



# CCOC COMMUNICATOR

## MEETINGS-OPEN, CLOSED, AND ELECTRONIC: Rules and Thoughts for Community Associations

By Dinah Stevens, Esq.

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**This article is written as a result of the responses to the recent CCOC decision in the consolidated cases of *McBeth and Muse v. Fountain Hills Community Association* (##52-12 & 67-12).** Those complaints included charges that the HOA’s board of directors had improperly held closed meetings.



**As the facts became more clear, several different issues arose.** First, it appeared that several or all of the board members gathered in a private home to discuss a specific action; they later exchanged emails on the topic using the words “resolution” and “vote,” although the emails did not show they actually took a vote. The action discussed was within the board’s authority to take, and it was brought up at a later open board meeting, where it was debated, and a motion was made and finally adopted.

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## CCOC WINS NATIONAL AWARD FOR VIDEOS

**CCOC Chairwoman Elizabeth Molloy** announced that the National Association of Counties (NACo) has recognized the CCOC video program with a 2014 Achievement Award.

**The Award commends the CCOC as the first government agency to create an impartial series of instructional videos readily available to the public on community asso-**

ciation topics. The first round of 15 videos was released in 2013, and Ms. Molloy stated that a second series is in progress.

**This is the CCOC’s second award** from NACo, which granted its 2013 Award for the CCOC’s Dispute Resolution Program.

## Meetings-Open, Closed, and Electronic

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**Second, evidence of other email strings showed discussions** by board members of several issues. In only one of these strings did the board actually take action. In that case, the board was voting on a debt collection matter that was described as urgent. Such a meeting can properly be closed under the HOA Act because it involved a discussion of a legal matter and also of an individual's assessment account. However, the board failed to follow the requirements for reporting on the closed meeting. So, in this instance, the violation was a procedural one.

**Third, there were committee meetings that were held** without notice to the community. The HOA Act applies to committees of the board as well as to the full board itself.

**Fourth and finally, the board met without advance notice** to the community to discuss a plan for hiring a new management company. (However, once the board begins negotiations with prospective managers, it can properly close such meetings under the open meetings laws.)

**"The HOA Act applies to committees of the board as well as to the full board itself."**

**The panel's Decision and Order found that the HOA** had been sloppy about compliance with the open meetings requirements of the HOA Act. However, the panel found only one clear violation, which was the procedural one involving the board's failure to report how the board voted on a motion to close its meeting and what was the reason for closing the meeting. In the other instances, the board did not make any decisions during the closed meetings, and therefore the panel did not need to rule on the validity of any decisions.

**The panel ruling that seems to have generated the most interest** is the one that holds that mere discussions are not regulated by the open meetings laws. Many people are surprised that all gatherings of the board do not fall under the State's open meetings laws for community associations. The core problem here is that although the State regulates "meetings," it never defines what a "meeting" is. Although the spirit and intent of the laws is that board and committee discussions of association business will be held at open meetings which all members can attend, those laws don't clearly prohibit all discussions between some or even all of the members of a board without notice to and the opportu-

nity of all members to attend.

**On the contrary, other provisions of the relevant laws** seem to assume that not all board discussions have to be open to the general membership. For example, Section 11-109.2 of the Condominium Act states that the board must prepare a proposed budget and submit it to the membership at least 30 days before an open meeting at which the members can discuss the proposed budget and the board can vote on it. Similarly, Section 11-111 states that the board cannot adopt a new rule without sending the proposed rule to the membership at least 15

days before an open meeting at which members can comment on the rule and the board can vote. In both these cases, the logical conclusion is that the board's discussions to develop the proposed budgets and rules do not have to be held in open meetings. The open meetings re-

quired by these laws are unnecessary if all of the board's work sessions on the proposed budgets or rules were already held in open meetings at which members could comment. What these two laws emphasize is that the board's *decisions* must be made at open meetings.

**It is interesting that the Uniform Common Interest Ownership Act of 2008** (not yet adopted in Maryland), which, although it fails to define "meeting," nonetheless states that "a gathering of the board members at which the board members do not conduct association business" is not a "meeting" which must be open (Section 3-108(b)(2)). Although this language does not completely resolve the issue, it is helpful. Dictionaries commonly define the word "conduct" as the equivalent of guiding, directing, managing, and controlling. These words imply more than simple discussions or conversations.

**"The core problem is that although the State regulates 'meetings,' it never defines what a 'meeting' is."**



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## A Fine Idea (or Another Fine Mess)?

In the CCOC’s Winter 2012 *Communicator*, John McCabe, a CCOC volunteer panel chair and Rockville attorney, discussed a recent ruling by a Montgomery County Circuit Court judge that held that homeowner associations had no legal right to impose fines on their members for rule violations. (The ruling did not apply to condominium associations because, unlike the HOA Act, the Condominium Act specifically grants the right to impose fines.) Mr. McCabe disagreed with the court’s interpretation of the law, and argued that under Maryland corporation law, HOAs (which are also corporations) have all the power necessary to carry out their intended purposes. But that ruling, and a similar one in Virginia, suggest that the courts are uneasy with, if not hostile to, the idea that private associations can impose financial penalties on their members.

**An association’s decision to impose fines has a better chance of holding up in court** if the association can show that the fine was properly and reasonably adopted. Three recent CCOC decisions can help to provide the necessary guidelines.

**“An association’s decision to impose fines has a better chance of standing up in court if the association can show that the fine was properly and reasonably adopted.”**

In *Kim v. Montrose Woods Condominium Ass’n.*, the hearing panel chaired by Kevin Kernan invalidated a fine of \$3,950 for two reasons: (1) the association did not follow its own rules when it charged the fine; and (2) the fine was unreasonable because most of it was added after the homeowner had already begun to comply with the rules.

**The Kim panel held that the purpose of fines** is to encourage voluntary compliance with associations rules. Therefore, once the member began to comply in good faith, the fines had achieved their purpose. Adding more fines was unjustified.

**In addition, the association violated its own rules.** It did not warn the member that he might be fined, it did not notify him that fines were already accumulating for almost month, it did not keep minutes of its violation hearing so it could not explain why it imposed the fines it did, and it

did not notify him of his right to appeal the decision to the CCOC.

**The Kim decision was followed and applied** by the CCOC a month later in the case of *Parkside Condominium Ass’n. v. Cayzedo*. In that case, the condominium

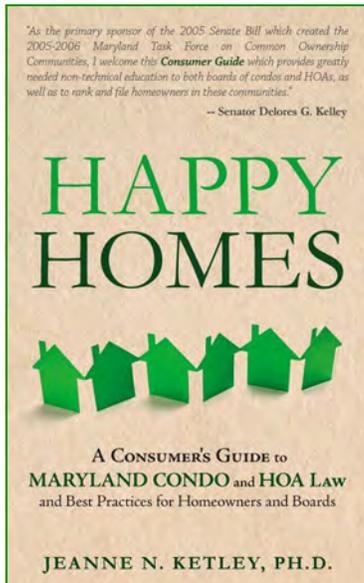


**“Here’s another fine mess you’ve gotten me into, Stanley!”**

had adopted a rule allowing the association to make an annual interior inspection of each unit. For several years, the unit owner refused to allow an inspection of her entire unit. The association finally held a hearing in late 2010, found that the owner was in violation, imposed a daily fine on her, and it warned her it would seek legal action to enforce its right to inspect the unit. However, instead of following up on enforcement, it then began a new round of warnings, notices of hearings, and hearings. Meanwhile, the daily fines continued to accumulate at the rate of \$5 per day. The association took no action to enforce its various decisions against the unit owner until March, 2013, when it filed a complaint with the CCOC seeking access to the unit and \$3,735 in fines.

**The hearing panel, led by Commissioner Marietta Ethier,** found that although the association had correctly followed its rules and had the right to inspect the unit, it could not justify all its fines. Applying the *Kim* principle that fines are justified if they encourage voluntary compliance, the panel found that the fines clearly *failed* in this purpose. In spite of the accumulation of fines over more than two years, the unit owner still avoided the inspections. The panel concluded that fines were reasonable from the day they were first imposed up to the day that the association warned the unit owner it would take legal action but failed to do so. This period of time was 180 days, and the panel determined that a reasonable fine was therefore \$900. It invalidated the rest of the fines, but it did order the unit owner to allow full access, and it allowed the association to hire a locksmith at the unit owner’s

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**"Using clear, simple and precise language, Ketley explains how community associations operate and member rights in a way that is easily understood by those with no legal experience."**

## **"Happy Homes"** **A New Resource for Association Members**

**By Galia Steinbach**

**Happy Homes is a lifeline for the ordinary member of Maryland's community associations.** Author Jeanne Ketley shares the valuable knowledge she has gained during her ten years of experience with the Maryland Homeowners Association (MHA) and as a resident and board member of common ownership communities.

**Using clear, simple and precise language,** Ms. Ketley explains how community associations operate and member rights in a way that is easily understood by those who have no legal experience. At the same time, she takes meticulous care to back up her statements with references to specific statutes.

**The book begins with a personal introduction depicting the author's journey from** being a typical uninvolved homeowner content to allow the board to run the show without her to being an active member and finally to serving as the president of the MHA and an advocate for laws protecting member rights.

**There are eleven chapters, each focusing on a single aspect of community association life,** followed by two appendices listing "best practices" for association management and ending with an invaluable, comprehensive list of resources. The book is packed with information essential to homeowners, board members, and managers alike.

**In addition to educating members about their privileges and responsibilities,** Ms. Ketley explains why it is important for members to be involved in running their communities, and she strongly encourages them to participate by serving on their boards of directors for at least one term of office.

**The book is available from several online sources, including Amazon.** I strongly recommend it.

Galia Steinbach is a resident, landlord, and member of several community associations in Montgomery County. She is the Chairwoman of the County's Commission on Landlord-Tenant Affairs, and is also a volunteer assisting the CCOC.



## **Jeffrey Van Grack**

**Together with all others who knew him, the CCOC mourns the death of Jeffrey Van Grack, who died August 9, 2014, at the age of 60.** Mr. Van Grack was an inspiring leader in community association law who founded one of the first law firm sections to specialize in this field and who mentored several of the attorneys who now follow his example. The CCOC owes a particular debt to his work because he served on the task force that created the CCOC in the late 1980's. He continued his contributions to the CCOC by serving as a volunteer panel chair for many years. We will miss him.



## 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 then 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 be called directly or through 311, including:

Office of Consumer Protection	240-777-3636
(email: <a href="mailto:consumerprotection@montgomerycountymd.gov">consumerprotection@montgomerycountymd.gov</a> )	
CCOC	240-777-3766
(email: <a href="mailto:ccoc@montgomerycountymd.gov">ccoc@montgomerycountymd.gov</a> ) (email preferred)	
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://www3.montgomerycountymd.gov/331/Home.asp>

Sign up for our free “eSubscribe” emails by enrolling here: <http://www.montgomerycountymd.gov/mcg/esubscribe.html> (the CCOC is listed under Consumer Protection).

## Annual Notices

County law requires all associations to send to their members each year a notice that informs them of the CCOC and the services it offers. The notice can be part of a newsletter or part of an annual meeting package, or a separate mailing. Long and short sample notices are available in Word format from the CCOC. Simply send us an email requesting them.



## Commission Participants (as of September, 2014)

### \*Residents from Condominiums/Homeowner Associations:\*

- Elizabeth Molloy, Chairperson
- Jim Coyle
- Marietta Ethier
- Rand Fishbein
- Bruce Fonoroff
- Elayne Kabakoff
- David Weinstein
- Ken Zajic

### \*Professionals Associated with Common Ownership Communities:\*

- Arthur Dubin, Vice-chairperson
- Mitchell Alkon
- Richard Brandes
- Terry Cromwell
- Thomas Stone
- Eugenia Mays
- Aimee Winegar
- Office of the County Attorney
- Walter Wilson, Associate County Attorney

### \*Volunteer Panel Chairs:\*

- Christopher Hitchens, Esq.
- John F. McCabe, Jr., Esq.
- Dinah Stevens, Esq.
- John Sample, Esq.
- Douglas Shontz, Esq.
- Julianne Dymowski, Esq.
- Corinne Rosen, Esq.
- Ursula Burgess, Esq.
- Greg Friedman, Esq.
- Charles Fleischer, Esq.
- Nicole Williams, Esq.
- Rachel Browder, Esq.
- Jennifer Jackman, Esq.
- Kevin Kernan, Esq.
- Hon. Bruce Birchman, Esq.

### \*Commission Staff\*

- Ralph Vines, Administrator
- Peter Drymalski, Deputy Assistant Editor
- John Lewis, Investigator

## Meetings-Open, Closed and Electronic

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**Most people agree that if the board does not have a quorum**, then the board can't take any votes or make any decisions, and such meetings or gatherings do not have to be open. This leads us to what is perhaps the most logical definition of what is a "meeting" under the open meetings law: it is one at which a quorum of the board is present in order to take legally effective action. In other words, it is *decision-making* that is the key to a "meeting" and something more is necessary for the law to apply than simply gathering the board together.

**The laws mandating meetings to be open are broad in language and clearly favor open meetings.** By not clearly including every possible conference of board members, the laws seem to allow some flexibility for discussions that are not intended to result in votes and decisions. But that flexibility should not be stretched too far. A board that routinely makes decisions in closed sessions and then merely confirms them in open meetings later might be

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found to violate the spirit and intent of the law, and its decisions could be invalidated.

**This flexibility can permit a work session** at which, for example, the board considers a draft of a proposed budget or rule, a review of an engineer's report or other expert work, an informational session with a third party, or pre-bid sessions with contractors. Such gather-

ings need not always be open to all members. There are pros and cons to consider. On the one hand, a meeting of only the directors can be more focused, more effective, more relaxed, and encourage more discussion. On the other hand, owners will have a more full understanding of the reasons for the board's final decisions if they are allowed to attend such conferences. The laws do not require such conferences to be open, but opening them can be beneficial.

**One basic requirement of the open meetings laws is notice to all members.** Under the Condominium Act, the board can give notice by announcing in advance a schedule

of all regular meetings or by giving between 10 and 90 days advance notice of a meeting and stating the time and place. The HOA Act more generally requires "reasonable" notice. The HOA Act also specifically includes committee meetings as covered by the open meetings law. Section 5-6B-19 of the Cooperative Housing Act creates an open meetings law for cooperatives that applies to both the board and to its committees.

**Another requirement of the open meetings laws** is that all members have the right to speak to any item on the agenda for that meeting. If the meeting is not limited by an agenda, members can comment on any association business. Boards are allowed to make reasonable rules governing member comments.

**All associations must hold at least one meeting per year at which members can comment on any association business.** Usually, this will be the annual meeting and election.

**The basic purpose of the open meeting** is not to allow everyone to participate as though they were members of the board, but to ensure that the association's business is per-

formed publicly.

**If the open meetings laws apply, the board can still close the meeting for certain reasons.** The reasons are stated in the laws and include discussions of personnel matters, discussions of individual assessment accounts, consultations with staff and attorneys, discussions of legal matters and of contracts not yet approved; protection of individual privacy in matters not connected with association business, investigations into possible or actual criminal misconduct, or to comply with some other law. At such a meeting, the board cannot

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take any action or discuss any matter that is not within one of the exceptions.

**In order to close a meeting properly, the minutes must state the time and place of the meeting, the reason for which it was closed, and the vote of the directors to close it.** These minutes must be included in the minutes of the next open meeting of the board.

**Although the laws do not refer to holding meetings by telephone or electronic media,** there is no reason not to use those means to conduct association business so long as the board complies with the open meetings laws. By definition, actions taken by email, instant messenger,

**“By definition, actions taken by email, instant messenger, telephone, etc., are closed meetings because all members cannot attend them, and usually the board does not give advance notice of them.”**

telephone, etc., are closed meetings because all members cannot attend them, and usually the board does not give advance notice of them. If such a meeting is being held, and a director poses a question or motion for a vote, the proposal should also include a resolution stating the reason for closing the meeting as well as the proposal to be voted upon. The directors must then vote on closing the meeting before they can vote on the main question. So, for example, as part of an email meeting, the email resolution should state, “Resolved, that the discussion of the proposed assessment collection settlement with Unit 00 is within the open meeting exception for pending or potential litigation and should be closed.” After a vote, the

board would then discuss the terms of the proposed settlement and vote up on it.

**Discussions of association issues by email or other electronic means when no decision is expected or taken, are not “meetings” regulated by the open meetings laws and do not have to be open.** These conversations are only different from casual personal or telephonic conversations because there might be a record of them. It is impractical to try to regulate such casual activities. More-



over, records of personal emails, text messages, and other messaging of board members which are not association records will not ordinarily be discoverable in Commission proceedings.

**In summary, a reasoned and pragmatic interpretation of the open meetings laws leads to the conclusion that they do not apply to every gathering of board members.** But boards should be aware that if they frequently meet in private sessions without notice to discuss and resolve issues, and then only hold their votes in public meetings, they can still be found to have violated the laws. And, by not sufficiently helping their members to understand the actions they take, they may also arouse the resentment and mistrust of the people they are supposed to serve.

Dinah Stevens is a retired attorney formerly with the Administrative Office of the United States Courts, and has been a volunteer panel chair for the CCOC for 22 years during which she has authored many important decisions for the CCOC. She is the author of the Decision in the *McBeth and Muse v. Fountain Hills CA* case. She gratefully acknowledges the assistance of the CCOC staff in the preparation of this article. The opinions expressed in this article on hers and the staff's and do not necessarily represent the opinions of the CCOC.

## All CCOC Decisions Are Now Online

**The CCOC is pleased to announce that all its formal decisions from 1992 to the present are now posted online at its website.** Most decisions are accompanied by short summaries which describe the important rulings made in each case. In order to find decisions that might be relevant to specific issues or questions, the CCOC has also prepared the *Staff's Guide to the Procedures and Decisions of the CCOC* (2014 edition) which is also online. (Printed copies of the *Guide* are available for \$15.)

This space for mailing only.

## A Fine Idea?

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cost if she failed to cooperate.

**More guidance comes from the CCOC decision in *Plymouth Woods Condominium Ass'n. v. Nejadi and Torres*.** In that case, CCOC Chairperson Elizabeth Molloy, who also chaired the hearing panel, upheld fines of \$500 against absentee landlords whose tenants caused excessive noise and damaged laundry equipment. It is noteworthy that the association had two different levels of fines: \$200 for a serious offense such as vandalism, and \$50 for less serious offenses such as the failure to carpet 80% of a unit's floors. It also set maximum fines: \$400 for the more serious ones and \$100 for the others. In this case, it imposed maximum fines for both offenses. The hearing panel found the fines properly imposed according to the rules and the law, and also found them to be reasonable in amount.

**What standards emerge from these decisions?** The core principles are that fines should have a reasonable basis and the association should follow its rules strictly before imposing them. Fines are justified if they are intended to encourage voluntary compliance with the rules and thereby avoid the costs of litigation to force compliance. But fines are irrational and unjustified once it is clear that they have either served this purpose (the homeowner has begun efforts

to comply) or have failed to have any effect (the homeowner ignores them and persists in violating the rules). At this point, the association ought to stop the fines and to take more effective action to compel obedience. It is unreasonable to allow fines to pile up indefinitely.

**Fines should be proportionate to the violation.** Large fines could not be justified in the *Parkside* case because there was no emergency and no evidence of any defect in the unit. Instead the association simply wanted to perform a routine inspection. In the *Plymouth Woods* case, on the other hand, the association had a schedule of fines that varied according to the severity of the offense, and it also capped the amount of the fines it could impose.

**Fines are not a substitute for damages.** If an association runs up additional costs due to a violation, it has legal remedies for collecting them. Fines are separate from, and can be in addition to, actual damages.

**To protect their rights to impose fines,** associations should follow their own rules and the relevant laws on rule violations, keep good records to document the problem and the reasons for their decisions, exercise some common sense, and be prepared to take more effective action when the fines do not solve the problem.