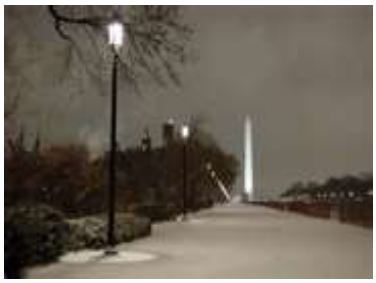

Montgomery County Government
Commission on Common Ownership Communities
100 Maryland Avenue, Room 330
Rockville, Maryland 20850
www.montgomerycountymd.gov/ccoc

Winter 2012

CCOC Communicator

Inside this issue:

Do Homeowner Associations Have the Right to Impose Fines?

By John F. McCabe, Esq.

Perhaps the biggest concern for Maryland's many HOAs this year is whether they have the right to impose fines on members who violate their rules. That concern arises from a recent decision in the Montgomery County Circuit Court in which the Circuit Judge struck down an HOA's fines for an ongoing architectural violation.

In The Orchards Homeowner Association Inc. v. Kelley (Civil Action No. 340607-V), an HOA sued a member who had installed a wall made of sandbags on her lot without permission and refused to remove it in spite of repeated requests from the HOA. The HOA charged her a fine, and then sued, requesting a court order to remove the sandbags and to collect the fines. The Circuit Judge had a visceral reaction to the issue of fines, and at the hearing on the dispute, he said the following:

"Let me first say with respect to the ability to tax [that] the Court accepts the fact that the corporation put it in its bylaws and that's accepted, at least for purposes of this motion by defense counsel. And I don't dispute the fact that they can put in their bylaws generally what's not a violation of the law.

"However, the power to fine is punitive inherently comes from a State or city municipality. And it's done rigidly in the areas of the criminal offenses. That's where the State has the ability to fine people. And it's done punitively. It's done as a deterrent. It's done as punishment. And society recognizes that.

"The Court sees no authority for this [HOA] to tax. There's been a reference made to a case with respect to a condo association. And there the court specifically was addressing a condo association. There's been nothing brought

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Some Thoughts on Architectural Control

By Arthur N. Dubin, Commissioner

"Architectural control" is a potentially divisive and dangerous phrase to use in the administration of a common interest community when not handled with care. To most of us, architectural control refers to the standards established for that community which govern how the homes are maintained and modified. It includes the procedures to be followed for making any changes and for enforcing the standards. All this seems simple enough, but architectural control tends to create more disagreements between associations and their members than anything else.

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Do HOAs Have the Right to Impose Fines?

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"The test is that there's got to be authority to fine. The Court does not accept the fact that the [HOA] is without power....The power is to get a court order to 'tear down that wall.'"

before this Court [to show that] our Courts or our legislature has said that homeowner associations have carte blanche to tax or to fine or to do anything they wish to do as long as it doesn't violate one of the Bill of Rights.

"Although you were using it by way of an analogy, they couldn't say, 'okay, well if you do something like put up a wall without approval, we're going to cut off your water supply for 30 days.' You might argue that that's not cruel and unusual [punishment] because they could go get water somewhere else. It would just be punishment.

"But the fact that the penalty that they might impose is not cruel and unusual is not the test. The test is that there's got to be authority to fine. The Court does not accept the fact that the homeowners association is without power. The power is to order, to get a Court order to 'tear down that wall,' as President Reagan said to Mr. Gorbachev. That's the power. And if it's not followed, the Court can fine. The Court can imprison people [through the] contempt of court [power]. You've got every power known to mankind to enforce that. That's your power, not to tax, not to fine."

The HOA chose not to appeal that decision. It must be emphasized that the ruling affects *only* the HOA involved in that case, and it is not binding on any other HOA in Montgomery County or elsewhere. Nonetheless, it can be expected that other homeowners will refer to that case in support of their own disputes with their own HOAs.

There are no reported decisions by the Maryland appellate courts on the issue of an HOA's authority to charge fines. The Circuit Court judge obviously accepted the reasoning of the Supreme Court of Virginia in a similar dispute in which that Court ruled that the power to issue fines is limited to the government. As a result of that decision, the Virginia legislature passed laws granting condominiums and HOAs the authority to charge fines. Other states have followed the same solution. And as the judge noted in the Montgomery County case, Maryland law already grants condominium associations the right to charge fines.

If State law does not clearly grant this right to HOAs, do they still have the legal authority to impose fines on their members for violations of their governing documents? There are hundreds of HOAs in Montgomery County alone and thousands throughout the rest of the State. They all operate under covenants recorded in their local land records, and many of these documents

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Are You Tired of Exposed and Incomplete Cable TV Installations in Your Community?

Low-hanging and exposed TV cables are a few examples of the problems created by cable TV installers in our communities.

To help you with such issues, the County has the Office of Cable and Broadband Services (the Cable Office) which oversees the cable TV franchises of Comcast, RCN, and Verizon FiOS TV. The Cable Office has been very successful serving as an intermediary to help resolve complaints about cable TV installations and

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Some Thoughts on Architectural Control

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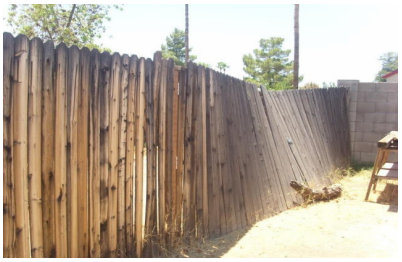
Why all the fuss? Almost all common interest communities have documents providing for architectural control and those documents affect everyone who buys a home in that community. The documents usually state as well that by the simple fact of buying a home in the community, the buyer agrees to abide by all the rules. Buyers can't assume that exceptions will be made especially for them.

Architectural control is not only a collection of rules about how things should look. It is also a *process* under which proposals for changes are reviewed and decided upon by the community's representatives. To assist with this process, the community should regularly publish its standards and make them readily available. It should involve the members by giving them input into proposed changes by their neighbors as well as the option of reporting unauthorized changes or signs of lack of maintenance. The association should apply its rules as consistently as possible and keep good records explaining why it allowed exceptions.

Architectural control should not be regarded as inflexible and unchanging. Standards can become obsolete, and when they do, the association should be open to modernizing them. For example, the approved styles of sheds may no longer be readily available, and different designs may have to be substituted. Likewise, associations should consider new technologies and public policies. For example, new styles of asphalt roof shingles have been invented that reflect sunlight instead of absorbing it and allow homeowners to reduce their summertime energy consumption. Associations should also remember that in the end, the general membership has the decisive voice in determining what the rules are. If any given rule begins to provoke resentment or controversy, the association can suggest that the membership be allowed to vote on changing it. This takes the heat off the board and places responsibility where it belongs, which is with the majority.

Sometimes, architectural control is weakened by the board of directors itself when it is guilty of such conduct as:
*overzealous enforcement
*lack of enforcement
*self-serving rulings
*routinely allowing 'grandfather clauses'
*spur-of-the-moment rule changes and exceptions.

Parties involved in an architectural dispute will do well to consider a set of questions that Jack McCabe, one of the CCOC's panel chairmen, developed in a case that recently came before the CCOC. These questions included the following:



*If you claim that the association cannot enforce its rules against you, state the reasons for that claim;

*If you claim that your association has allowed other violations similar to yours to exist in the community and therefore it can't treat you differently, then show on what lots the violations are located, what the violations are, and how you know the board was aware of them and approved them;

*If you claim that the association has somehow waived the rule it is trying to apply against you, provide evidence to show other situations in which the rule was not applied or ignored;

*If you claim the board is practicing inconsistent enforcement, provide evidence of other cases in which the board treated the same violation by another person differently than it is treating you;

*If you think the board is not acting in good faith, what facts do you have that demonstrate this?

*Can the board show that it has followed its own rules for dealing with this dispute? Has it given proper notice of the items in dispute, and has it informed the member of his or her right to a hearing on the dispute?

Associations should also maintain good records of all architectural disputes, and in addition to showing that they have complied with their own rules, they should maintain good records of their hearings and decisions. The reason for this is that, if any decision is later brought to the CCOC for review, the CCOC's main task is not to hear the entire dispute all over again but rather to decide if the board followed its own rules, had a good reason to decide the way it did, *and had facts on which to make its decision.*

For example, in one case, the CCOC reversed a board decision fining a member for cutting down trees in the common areas because at the CCOC hearing the association's representative provided no information about what facts the board had in front of it when it made its own decision against the member. The panel held that without knowing what facts the board relied on, there was no way that the CCOC could decide if the board had a good reason for its decision.

In another recent case, a CCOC panel refused to issue a default judgment against a homeowner who did not bother to answer the complaint or defend himself, on the grounds that the HOA involved had failed to properly notify the member of its decisions. The decision issued to the member by the board stated that some items he had installed on his lot were violations and had to be removed, but it did not mention all of the items. The hearing panel found that the HOA had only proven its case as to the items on which it gave notice of violation and which the board referred to in its decision. The panel refused to enter a judgment on the matters which the board failed to mention in its decision.

Association boards, and association members, should be familiar with their architectural controls and do their best to comply with them. Ignorance of the rules is not only no excuse, it is frequently the cause of an unnecessary waste of time and money.

The board in particular should keep in mind that although both parties have the duty to obey the governing documents, the board duty is a fiduciary one to be treated seriously and at all times.

(Arthur Dubin is the president of ZALCO, a professional property management firm serving many HOAs and condominiums.)

Do HOAs Have the Power to Impose Fines?

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contain provisions allowing the HOAs to charge fines. Other HOAs which do not have this authority in their recorded covenants have adopted bylaws to create that power. Others may have accomplished the same result through rules and regulations adopted by their boards of directors. To answer the question, we must begin by looking at the underlying authority under which HOAs operate, both in Maryland and elsewhere.

Most HOAs in Maryland are non-stock membership corporations organized under the Corporations & Associations Article of the Maryland Code. They have articles of incorporation filed with the State, covenants filed in the land records, and bylaws filed in the local HOA Depository (and sometimes also in the land records). There are some HOAs which are not corporations, but they will still have recorded covenants and bylaws, and might also have charters.

The essential authority of an HOA, whether incorporated or not, must derive from the document that creates it: its charter. This charter, in turn, is limited in scope by law. Since most HOAs are incorporated, this discussion is limited to them. However, the functioning of an unincorporated association is similar enough to the incorporated ones that this discussion will be helpful to them as well. However, readers should recognize that there may be details in which incorporated and unincorporated HOAs may differ from each other.

The essential authority of an HOA, whether incorporated or not, must derive from the document that creates it: its charter."

Since the authority of a HOA derives from its charter, its other governing documents can only implement that authority, they cannot expand upon it. Therefore, when a recorded covenant or other governing document establishes assessments, property use restrictions, and enforcement authority such as rights to issue orders and impose fines, all these powers must flow from the authority of the HOA as a corporation organized under Maryland law. While restrictive covenants filed in the land records can create important legal rights in the nature of contracts (*see, Peabody Heights Co. v. Wilson,* 82 Md. 196 (1895); *Turner v. Brocato*, 206 Md. 336 (1954), and (that favorite of the courts and of CCOC's hearing panels) *Kirkley v. Seipelt*, 212 Md 127 (1956)), those documents cannot give an HOA a power which it does not have the authority to exercise under its charter.

A charter can be compared to a national or state constitution which defines the general authority of the government, or in this case the general authority of an association. While most bylaws contain important provisions, those provisions are essential procedural in nature and describe the details of how an association will operate. For example, they regulate such things as how and when the members can vote, what quorums are needed, how directors are elected and officers chosen. But the substantive provisions, such as the authority to charge assessments and the right to regulate the use and appearance of the lots within the association are all found in the HOAs recorded covenants.

In the Circuit Court case, the HOA attempted to create the authority to charge fines by including it in its bylaws. It can and was argued that the bylaws, being essential procedural in nature, cannot be used as the basis to create the authority to impose fines.

Similar legal principles apply to condominiums, but there are important differences. Condominiums file both their covenants and their bylaws in the land records. In addition, the Maryland Condominium Act regulates the content of the bylaws. In contrast, the Maryland Homeowners Association Act is quite short. It is primarily a law that regulates an HOAs procedures, such as by requiring resale disclosure packages, open meetings, the right to inspect records, etc. There are very few substantive requirements in it: for example, it regulate late fees, family day care, and home businesses. But it neither prohibits nor grants the right to impose fines.

If one takes to extremes the Circuit Court's position, which in turn follows the decision of the Virginia Supreme Court , then no private entity can ever impose fines on its members. If the power to fine belongs only to the government because it is in the nature of a penalty or a punishment, then it cannot be delegated to a private entity. But the legislature of Virginia and of other states, and indeed the Maryland General Assembly itself, do not agree with that reasoning. Remember that the Maryland Condominium Act specifically allows condominium associations to impose fines.

Although clear authorization in a law passed by the legislature is certainly the best authority under which to create a right to impose fines, is it the *only* way to do so?

The most respected and influential national legal reference says no. This is the *Restatement of the Law of Property: Servitudes (Third Edition),* written by the American Law Institute. According to the *Restatement,* the legal authority for the right to charge fines is solidly based on the recorded covenants, which create a form of contact between the association itself and its members (and also create a contract between the members as well). In the introduction to Chapter 6, the authors explain:

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Do HOAs Have the Power to Impose Fines?

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> "Servitudes underlie all common interest communities, regardless of the ownership and organizational forms used. They provide the mechanism by which the obligations to share financial responsibility for common property and services and to submit to the management and enforcement powers of the community association are imposed on present and future owners of the property in the community."

In other words, a servitude, that is, a recorded covenant , creates a contract under which an association may assess its owners, and fine its owners, with or without an enabling statute. The recorded covenant is not a mere procedural regulation, nor a rule adopted by a board of directors. It is the core statement of the purpose and authority of the association, and anyone and everyone who becomes the owner of a lot within that association either intentionally or by operation of law agrees to its terms. The obligation is created by contract, not by law; and no law is necessary to establish the terms of the contract.

"A servitude, that is, a recorded covenant, creates a contract under which an association may assess its owners, and fine its owners, with or without an enabling statute."

Must the right to impose fines be explicitly stated in the recorded covenants? The authors of the *Restatement* and of the court decisions they refer to, say it need not be. Most declarations of covenants are very broad in nature, and they do not spell out exactly how the association is to carry out its functions. Instead, they declare what the general purpose of the association is, and state that it has the authority to carry out that purpose. What is most important is that the covenants give the association the right to regulate certain matters, such as the appearance and condition of the community. So long as the association does not violate any statute or any provision of its covenants or charter, it has the inherent authority to adopt any bylaws or rules that assist it in carrying out its delegated purposes.

Some legal experts do not agree completely with the *Restatement's* position, and they believe that although associations do have the right to impose fines, that authority must be clearly stated in the recorded covenants because the covenants form the basis of the contract between the members and the association. Other experts believe that in Maryland this is not necessary, because Maryland law requires that the bylaws, and indeed all of an HOA's rules and regulations, be filed in the local Circuit Court's Homeowner Association Depository, where they are public information and readily accessible to prospective HOA members. Maryland law in fact says that no HOA documents are "enforceable" until they are filed in the Depository, which strongly implies that they *are* enforceable if they are filed there. Such experts reason that by creating the Depository, into which all bylaws and rules must be filed in order to be enforceable, the General Assembly has added to the contractual rights of the association which were created by the filing of its covenants in the land records.

The foregoing discussion leaves us in this posture with respect to an association's right to assess fines to enforce violations of their governing documents. Condominiums have been granted that authority by the Maryland Condominium Act, (Section 11-109(d)(16) of the Real Property Article). HOAs do not have any similar statutory authorization to impose fines. However, my point is that their own charters give them plenary authority to do whatever a corporation or association may lawfully do. Through their recorded covenants, they may lawfully enter into agreements with their members that create servitudes or restrictive covenants, and may enforce those pre-existing servitudes and covenants that bind the property covered by the covenants. The servitudes and covenants can properly include the authority to fine members for violations. Arguably, placing such a right in the bylaws alone is not legally sufficient, because the bylaws are essentially a procedural document, not a substantive one, at least in the minds of one of our Circuit Court judges and of the Virginia Supreme Court; but as I have noted, not all experts agree with that position. Still, the best advice for associations that wish to protect solidly their right to assess fines is to amend their declarations of covenants if those documents do not clearly contain the right already, and not only their bylaws.

In my opinion, until an appellate court rules to the contrary, HOAs whose covenants grant them the authority to impose

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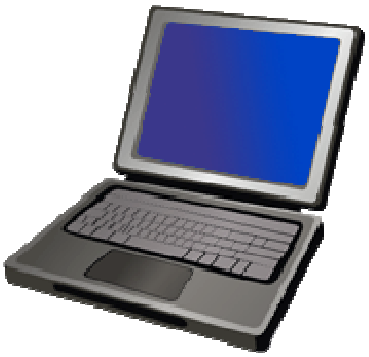
The CCOC will be issuing its newsletters and other announcements electronically, so if you want to continue receiving the newsletter, please sign up at eSubscription.



Do HOAs Have the Power to Impose Fines?

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may use that authority in their enforcement efforts.

We can now turn to an easier but still important question: how should this right to impose fines be used? Or put another way, what due process must an association give its members before it can fine them?

A relevant law is the Dispute Resolution section of the Maryland Condominium Act, Section 11-113 of the Real Property Article. That section mandates a dispute settlement procedure that contains basic due process protections.

First, the association must first give a written notice to the alleged violator that describes the violation, states what action is required to correct it, and gives a grace period during which the person can correct the violation without penalty. If the alleged violation is not a continuing one, it must also state whether any further violation of the same rule will result in a penalty after notice and hearing.

Then, if the violation continues or is repeated after the grace period, the board of directors must hold a confidential hearing on the violation if it wants to impose a sanction. It must give a notice of the hearing to the alleged violator that states the date and time of the hearing, the nature of the alleged violation, the right to attend the hearing and present a defense including evidence and witnesses, and the proposed penalty. The board must then hold a hearing at which the alleged violator can present his side of the story, present his own witnesses and cross-examine the witnesses against him. The board must make minutes of the hearing which contain a written statement of the results of the hearing and of any penalty imposed.

This is also generally the process that the CCOC requires associations to follow before they can file complaints against their members with the CCOC. (The CCOC's requirements are stated in its *Statement of Policy Concerning the Exhaustion of Remedies as a Precondition to Filing Complaints*, which is posted online at the CCOC website.) I strongly recommend that HOAs follow the Condominium Act procedures in addition to any other rules contained in their own documents.

Some HOAs may have additional requirements, such as that the board must first make a ruling on whether there is probable cause to believe that a violation is taking, or has taken, place; others require that the person charged must ask for a hearing before the board can impose a penalty.

One of the most important features of a fine is that, once imposed, it can be recorded in the land records as part of a lien against the property involved. For this to be done properly, the governing documents that create the right to fine must also provide that the association can file a lien for the fine, and they must have been filed in the land records. (This is true for condominium associations as well. These requirements are found in the Contract Lien Act, which is Title 14 of the Real Property Article.)

The next most complex topic regarding fines, after the authority to fine itself, is the amount of the fines. There is little guidance as to what the amount of the fine should be. If the fine is too low, it might not discourage the violators from continuing to violate the rules; instead, they may simply see it as the cost of buying the right to disobey. If the amount is too high, such as for ongoing violations, a court might see it as excessive and unreasonable and refuse to enforce it. The issue is complicated because a fine is not "damages," it is not calculated on the basis of provable injury or financial harm, and it is not intended to compensate the community for its monetary expenses. It is therefore more difficult to justify setting the fines at one amount or another.

There are two types of fines. One is for the isolated violation**.** Under the procedures outline in the Maryland Condominium Act, each unit owner essentially gets off without penalty for a single violation. It is only with the second or later violations that the association can charge a fine after the first violation has ceased or been corrected.

However, the second type, for ongoing violations like the one involved in the Circuit Court case, poses a more difficult challenge. Examples of these are pets living in the association without permission, architectural violations, and any other violation that once committed remains in place. Most governing documents state that such violations are continuing ones and constitute a new violation for each day they exist, and they earn a new penalty for each day. If the violator is stubborn, the fines can mount up dramatically, even exponentially.

To place a cap, or maximum, on the fines might simply create a fixed price that the members might be willing to pay to keep their violations. But to allow the fines to increase without limit creates the risk that a court will refuse to enforce them because they are disproportionate to any injury caused by the

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Exposed and Incomplete Cable TV Installations

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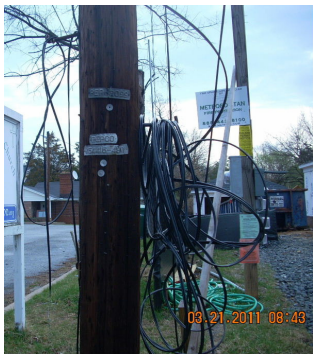
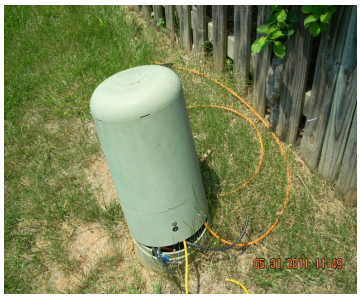


service.

The County's Cable Office has two right-of-way inspectors who assist residents and property managers with correcting ongoing cable TV infrastructure maintenance problems as well as with incomplete installations performed by the cable operators. The inspectors identify violations through their daily activity in the field. In addition, many cable-related safety hazards are reported directly to the Cable Office from residents and managers. Exposed cables, low-hanging wires and damaged equipment are just a few of the violations that the Cable Office can help to resolve. When a person reports a problem, an inspector will visit the site, determine which cable TV operator is responsible, and notify the operator to correct the problem.



The Cable Office also handles complaints about billing errors and poor service.

The Cable Office has jurisdiction over Verizon's FiOS services, both TV and telephone, but its traditional "copper wire" phone service is under the authority of the Maryland Public Service Commission, and complaints about it should be reported to that agency.

To contact the Cable Office, call 240-773-8111 or email it at ***CATV.complaints @ montgomerycountymd.gov***.

Recent CCOC Decisions on Architectural Control

HOA order to remove a roof is unreasonable when there is no visible difference between the roof material installed and the roof material required by the rules. In its second and final ruling in the case of *Inverness Forest Ass'n. v. Salamanca*, CCOC #17-08 (July 6, 2011), the hearing panel overturned a decision by the HOA board that the owner must remove the "Class C fire-rated" synthetic cedar shingle roof that he installed without permission. The HOA rules permitted only a specific manufacturer's "Class A fire-rated" synthetic cedar shingle roof. Although the panel upheld the HOA's rule, it concluded that the HOA's decision to force the owner to remove his roof was unreasonable for several reasons. First, there were other non-conforming roofs. Secondly, the Class C roof installed was more fire-resistant than the unrated natural cedar shingle roofs predominant in the community, and leaving the roof in place would not cause any harm or risk of harm to the community. Finally, the panel examined samples of both synthetic roof materials and could not see any visible difference between them. In view of all the facts, forcing the owner to spend money to remove and replace a brand new roof could not be justified.

Condo refusal to allow installation of air conditioning unit in common areas upheld. In *Verchinski v. Plymouth Woods Condo. Ass'n.*, CCOC #57-10 (June 22, 2011) the panel ruled that an association could reasonably refuse to allow a member to install an air conditioning compressor in the common areas instead of in her utility closet which was designed for it. A compressor in the common areas would create extra noise for the ground-floor residents and the wiring and piping would alter the appearance and integrity of the exterior walls; moreover, units were available that would fit into the member's utility closet, so that it was not essential that she have the use of the common areas for her new compressor.

CCOC Elects New Officers for 2012

The CCOC is pleased to announce that it has elected Elizabeth Molloy as its Chairperson for 2012, and B. Gwen Henderson as its Vice-chairperson. Ms. Molloy will replace Staci Gelfound, whose term expires this year. The CCOC appreciates Ms. Gelfound's many services on behalf of the Commission and her leadership as its Chairperson for the last two years.

Useful County Phone Numbers for Common Ownership Communities

Most County Government agencies may now be reached by phone by dialing "311" during ordinary business hours. The operator will refer the caller to the proper agency. This service includes non-emergency Police services such as reporting abandoned cars and community outreach, Libraries, the Circuit Court, Landlord-Tenant Affairs, Housing Code Enforcement, the Office of the County Executive, Cable TV regulation, the Department of Permitting Services and the Department of Transportation.

Some County agencies may still be called directly or through 311, including:

Office of Consumer Protection	240-777-3636
CCOC	240-777-3766
County Council	240-777-7900

Parks & Planning Commission

Planning Board	301-495-4605
Parks Headquarters	301-495-2595

City of Rockville: residents should still call their City agencies directly.

Emergency services: 911

For more information on the 311 system or to search for agencies by computer, go to:

http://www.montgomerycountymd.gov/331/Home.asp

FY 2012 Commission Participants (as of January, 2012)

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Allen Farrar

Bruce Fonoroff

Elayne Kabakoff

David Weinstein

Jan Wilson (Annual Forum Chair)

Ken Zajic

(One position is vacant)

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Mitchell Alkon (Legislative Committee Co-chair)

Richard Brandes

Ralph Caudle

Arthur Dubin

Staci Gelfound

Helen Whelan (Legislative Committee Co-chair)

County Attorney's Office:

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Julianne Dymowski, Esq.

Charles Fleischer, Esq.

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Do HOAs Have the Power to Impose Fines?

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violation. A court might expect the association to take legal action rather than to sit back and let fines mount up.

Fines are a convenient and efficient tool of rule enforcement for community associations because they can be imposed at less cost to the association than a court action would require. **Properly used, fines can encourage voluntary compliance with the association's rules and are likely to discourage violations in the first place. But in the case of a continuing violation, the association must seriously consider a court action to back up its decisions and not rely on fines alone to accomplish the job.** A large fine imposed without regard to any objective or measurable cost to the community for the violation can give the court an easy excuse for refusing to permit any fines at all. Therefore, if an HOA has the authority to assess fines and has followed all of the procedural due process necessary before imposing them, it will still have to evaluate the best means of having the violation corrected.

I should add here, that before an association makes any effort to impose fines in a particular case, it should first have properly adopted a written schedule of fines, as it adopts any other rule. This will give the association the opportunity to go on record and explain the justification for the fine schedule. A fine imposed on a violator which was adopted solely for that case and not pursuant to a previously and impartially adopted schedule, is more likely to be seen as arbitrary and unjustified. I also suggest that fines take into account whether a violation creates a harm or a nuisance to others, or is purely cosmetic in nature.

In conclusion, Maryland has provided well for the assessment of fines by condominiums to enable them to enforce their documents more effectively. The State has not, however, provided similar clear authority for HOAs and some case law suggests that HOAs do not have the authority at all. Other legal authorities state that this authority can be found in the covenants filed in the land records, covenants that create the servitudes that form the foundation for the governance of HOAs, and that these servitudes create sufficient authority to support the assessment of fines for violations of the governing documents. Under this line of reasoning, servitudes are binding on the use of the property; they predate the ownership of the property by the members of the association that enforces them; they are contractual in nature; and they are therefore enforceable as contracts without the need for statutory authorization. No doubt, bills on this topic will be presented to the current General Assembly.

(John McCabe is a Rockville attorney who specializes on common ownership law. He has been a CCOC Panel Chair for 20 years, and the recipient of the CCOC's Distinguished Service Award.)

Important Rulings of the Maryland Appeals Courts

Associations and their managers can be sued for misleading resale disclosures. The Maryland Court of Appeals held in *MRA Property Management v. Armstrong* (October 25, 2011) that condominium members who purchase units in reliance on resale packages that failed to disclose the existence of major defects known to the condominium association and its manager could sue both the association and the manager under the Maryland Consumer Protection Act. The Court ruled that *even though the association and the manager were not selling any units,* they participated in the sales by issuing resale packages. The association and its manager were considering adopting a significant special assessment to fix major defects but the resale packages they issued at the same time failed to mention the defects. *NOTE: the CCOC has prepared a special brochure on the importance of resale packages, "What You Need to Know About Buying a Home in a Condominium, Cooperative, or Homeowners Association." Printed copies are available from the CCOC for $2 each, free copies can be printed from the CCOC website.)* (**NOTE**: As we go to press, the Court of Appeals has withdrawn the MRA decision and scheduled it for re-argument.)

Associations can be sued by their members when they negligently fail to protect the association's legal rights. The Court of Special Appeals ruled in *Greenstein v. Council of Unit Owners of Avalon Court Six Condominium* (September 29, 2011) that the members of a condominium could sue their association for negligence. In that case, the board of directors knew that a new condominium was plagued by water leaks around its windows and that the leaks could have been related to faulty con-

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Attend the CAI Annual Conference March 31, 2012

The CCOC strongly encourages community association members to attend the annual conference of the Washington, DC, Chapter of the Community Associations Institute, which will be held on March 31, 2012 at the Washington Convention Center, 801 Mt. Vernon Place, Washington, DC. (The Convention Center is located near a Metro station.) The Chapter's annual conferences offer many useful seminars and discussions on major issues affecting common ownership communities and are especially helpful for managers and members of board of directors. Enrollment fees are $25 and up, and will rise after March 9, so enroll early. For more information go to: *www.caidc.org* or call 703-750-3644.

Important Rulings of the Maryland Appeals Courts (continued from p. 9)

struction by the builder. But the board took no action for several years. It then decided to sue the builder for warranty-related defects, but the trial court dismissed the lawsuit because the statute of limitations had run out on the claims. The association's members then sued the association for negligence, claiming as damages the amounts of the special assessments the association was imposing to correct the leaks. The Court of Special Appeals, in a reported decision, upheld the members' rights to do so and ruled that they were entitled to a trial to prove their claims.

The Court ruled on the basis of negligence by the association, and did not mention the "business judgment" rule, which normally protects associations from lawsuits by their members so long as they act in good faith and according to their documents. But t is worth noting that the "business judgment" rule only protects the *decisions* of a board to do something or not to do it. In this case, the board made *no decision*, either to sue or not to sue, until it was too late. The business judgment rule does not protect a board that does nothing.

The duty of a buyer at foreclosure to pay association assessments begins on the date of the foreclosure sale, and not on the date that the purchaser receives title to the unit. In a decision likely to be cheered by associations across the State, the Court of Special Appeals has decided that the buyer of a condominium unit at a foreclosure sale must pay the condominium association's assessments that fall due on or after that date, even though the title to the unit is not formally transferred for several months thereafter. The Court held that the purchaser becomes the "equitable" owner of the unit at sale even if he or she is not yet the owner of record.

Condominium association advocates believe that this decision also applies to mortgage lenders who take control of units at foreclosure instead of selling them to a third party. In the past, lenders have taken control but have not had title issued to them for lengthy periods while they sought to sell the units on the open market for better prices than were bid at the foreclosure sales. During this period, they refused to pay assessments, which in turn exacerbated the financial losses suffered by the condominium associations. Under this ruling, the lenders may have to begin paying the assessments on the date of the foreclosure sale for any units they retain and do not sell to third parties.

The case is *Campbell v. Council of Unit Owners of Bayside Condominium* (issued December 1, 2011).