, Department of Finance

SUBJECT: Council Bill 19-13 – Common Ownership Communities – Administrative Hearing- Attorney's Fees

Please find attached the fiscal and economic impact statements for the above-referenced legislation.

JAH:aw

c: Kathleen Boucher, Assistant Chief Administrative Officer
Lisa Austin, Offices of the County Executive
Joy Nurmi, Special Assistant to the County Executive
Patrick Lacefield, Director, Public Information Office
Joseph F. Beach, Director, Department of Finance
Michael Coveyou, Department of Finance
Eric Friedman, Office of Consumer Protection
Alex Espinosa, Office of Management and Budget
Naeem Mia, Office of Management and Budget
Amy Wilson, Office of Management and Budget

Fiscal Impact Statement
Council Bill 19-13 Common Ownership Communities -
Administrative Hearing – Attorney’s Fees

1. Legislative Summary.

The Bill would expand the authority of the Commission on Common Ownership Communities to award attorney’s fees to a prevailing party in certain disputes to enforce the association documents or a State or County law regulating common ownership communities.

2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.

Implementation of the bill would not impact County revenues or expenditures as award of attorney’s fees to the prevailing party would be by and between unit owner or occupant and common ownership community associations.

3. Revenue and expenditure estimates covering at least the next 6 fiscal years.

Not Applicable

4. An actuarial analysis through the entire amortization period for each bill that would affect retiree pension or group insurance costs.

Not Applicable

5. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.

Not Applicable

6. An estimate of the staff time needed to implement the bill.

While this bill could possibly increase the number of awards given by the Commission, existing staff is implementing the current procedures and no additional staff time would be required.

7. An explanation of how the addition of new staff responsibilities would affect other duties.

Not Applicable

8. An estimate of costs when an additional appropriation is needed.

Not Applicable

9. A description of any variable that could affect revenue and cost estimates.

Not Applicable

10. Ranges of revenue or expenditures that are uncertain or difficult to project.

Not Applicable

11. If a bill is likely to have no fiscal impact, why that is the case.

Award of attorney’s fees to the prevailing party would be by and between unit owner or occupant and common ownership community associations and would not impact County revenues or expenditures.

12. Other fiscal impacts or comments.

Not Applicable

13. The following contributed to and concurred with this analysis:

Marsha Carter, Office of Consumer Protection; and

Amy Wilson, Office of Management and Budget


Jennifer A. Hughes, Director
Office of Management and Budget

7/1/13
Date

Economic Impact Statement
Bill 19-13, Common Ownership Communities – Administrative Hearing - Fees

Background:

This legislation would expand the authority of the Commission on Common Ownership Communities (CCOC) to award attorney's fees to a prevailing party in certain disputes. According to CCOC, current law allows the CCOC to award attorney fees to a prevailing party only if the association documents require an award of fees. Most associations' documents state that if the association must take legal action to enforce the documents then the losing member must reimburse it for such costs. However, few association documents state that if the homeowner successfully sues to enforce the documents, then the losing association must reimburse the member for his or her fees and costs.

The Bill would amend Section 10B-13(d) of Chapter 10B of the Montgomery County Code – Common Ownership Communities.

1. The sources of information, assumptions, and methodologies used.

- Sources of information and data were provided by the Commission on Common Ownership Communities (CCOC).
- According to CCOC, homeowners filed two-thirds of the complaints but win only one-third of all cases going to a hearing. Associations filed one-third of the complaints but win two-thirds of all cases going to a hearing.
- CCOC reviewed thirty-seven (37) of the most recent Decisions and Orders over the past three years. Of those cases, twenty-six (70%) were filed by homeowners and eleven (30%) were filed by associations. Of the thirty-seven cases, homeowners were represented by attorneys in four cases and the associations were represented by attorneys in fourteen cases. In four of the thirty-seven decisions, CCOC awarded attorney fees to the association and no awards to the homeowners.

2. A description of any variable that could affect the economic impact estimates.

- CCOC staff reviewed 325 complaints closed between 2010 and 2012. Of those cases, 236 were filed by homeowners. The economic impact or benefits of Bill 19-13 is limited to those homeowners who are awarded attorney's fees if they are the prevailing party. Given the total number of cases filed by the homeowners between 2010 and 2012, the total economic impact of Bill 19-13 to the County's employment, spending, personal income, investment, savings, and property values would be minimal.

3. The Bill's positive or negative effect, if any on employment, spending, saving, investment, incomes, and property values in the County.

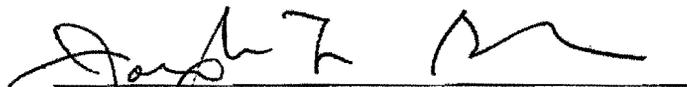
- The economic impact of Bill 19-13 would have minimal effect on the County's economy because of the number of cases that have been filed by the homeowners.

Economic Impact Statement
Bill 19-13, Common Ownership Communities – Administrative Hearing - Fees

4. If a Bill is likely to have no economic impact, why is that the case?

- The bill would have minimal economic impact because of the number of cases or homeowners who have filed a dispute over the past three years.

5. The following contributed to and concurred with this analysis: David Platt and Mike Coveyou of the Department of Finance and Peter Drymalski of CCOC.



Joseph F. Beach, Director
Department of Finance

6/27/13
Date