

MEMORANDUM

January 15, 2016

TO: County Council

FROM: Josh Hamlin, Legislative Attorney 

SUBJECT: **Public Hearing:** Bill 50-15, Common Ownership Communities - Commission on Common Ownership Communities – Composition – Dispute Resolution

Bill 50-15, Common Ownership Communities - Commission on Common Ownership Communities – Composition – Dispute Resolution, sponsored by Lead Sponsor Council President on behalf of the County Executive, was introduced on December 8, 2015. A joint Planning Housing and Economic Development and Public Safety Committee worksession is tentatively scheduled for January 28, 2016 at 2:00 p.m.

Bill 50-15 would:

- (1) make mediation of certain disputes regarding common ownership communities mandatory;
- (2) alter the composition of the three member hearing panel;
- (3) alter the composition of the Commission on Common Ownership Communities to include members of the public;
- (4) transfer duties assigned to the Office of Consumer Protection to the Department of Housing and Community Affairs;
- (5) provide for certain transition provisions; and
- (6) generally amend County law concerning common ownership communities.

By memorandum dated November 23, 2015, the Executive requested the Council's consideration of Bill 50-15. The memorandum details the proposed changes to the law, and the justification for the changes (See ©12-13).

Background

Bill 50-15 would make three distinct changes to the existing law.

- (1) It would move all of the Commission on Common Ownership Communities (CCOC) from the Office of Consumer Protection (OCP) into the Department of Housing and Community Affairs (DHCA). This proposed move was prompted by the Office of Legislative Oversight (OLO) report on the CCOC from March of last year,¹ which was mentioned by the Executive in his transmittal memo. In that

¹ http://www.montgomerycountymd.gov/OLO/Resources/Files/2015_Reports/OLOReport2015-8CommissiononCommonOwnershipCommunities.pdf

report, OLO stated its belief “that relocating the Commission to DHCA could provide administrative and information technology resources and support that the Office of Consumer Protection simply cannot provide.”

- (2) It would make mediation of all complaints mandatory where it is currently optional. The justification for this change, offered by the Executive, is that it “will facilitate the prompt resolution of complaints without the formalities and costs associated with a quasi-judicial administrative hearing,” and that mediation is a better means of resolving what generally are “conflicts between neighbors” than an adversarial proceeding.
- (3) It would change the composition of both the Commission as a whole and of the hearing panels convened to adjudicate disputes not resolved through mediation. Bill 50-15 would alter the composition of the Commission, which now consists of 8 owner/resident members and 7 professional/manager members, to be made up of 5 owners/residents, 5 professionals/managers, and 5 members from the public at-large. It would also change the makeup of the hearing panels, which now consist of one member from each of the existing member-groups and a volunteer panel chair that is an attorney practicing Common Ownership Community law, to be comprised of 1 member from each of the proposed new member-groups.

The proposed elimination of the volunteer attorney-panel chairs is in response to a conflict of interest identified by the Ethics Commission in the dual role these attorneys may have in serving on a CCOC hearing panel in one instance while representing a client before a hearing panel in another case. In its report, OLO provided an excellent summary of the Ethics Commission advice and determinations regarding the CCOC (©14-16). Most pertinent to Bill 50-15’s proposed change is correspondence between the Ethics Commission and the CCOC beginning in February 2014 (©17-31), and culminating with a letter of guidance dated April 10, 2014 (©32-35). In that letter, the Ethics Commission concluded that volunteer panel members (*i.e.*, the attorney panel chairs) are prohibited from compensated representation of businesses with a matter before a CCOC panel.

Since the OLO report was published, the Ethics Commission denied a CCOC request to waive certain conflict of interest provisions in the County’s Code of Ethics for attorneys serving as hearing panel chairs (©36-41). As it currently stands, the Ethics Commission’s April 2014 conclusion that volunteer panel members are prohibited from representing, for compensation, businesses before a CCOC panel, still applies.

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Ethics Commission Advisory Opinion 15-08-011	

Bill No. 50-15
 Concerning: Common Ownership
Communities - Commission on
Common Ownership Communities -
Composition - Dispute Resolution
 Revised: _____ Draft No. _____
 Introduced: December 8, 2015
 Expires: June 8, 2017
 Enacted: _____
 Executive: _____
 Effective: _____
 Sunset Date: None
 Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Council President at the Request of the County Executive

AN ACT to:

- (1) make mediation of certain disputes regarding common ownership communities mandatory;
- (2) alter the composition of the three member hearing panel;
- (3) alter the composition of the Commission on Common Ownership Communities to include members of the public;
- (4) transfer duties assigned to the Office of Consumer Protection to the Department of Housing and Community Affairs;
- (5) provide for certain transition provisions; and
- (6) generally amend County law concerning common ownership communities.

By amending

Montgomery County Code
 Chapter 10B, Common Ownership Communities
 Sections 10B-2, 10B-3, 10B-4, 10B-5, 10B-7A, 10B-9A, 10B-11, 10B-12, 10B-13, 10B-14,
 and 10B-19.

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:

1 **Sec 1. Sections 10B-2, 10B-3, 10B-4, 10B-5, 10B-7A, 10B-9A, 10B-11, 10B-12, 10B-**
 2 **13, 10B-14, and 10B-19 are amended as follows:**

3 **Article 1. Commission on Common Ownership Communities.**

4 * * *

5 **10B-2. Definitions.**

6 In this Chapter, the following words have the following meanings:

7 [(a)] *Commission* means the Commission on Common Ownership
 8 Communities.

9 [(b)] *Common ownership community* includes:

- 10 (1) a development subject to a declaration enforced by a homeowners'
 11 association, as those terms are used in state law;
 12 (2) a residential condominium, as that term is used in state law; and
 13 (3) a cooperative housing project, as that term is used in state law.

14 * * *

15 [(c)] [Office means the Office of Consumer Protection.] Department means
 16 the Department of Housing and Community Affairs.

17 Director means the Director of the Department of Housing and
 18 Community Affairs or the Director's designee.

19 **10B-3. Commission on Common Ownership Communities.**

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

- 23 (1) [Eight] Five members should be selected from unit or lot owners
 24 or residents of self-managed and professionally managed
 25 condominiums, self-managed and professionally managed
 26 cooperative housing corporations, and self-managed and

27 professionally managed homeowners' associations, and may
 28 include members or former members of governing boards.

29 (2) [Seven] Five members should be selected from persons who are
 30 members of professions associated with common ownership
 31 communities (such as persons involved in housing development
 32 and real estate sales and attorneys who represent community
 33 associations, developers, housing management or tenants),
 34 including at least one person who is a professional community
 35 association manager.

36 (3) Five members should be selected from the public at large who
 37 would not meet the criteria for selection under subsection (a)(1) or
 38 (a)(2).

39 (b) Designees of the County Council (if the Council selects a designee),
 40 Planning Board, Department of Environmental Protection, Department of
 41 Permitting Services, Department of Transportation, [Office of Consumer
 42 Protection,] and Department of Housing and Community Affairs are ex-
 43 officio nonvoting members of the Commission.

44 * * *

45 (i) The [Office] Department must provide the Commission with staff, offices
 46 and supplies as are appropriated for it.

47 (j) The Commission must submit an annual report by September 1 to the
 48 County Executive and the County Council summarizing its activities,
 49 needs, and recommendations, and the extent to which the goals of this
 50 Chapter are being met.

51 **10B-4. Administrative support.**

52 In selecting staff to carry out the [Office's] Department's responsibilities under
53 this Chapter, the Director must consider the recommendations of the
54 Commission.

55 **10B-5. Duties of the [Office] Department of [Consumer Protection] Housing and
56 Community Affairs.**

57 The [Office] Department, in consultation with the Commission, must:

58 * * *

59 **10B-7A. Notification requirements.**

60 The governing body of a community association must, at least annually,
61 distribute information in a form reasonably calculated to notify all owners about
62 the availability of dispute resolution, education, and other services to owners
63 and residents of common ownership communities through the [Office]
64 Department and the Commission. The governing body may satisfy this
65 requirement by including with any annual notice or other mailing to all members
66 of the community association any written materials developed by the [Office]
67 Department to describe the Commission's services.

68 **Article 2. Dispute Resolution.**

69 * * *

70 **10B-9A. Request for relief from stay.**

71 * * *

72 (b) The special panel must consist of 3 voting members of the Commission
73 designated by the chair, and must include [at least] one representative of
74 each membership category.

75 * * *

76 **10B-11. Mediation; dismissal before hearing.**

77 (a) The [Office] Director may investigate facts and assemble documents
78 relevant to a dispute filed with the Commission, and may summarize the

79 issues in the dispute. The [Office] Director may notify a party if, in [its]
80 the Director's opinion, a dispute was not properly filed with the
81 Commission, and may inform each party of the possible sanctions under
82 Section 10B-13(d).

83 (b) If the [Office] Director, after reviewing a dispute, finds that, assuming all
84 facts alleged by the party [which] that filed the dispute are true, there are
85 no reasonable grounds to conclude that a violation of applicable law or
86 any association document has occurred, [it] the Director may so inform
87 the Commission. The Commission[, in its discretion, may] must dismiss
88 a dispute if it finds that there are no reasonable grounds to conclude that
89 a violation of applicable law or any association document has occurred,
90 or it may order the [Office] Director to investigate further. The
91 Commission may reconsider the dismissal of a dispute under this
92 subsection if any party, in a motion to reconsider filed within 30 days
93 after the dispute is dismissed, shows that:

- 94 (1) the Commission erroneously interpreted or applied applicable law
95 or an association document; or
96 (2) material issues of fact [which] that are necessary to a fair resolution
97 of the dispute remain unresolved.

98 (c) [Any party may request mediation.] If the Director, after reviewing a
99 dispute and any investigation, finds reasonable grounds to conclude that
100 a violation of applicable law or an association document has occurred,
101 the Director must attempt to resolve the matter through mediation. Each
102 party named in the dispute or its representative must attend any mediation
103 conference scheduled by the Director under this Section unless excused
104 by the Director. If the party that files the dispute refuses or fails to
105 participate in the mediation, the Director must dismiss the dispute. If the

106 party that is the subject of the dispute refuses or fails to participate in the
107 mediation, the Director must refer the dispute to the Commission for
108 resolution. The party that is the subject of the dispute may not appear at
109 the hearing, and the hearing panel may award relief to any party that the
110 facts on the record warrant.

111 (d) [If a party requests mediation, the Commission must notify all parties of
112 the filing and of the mediation session.] Unless otherwise agreed to by
113 the parties in writing, a mediation conference is informal and nothing said
114 or done during a mediation conference is admissible in any subsequent
115 hearing under this article.

116 (e) [The Commission must provide a qualified mediator to meet with the
117 parties within 30 days after a party requests mediation to attempt to settle
118 the dispute.] The Commission must promptly schedule a hearing under
119 Section 10B-13 if either: (1) mediation has not occurred within 90 days
120 after the Director found reasonable grounds to believe a violation
121 occurred; or (2) the Director decides at any time that mediation would be
122 fruitless. The Director may extend the mediation deadline by mutual
123 consent of the parties.

124 [(f) If any party refuses to attend a mediation session, or if mediation does not
125 successfully resolve the dispute within 10 days after the first mediation
126 session is held, the Commission must promptly schedule a hearing under
127 Section 10B-13 unless a hearing has already been held under Section
128 10B-13.]

129 **10B-12. Hearing Panel.**

130 (a) If a hearing is scheduled, the chair of the Commission must convene a 3-
131 member panel to hear the dispute.

132 (b) The chair must choose [2] 3 members of the panel from the voting
 133 members of the Commission. The persons selected must represent the [2]
 134 3 different membership groups of the Commission. [The 2 Commission
 135 members must designate the third member from a list of volunteer
 136 arbitrators trained or experienced in common ownership community
 137 issues maintained by the Commission. The third member must chair the
 138 panel. If a suitable arbitrator is not available, the chair of the Commission
 139 must designate the third panelist from among the voting members of the
 140 Commission, and must designate the chair of the panel.] The chair must
 141 designate one panel member to serve as panel chair.

142 * * *

143 **10B-13. Administrative hearing.**

144 * * *

145 (d) The hearing panel may award costs, including reasonable attorney's fees,
 146 to any party if the other party:

- 147 (1) filed or maintained a frivolous dispute, or filed or maintained a
 148 dispute in bad faith;
- 149 (2) [unreasonably] refused to participate in mediation of a dispute[, or
 150 unreasonably withdrew from ongoing mediation]; or
- 151 (3) substantially delayed or hindered the dispute resolution process
 152 without good cause.

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

155 (e) [the] The hearing panel must apply state and County laws and all relevant
 156 caselaw to the facts of the dispute, and may order the payment of damages
 157 and any other relief that the law and the facts warrant. The decision of the

158 hearing panel is binding on the parties, subject to judicial review under
159 Section 2A-11.

160 * * *

161 (i) The Commission, acting through the [Office] Department and the County
162 Attorney, may enforce a decision of the hearing panel by taking any
163 appropriate legal action.

164 * * *

165 **10B-14. Settlement of disputes; assistance to parties.**

166 * * *

167 (b) The [Office] Director may inform any party who has settled a dispute by
168 mediation, or any party who prevails in a hearing held under Section 10B-
169 13, about how the agreement or decision can be enforced.

170 **10B-19. Enforcement.**

171 (a) The [Commission] Department may enforce this Article by legal action.

172 (b) In addition to any action by the [Commission] Department and any other
173 action authorized by law, including the filing of a dispute under Article
174 2, any person may file an action:

175 (1) for injunctive relief to enforce this Article or correct any violation
176 of it, and

177 (2) to recover damages for a loss sustained as a result of a violation of
178 this Article.

179 **Sec. 2. Effective Date.**

180 Sections 10B-11(c), (d), and (e), which mandate mediation of disputes, applies
181 to all disputes filed with the Commission after this Act takes effect as provided in
182 Charter Section 112.

183 **Sec. 3. Transition.**

LEGISLATIVE REQUEST REPORT

Bill 50-15

*Common Ownership Communities - Commission on Common Ownership Communities –
Composition – Dispute Resolution*

DESCRIPTION:	This legislation would: 1) make mediation a mandatory component of dispute resolution when complaints are filed with the Commission on Common Ownership Communities (CCOC); 2) change the composition of the Commission by requiring that one third of the Commissioners be selected from members of the general public; 3) replace the volunteer arbitrators that currently chair hearing panels with voting members of the Commission; and 4) transfer staff support duties from the Office of Consumer Protection to the Department of Housing and Community Affairs.
PROBLEM:	This legislation addresses three concerns that have arisen about the operation of the current CCOC law. 1) Adjudication of disputes has required parties to engage in hearings that require the parties to comply with complex rules of procedure. 2) The CCOC does not have adequate access to staff support and other resources to carry out its mission as effectively as initially envisioned. 3) CCOC hearing panels are currently chaired by outside volunteers that are not voting members of the Commission and have been found, in some instances, by the Ethics Commission to have a conflict of interest.
GOALS AND OBJECTIVES:	To improve the efficiency and effectiveness of the CCOC by encouraging informal resolution of disputes between homeowners, residents and governing bodies of common ownership communities; to ensure that hearing panels are composed of individuals who represent a balance of the interests involved in adjudication of disputes; and to provide the CCOC with better access to administrative support and technology resources.
COORDINATION:	Department of Housing and Community Affairs
FISCAL IMPACT:	To be requested.
ECONOMIC IMPACT:	To be requested.
EVALUATION:	To be requested.
EXPERIENCE ELSEWHERE:	N/A
SOURCE OF INFORMATION:	Eric Friedman, Office of the Consumer Protection, 240-777-3636 Clarence Snuggs, Department of Housing and Community Affairs, 240-777-3600.

**APPLICATION
WITHIN
MUNICIPALITIES:**

Only applicable in the City of Rockville.

PENALTIES:

N/A

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OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Isiah Leggett
County Executive

MEMORANDUM

November 23, 2015

TO: George Leventhal, President
Montgomery County Council

FROM: Isiah Leggett, County Executive 

SUBJECT: Commission on Common Ownership Communities – Amendments to
Chapter 10B

I am forwarding with this memorandum proposed legislation to amend Chapter 10B, Common Ownership Communities. I believe that this legislation will enhance the ability of the Commission on Common Ownership Communities (CCOC) to better fulfill the purposes for which it was established 25 years ago. As you know, I was a member of the County Council when the CCOC was established, and I remember well the intent and the need for creating this first-of-its kind commission. After 25 years, however, revisions are needed.

Several factors contribute to the timeliness of these proposed legislative changes. Over one-third of Montgomery County's residents now live in common ownership communities, and the CCOC has gathered considerable experience regarding a multitude of issues. The Office of Legislative Oversight recently submitted a report evaluating the CCOC and offered several recommendations, including having the staff support for CCOC be provided by the Department of Housing and Community Affairs. Furthermore, Montgomery County's Ethics Commission has identified a conflict of interest regarding the manner in which CCOC hearing panels are convened. Finally, a review of the nature of the complaints filed, as compared to the mechanisms used to process those complaints, indicates that the CCOC dispute resolution program has strayed from its original intent to function as an alternative to court litigation.

In order to systematically address all of the above issues, and to ensure that the CCOC will continue to contribute to the quality of life in Montgomery County, the legislation I am forwarding to the Council for its consideration would: (1) make mediation a mandatory component of dispute resolution when complaints are filed with the CCOC; (2) change the composition of the Commission by requiring that one-third of the Commissioners be selected from members of the general public; (3) replace the volunteer arbitrators who currently chair hearing panels with voting members of the Commission;

George Leventhal, President
November 23, 2015
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and (4) transfer staff support duties from the Office of Consumer Protection to the Department of Housing and Community Affairs.

Executive staff stand ready to work with the Council on this important legislation.

IL:tjs

4. COMCOR Code of Montgomery County Regulations

COMCOR also outlines regulations for common ownership communities in three subject areas: dispute resolution, establishment of a dispute filing fee, and the establishment of an annual registration fee. The remaining regulations relating to the dispute resolution process are included in Chapter Four. These executive regulations also outline the payment of fees associated with common ownership communities:

- The cost to file a case with the CCOC is \$50 for each dispute and assists to fund the dispute resolution process and provision of technical assistance.²⁴
- Regulations require an annual \$3.00 per unit registration fee. If an association fails to pay the fee and register, it is a Class A violation and renders the community ineligible to file a complaint under Chapter 10B.²⁵



C. Ethics Commission Advisory Opinions

The Montgomery County Ethics Commission may issue either an advisory opinion or waiver on an issue relating to Section 19A-7 of the County Ethics Law. Advisory opinions may be requested by any person subject to the Ethics law, the Code of Ethics for the County Appeals Board, or County Procurement law. The Ethics Commission may grant a waiver of the prohibitions of the Ethics law and Procurement law, if in the Commission's opinion, certain statutory provisions are met. The Commission can also issue a Letter of Guidance in regards to the law and specific questions.

The Commission on Common Ownership Communities is considered a County administrative agency and Commission members are considered public employees. Due to this designation, Section 19A-12 of the County Ethics law states that a public employee must not be employed by any business that:

- Is regulated by the County agency with which the public employee is affiliated; or
- Negotiates or contracts with the agency with which the public employee is affiliated; or
- Hold any employment relationship that would impair the impartiality and independence of judgment of the public employee.²⁶

The Commission may grant a waiver of the prohibited acts if it finds that a waiver is needed to ensure timely and available services; failure to grant a waiver may reduce the County's ability to hire or retain qualified employees; or the proposed employment is not likely to create an actual conflict of interest.²⁷

Summarized below, the Ethics Commission has issued three advisory opinions, one waiver, and one letter of guidance regarding the Commission on Common Ownership Communities since the early 1990s. Each action by the Ethics Commission relates to the applicability of the Sections 19A-8(b) and 19A-12(b) to Chapter 10, which regulates the Commission's activities.

Advisory Opinions. The County Ethics Commission issued three advisory opinions relating to an individual's ability to either represent or participate in Commission on Common Ownership Communities' activities. Brief descriptions for each decision are provided below.

²⁴ COMCOR 10B.07.01.01

²⁵ COMCOR 10B.07.02.01

²⁶ § 19A-12.

²⁷ § 19A-8(b).

- Advisory Opinion 1994-7. The question before the Ethics Commission was whether a member of the Commission, who was also a private attorney, could represent an HOA client in a matter before the Commission. In this case, the Ethics Commission ruled that a waiver was not necessary since the situation in question only occurred once in the prior four years, thus not meeting the need of timely delivery of services. Further, the Ethics Commission found that an actual conflict may occur as a result of the representation of the HOA client in front of the Commission. The Ethics Commission reasoned that if the case were on appeal, the attorney would be taking a position that was adverse to the Commission and the County, creating an actual conflict of interest. However, this decision “does not preclude [the attorney] from advising [his] client and assisting with a settlement of the dispute.”²⁸
- Advisory Opinion 1998-12. There were two questions before the Commission in this case. The first was whether an attorney’s former partner or other attorneys at a firm could represent clients in matters before the Commission and other County Boards and the Commission ruled that the attorney’s former firm may represent clients before the Commission and other boards. The second question dealt with whether the attorney could continue to represent and advise clients on matters unrelated to Montgomery County Government even though his former firm is representing the client before other Montgomery County agencies. The Ethics Commission ruled that the attorney must recuse himself on all matters relating to County boards and commissions in which the firm is representing clients.
- Advisory Opinion 2000-5. This is a case in which a Commission board member was an officer of his homeowner association and another Commission member had a financial interest in the property management company that manages the same association. The first board member is also the chair of the committee on which the second member served. The Ethics Commission looked at two questions: (1) can the first board member vote on jurisdiction over cases or serve on a hearing panel involving the management company and (2) does the fact he votes on the association’s contract with the management company raise any concerns about voting on Commission issues. The Ethics Commission ruled in regards to both questions that the law does not prohibit him from participating in Commission matters, as long as he stays impartial.

Waiver. The only Ethics Commission waiver was issued in 1992 and concerns whether the Council representative to the Commission could also serve as the president of her homeowner’s association. The Ethics Commission waived the conflict of interest because the Council knew she was a member of the homeowner’s association upon appointment and she was a non-voting Commission member limited to participating in discussions only. Further, the Ethics Commission required her to disclose to the Commission that she held an elected position in her homeowner’s association to ensure that the association did not receive an unfair advantage.

Letter of Guidance. The Ethics Commission examined the applicability of Section 19A to the volunteer arbitrators who serve as Hearing Panel Chairs. The Ethics Commission found that the list of volunteers is almost exclusively comprised of lawyers who practice in Montgomery County and often represent homeowner associations and condominium associations. The Ethics Commission concluded that arbitrators are public employees because they exercise responsibility in adjudicating matters before the Commission, thus Section 19A applies.

In addition to excluding volunteer panel members from participating because their work is regulated by the County, the Ethics Commission took a broad approach to defining the conflict of interest. The Ethics Commission wrote that volunteer arbitrators may be able to influence the decision at hand in a way that

²⁸ Montgomery County Ethics Commission, Advisory Opinion 1994-7.

favors their clients or may be influenced by the prospect of gaining clients due to their representation. While no claim has been filed by individuals to the Ethics Commission on this matter, the Commission is aware of four separate instances where individuals felt that there was bias between the volunteer panel chair and the associations.

The application of State and County law govern the formation and operation of common ownership communities and afford protections to both the association governing bodies and residents living in one of these communities.



MONTGOMERY COUNTY ETHICS COMMISSION

Kenita V. Barrow
Chair

Mark L. Greenblatt
Vice Chair

February 4, 2014

Elizabeth Molloy
Chair
Commission on Common Ownership Communities
c/o The Montgomery County Office of Consumer Protection
100 Maryland Ave, Suite 300
Rockville, MD 20850

Dear Ms. Malloy:

This letter provides notice to the Commission on Common Ownership Communities ("CCOC") of the Montgomery County Ethics Commission's intent to issue an interpretation of Chapter 19A of the Montgomery County Code as to certain practices at the CCOC. In recent months, the Ethics Commission has been notified, informally and in writing, by unrelated parties of potential conflict of interest concerns related to hearings convened by the Chair of the CCOC. It is our understanding that panel chairs can represent clients before CCOC panels to which they have not been assigned. After consideration of the applicable laws, the Ethics Commission is concerned that representation of clients by CCOC panel chairs before the CCOC may be inconsistent with the Montgomery County Public Ethics Law, Chapter 19A. Accordingly, the Ethics Commission is providing you with its preliminary views so that you might provide any additional information that you believe would be relevant to the Ethics Commission's review of the matter.

In accordance with Chapter 10B of the Montgomery County Code, the CCOC has established a list of volunteer panelists made up of persons who are "trained or experienced in common ownership community issues." The list of volunteer panelists is almost exclusively comprised of lawyers who practice in Montgomery County. Many of these lawyers represent clients in matters involving communities of common ownership. In fact, many of the lawyers on the list of panel members advertise that they represent homeowners associations and residential condominium associations.

The Ethics Commission's concern stems from the representation by panel members of clients before CCOC hearing panels that they are not currently sitting on. Section 19A-12 provides specific limitations on the activities of "public employees":

Montgomery County Ethics Commission

100 Maryland Avenue, Room 204, Rockville, MD 20850
OFFICE 240-777-6670, FAX 240-777-6672

- (b) *Specific restrictions.* Unless the Commission grants a waiver under subsection 19A-8(b), a public employee must not:
- (1) be employed by, or own more than one percent of, any business that:
 - (A) is regulated by the County agency with which the public employee is affiliated; or
 - (B) negotiates or contracts with the County agency with which the public employee is affiliated;or
 - (2) hold any employment relationship that could reasonably be expected to impair the impartiality and independence of judgment of the public employee.

A threshold question is whether volunteer panel members who serve as arbitrators on panels are "public employees." The Ethics Commission believes that panel members are "public employees" as they exercise responsibility in adjudicating matters brought to the CCOC. Panel members have long been considered "public employees" by County Executive regulation, as they are designated as "public employees" required to file confidential financial disclosure reports pursuant to Article IV of the Public Ethics Law.

Because volunteer panel members are "public employees," representation by volunteer panel members of businesses regulated by the CCOC is likely prohibited by Section 19A-12(b)(1) of the Public Ethics Law. The Commission thinks that a business with a matter before a CCOC panel is "regulated by the County agency with which the public employee is affiliated." Therefore, the Commission believes volunteer panel members are prohibited from representing businesses with a matter before a CCOC panel.

Section 19A-12(b)(1)'s prohibition only extends to outside employment by businesses. Section 19A-12(b)(2)'s reach is broader as "any employment relationship that could reasonably be expected to impair the impartiality and independence of judgment of the public employee" is prohibited. The Commission believes representation by panel members of clients before CCOC hearing panels that they are not currently sitting on is prohibited by 19A-12(b)(2). Panelists who represent clients before other panels may be able to influence the resolution of matters before other panels by resolving matters that come before them in a way that favors their clients: adjudicative bodies are frequently influenced by how similar matters were decided even without formal reliance on precedence.¹ Also, panelists who represent clients before other panels could, in theory, be influenced by the prospect of gaining clients, such as a housing association with many matters coming before the CCOC, in adjudicating matters when serving as a panelist. Lastly, CCOC panels are collaborative bodies where give and take between panel members can be expected. Panel members appearing as attorneys before persons with whom this give and take has occurred cannot be looked at in a vacuum without regard for other potential official

¹ "Although the rulings of the hearing panels are not binding on other hearing panels in different cases (they are, however, binding on the parties to the case resolved by the rulings), the panels' explanations of the laws and the legal principles are a valuable source of information for those who seek guidance on the problems facing them as members or directors of the County's community associations." The CCOC Staff's GUIDE TO THE PROCEDURES AND DECISIONS of the MONTGOMERY COUNTY COMMISSION ON COMMON OWNERSHIP COMMUNITIES, November 2012.

interactions. Under these circumstances, the representation of clients by CCOC panelists could be reasonably expected to impair the impartiality and independence of judgment of these public employees.²

The Ethics Commission realizes that it may well have been the expectation, when the CCOC authorizing legislation was enacted, that the volunteer panel chairs would include lawyers practicing before other CCOC panels. However, neither the CCOC authorizing legislation nor the Public Ethics Law included a provision that provide an exception for the CCOC panels from the requirements of the Public Ethics Law.

The Ethics Commission is very aware that the CCOC's practices as regards volunteer panelists are not new. And the Commission has, based on the information that has been brought to its attention, no interest or intent to conduct any investigation into past practices. But the Commission believes the CCOC's practices should be aligned with the County's Public Ethics Law. This could occur by either altering CCOC practices or the CCOC's authorizing legislation or the Public Ethics Law. The Ethics Commission solicits your views as to what steps should be taken to address the apparent inconsistency between the Public Ethics Law and Commission practices. The Commission would welcome receiving any additional information regarding the issues presented above. After sixty days from the date of this letter, the Ethics Commission will consider any additional information it has received; then it may issue an interpretation of the provisions of the Ethics Law with respect to the issues identified in this letter. In the meantime, the opinions expressed here are to be considered to be preliminary and for the purpose only of soliciting your views to an issue pending before the Commission.

Should you have any questions, please refer them to Robert Cobb, Counsel to the Ethics Commission at 240-777-6674.

Sincerely,

Kenita Barrow

Kenita Barrow

Chair

Montgomery County Ethics Commission

cc: Timothy Firestine, Chief Administrative Officer
Marc Hansen, County Attorney
Eric Friedman, Director of Consumer Protection
Steve Farber, Council Administrator

² The Commission's Advisory Opinion 1994-7 addressed the question of whether a CCOC member could represent a client before the CCOC hearing panel. The Commission determined that it would not issue a waiver of the prohibition of Section 19A-12(b) to a member of the CCOC because the statutory waiver standard could not be met.



COMMISSION ON COMMON OWNERSHIP COMMUNITIES

Isiah Leggett
County Executive

April 4, 2014

Kenita V. Barrow
Montgomery County Ethics Commission
100 Maryland Avenue, Room 204
Rockville, MD 20850

Dear Ms. Barrow:

As requested, the Commission on Common-Owned Communities (CCOC) is providing its views in response to your letter of February 4, 2014 providing your preliminary views that representation of clients by the CCOC voluntary panel chairs before the CCOC may be inconsistent with the Montgomery County Public Ethics Law, Chapter 19A. We understand that the opinions expressed in your February 4 letter are preliminary and that after April 5, the Ethics Commission will consider any additional information it has received and may issue an interpretation of the provisions of the Ethics Law with respect to the issues identified in this letter.

Background

The CCOC is made up of fifteen members appointed by the County Executive. Eight members are residents of common ownership communities and seven are professionals associated with common ownership communities (attorneys, property managers, realtors, developers, etc.). The CCOC is responsible to act as an advisor to the County Council, the County Executive, and offices of County government on matters including: providing education to members of common ownership communities; ensuring proper establishment and operation of common ownership communities; reducing the number and divisiveness of disputes by offering informal resolution of disputes or formal hearings; assisting the development of policy supporting these communities; and preventing potential public financial liability for repair or replacement of common ownership community facilities.

The CCOC has jurisdiction to handle disputes between two or more parties involving: (1) the authority of a governing body, under any law or association document, to (a) require any person to take any action, or not to take any action, involving a unit; (b) require any person to pay a fee, fine or assessment; (c) spend association funds; or (d) alter or add to a common area or element; or (2) the failure of a governing body, when required by law or an association document, to (a) properly conduct an election; (b) give adequate notice of a meeting or other action; (c) properly

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Letter to the Montgomery County Ethics Commission
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conduct a meeting; (d) properly adopt a budget or rule; (e) maintain or audit books and records; or (f) allow inspection of books and records.¹

Section 10B-12(a) of the Montgomery County Code requires the CCOC to convene a three-member panel to hear a dispute and Section 10B-12(b) directs the CCOC to choose a resident and a professional CCOC member to fill two of the positions on the panel and to designate the third member from a list of volunteer arbitrators trained or experienced in common ownership issues.

The CCOC's Panel Chair Guidelines, adopted on September 2, 1998, call for the CCOC's hearing panels to have attorneys experienced in common ownership issues as the panel chairs. (See Exhibit 1.) One reason for this is that most commissioners are not lawyers, and most of the lawyers who have served on the CCOC do not practice community association law. The CCOC maintains a list of volunteer panel chairs on its website. The panel chairs are appointed by the CCOC for two-year terms and can be reappointed for subsequent two-year terms. To be considered by the CCOC for appointment a prospective panel chair submits a letter describing his or her relevant experience and a resume. The CCOC considers a panel chair's past performance in determining whether or not to reappoint him or her. Of our 16 current volunteer panel chairs, 8 practice before the CCOC and of those 8 almost all have represented both associations and individuals before the CCOC.

When a complaint is filed, CCOC staff works with the parties to set up mediation sessions to discuss informal settlements of the disputes. Most disputes are settled. If mediation is unsuccessful or declined, CCOC staff submits the complaint to the CCOC to determine whether the dispute is within the CCOC's jurisdiction. If the CCOC accepts the dispute for consideration, the chair assigns a hearing panel and initial hearing date. In some situations, the matter can be set for hearing before the Office of Zoning and Administrative Hearings (OZAH) and the OZAH hearing officer, after holding the hearing, makes a recommendation for consideration by the CCOC hearing panel assigned. The hearing panel then reviews the record and issues the final decision.

Our panel chairs understand that they cannot accept assignments if they, or the law firms to which they belong, have represented one of the parties in the past or currently represent one of the parties in another matter.

When a matter is set for hearing, a summons is sent to each party which identifies the names of the panel members and notes that a party may object to any selected panel member by notifying the CCOC within ten days and specifying the basis for the objection. (See Exhibit 2.) This advice is reiterated in the booklet we send with each summons, *How to Prepare for Your Hearing*. (Exhibit 3). The CCOC Chair will rule on any objections filed. In the approximately

¹ A dispute does not include a disagreement that involves: (1) title to any unit or any common area or element; (2) the percentage interest or vote allocable to a unit; (3) the interpretation or enforcement of any warranty; (4) the collection of an assessment validly levied against a party; or (4) the judgment or discretion of a governing body in taking or deciding not to take any legally authorized action.

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50 disputes set for hearing over the past three years, only one person has filed a request for the removal of a panel chair, and the attorneys involved both voluntarily withdrew.

To date, almost all CCOC decisions have been unanimous, and all the members of a panel participate in the making of their panel's decision. After the hearing is completed and the panel has made its decision, the panel chair drafts and circulates a decision reflecting the consensus of the panel for comment by the other panel members and the County Attorney. Once reviewed and edited as appropriate, the panel issues its final Decision and Order. Decisions issued by the CCOC's hearing panels that are appealed to the Circuit Court are rarely overturned.

In your letter you note that Section 19A-12(b) states:

Unless the Commission grants a waiver under subsection 19A-8(b), a public employee must not:

- (1) be employed by, or own more than one percent of, any business that:
 - (A) is regulated by the County agency with which the public employee is affiliated; or
 - (B) negotiates or contracts with the County agency with which the public employee is affiliated; or
- (2) hold any employment relationship that could reasonably be expected to impair the impartiality and independence of judgment of the public employee.

Status of Panel Chairs as Public Employees

You identify in your letter that a threshold question of whether volunteer panel members who serve as arbitrators on panels are "public employees." You state that the Ethics Commission believes that panel members are "public employees" as they exercise responsibility in adjudicating matters brought to the CCOC. You note that panel members have long been considered "public employees" by County Executive regulation, as they are designated as "public employees" required to file confidential financial disclosure reports pursuant to Article IV of the Public Ethics Law. We agree.

Section 19A-12(b)(1) No representation of client directly before panel

You then state that because volunteer panel members are "public employees," representation by volunteer panel members of businesses regulated by the CCOC is likely prohibited by Section 19A-12(b)(1) of the Public Ethics Law. The Ethics Commission asserts that a business with a matter before a CCOC panel is "regulated by the County agency with which the public employee is affiliated." Therefore, the Ethics Commission believes volunteer panel members are prohibited from representing businesses with a matter before a CCOC panel. We do not appoint as panel chair an attorney who represents one of the parties appearing before the panel.

As for being employed by a business regulated by the County agency, the CCOC has always viewed the attorneys that chair hearing panels as being employed by the law firms that

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compensate them for representing parties before hearing panels rather by the parties themselves. Those law firms are not businesses regulated by the CCOC. They are strictly regulated by the Maryland Court of Appeals. In the rare instance whereby a panel chair attorney is compensated directly by a community association as its employee, we believe that the exception under Section 19A-12(c)(3) would apply because panel chairs are required to file financial disclosure statements revealing their sources of income and the financial disclosure statements are placed on file with the Ethics Commission.

Section 19A-12(b)(2) impartiality and independence of judgment

You state that Section 19A-12(b)(2)'s reach is broader as "any employment relationship that could reasonably be expected to impair the impartiality and independence of judgment of the public employee" is prohibited. The Ethics Commission believes representation by panel members of clients before CCOC hearing panels that they are not currently sitting on is prohibited by 19A-12(b)(2). You identify three ways in which you believe panel chairs may be affected. We address each concern in turn.

You opine that panelists who represent clients before other panels may be able to influence the resolution of matters before other panels by resolving matters that come before them in a way that favors their clients. In support of this, you state that adjudicative bodies are frequently influenced by how similar matters were decided even without formal reliance on precedence.

We do not believe that volunteer panel chairs use their positions to influence the resolution of matters before other panels, nor have we ever been presented with evidence to the contrary. The fact that one hearing panel may be influenced by how a dispute involving similar set of facts that was resolved by a different hearing panel in an earlier case occurs independently of whether the earlier hearing panel was chaired by an attorney that represents clients before other CCOC hearing panels. Section 10B-13(e) requires each hearing panel to apply the statutes and case law that are relevant to the facts of the case. Therefore, even though a decision by one panel does not create binding precedent for other panels, if the statutes and cases cited in an earlier case are useful in resolving a similar dispute in another case, it is inevitable that the same cases and statutes will likely be relied upon in a later case. In addition, we note that beyond the panel chair, each panel is composed of two other persons representing different interests in order to achieve balance.

You also express concern that panelists who represent clients before other panels could, in theory, be influenced by the prospect of gaining clients, such as a housing association with many matters coming before the CCOC, in adjudicating matters when serving as a panelist. Again, we note that Section 10B-13(e) requires each hearing panel to apply the statutes and case law that are relevant to the facts of the case. In addition, the County's Administrative Procedures Act requires the hearing panels to issue detailed Findings of Fact and Conclusions of Law. The Findings of Fact must be supported by credible evidence in the official record or they can be reversed by the Circuit Court. The vague possibility of bias must be balanced against the need to support the decision with evidence on record and to follow the relevant statutes and judicial precedents.

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Last, noting that CCOC panels are collaborative bodies where give and take between panel members can be expected, you state that panel members appearing as attorneys before persons with whom this give and take has occurred cannot be looked at in a vacuum without regard for other potential official interactions. You state that under these circumstances, the representation of clients by CCOC panelists could be reasonably expected to impair the impartiality and independence of judgment of these public employees.

We do not believe this to be a concern. CCOC members who serve on panels have experience with their own associations, either as residents or representatives and have experience discussing issues facing associations and their residents with the full Commission. Of the 17-20 hearings we hold each year, a CCOC commissioner might serve on 2 or 3 panels.

We have reviewed the most recent 34 decisions. OZAH conducted hearings for 3 of the cases and a volunteer-panel-chair-led panel conducted hearings for the remaining 31 cases. All 3 recommendations issued by the OZAH hearing officers were in favor of the associations involved in those proceedings. The CCOC hearing panels adopted all of those recommendations.

Of the remaining 31 cases, 13 cases involved panel chairs acting as advocates for one or the other of the parties. In 12 of these cases, the attorney represented the association; in 1 the homeowner. Of these 13 cases, the parties represented by the panel chair/advocates prevailed in 4 cases, lost in 4 cases, and received split decisions in 5 cases. Of the 14 cases heard by our panels, where an association was represented by an attorney who is not a volunteer panel chair, the association prevailed in 8 cases, lost 4, and received split decisions in 2. In other words, our records do not support the supposition that panel chairs acting as professional advocates exercise undue influence compared to the disputes in which other attorneys appear before the CCOC, or compared to the results of the disputes that go to OZAH. We again note that beyond the panel chair, each panel is composed of two other persons representing different interests in order to achieve balance.

The Commission has several mechanisms in place to ensure the impartiality and independence of its panel chairs. The attached Panel Chair Guidelines, which have been in effect for 16 years require any person interested in serving as a panel chair to provide a description of his or her relevant experience in addition to submitting a resume. This provides an opportunity for the prospective panel chair to disclose any employment held prior to appointment as a panel chair. Additionally, any party with a case before the CCOC may object to any person selected to serve on a hearing panel, including a panel chair. In response to that objection, the CCOC Chair may replace that panel chair to avoid even the perception of a conflict of interest. Beyond the CCOC, attorneys are subject to the Maryland Rules of Professional Conduct, which provide very strict guidelines requiring them to avoid conflicts of interest.

As explained above, we do not believe that our current practice is in conflict with the ethics law. However if the Commission believes that further clarification is needed, we would propose the following amendment to Section 10B-12(c) of the County Code as a way to clarify the issue:

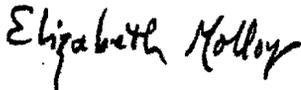
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(c) Each panelist must not have any interest in the dispute to be heard. Notwithstanding Section 19A-12, the list of volunteer arbitrators that chair panels under subsection (b) may include attorneys that represent parties before other hearing panels convened under subsection (a). However, an arbitrator must not chair a panel in which a party is represented by an attorney employed by a law firm that also employs the arbitrator.

We hope this information is useful in helping you address this issue. Until resolved we are not new assigning cases to the affected panel chairs. Even with referring some cases to the OZAH, we are concerned that the timeliness of our processing of cases will be affected by the loss of one half of our available volunteer panel chairs.

Please feel free to contact Peter Drymalski, at Peter.Drymalski@montgomerycountymd.gov or 240-777-3716, if you have additional questions.

Sincerely,



Elizabeth Molloy
Chair

Montgomery County Commission on Common-Ownership Communities

cc: Timothy Firestine, Chief Administrative Officer
Marc Hansen, County Attorney
Eric Friedman, Director of Consumer Affairs
Steve Farber, Council Administrator

PANEL CHAIR GUIDELINES

Adopted by the Montgomery County Commission on Common Ownership Communities

As amended, December 2012

The Legislative Committee of the Commission recommends, and the Commission hereby adopts, the following guidelines and procedures:

PROCEDURES FOR PANEL CHAIRS

The Committee recommends that the Commission establish internal procedures regarding the selection, terms and practices of the Panel Chairs as follows:

- A. Term: Panel Chairs should be appointed by the Commission for two-year terms. There shall be no limitations on the number of terms a Panel Chair may serve.
- B. Appointment: Each person interested in serving as a Panel Chair must submit a letter of interest describing his or her relevant experience, together with a resume. The Commission will then consider these materials at a regular monthly Commission meeting. The Commission will seek to complete appointments in September of each year, but may make appointments at any time should an interested person submit a letter and resume, and the Commission believes there is a need for additional Panel Chairs.
- C. Reappointment: Each Panel Chair seeking reappointment will notify the staff. However, any discussion of a Panel Chair's past performance will be discussed at a close meeting in order to maintain all confidences. Such closed meetings will be held in accordance with all open meetings requirements as advised by the Commission's counsel. The Commission staff will contact each panel chair at least one month before the expiration of the Panel Chair's term, to inquire whether that Panel Chair is interested in reappointment and to remind the Panel Chair of the reappointment procedures.
- D. Qualifications: Each person applying as a Panel Chair for the first time should be an attorney.

E. Decision Timetables: According to the County Code, Section 10B-13 and Section 2A-10, all panel decisions must be issued within 45 days of the hearing unless an extension is provided. The Commission is concerned that decisions are issued in a timely manner, and if possible within the 45-day time limit. Toward this end, the Commission expects that Panel Chairs and Commissioners will adhere to the following timetable when issuing decisions:

- (i) Up to 21 days for the Panel Chair to draft decision and send to other Panel Members and Staff for review (no later than day 21).
- (ii) Up to 5 days for Panel Members to send comments back to Panel Chair and Staff (no later than day 26).
- (iii) Up to 5 days for Panel Chair to consider comments, confer with Panel Members and revise draft decision (no later than day 45).
- (iv) Up to 14 days for Commission's attorney and Panel Members to review and revise draft and issue in final (no later than day 45).

These procedures are intended for internal guidance only and are not meant to be published as formal rules.

Amended December 5, 2012; September 1, 1999; adopted September 2, 1998.

EXHIBIT 2

BY REGULAR AND CERTIFIED U.S. MAIL

SUMMONS, STATEMENT OF CHARGES, AND NOTICE OF HEARING

MONTGOMERY COUNTY COMMISSION ON COMMON OWNERSHIP COMMUNITIES

In the Matter of Case No.

, 2014

TO:

At its meeting on Wednesday, , 2014, the Montgomery County Commission on Common Ownership Communities accepted jurisdiction of the above-referenced dispute. The hearing has been scheduled for Wednesday, 2014, at 6:30 p.m., in Room 225, Council Office Building, 100 Maryland Avenue, Rockville, Maryland. The Complainant, (name) alleges that the Respondent, (name), is/are in violation of the rules of the community by

This letter is official notice of the jurisdictional decision of the Commission pursuant to Montgomery County Regulation 10B.06.01.02. If you wish to submit a Request for Production of Documents or for Interrogatories pursuant to Montgomery County Regulation 10B.06.01.04(b) and (c), you must serve them upon the other party within fifteen (15) days of the date of this notice, and send a copy to the Commission. You must also submit the proposed Interrogatories to the Panel Chair for review and approval. Do not contact the Panel directly: all correspondence to the Panel should be addressed to the Commission's staff.

You are hereby notified to bring all relevant documents* concerning this dispute to the hearing.

If you would like to have individuals subpoenaed to testify at the hearing, submit your request to the Commission in writing within fifteen (15) days of the date of this correspondence. The Panel Chair will rule upon those requests.

Associations (condominium and homeowner associations and cooperatives) MUST be represented EITHER by legal counsel OR by a duly-appointed member of their board of directors; homeowners and unit owners may represent themselves or be represented by legal counsel.

In reference to the public hearing process, please be advised that Section 2A-6 of the Montgomery County Code, 1994, as amended, states in part that:

- The parties have the opportunity to present witnesses; cross-examine witnesses and present supporting documentation;
 - There are pre-hearing procedure requirements as set forth in Section 2A-7 of the Administrative Procedures Act;
 - The parties may request a continuance of the hearing by written request if made not less than five (5) days prior to the date of hearing;
 - A verbatim record and transcript of the hearing will be made where said record and transcript is required by law; or, in the alternative, that any party may request that such record of the transcription be made at his or her expense; and
 - There is a right, subject to the provision of the state public information law, to inspect and copy at the requesting party's own expense documents of any party, administrative authority or investigating governmental agency involved where such inspection is not otherwise prohibited by law.
 - Hearings are open to the public.
 - The Commission may summons any witness it deems necessary, and the failure to comply with any Summons, including this one, constitutes a violation of Chapter 10B of the Montgomery County Code (1994, as amended). The Commission may extend the time for any hearing and for the issuance of any findings, decisions and orders.
 - You must send a copy of any motion or request that you make to the Commission to the other party. Your motion or request must state that you sent the copy and the date you sent the copy to the other party.
 - Any communication you make with the staff concerning the substance of this dispute will be shared with the other party.
- Although it is not required, each party is strongly encouraged to limit the presentation of its case or defense to one hour or shorter.

Enclosed is a copy of the original complaint form, and at or before the public hearing, the staff will send you a computer link to the digital copy of the case file containing the proposed documents to be entered into the record. (This will be called Commission Exhibit 1.) If you intend to enter into evidence any documents not already included in Commission Exhibit 1, please bring a total of six (6) copies of each such document so that the other party and three panel members can each receive a copy.

The hearing panelists are (names), Commissioners, and (name) will be the Panel Chair. If you object to any selected panel member, you must notify this office, in writing, within ten (10) days from the date of this letter. You must address your objection to Elizabeth Molloy, Chairperson, Commission on Common Ownership Communities, 100 Maryland Avenue, Room 330, Rockville, Maryland 20850, and must specify the basis for the objection and send a copy of your objection to the parties to the dispute. The Commission Chairperson will rule upon any such objections.

Sincerely,

Peter Drymalski
Commission Staff

Encl: sent by certified mail only, extra copies available on request:
complaint

Preparing for Your Commission on Common Ownership Communities Hearing
Chapter 10B, Montgomery County Code and Executive Regulation 10B.06.01

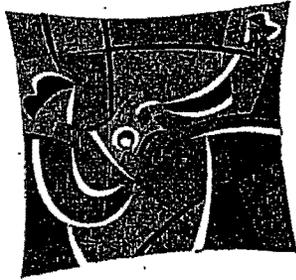
Certificate of Service

I certify that on (date), 2014, I mailed a copy of this Summons and Notice of Hearing to Complainant/Respondent at the address above by regular First-Class U.S. Mail and by certified First-Class U.S. Mail.

Peter Drymalski, Investigator
Office of Consumer Protection
100 Maryland Avenue, Room 330
Rockville, Maryland 20850

* What documents are relevant will depend on the specific complaint and the defenses to it. Some examples are: 1. in a dispute over whether the homeowner is in violation of an architectural rule, then relevant documents include notices of violation, rulings of the board and architectural committee, photographs, and copies of the rules allegedly violated. 2. in a dispute over official actions taken by a board of directors, relevant documents include copies of the by-laws and covenants, meeting agendas, minutes of the meetings, correspondence and notices.

1. THE SUMMONS



The hearing process begins when the CCOC votes to accept a dispute and refer it to a hearing panel. The CCOC staff then issues a *Summons and Statement of Charges*. The *summons* is an order from the CCOC to both parties to come to a hearing and to bring relevant documents with them.

The summons contains important information, including:

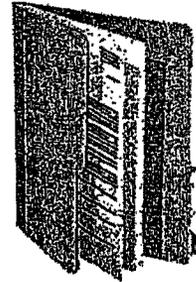
- The date and place of the hearing;
- the issues to be resolved at the hearing;
- * • the names of the 3 members of the hearing panel; *
- * • the right to object to a panel member for good cause; *
- the right to conduct discovery (see below);
- the right to request subpoenas;
- Other rights under the County's Administrative Procedures Act.

Read the summons carefully, and use it to begin planning for your hearing.

The summons comes with a copy of the original complaint form and copies of County Code Chapter 10B and Code of Montgomery County Regulation (COMCOR) Section 10B.06.01. Read these also. The Regulation gives you detailed information about what happens during the hearing process.

2. COMMISSION EXHIBIT 1

In order to make it easier for both parties to prepare for the hearing, and to simplify the record, the CCOC prepares an official record of the case called Commission Exhibit One ("CE1"). The staff prepares CE1 as soon as it issues the summons, and this file contains the history of the dispute up to the date of the summons in



chronological order, beginning with the filing of the complaint. It includes the complaint, the answer, relevant documents filed by the parties, the governing documents of the association, official documents drafted by the staff during the case, and other information which the staff believes is relevant to the dispute. When CE1 is ready the staff posts it online for the use of the parties and the

hearing panel. (Access to the file is protected by a password, which the staff provides only to the parties and the panel.)

At the hearing, the panel chair will introduce CE1 into evidence. The parties can then object for good cause to any document contained in CE1. Likewise, the parties can introduce into evidence, as part of their own case presentations, any documents which are not already part of CE1. A party who wishes to introduce new documents, not already part of CE1, must bring 5 copies of each such documents to the hearing for the official record and for the use of the hearing panel and the other party.

Both parties can use CE1 as part of their own cases simply by referring to the proper page number of CE1. This way, the parties do not have to bring numerous documents to the hearing.

The staff sends the link to the online copy of CE1 several weeks before the hearing. Take the time to review it carefully and



MONTGOMERY COUNTY ETHICS COMMISSION

Kenita V. Barrow
Chair

Mark L. Greenblatt
Vice Chair

April 10, 2014

Elizabeth Molloy
Chair
Commission on Common Ownership Communities
c/o The Montgomery County Office of Consumer Protection
100 Maryland Ave, Suite 300
Rockville, MD 20850

Dear Ms. Malloy:

Thank you for your letter of April 4, 2014, responding to the Ethics Commission's (MCEC) letter of February 4, 2014. The MCEC considered your letter at its Public Meeting held on April 8. The MCEC appreciates the thoughtful consideration of the Commission on Common Ownership Communities ("CCOC") to the issues raised by the MCEC and, furthermore, the interim steps taken by the CCOC to address the concerns raised by the MCEC. In particular, the MCEC recognizes the step taken to stop assigning new cases to panel chairs who represent parties before other CCOC panels pending resolution of the issues raised by the MCEC.

After considering your letter, the MCEC issues this guidance which interprets Chapter 19A of the Montgomery County Code.

The MCEC has been notified, informally and in writing, by unrelated parties of potential conflict of interest concerns related to hearings convened by the Chair of the CCOC. Panel chairs appointed by the Chair of the CCOC can represent clients before CCOC panels to which they have not been assigned. After consideration of the applicable laws, the MCEC concludes that representation of clients by CCOC panel chairs before the CCOC is inconsistent with the Montgomery County Public Ethics Law, Chapter 19A.

In accordance with Chapter 10B of the Montgomery County Code, the CCOC has established a list of volunteer panelists made up of persons who are "trained or experienced in common ownership community issues." The list of volunteer panelists is almost exclusively comprised of lawyers who practice in Montgomery County. Many of these lawyers represent clients in matters involving communities of common ownership and advertise that they represent homeowners associations and residential condominium associations. Your letter indicates that in 12 of 13 recent cases involving panel chairs acting as attorneys for a party before a CCOC panel,

Montgomery County Ethics Commission

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the panel chair/attorney represented the homeowners association. In just one of the cases, the panel chair/attorney represented the homeowner.

Section 19A-12 provides specific limitations on the activities of “public employees”:

(b) *Specific restrictions.* Unless the Commission grants a waiver under subsection 19A-8(b), a public employee must not:

(1) be employed by, or own more than one percent of, any business that:

(A) is regulated by the County agency with which the public employee is affiliated; or

(B) negotiates or contracts with the County agency with which the public employee is affiliated; or

(2) hold any employment relationship that could reasonably be expected to impair the impartiality and independence of judgment of the public employee.

A threshold question is whether volunteer panel members who serve as arbitrators on panels are “public employees.” The MCEC concludes that panel members are “public employees” as they exercise responsibility in adjudicating matters brought to the CCOC. Your letter indicates that you agree with this conclusion.

Because volunteer panel members are “public employees,” volunteer panel members may not be employed by businesses regulated by the CCOC pursuant to Section 19A-12(b)(1) of the Public Ethics Law. Your letter suggests that attorneys representing clients before the CCOC are not “employed by” their clients, but are employed by, in the typical case, a law firm; you believe the 19A-12(b)(1) restriction does not apply because the CCOC does not regulate law firms.¹ The MCEC concludes that the panel chairs are “employed by” the clients they represent before the CCOC for purposes of this guidance. 19A-4(f) defines “employer” as meaning “any person who pays or agrees to pay compensation for services rendered.” A client who pays for legal services is an employer, and for purposes of 19A-12(b)(1), the lawyer who provides the legal services for that client is deemed to be “employed by” that client. In addition, the MCEC concludes that a

¹ Your letter states “the CCOC has always viewed the attorneys that chair hearing panels as being employed by the law firms that compensate them . . . rather than by the parties themselves.” This position is belied by the 1994 MCEC opinion addressing an application for a waiver of section 19A-12(b) for a CCOC Commissioner seeking to engage in representation of an HOA before a CCOC panel. The HOA client (and not simply the attorney’s law practice) was considered to be the “employer” as 19A-12(b) was deemed to apply.

Notably, the MCEC’s Advisory Opinion 1994-7 stated that the MCEC would not issue a waiver of the prohibition of Section 19A-12(b) to the member of the CCOC because the statutory waiver standard could not be met. The opinion observes the “actual conflict that would occur in the event that the decision of the COCOC were appealed to the Circuit Court. Upon appeal, if you were to continue your representation, you would be taking a position adverse to the COCOC and the County, which creates an actual conflict of interest”

business with a matter before a CCOC panel is “regulated by the County agency with which the public employee is affiliated.” Therefore, the MCEC concludes that volunteer panel members are prohibited from compensated representation of businesses with a matter before a CCOC panel.

Section 19A-12(b)(1)’s prohibition only extends to outside employment by businesses. Section 19A-12(b)(2)’s reach is broader as “any employment relationship that could reasonably be expected to impair the impartiality and independence of judgment of the public employee” is prohibited. The MCEC concludes representation by panel members of clients before CCOC hearing panels that they are not currently sitting on is prohibited by 19A-12(b)(2). Panelists who represent clients before other panels may be able to influence the resolution of matters before other panels by resolving matters that come before them in a way that favors their clients: adjudicative bodies are frequently influenced by how similar matters were decided even without formal reliance on precedence.² Also, panelists who represent clients before other panels could, in theory, be influenced by the prospect of gaining clients, such as a housing association with many matters coming before the CCOC, in adjudicating matters when serving as a panelist. Lastly, CCOC panels are collaborative bodies where give and take between panel members can be expected. Panel members appearing as attorneys before persons with whom this give and take has occurred cannot be looked at in a vacuum without regard for other potential official interactions. Under these circumstances, the representation of clients by CCOC panelists could be reasonably expected to impair the impartiality and independence of judgment of these public employees. The MCEC is cognizant of the facts and arguments iterated in your letter supporting your opinion that conflicts of interest are addressed and do not present an issue in connection with CCOC panels’ operations. Nonetheless, the MCEC has received four separate sets of allegations that the process employed by the CCOC seems unfair. In light of the construct of the County’s Public Ethics Law, the MCEC agrees that the relationships involved could be reasonably expected to impair the impartiality and independence of judgment of these public employees. The MCEC wishes to make clear that it is not aware of any impaired judgment of any individual in connection with a particular CCOC panel decision – a finding that there is a reasonable expectation of an impairment of judgment due to an institutional and systemic approach is different from making a finding that an impairment has occurred in an individual case. Moreover, the MCEC recognizes that the volunteer panelists affected by this opinion have offered their services to the County pursuant to a regimen established by others.

The MCEC realizes that it may well have been the expectation, when the CCOC authorizing legislation was enacted, that the volunteer panel chairs would include lawyers practicing before other CCOC panels. However, neither the CCOC authorizing legislation nor the Public Ethics

² “Although the rulings of the hearing panels are not binding on other hearing panels in different cases (they are, however, binding on the parties to the case resolved by the rulings), the panels’ explanations of the laws and the legal principles are a valuable source of information for those who seek guidance on the problems facing them as members or directors of the County’s community associations.” The CCOC Staff’s GUIDE TO THE PROCEDURES AND DECISIONS of the MONTGOMERY COUNTY COMMISSION ON COMMON OWNERSHIP COMMUNITIES, November 2012.

Law included a provision that provide an exception for the CCOC panels from the requirements of the Public Ethics Law.

At its April 8, 2014, meeting the MCEC considered the amendment to Section 10B-12(c) suggested in your letter. The MCEC agrees that the amendment would resolve the inconsistency between the CCOC's practices as regards panel chairs representing clients before other panel chairs and current County law; but, the MCEC does not support this proposal as, in the MCEC's view, representation by panel chairs of clients before other CCOC panels inherently raises an appearance of a conflict of interest, whether it has been made legal or otherwise.

Should you have any questions, please refer them to Robert Cobb, Counsel to the MCEC at 240-777-6674.

Sincerely,



Kenita Barrow
Chair
Montgomery County Ethics Commission

cc: Craig Rice, Council President
Isiah Leggett, County Executive
Timothy Firestine, Chief Administrative Officer
Marc Hansen, County Attorney
Eric Friedman, Director of Consumer Protection
Steve Farber, Council Administrator



MONTGOMERY COUNTY ETHICS COMMISSION

Kenita V. Barrow
Chair

Mark L. Greenblatt
Vice Chair

August 21, 2015

Advisory Opinion 15-08-011

Rand Fishbein, Ph.D.
Chair, Commission on Common Ownership Communities

This is in response to your letter of July 9, 2015, requesting, on behalf of the Commission on Common Ownership Communities (CCOC), among other things, a waiver of restrictions on outside employment as those restrictions apply to volunteer Panel Chairs of the CCOC in quasi-judicial hearings of the CCOC. In particular, the CCOC has requested that the Ethics Commission:

1. Approve new CCOC Ethical Standards for Hearing Officers on CCOC Panels.
2. Approve a new CCOC Conflict of Interest Disclosure form for attorneys who practice before the CCOC Hearing Panels.
3. Approve a Litigant Consent Form permitting parties, by mutual consent, to permit an attorney who practices before the Commission to serve as a Panel Chair in their case.
4. Grant a class waiver under Section 19A-8 of the County Code for attorneys who practice before the CCOC so they may also act as Panel Chairs without being in violation of 19A-12(b).

The request of the CCOC is made in the context of the Ethics Commission's issuance of "**Guidance on Representation of Clients before the Commission on Common Ownership Communities by CCOC Panel Chairs**" on April 10, 2014. That guidance found that representation by volunteer panel members of clients before CCOC hearing panels that they are not currently sitting on is prohibited by 19A-12(b)(2) of the Montgomery County Public Ethics Law.

The Ethics Commission has closely reviewed the requests in your July 9 letter with particular focus on the request for a waiver; the Commission has considered the presentations you and other representatives of the CCOC made at the Ethics Commission's public meetings on June 17 and July 21 of this year; and the Commission is appreciative of the extensive thought and effort that the CCOC has given to ensuring

MONTGOMERY COUNTY ETHICS COMMISSION

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that CCOC hearing panels operate in a manner that is balanced and fair. After considerable thought and deliberation, however, the Commission denies the request for a waiver from the application of 19A-12(b)(2) to volunteer Panel Chairs with regard to their private representation of parties to CCOC hearing panels. The Commission believes the practice the CCOC would like waived is inherently inconsistent with the County's ethics law; if the practice is to be authorized, it must be authorized by County legislation.

As the Commission is not issuing a waiver, the request for approval of a consent is moot. As for the requested approvals for new Standards and Disclosure Form, the Commission is not statutorily authorized to "approve" supplemental standards of conduct for other agencies in County government. Presumably, as there is no statutory authority for the issuance of such standards, the standards would not have the force and effect of law. The Commission is authorized to issue regulations under the procedure associated with method (2) under County law, but only to implement the Public Ethics Law; there is no suggestion of implementing the proposed Standards as regulations under method (2). This said, the Ethics Commission is not opposed to the issuance of internal guidance by a County agency, as long as the standards are not inconsistent with the County's ethics laws or other law. The Commission notes that in the draft Standards you presented there is no reference to or summary of applicable County law on the subjects of conflict of interest as regards personal financial interests, outside employment activities, and post-employment activities, or with respect to disclosure of confidential information, ex parte communications, soliciting and acceptance of gifts, political activities and financial disclosure. These are the requirements covered by County law the violation of which can be addressed through civil and criminal sanction. The Commission believes there would be substantial opportunity for confusion among volunteer panel chairs who might conclude that the Standards you have proposed are the primary rules addressing their conduct to the exclusion of applicable law.

Waiver Request

The waiver standard applicable to the CCOC's request for a waiver of 19A-12(b) is found in 19A-8(b).

19A-8(b) provides:

- (b) After receiving a written request, the Commission may waive the prohibitions of subsection 19A-12(b) if it finds that:
 - (1) the waiver is needed to ensure that competent services to the County are timely and available;
 - (2) failing to grant the waiver may reduce the ability of the County to hire or retain highly qualified public employees; or
 - (3) the proposed employment is not likely to create an actual conflict of interest.

The Ethics Commission's decision whether to grant a waiver pursuant to 19A-8(b) is inherently discretionary.

The CCOC has provided information supporting the notion that a waiver is needed to bring on competent persons to perform the position of panel chairs. Representations have been made by the CCOC that recruiting competent professionals (without the 19A-12(b)(2) conflict) to perform the requested services has been very difficult; the CCOC has also indicated that obtaining retired members of the judiciary (one alternative that has been considered) is very difficult. The CCOC has vigorously expressed that the waiver is needed to ensure competent services to the CCOC. To the same extent, the CCOC has indicated that its ability to operate the CCOC hearing panels has been severely impaired by the Ethics Commission April 2014 guidance.

In the view of the CCOC, its panel chairs do not have an actual conflict of interest in representing parties before other panels. The CCOC contends that the high bar of professional ethics for Maryland lawyers and the idea that said lawyers are not going to compromise either their ethics or their careers to advance personal interests ahead of the duties and roles they have as Panel Chairs protects the integrity of the CCOC process and ensures the integrity of those serving as panel chairs.¹ Furthermore, the CCOC has expressed that the additional steps taken (including the new CCOC Ethical Standards for Hearing Officers on CCOC Panels, the new CCOC Conflict of Interest Disclosure form for attorneys who practice before the CCOC Hearing Panels, and the new Litigant Consent Form) would all serve to further protect the CCOC hearing panel process from actual conflicts of interest.

Notwithstanding the positions taken by the CCOC, the Ethics Commission is not inclined to exercise its discretion to issue a waiver of the requirements of 19A-12(b)(2). The Ethics Commission April 2014 guidance made clear the Commission believed “representation of clients by CCOC panel chairs before the CCOC is inconsistent with the Montgomery County Public Ethics Law, Chapter 19A.” The Commission described the activities of Panel Chairs as lawyers for parties before CCOC panels in terms of the relative balance of representation of homeowners versus residential associations:

The list of volunteer panelists is almost exclusively comprised of lawyers who practice in Montgomery County. Many of these lawyers represent clients in matters involving communities of common ownership and advertise that they represent homeowners associations and residential condominium associations. Your letter [letter from Elizabeth Malloy to Kenita Barrow dated April 4, 2014] indicates that in 12 of 13 recent cases involving panel chairs acting as attorneys for a party before a CCOC panel, the panel chair/attorney represented the homeowners association. In just one of the cases, the panel chair/attorney represented the homeowner.

¹ The CCOC provided no support for this assertion. Such support may have included the volunteer attorney panel chairs seeking an opinion of the Maryland State Bar Association on the propriety of representing clients before the quasi-judicial agency for which the same attorneys serve as panel chairs.

This imbalance of representation evidenced concerns that institutional biases (rather than any intentional act) would influence the adjudicative process. These concerns were identified in the Ethics Commission guidance as follows:

1. Panelists who represent clients before other panels may be able to influence the resolution of matters before other panels by resolving matters that come before them in a way that favors their clients: adjudicative bodies are frequently influenced by how similar matters were decided even without formal reliance on precedence.
2. Panelists who represent clients before other panels could, in theory, be influenced by the prospect of gaining clients, such as a housing association with many matters coming before the CCOC, in adjudicating matters when serving as a panelist.
3. CCOC panels are collaborative bodies where give and take between panel members can be expected. Panel members appearing as attorneys before persons with whom this give and take has occurred cannot be looked at in a vacuum without regard for other potential official interactions. Under these circumstances, the representation of clients by CCOC panelists could be reasonably expected to impair the impartiality and independence of judgment of these public employees.

In consideration of whether a waiver should issue, the Commission addresses each of these concerns with reference to the Council "findings" in the CCOC's enabling legislation:

The Council finds that there is often unequal bargaining power between governing bodies, owners, and residents of homeowners' associations, residential condominiums, and cooperative housing projects. . . . Owners and residents in common ownership communities require the protection of democratic governance. In furtherance of this goal, the Council finds a need to regulate . . . resolution of disputes with adequate due process protections. . . .

1. Potential for Resolving Matters In Ways That Will Benefit Clients

The proposed solutions do not materially address the concern that Panel Chairs will be institutionally biased to decide matters in a way that creates precedence in a manner that may favor the persons they represent contemporaneously and in the future. There is some legitimacy to questioning the level of this risk: the CCOC hearing decisions are not required to be precedential, so a hearing panel that considers a subsequent "Case B" that is similar to "Case A" that was previously adjudicated by an attorney/Panel Chair representing a party in Case B will not be bound by the Case A decision. In addition, one might question whether facts in two cases would be sufficiently similar to even consider whether the Case B decision could influence the decision in Case A. Accordingly, the attorney who was the Panel Chair in Case A would be unlikely to be tempted to rule in Case A in a way that would favor a client in a future Case B. On the other hand, the

institutional bias created in a person's representing and arguing on behalf of clients who are predominantly on one side of a set of issues could reasonably be expected to influence that person's perspective in cases where that person intends to be a neutral adjudicator of issues. Would a defendant in a criminal matter want to have his case judged by a current prosecutor? Would a prosecutor want a prosecution decided by a judge who currently handles only criminal defense work?

2. Spector of Gaining Clients, Particularly Housing Associations

The County's ethics law prohibits public employees from using the prestige of office for private gain (19A-14) and more specifically being hired by persons with business before the public employee's agency.

In theory, attorneys volunteering to be Panel Chairs who represent parties back to the CCOC Panels could be motivated by the prospect of handling themselves in a manner that is conducive to gaining clients. It is noteworthy that housing associations are likely to have a much greater need for legal services than an individual homeowner and would be more attractive for this reason to have as clients. Noting also, the reported prevalence of panel chairs representing housing associations (as they did in 12 of 13 cases as mentioned above), it seems that panel chairs would have an economic incentive to act in such a way as to not offend the panel chair's professional interests in representing housing associations. This creates an institutional bias toward favoring housing associations.²

We note each chair would be required by the CCOC's Standards to avoid circumstances creating "a perceived or actual conflict of interest." The Commission also observes that various mechanisms, such as requirements in terms of completing matters a certain time before being appointed a panel chair or beginning a new representation before a CCOC panel might tend towards addressing the theoretical issue of panel chairs trying to advance their professional interests through being a panel chair, but the Ethics Commission believes the ethics law, for good reason, does not allow public employees to try to advance their private interests through the conduct of their official positions.

3. Panel Members as Insiders Whose Relationships with other Insiders May Suggest a Process Imbalance

There is no way to avoid the appearance of incremental advantage that accrues from being a "person inside the tent". This appearance exists when a CCOC panel volunteer represents a party before a CCOC panel. Creating temporal separation that separates a volunteer Panel Chair from their role as practicing attorney for clients before CCOC panels could assist with the appearance issues but not eliminate them. To the

² The statistics reported in Ms. Malloy's letter of April 4, 2014, regarding case outcomes suggest that no bias has actually occurred; however, the sample of cases is small and the variables associated with the cases could explain the results. The framework desired by the CCOC promotes institutional bias whereas the CCOC mandate is towards a leveling of bargaining power for residents.

Commission, representing parties before colleagues will always create an appearance of gaining an advantage in an adjudicative process.

The Ethics Commission believes the representation of clients by public employees to the very body the public employees serve by deciding similar cases is inherently conflicting, and not appropriate for a waiver.

Lack of Suitability of a Class Waiver

At the public Ethics Commission meeting on June 17, representatives of the CCOC told the Ethics Commission that volunteer Panel Chairs who would be representing parties before CCOC hearing panels frequently represent both residents and homeowners associations.³ The Ethics Commission believes that while analyzing the make-up of represented clients is helpful in assessing the overall degree of institutional imbalance evidenced by the panel chairs representing clients before CCOC panels, it is not dispositive as to individual panel chairs, which is important in the consideration of the issuance of a class waiver. If some panel chairs represented only homeowner associations as opposed to both homeowner associations and homeowners, any rationale that there was balance to representative activity by panel chairs in general would fail as to those panel members.

Notwithstanding the great effort to establish systems to protect litigants through additional ethics rigor, policies, and consents, the waiver the CCOC requests would allow panel chairs whose business is representing homeowners associations to sit in judgment of disputes between homeowners and homeowners associations. This strikes the Commission as a fundamentally flawed construct for a class waiver.⁴

For the reasons stated, the Ethics Commission declines to issue the requested waiver. The Commission is hopeful that the effort the CCOC has put into managing its processes to ensure the equality and fairness in CCOC proceedings have been of benefit notwithstanding the Commission's unwillingness to grant the requested waiver. The Commission also appreciates the considerations that the CCOC has shown to the Commission in the addressing of this difficult issue.

For the Commission:



Kenita V. Barrow, Chair

³ This representation is difficult to reconcile with the statistics reported in the Malloy letter (12 of 13 recent instances involved the representation of homeowners associations by attorneys who were volunteer panel chairs).

⁴ The lack of suitability for a class waiver does not stand as encouragement for the application for the issuance of individual waivers. The three enumerated concerns above would also be present in the consideration of an individual waiver, even where an individual could demonstrate that the individual represented both residents and homeowner associations.