

**MEMORANDUM**

April 1, 2016

TO: County Council

FROM: Josh Hamlin, Legislative Attorney 

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

**Planning, Housing and Economic Development/Public Safety Committee worksession recommendation (6-0): Enact Bill 50-15 with amendments.**

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 public hearing was held on January 21, 2016, and a joint Planning, Housing and Economic Development/Public Safety Committee worksession was held on March 10.

As introduced, 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).

The PHED/PS Committee recommended enactment of the Bill (6-0) with the following amendments:

- (1) change the requirement that the Director of DHCA attempt to resolve disputes “through mediation” to “through informal negotiation including, in the Director’s discretion, mediation” (6-0);

- (2) delete all language in the Bill changing the composition of the CCOC and its hearing panels (6-0);
- (3) add language prohibiting volunteer panel chairs from representing any parties in disputes before other CCOC hearing panels (6-0); and
- (4) add language to require all CCOC members to complete the training required of common ownership community board members, and training in the State and local laws on matters within the jurisdiction of the CCOC (6-0).

## **Background**

### ***A [very] brief history of the Commission on Common Ownership Communities<sup>1</sup>***

The genesis of the Commission on Common Ownership Communities (CCOC) was a Task Force created by the County Council in 1987 to consider the issues facing homeowners associations, condominium associations, and housing cooperatives (collectively, common ownership communities, or COCs).<sup>2</sup> In 1989, the Task Force issued its Report containing several recommendations, including the establishment of the CCOC. The CCOC was established in 1991 by Bill 42-89, and charged with advising the County government on, among other things, how to ensure proper establishment and operation of COCs, the promotion of education and understanding of the rights and obligations of living in a COC, and reducing the number and divisiveness of disputes. The CCOC was also empowered to hear and resolve certain disputes between and among COCs, unit owners, and unit occupants.<sup>3</sup> The number of County residents living in COCs dramatically in the 1990s, now numbering approximately 340,000 according to the OLO report. The fact that over a third of County residents now live in a COC demonstrates the importance of the CCOC being able to function efficiently and effectively.

The CCOC operates within the County's Office of Consumer Protection (OCP), which was part of the Department of Housing and Community Affairs (DHCA) until 2005. In 2005, OCP became an independent office, and the CCOC remained within it.<sup>4</sup> The CCOC is staffed by one full-time OCP staffer, who is responsible for all CCOC-related work, including outreach, education, and dispute resolution. The CCOC has always been part of a County agency, first DCHA, and currently OCP. It has not ever been an independent entity.<sup>5</sup>

The CCOC itself has 15 members who are appointed by the County Executive and confirmed by the County Council for three year terms. Of these members, eight are residents of COCs, and seven are professionals whose work is associated with COCs, such as developers, real estate professionals, attorneys, community managers, and the like. At least one of the "professional" members must be a community association manager. The current membership list

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<sup>1</sup> For a more comprehensive look at the history, structure, and functions of the CCOC, see the March 10, 2015 Office of Legislative Oversight report, "An Evaluation of the Commission on Common Ownership Communities" at: [http://www.montgomerycountymd.gov/OLO/Resources/Files/2015\\_Reports/OLOReport2015-8CommissiononCommonOwnershipCommunities.pdf](http://www.montgomerycountymd.gov/OLO/Resources/Files/2015_Reports/OLOReport2015-8CommissiononCommonOwnershipCommunities.pdf)

<sup>2</sup> There are three types of Common Ownership Communities: homeowners associations, condominiums, and housing cooperatives.

<sup>3</sup> "Dispute" is comprehensively defined in § 10B-8(4) (see ©16).

<sup>4</sup> See 2005 L.M.C., ch. 26

<sup>5</sup> CCOC leadership and some other speakers at the public hearing have asserted that the CCOC *should be* an independent County entity.

is at ©15, and indicates that there are five vacancies, four of which have occurred fairly recently. One of the vacancies was created by the expiration of a term in early 2015. Three professional members resigned in November of 2015, and one resident member resigned in February of this year. All but the most recent vacancy have been advertised, with the early 2015 vacancy being advertised three times.

The sole source of revenue for the CCOC is the association fee of \$3 per property unit. The fee is collected as part of the annual registration process under § 10B-7. The annual registration and collection of registration fees is performed by DCHA, and the amount of the fee is set by regulation<sup>6</sup> under § 10B-7(b). According to the OLO report, the fee generated \$408,770 in FY2014. The CCOC's actual expenditures in FY2014 were \$410,684, which includes both personnel and operating expenses for OCP and DHCA.<sup>7</sup>

### ***Laws governing Common Ownership Communities***

There are a number of laws, both State and County, governing, or applicable to, the operation of COCs. There are separate titles of the Real Property Article of the Maryland Code governing homeowners associations (HOAs), condominiums, and housing cooperatives. In addition to these specific provisions, State law permits a director or officer of an HOA, condominium association, or cooperative to represent the COC in a hearing or other matter to resolve a dispute. The "business judgment rule" is also applicable in disputes involving COCs. The business judgment rule is a set of legal principles designed to protect the decision-making process of organizations, when the decision is made in good faith and upon a reasonable basis. County law governing COCs is in Chapter 10B of the Code; regulations adopted pursuant to Chapter 10B are in the Code of Montgomery County Regulations at Chapter 10B. These State and County laws are described in more detail in the OLO Report (see ©26-29).

### ***Key findings and recommendations of the OLO Report***

In preparing its 2015 Report, OLO interviewed numerous stakeholders, and distributed two surveys. One of the surveys sought to determine overall satisfaction with the CCOC and its services, while the other specifically sought input on the dispute resolution process. OLO received 211 responses to the first survey, which represented a 16% response rate; 76% of respondents identified as either an owner or tenant of a property in a COC, and 43% identified as a representative or board member of a COC. The second survey was targeted to 211 parties who had participated in the CCOC dispute resolution process from January 2012 through December 2014. Of this group, 56 responded; 28 of these were owners or tenants, 22 were representatives of an association, and 6 were other stakeholders.

The results of the first survey indicated a fairly high degree of familiarity with the CCOC, general satisfaction with CCOC staff, somewhat less satisfaction with available resources, and a need for more education for both associations and residents. The second survey, concerning dispute resolution, presented a somewhat more problematic picture. Two-thirds of respondents felt the information provided for filing and responding to a complaint was adequate, and that the process was easy, but nearly a third did not feel that it was easy to contact staff. Of those

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<sup>6</sup> COMCOR 10B.07.02.01

<sup>7</sup> See page 5 of the OLO Report referenced in footnote 1.

respondents who participated in mediation, just over half were satisfied with the process. Notably, 40% of the 18 respondents who participated in the CCOC hearing process reported that the hearing was not fair and impartial.

In addition to the surveys and stakeholder interviews, OLO reviewed case files for all closed cases that had been filed with the CCOC between January 23, 2012 and February 3, 2015. This review revealed that 47% of cases were resolved before mediation, 29% were resolved through mediation, 12% with a hearing, and 11% were withdrawn or dismissed for lack of jurisdiction. The average time to close a case during this period was 169 days.

From the information gathered through the surveys, interviews, and case reviews, OLO identified three specific recommendations. First, OLO recommended that the Council request that the Executive “review the CCOC’s allocation of resources and ensure that the CCOC perform all tasks mandated by Chapter 10B of the Code, including more informal dispute resolution (mediation), education, and policy work.” This recommendation generally addresses the finding that the CCOC overemphasizes formal dispute resolution at the expense of its other statutory responsibilities, and lacks the staff support to fully meet these responsibilities.

The second OLO recommendation was that the Council request that the Executive “develop an electronic case management system for all CCOC complaints and a database inventorying all relevant information regarding COCs.” This recommendation reflects the problems with the current, primarily paper-based, dispute resolution process which impairs the efficiency of both the dispute resolution process and the educational and informational functions of the CCOC. Both this and the first recommendation would likely require additional resources, both staff and fiscal, to carry out.

The third recommendation in the OLO report was that “absent significant drawbacks, including organizational capacity to absorb the CCOC, relocate the CCOC from OCP to DHCA.” In making this recommendation, OLO stated its view “that relocating the CCOC to DHCA could provide administrative and information technology resources and support that OCP simply cannot provide.” OLO noted that these additional resources would be particularly helpful if the CCOC expanded its educational and policy efforts, as OLO recommended.

### ***County Executive’s 2015 Memo and CCOC’s response***

In an October 30, 2015 memorandum to PHED Committee Chair Nancy Floreen and PS Committee Chair Marc Elrich (see ©30-33), the County Executive transmitted his recommendations to amend Chapter 10B, including the mandatory mediation, change in CCOC composition, and relocation of the CCOC to DHCA that would ultimately be embodied in Bill 50-15. The Executive also indicated an intention to increase the CCOC annual registration fee from \$3 to \$5 per unit. The additional funds would be used to improve and expand the CCOC’s functions. As mentioned above, that fee is set by regulation, and no fee increase is included in Bill 50-15.

The CCOC responded to the Executive’s recommendations by memorandum dated November 16, 2015 (see ©34-40). The CCOC expressed concern that the recommendations had been made without consultation with the CCOC itself, and recommended further discussion on the matters of mandatory mediation and altering the composition of the CCOC. The CCOC also

expressed a view that neither OCP nor DHCA was the appropriate place for the CCOC, instead believing the CCOC should be a more independent body. The CCOC addressed the Executive's recommended fee increase to open a discussion about its concerns that it has little control over the funds that are raised through the fee, due in part to the fact that 60% of the fee revenues are spent on administrative expenses. As part of this discussion, the CCOC referenced its request for certain services and information from DHCA in September 2015 (see ©41-48).

### ***Bill 50-15***

Bill 50-15 would make three distinct changes to the existing law. One of these changes, the relocation of the CCOC to DHCA, would affect all of the CCOC's operations, while the other two would specifically impact its dispute resolution function. The changes the Bill would make are:

- (1) It would move all of CCOC from the Office of Consumer Protection (OCP) into DHCA. This proposed move was prompted by the March 2015 OLO Report, which was mentioned by the Executive in his transmittal memo. In that 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 require the use of mediation to resolve complaints prior to those complaints proceeding to an administrative hearing. Under the existing law, mediation is 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 is 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 (©49-51). Most pertinent to Bill 50-15's proposed change is correspondence between the Ethics Commission and the CCOC beginning in February 2014 (©52-66), and culminating with a letter of guidance dated April 10, 2014 (©67-70). 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.

The CCOC then requested a waiver of conflict of interest restrictions on volunteer attorney panel chairs (©71-82) which was declined by the Ethics Commission (©83-88). 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.

### **Public Hearing and Correspondence**

There were 17 speakers at the January 21 public hearing on Bill 50-15. DHCA Director Clarence Snuggs spoke on behalf of the Executive (©89), and reiterated the justifications offered by the Executive in his transmittal memorandum. Director Snuggs emphasized DHCA's expertise in matters related to COCs, and synergy that would be present with DHCA's administration of both the Commission on Landlord-Tenant Affairs and the CCOC – two entities with similar organizational structures and functions. Dr. Rand Fishbein, Chair of the CCOC, conveyed the CCOC's "strenuous and united opposition" to the Bill (©90-92). Dr. Fishbein expressed concern that the "bill was conceived in secret with absolutely no consultation with the Commission." Dr. Fishbein objected to all three changes proposed in the Bill, and stated that the problems facing the CCOC are "fundamentally resource-based – not process-based." David Frager testified in opposition to the Bill on behalf of the Leisure World Board of Directors (©93-94), expressing particular concern about changing the composition of the CCOC to include at-large members, and that mandating mediation would impair the informal (pre-mediation) resolution of disputes.

Katalin Peter of the Greater Capital Area Association of Realtors (GCAAR), testified in general support of the Bill, but sought certain clarifications (©95-96). Pete Young, Vice-President of the Montgomery Village Foundation (MVF) Board of Directors expressed MVF's objections to the Bill (©97-99), both to the composition changes and the proposed mediation requirement, as well as objecting to any increase in the COC registration fee (which is not proposed in the Bill). Vicki Vergagni, President of the Board of Directors and on-site community manager of Glen Waye Gardens Condominium testified in opposition to the Bill (©100-107), requesting that the Bill be tabled pending a collaborative effort of all stakeholders to determine the best way forward. CCOC member Mark Fine echoed CCOC Chair Fishbein's assertion that the problem was one of resources, not process (©108-109). CCOC Vice-Chair Amy Winegar also spoke in opposition to the Bill (©110-111), questioning whether the five the public at-large member positions proposed in the Bill could be filled. Mitchell Farrah, representing the Washington Metropolitan Chapter Community Association Institute (WMCCAI) testified in opposition to all of the changes proposed in the Bill (©112-114).

Greg Friedman, a volunteer panel chair for the CCOC, opposed the changes in the composition of the CCOC (©115-116), saying that they would deprive the panels of necessary expertise in conducting hearings, and questioning the likelihood of filling the five proposed at-large positions. Paul Bessel, a Leisure World resident, testified in support of the Bill but recommended that the Bill be amended to require all CCOC members to receive proper training (©117-123). Dinah Stevens, another volunteer panel chair, testified in opposition to the proposed changes (©124-127), and described her experiences chairing hearing panels. Steven Muse, a resident of Fountain Hills Community Association, testified in support of the Bill (©128-130), and

illustrated the impartiality problems identified by OLO in its report. Jackie Simon testified in support of moving the CCOC to DHCA, but opposed the Bill's other proposed changes (©131-132). Condominium resident Katharine Borgogni opposed the Bill (©133), expressing particular concern about replacing volunteer panel chairs with members of the public with no particular expertise in COC matters.

Kathleen Hastings testified in general support of the Bill (©134-137), but recommended additional measures to assist homeowners in the event of a breach of a mediation agreement and the licensing of community managers. Vernard McBeth testified in support of requiring mediation prior to advancing to a hearing panel, expressed ambivalence to the relocation of the CCOC to DHCA, and supported altering the composition of the CCOC but suggested an alternative model (©138-139).

The Council received a number of pieces of correspondence concerning Bill 50-15, virtually all of it in opposition to the Bill's proposed changes (see, for example, email from Lawrence Dorney at ©140-144). The reasons offered in the correspondence for opposing the bill generally reflected those offered in the public hearing testimony. Also, the Bill was the subject of an online petition<sup>8</sup> which, as of March 7, had 240 supporters with over 90 comments.

On March 29, the CCOC submitted a memorandum dated April 5, 2016 requesting certain changes to the Bill as recommended by the PHED/PS Committee (see ©185-189). The CCOC recommended changes to existing provisions of the amended Bill including deleting the training requirements added by the Committees and amending the provisions related to mediation. Additionally, the CCOC has requested several additional changes to the Bill aimed at increasing the CCOC's independence, including greater control over budget and operational matters.

### **Issues/Committee Recommendations**

#### **1. Should the CCOC be moved into DHCA?**

The first significant change proposed in this Bill is the consolidation of all of CCOC's operations within DHCA – a move of all but its survey and fee collection functions from OCP. The 2015 OLO Report includes the specific recommendation that, “[a]bsent significant drawbacks, including the organizational capacity to absorb the Commission, relocate the Commission on Common Ownership Communities from the Office of Consumer Protection to the Department of Housing and Community Affairs.” OLO recognized that the CCOC “is not a perfect fit in any County department,” a point that has been echoed by the CCOC itself. However, in OLO's view, the size and existing administrative and technology infrastructure of DHCA could better serve the CCOC, and is certainly no less appropriate a home for the CCOC than is OCP. The Executive, in his October 30, 2015 memorandum to the PHED and PS Committee Chairs, asserted that CCOC issues are in fact more closely aligned with the work of DHCA (see ©32).

OLO's recommendation was qualified, however, by the prefatory language “absent significant drawbacks, including the organizational capacity to absorb the Commission.” This qualification, of course, raises the question of whether DHCA is capable of absorbing the Commission without compromising its ability to function. At the public hearing, there was

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<sup>8</sup> <https://www.change.org/organizations/wwwstopbill50-15com>

testimony reflecting a skepticism of this capacity. DHCA Director Clarence Snuggs testified however, that DHCA has expertise in many of the issues facing the CCOC, and that relocating the CCOC to DHCA would create greater synergy between the COC program, the CCOC, and existing housing programs provided by DHCA.

As with the other provisions of the Bill, this proposed change generated a great deal of resistance at the public hearing. Most of this opposition was grounded in a belief that DHCA would be no better a fit for the CCOC than is OCP. CCOC Chair Dr. Rand Fishbein stated concern that a move would result in the CCOC being “transformed into an advocacy voice for the County’s affordable housing program.” Absent further changes in Chapter 10B (which are not proposed in this Bill), staff does not see how the CCOC can veer too far from its statutory responsibilities and functions.

Dr. Fishbein also asserted in his testimony, as did the CCOC in its memorandum analyzing Bill 50-15 (see ©145-158), that this proposed change in Bill would give the Director of DHCA additional “pre-emptory authority to intervene, at his sole discretion, in the Commission’s quasi-judicial process.” In general, the Bill substitutes references to “the Office” (OCP) with the “Director” (DHCA). Dr. Fishbein’s objection may stem in part from this change, which is consistent with County legislative drafting convention: offices or departments don’t act other than through their officials and employees. The “Director” is the appropriate actor in this case, and may under County law delegate these responsibilities to appropriate DHCA employees. Functionally, however, the Director of DHCA is not in these instances given any more power than is currently wielded by the Director of OCP.

The CCOC memorandum analyzing the Bill does include objections to proposed changes related to the mediation of disputes (see ©152-154). In particular, the CCOC objects to provisions requiring the CCOC to dismiss a dispute if it finds “there are no reasonable grounds to conclude that a violation of applicable law or any association document has occurred,” after the Director makes the same finding (see lines 83-90 at ©5). This proposed change does not give any additional authority the designated County staff, but only removes the discretion of the CCOC to choose not to dismiss a dispute after *the CCOC finds* no reasonable grounds to continue. Also, the Bill retains the existing law’s language permitting the CCOC to order staff to investigate further, in the absence of such a finding. The CCOC retains the authority for making the finding of “no reasonable grounds,” and Council staff does not believe that there is any need for discretion over whether to dismiss once this finding has been made.

The CCOC also objects to the Bill’s provision allowing the Director to determine that “mediation would be fruitless.” (see lines 118-123 at ©6). This provision must be considered in the context of mediation being a required step in the dispute resolution process. Also, the result of such a determination by the Director is the requirement that a hearing be scheduled by the CCOC. Ultimately, this measure only ensures that time and energy is not wasted on mediation, and does not in any way divest the CCOC of hearing authority over a dispute.

Council staff agrees with the OLO recommendation, and believes that there are significant potential benefits to relocating the CCOC to DHCA. Staff also notes that one of the underlying conflicts in this matter, which is not a part of this Bill, is the accounting of funds collected as the CCOC registration fee. Currently, the CCOC is served primarily by OCP, but registration and fee collection is conducted by DHCA. Having all CCOC functions served by a single County agency

should make any answer to these underlying accounting questions easier, as all collected registration fees should be spent within that agency's budget.

**Committee recommendation (6-0):** relocate the CCOC into DHCA as proposed in the Bill.

## 2. Should mediation of disputes before the CCOC be mandatory?

According to the Executive's transmittal memo, Bill 50-15 would "make mediation a mandatory component of dispute resolution when complaints are filed with the CCOC." Specifically, the pertinent provisions of the Bill would require the Director, "after finding reasonable grounds to conclude that a violation of applicable law or an association document has occurred," to "attempt to resolve the matter through mediation" (see lines 98-101 at ©5). The Executive has stated that requiring mediation, which is currently optional, "will facilitate the prompt resolution of complaints without the formalities and costs associated with a quasi-judicial hearing" (see ©31). This objective is consistent with OLO's recommendation # 1, which would include "more informal dispute resolution (mediation)." The proposed change is illustrated in a comparison of the CCOC dispute resolution flow chart from the OLO Report (©159) and the modified flow chart incorporating mandatory mediation (©160).

There was correspondence and testimony at the public hearing objecting to this proposed change. Much of the objection to requiring mediation was due to a concern that under the *existing system*, nearly half of disputes are resolved informally prior to mediation.<sup>9</sup> Opponents of the proposed change expressed concern that requiring mediation might discourage parties from attempting to resolve disputes informally, thereby having the effect of making the dispute resolution process *less* efficient. Dr. Fishbein of the CCOC articulated this view in his testimony (see ©91), as did the CCOC in its memorandum (see ©152-154).

The OLO Report provides some important context to the consideration of this issue. As described above, OLO examined the case files of 178 CCOC cases closed between 2012 and early 2015.<sup>10</sup> It found that 47% of these cases were resolved before mediation, 29% were resolved through mediation, 12% with a hearing, and 11% were withdrawn or dismissed for lack of jurisdiction. These numbers seem to bear out the assertion by the CCOC that it is committed to the informal resolution of cases, including through *voluntary* mediation. It also illustrates that, assuming the purpose of the proposed change is to reduce the number of disputes requiring a hearing, the room for improvement is relatively small (12% of disputes). The concern that an inflexible mediation mandate may have an effect the opposite of that intended, as well as the fact that there is relatively little room for improvement, seems to indicate that caution is warranted in making changes to the process is warranted.

It is also important to understand that the changes proposed in Bill 50-15 would only make mediation a necessary step prior to resolution by a hearing panel, and would not on their face preclude parties from resolving the matter prior to mediation (as did the parties in 47% of the cases that OLO examined). Finally, it should be noted that nothing in the current law impairs the ability

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<sup>9</sup> In its 2015 Report, OLO found that 47% of the 178 closed cases examined were resolved *prior to* mediation.

<sup>10</sup> The fact that open cases could not be reviewed, and the lack of electronic case tracking records are acknowledged weaknesses of this data.

of the parties to engage in voluntary mediation, but neither does it direct staff to attempt informal resolution.<sup>11</sup>

A four-month summary of CCOC complaints, submitted by OCP (see ©180-184), shows the status of all complaints received by the CCOC between October 1, 2015 and January 31, 2016. The summary shows that 20 complaints were submitted in that time period, of which 10 have been resolved through mediation or staff facilitating communication between the parties. Nine complaints are currently scheduled for mediation, and one is scheduled for an administrative hearing. The summary seems to support the idea that the vast majority of complaints can be resolved without the need for an administrative hearing, and supports Bill 50-15's proposed requirement in the law that informal resolution be attempted prior to an administrative hearing.

The Committee recognized that an emphasis on informal resolution disputes is consistent with the CCOC's founding principles, but also appreciated the possibility that an inflexible mediation requirement may result in fewer cases being resolved prior to mediation. This may result in a greater administrative burden and longer resolution time for cases that might have otherwise been resolved before mediation. A more flexible requirement that *informal resolution*, which may include mediation, be attempted before a dispute proceeds to the hearing process, would likely help ensure that cases that would otherwise be resolved prior to mediation continue to be so resolved.

Under this approach, parties would still be required to attend a mediation conference if scheduled by the Director, but the Director would be able to exercise discretion in scheduling such mediation, within the confines to the more general requirement to attempt informal resolution. This would also be consistent with the provision of the Bill mentioned earlier that would allow the Director to make a determination that mediation is fruitless, and would not require the administrative burden and delay that required scheduling such a dispute for mediation would entail.

**Committee recommendation (6-0):** amend lines 128-132 of the Bill as follows:

- (c) [Any party may request mediation.] If the Director, after reviewing a dispute and any investigation, finds reasonable grounds to conclude that a violation of applicable law or an association document has occurred, the Director must attempt to resolve the matter through informal negotiation including, in the Director's discretion, mediation.

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**3. Should the composition of the CCOC, and its hearing panels, be altered?**

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<sup>11</sup> COMCOR 10B.06.01.01 does provide that “[m]ediation may be requested by the Complainant or Respondent at any time, or may be recommended by the Staff at any time, or may be recommended, ordered or terminated by the Hearing Panel or Panel Chairperson at a Prehearing Conference.”

The component of Bill 50-15 that has generated the most resistance in correspondence and public hearing testimony is the proposed change to the composition of the CCOC and its three-person hearing panels. The proposed change in the composition of the CCOC proposes to solve this problem of lack of impartiality by eliminating the use of the volunteer panel chairs altogether, and providing that CCOC membership consists of 15 members, with five from each of three member groups: owners/residents, professionals/managers, and members of the public at-large that are not from the first two groups (see lines 23-38 at ©2-3). Under the Bill, hearing panels would now be composed of one member from each of the member groups, and chaired by a member designated by the CCOC Chair (see lines 132-141 at ©7).

The root of this proposed change is a determination by the County Ethics Commission that the use of attorneys who practice before the CCOC as non-member, volunteer panel chairs under the existing law represented a conflict of interest. The Ethics Commission's determination was triggered, at least in part, by four complaints alleging unfairness in the hearing process (see ©69). The proposed change would remove the issue that led to that determination, thereby addressing the imbalance, real or perceived, on the hearing panels. In his October 30, 2015 memorandum, the Executive said that the proposed change would resolve the conflict of interest issue, and pointed out the proposed new makeup of the CCOC is modeled on the Commission on Landlord-Tenant Affairs,<sup>12</sup> also administered by DHCA, consistent with the recommendations of the 1989 Task Force Report that was the basis for the CCOC (see ©31).

The ethics issue is summarized in the OLO report (see ©49-51), and the correspondence between the CCOC and the Ethics Commission is at ©52-88. Essentially, the Ethics Commission determined that the volunteer panel chairs are "public employees" for the purposes of the County's Code of Ethics,<sup>13</sup> and that panel chairs who also represent clients before CCOC panels have a conflict of interest under the Code of Ethics. Since the Ethics Commission's guidance letter of April 10, 2014, the CCOC has complied with the Ethics Commission's determination.<sup>14</sup> The Ethics Commission determination made about half of the volunteer panel chairs on the list at that time ineligible to serve in that capacity, but the CCOC has continued with a list of seven attorneys who do not have a conflict of interest as identified by the Ethics Commission. Council staff does not believe, nor has there been any assertion, that the CCOC's ability to conduct hearing panels has been compromised by this reduction in available panel chairs. As stated above, the CCOC has been proceeding in compliance the Ethics Commission determination for nearly two years.

This proposal generated by far the most intense opposition at the public hearing and in correspondence. Most of the objection centered on the concept of having people with no interest in or relationship to COCs making quasi-judicial decisions concerning these communities would

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<sup>12</sup> The Commission on Landlord-Tenant Affairs (COLTA) is established under County Code § 29-9. COLTA has 12 members and 3 alternate members. Of these, four members plus one alternate must be landlords, managers or attorneys representing landlords, or representatives of a landlord organization; four members plus one alternate must be tenants of rental housing, attorneys who represent tenants, or representatives of a tenant organization; and four members plus one alternate must be members of the public at-large that are neither landlords, tenants, or professionals representing landlords or tenants.

<sup>13</sup> The Ethics Commission made this determination despite the fact that the volunteer panel chairs are neither County "employees" in the traditional sense, nor are they appointed members of the CCOC. As noted above the panel chairs professional arbitrators on a list maintained by the CCOC; they are selected by the CCOC according to the CCOC's "Panel Chair Guidelines (see ©61-62).

<sup>14</sup> The CCOC did, on July 9, 2015, request a waiver of the conflict of interest provisions for panel chairs. The Ethics Commission denied the CCOC's request (see ©71-88).

be inappropriate, particularly given the specialized nature of the State laws governing the various types of COCs. Also, the assertion was made more than once that it was necessary to have an attorney present to conduct the hearing and write the opinion, and that not having an attorney would jeopardize CCOC decisions appealed to Circuit Court. Paul Bessel offered a counterpoint to this view, asserting that with proper training, the at-large members would be perfectly capable of making informed decisions, and non-attorneys could write well-reasoned, defensible opinions and orders (see ©117-123). Finally, other opponents questioned whether there would even be five qualified at-large volunteers willing to serve.<sup>15</sup>

While CCOC Chair Fishbein stated his view that all of Bill 50-15 is “toxic” and its enactment would likely destroy the CCOC, Council staff believes that it is only this proposed change that *may* present an existential threat to the CCOC. Staff believes that, while the training suggested by Mr. Bessel may mitigate the absence of “skin in the game” and professional training in the field, this is by no means a certainty. Additionally, while staff believes that it is likely that sufficient numbers of qualified volunteers could be found to fill the at-large positions, this too is uncertain. The Committee believed that a better approach is to consolidate the CCOC’s operations in DHCA and provide a statutory focus on informal resolution of disputes as discussed in issues 1 and 2 above, but not radically remake the CCOC until the anticipated benefits of those changes can be evaluated. Once CCOC has been integrated into DHCA, any need, or lack of need, to radically reshape the membership should be more visible. The Committee also recommended adding language that would give clear effect to the Ethics Commission’s determination regarding certain panel chairs’ conflict of interest.

**Committee recommendation (6-0):** Delete all language in the Bill related to changing the composition of the CCOC and hearing panels, and add a new subsection to §10B-12 at lines 180-182 as follows:

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

\* \* \*

(d) Each volunteer arbitrator must not represent any parties in disputes before other hearing panels convened under this Chapter.

(e)

\* \* \*

**4. Should CCOC members be required to complete training prior to serving?**

As discussed above, County resident Paul Bessel expressed support for the Bill, but only if it added certain training requirements of CCOC members. Mr. Bessel requested that CCOC members be required to complete training in five areas: (1) the laws governing disputes within the CCOC’s jurisdiction; (2) the training currently required for COC board members; (3) how to chair

---

<sup>15</sup> Council staff inquired of the Executive Branch as to whether the at-large member position on COLTA had presented challenges to fill. The response was that while there were challenges, these were likely due to additional requirements for volunteers to fill those positions, rather than their “disinterested” status.

or participate in a hearing panel; (4) the Maryland Open Meetings Act; and (5) how to run a meeting using parliamentary procedure. The Committee recognized the value of training in areas specific to the work of the CCOC, including the applicable laws and the currently-required board member training.

**Committee recommendation (6-0):** Add training requirements at lines 51-57.

- (d) Prior to participation in any Commission matter, each voting member must complete:
- (1) training required of common ownership community board members under Section 10B-17(h); and
  - (2) training in the State and local laws on matters within the jurisdiction of the Commission provided or otherwise approved by the County Attorney.

In order to allow time for existing CCOC members to complete these requirements, the Committee-recommended Bill also includes an amended “Transition” provision at lines 233-238 as follows:

### **Sec. 3. Transition.**

[[The first three vacancies of members selected under Section 10B-3(a)(1) and the first two vacancies of members selected under Section 10B-3(a)(2) must be filled by members selected under Section 10B-3(a)(3).]] Current members of the Commission must complete the training required under Section 10B-3(d) within 90 days after this Act takes effect.

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

The Fiscal and Economic Impact statement (FEIS) for Bill 50-15 is at ©174-179 and shows anticipated fiscal impacts of the Bill generated by the relocation of the CCOC into DHCA and an increase in mediation as a dispute resolution tool. The FEIS indicates:

1. an expectation that the Bill’s requirement that mediation be attempted to resolve disputes will increase demand on the program, resulting in an estimated \$406,748 in additional expenditures (over the base amount of \$433,252 in the FY16 budget) in the fiscal year that the Bill is enacted, consisting of:
  - a \$250,453 increase in personnel costs, assuming one additional investigator, legal assistance and administrative support for the increased workload; and

- a \$156,295 increase in operating expenses to include information technology improvements (one-time) and community outreach and education;
- 2. an anticipated increase of \$336,748 per year over the FY16 base amount of \$433,252 for years 2 through 6 after enactment; and
- 3. no anticipated economic impact.

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Bill No. 50-15  
 Concerning: Common Ownership  
Communities - Commission on  
Common Ownership Communities -  
Composition - Dispute Resolution  
 Revised: March 10, 2016 Draft No. 4  
 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]]~~ attempted resolution of certain disputes regarding common ownership communities ~~by informal negotiation~~ mandatory;
- (2) ~~[[alter the composition of the three member hearing panel]]~~ require members of the Commission to complete certain training;
- (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]]~~(4) provide for certain transition provisions; and
- ~~[[6]]~~(5) 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.

<b>Boldface</b>	<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~~] Eight members should be selected from unit or lot  
24 owners 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]]~~ Seven members should be selected from persons  
 30 who are members of professions associated with common  
 31 ownership communities (such as persons involved in housing  
 32 development and real estate sales and attorneys who represent  
 33 community associations, developers, housing management or  
 34 tenants), including at least one person who is a professional  
 35 community 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 (c) Each voting member serves a 3-year term. Of the members first  
 45 appointed, one-third must be appointed for 1-year terms, one-third must  
 46 be appointed for 2-year terms, and one-third must be appointed for 3-year  
 47 terms. A member must not serve more than 2 consecutive full terms. A  
 48 member appointed to fill a vacancy serves the rest of the unexpired term.  
 49 Members continue in office until their successors are appointed and  
 50 qualified.

51 (d) Prior to participation in any Commission matter, each voting member  
 52 must complete:

53           (1) training required of common ownership community board  
 54           members under Section 10B-17(h); and

55           (2) training in the State and local laws on matters within the  
 56           jurisdiction of the Commission provided or otherwise approved by  
 57           the County Attorney.

58           (e) The County Executive, with the consent of the Council, may remove a  
 59           voting member of the Commission for neglect of or inability to perform  
 60           the duties of the office, misconduct in office, or serious violation of law.  
 61           Before the Executive removes a member, the Executive must give the  
 62           member notice of the reason for removal and a fair opportunity to reply.

63           ~~[[e]]~~(f) Section 2-148(c) applies only to voting members of the  
 64           Commission.

65           ~~[[f]]~~(g) The Commission must elect one voting member as chair and  
 66           another as vice chair, to serve at the pleasure of the Commission, and may  
 67           elect other officers as it determines.

68           ~~[[g]]~~(h) Voting members of the Commission receive no compensation for  
 69           their services.

70           ~~[[h]]~~(i) The Commission meets at the call of the chair as often as required  
 71           to perform its duties, but at least once each month. A majority of the  
 72           voting members are a quorum for the transaction of business, and a  
 73           majority of the voting members present at any meeting may take any  
 74           official action.

75           ~~[[i]]~~(j) The Office must provide the Commission with staff, offices and  
 76           supplies as are appropriated for it.

77           ~~[[j]]~~(k) The Commission must submit an annual report by September 1 to  
 78           the County Executive and the County Council summarizing its activities,

79 needs, and recommendations, and the extent to which the goals of this  
 80 Chapter are being met.

81 **10B-4. Administrative support.**

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

85 **10B-5. Duties of the [Office] Department of [Consumer Protection] Housing and**  
 86 **Community Affairs.**

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

88 \* \* \*

89 **10B-7A. Notification requirements.**

90 The governing body of a community association must, at least annually,  
 91 distribute information in a form reasonably calculated to notify all owners about  
 92 the availability of dispute resolution, education, and other services to owners  
 93 and residents of common ownership communities through the [Office]  
 94 Department and the Commission. The governing body may satisfy this  
 95 requirement by including with any annual notice or other mailing to all members  
 96 of the community association any written materials developed by the [Office]  
 97 Department to describe the Commission's services.

98 **Article 2. Dispute Resolution.**

99 \* \* \*

100 **10B-9A. Request for relief from stay.**

101 \* \* \*

102 (b) The special panel must consist of ~~[[3]]~~ three voting members of the  
 103 Commission designated by the chair, and must include [at least] at least  
 104 one representative of each membership category.

105 \* \* \*

106 **10B-11. Mediation; dismissal before hearing.**

107 (a) The [Office] Director may investigate facts and assemble documents  
108 relevant to a dispute filed with the Commission, and may summarize the  
109 issues in the dispute. The [Office] Director may notify a party if, in [its]  
110 the Director's opinion, a dispute was not properly filed with the  
111 Commission, and may inform each party of the possible sanctions under  
112 Section 10B-13(d).

113 (b) If the [Office] Director, after reviewing a dispute, finds that, assuming all  
114 facts alleged by the party [which] that filed the dispute are true, there are  
115 no reasonable grounds to conclude that a violation of applicable law or  
116 any association document has occurred, [it] the Director may so inform  
117 the Commission. The Commission[, in its discretion, may] must dismiss  
118 a dispute if it finds that there are no reasonable grounds to conclude that  
119 a violation of applicable law or any association document has occurred,  
120 or it may order the [Office] Director to investigate further. The  
121 Commission may reconsider the dismissal of a dispute under this  
122 subsection if any party, in a motion to reconsider filed within 30 days  
123 after the dispute is dismissed, shows that:

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

128 (c) [Any party may request mediation.] If the Director, after reviewing a  
129 dispute and any investigation, finds reasonable grounds to conclude that  
130 a violation of applicable law or an association document has occurred,  
131 the Director must attempt to resolve the matter through informal  
132 negotiation including, in the Director's discretion, mediation. Each party

133 named in the dispute or its representative must attend any mediation  
134 conference scheduled by the Director under this Section unless excused  
135 by the Director. If the party that files the dispute refuses or fails to  
136 participate in the mediation, the Director must dismiss the dispute. If the  
137 party that is the subject of the dispute refuses or fails to participate in the  
138 mediation, the Director must refer the dispute to the Commission for  
139 resolution. The party that is the subject of the dispute may not appear at  
140 the hearing, and the hearing panel may award relief to any party that the  
141 facts on the record warrant.

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

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

155 [(f) If any party refuses to attend a mediation session, or if mediation does not  
156 successfully resolve the dispute within 10 days after the first mediation  
157 session is held, the Commission must promptly schedule a hearing under  
158 Section 10B-13 unless a hearing has already been held under Section  
159 10B-13.]

160 **10B-12. Hearing Panel.**

- 161 (a) If a hearing is scheduled, the chair of the Commission must convene a 3-  
162 member panel to hear the dispute.
- 163 (b) The chair must choose [2] ~~[[3]]~~ two members of the panel from the voting  
164 members of the Commission. The persons selected must represent the [2]  
165 ~~[[3]]~~ two different membership groups of the Commission. [The 2  
166 Commission members must designate the third member from a list of  
167 volunteer arbitrators trained or experienced in common ownership  
168 community issues maintained by the Commission. The third member  
169 must chair the panel. If a suitable arbitrator is not available, the chair of  
170 the Commission must designate the third panelist from among the voting  
171 members of the Commission, and must designate the chair of the panel.]  
172 ~~[[The chair must designate one panel member to serve as panel chair.]]~~  
173 The two Commission members must designate the third member from a  
174 list of volunteer arbitrators trained or experienced in common ownership  
175 community issues maintained by the Commission. The third member  
176 must chair the panel. If a suitable arbitrator is not available, the chair of  
177 the Commission must designate the third panelist from among the voting  
178 members of the Commission, and must designate the chair of the panel.
- 179 (c) Each panelist must not have any interest in the dispute to be heard.
- 180 (d) Each volunteer arbitrator must not represent any parties in disputes  
181 before other hearing panels convened under this Chapter.
- 182 (e) If the Commission chair decides that a hearing should be held by a  
183 hearing examiner instead of a hearing panel, the chair, with the approval  
184 of the Commission, may designate the Office of Zoning and  
185 Administrative Hearings to conduct the hearing.

186 ~~[[e]]~~(f) If the parties to a dispute agree that the hearing should be held  
187 and the dispute decided by a hearing examiner instead of a hearing  
188 panel, the chair must designate the Office of Zoning and Administrative  
189 Hearings or another hearing examiner to conduct the hearing and issue  
190 a decision.

191 **10B-13. Administrative hearing.**

192 \* \* \*

- 193 (d) The hearing panel may award costs, including reasonable attorney’s fees,
- 194 to any party if the other party:
  - 195 (1) filed or maintained a frivolous dispute, or filed or maintained a
  - 196 dispute in bad faith;
  - 197 (2) [unreasonably] refused to participate in mediation of a dispute[, or
  - 198 unreasonably withdrew from ongoing mediation]; or
  - 199 (3) substantially delayed or hindered the dispute resolution process
  - 200 without good cause.

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

- 203 (e) [the] The hearing panel must apply ~~[[state]]~~ State and County laws and
- 204 all relevant caselaw to the facts of the dispute, and may order the payment
- 205 of damages and any other relief that the law and the facts warrant. The
- 206 decision of the hearing panel is binding on the parties, subject to judicial
- 207 review under Section 2A-11.

208 \* \* \*

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

212 \* \* \*

213 **10B-14. Settlement of disputes; assistance to parties.**

214 \* \* \*

215 (b) The [Office] Director may inform any party who has settled a dispute by  
 216 mediation, or any party who prevails in a hearing held under Section 10B-  
 217 13, about how the agreement or decision can be enforced.

218 \* \* \*

219 **10B-19. Enforcement.**

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

221 (b) In addition to any action by the [Commission] Department and any other  
 222 action authorized by law, including the filing of a dispute under Article  
 223 2, any person may file an action:

224 (1) for injunctive relief to enforce this Article or correct any violation  
 225 of it[[,]]; and

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

228 **Sec. 2. Effective Date.**

229 Sections 10B-11(c), (d), and (e), as amended by this Act, which [[mandate  
 230 mediation]] require attempted informal resolution of disputes, including mediation,  
 231 [[applies]] apply to all disputes filed with the Commission after this Act takes effect as  
 232 provided in Charter Section 112.

233 **Sec. 3. Transition.**

234 [[The first three vacancies of members selected under Section 10B-3(a)(1) and  
 235 the first two vacancies of members selected under Section 10B-3(a)(2) must be filled  
 236 by members selected under Section 10B-3(a)(3).]] Current members of the  
 237 Commission must complete the training required under Section 10B-3(d) within 90  
 238 days after this Act takes effect.

## 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

F:\LAW\BILLS\1550 CCOC\LR.Docx



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  
Page 2

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



Isiah Leggett  
County Executive

Marc P. Hansen  
County Attorney

OFFICE OF THE COUNTY ATTORNEY

**MEMORANDUM**

January 8, 2016

To: Clarence Snuggs, Director  
Department of Housing and Community Affairs

From: Walter Wilson *WW/EBZ*  
Associate County Attorney

Via: Edward Lattner, Chief *EBZ*  
Division of Government Operations

Re: Bill 50-15 (Common Ownership Communities—Commission on Common Ownership Communities—Composition—Dispute Resolution) CORRECTED

The County Executive's Office has requested that this office forward you our comments concerning Bill 50-15. Under the proposed legislation, participation in mediation when a complaint is filed with the Commission on Common Ownership Communities (CCOC) would become mandatory for the parties to the dispute. The CCOC would continue to consist of 15 Commissioners. However, five of the Commissioners would be selected from the general public while the other two membership categories that currently comprise the Commission—i.e., common ownership professionals and residents—would be represented by five individuals each. The three-member hearing panels that adjudicate disputes not resolved through mediation would no longer be chaired by volunteer arbitrators, but instead by voting members of the Commission. Finally, the responsibility for providing the staff support and other resources needed by the CCOC to carry out its mission effectively will be transferred from the Office of Consumer Protection to the Department of Housing and Community Affairs.

Having reviewed Expedited Bill 50-15, I am satisfied that the legislation, as introduced, does not raise any significant constitutional, preemption, or conflict concerns vis-à-vis state or federal law and is legally sound. If you have any questions or concerns regarding this memorandum, please call me at (240) 777-6759.

cc: Bonnie Kirkland, Assistant CAO  
Marc Hansen  
Josh Hamlin, Legislative Attorney

15-004520  
Bill 50-15 OCA review

**COMMISSION ON COMMON OWNERSHIP COMMUNITIES**  
**Membership Status as of 2/4/16**

**Membership Composition: 15 voting members. 7 Professionals (Housing Development/Real Estate Sales, Attorneys, Association Managers) 8 Unit or Lot Holders or Residents**

**Active Members**

	First Name	Last Name	Member Type	Status	TermStartDate	TermEndDate	NoOfTerms	Notes
Mr.	Richard	Brandes	Professional - Association Manager	Active	4/16/13	1/31/16	Second Term	Position advertised 1/2016
Ms.	Teresa (Terry)	Cromwell	Professional - Association Manager	Active	4/16/13	1/31/16	First Term	Position advertised 1/2016
Ms.	Aimee	Winegar	Professional - Association Manager	Active	4/16/13	1/31/16	First Term	Position advertised 1/2016
Mr.	James	Coyle	Unit or Lot Owner or Resident	Active	4/1/14	1/31/17	First Full Term	
Ms.	Marietta	Ethier	Unit or Lot Owner or Resident	Active	4/1/14	1/31/17	First Full Term	
Mr.	Mark	Fine	Unit or Lot Owner or Resident	Active	7/14/15	1/31/16	Partial Term	
Dr.	Rand	Fishbein	Unit or Lot Owner or Resident	Active	4/16/13	1/31/16	First Term	
Mr.	Bruce	Fonoroff	Unit or Lot Owner or Resident	Active	7/14/15	1/31/18	Second Term	
Mr.	Don	Weinstein	Unit or Lot Owner or Resident	Active	7/14/15	1/31/18	First Term	
Mr.	Kenneth	Zajic	Unit or Lot Owner or Resident	Active	4/1/14	1/31/17	Second Term	

**Vacancies**

	First Name	Last Name	Member Type	Status	TermStartDate	TermEndDate	NoOfTerms	Notes
Mr.	Arthur	Dubin	Professional - Real Estate Sales	Vacant	4/24/12	1/31/15	Second Term	Position advertised 12/2014, 7/2015, 1/2016
Ms.	Eugenia	Mays	Professional - Association Manager	Vacant	4/1/14	1/31/17	First Term	RESIGNED 11/2015. Position advertised 1/2016
Ms.	Gianna	Rahmani	Professional - Association Manager	Vacant	10/7/14	1/31/17	First Term	RESIGNED 11/2015. Position advertised 1/2016
Mr.	Thomas	Stone	Professional - Attorney	Vacant	7/14/15	1/31/18	Second Term	RESIGNED 11/2015. Position advertised 1/2016
Mr.	David	Weinstein	Unit or Lot Owner or Resident	Vacant	7/14/15	1/31/18	Second Term	RESIGNED 2/2016.

## Article 2. Dispute Resolution.

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### Sec. 10B-8. Defined terms.

In this Article and Article 3, the following terms have the following meanings:

- (1) *Association document* means:
  - (A) the master deeds, declaration, incorporation documents, bylaws, and rules of any common ownership community;
  - (B) any written private agreement between any parties concerning the operation of the community or maintenance or control of common or limited common property; and
  - (C) any similar document concerning the operation or governance of a common ownership community. Association document does not include a lease covered by Chapter 29 unless the lease provides that it may be enforced under this Chapter.
- (2) *Common element* includes:
  - (A) in a condominium or cooperative, all portions of the common ownership community other than the units; or
  - (B) in a homeowners' association, any real estate in a homeowners' association community that is owned or leased by the association, other than a unit; and
  - (C) in all common ownership communities, any other interest in real estate for the benefit of owners which is subject to the declaration.
- (3) *Community association* means the legal entity, incorporated or unincorporated, that is responsible for the governance or common property of a common ownership community.
- (4) *Dispute* means any disagreement between 2 or more parties that involves:
  - (A) the authority of a governing body, under any law or association document, to:
    - (i) require any person to take any action, or not to take any action, involving a unit or common element;

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- (ii) require any person to pay a fee, fine, or assessment;
  - (iii) spend association funds; or
  - (iv) alter or add to a common element; or
- (B) the failure of a governing body, when required by law or an association document, to:
- (i) properly conduct an election;
  - (ii) give adequate notice of a meeting or other action;
  - (iii) properly conduct a meeting;
  - (iv) properly adopt a budget or rules;
  - (v) maintain or audit books and records;
  - (vi) allow inspection of books and records;
  - (vii) maintain or repair a common element if the failure results in significant personal injury or property damage; or
  - (viii) exercise its judgment in good faith concerning the enforcement of the association documents against any person that is subject to those documents.

- (5) *Dispute* does not include any disagreement that only involves:
- (A) title to any unit or any common element;
  - (B) the percentage interest or vote allocable to a unit;
  - (C) the interpretation or enforcement of any warranty;
  - (D) the collection of an assessment validly levied against a party; or
  - (E) the exercise of a governing body's judgment or discretion in taking or deciding not to take any legally authorized action.

(6) *Governing body of a community association* means the council of unit owners, board of directors, or any other body authorized by an association document to adopt binding rules or regulations.

- (7) *Owner* includes:
- (A) a unit owner in a condominium;

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- (B) a lot owner in a homeowners' association, and
- (C) a member of a cooperative housing corporation.

(8) *Party* includes:

- (A) an owner;
- (B) a governing body; and
- (C) an occupant of a dwelling unit in a common ownership community.

(9) *Unit or lot* includes:

(A) any physical portion of a common ownership community with distinct property boundaries that:

- (i) provides complete, independent living facilities for one or more individuals,
- (ii) contains permanent provisions for living, sleeping, eating, cooking, and sanitation, and
- (iii) is designated for exclusive ownership, control, or occupancy by those individuals; and

(B) all legally enforceable rights and interests incidental to individual ownership of real property in a common ownership community. (1990 L.M.C., ch. 33, § 1; 2010 L.M.C., ch. 10, § 1.)

**Sec. 10B-9. Filing disputes; exhaustion of association remedies.**

- (a) The Commission may hear any dispute between or among parties.
- (b) A party must not file a dispute with the Commission until the party makes a good faith attempt to exhaust all procedures or remedies provided in the association documents.
- (c) However, a party may file a dispute with the Commission 60 days after any procedure or remedy provided in the association documents has been initiated before the association.
- (d) After a community association finds that a dispute exists, the association must notify the other parties of their rights to file the dispute with the Commission. The association must not take any action to enforce or implement its decision for 14 days after it notifies the

## MONTGOMERY COUNTY CODE

other parties of their rights.

(e) Except as provided in Section 10B-9A, when a dispute is filed with the Commission, a community association must not take any action to enforce or implement the association's decision, other than filing a civil action under subsection (f), until the process under this Article is completed.

(f) Any party may file a civil action arising out of an association document or a law regulating the association's powers and procedures at any time. The court may stay all proceedings for at least 90 days after the court is notified that a dispute has been properly filed under this Article so that a hearing under Section 10B-13 may be completed. Whether or not a stay is issued, the court may hear the action *de novo* only if a hearing panel assigned to the dispute has not issued a decision under Section 10B-13(e). (1990 L.M.C., ch. 33, § 1; 2010 L.M.C., ch. 10, § 1.)

**Editor's note**—Section 10B-9 is quoted in *Campbell v. Lake Hallowell Homeowners Association*, 831 A.2d 465 (2003).

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

(a) At any time after a dispute is filed under Section 10B-9, a community association may submit a request to lift the automatic stay required under Section 10B-9(e) to a hearing panel appointed under Section 10B-12, or if no hearing panel has been appointed, a special standing panel authorized to consider requests for relief from stays.

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

(c) An association that requests relief from a stay must serve a copy of its request on any other party named in the dispute by certified mail or personal service. A certificate of service must accompany any request submitted under this Section. A party served with a copy of the request must file its opposition, if any, within 10 days after receiving service.

(d) If a request for relief from a stay which states facts sufficient to show a need for immediate action is not granted or denied within 20 days after the request was filed, the request must be treated as granted.

(e) Except as provided in subsection (d), a request for relief from stay may only be granted if the assigned panel finds that:

- (1) enforcing the stay would result in undue harm to the community

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association; and

(2) lifting the stay will not result in undue harm to the rights or interests of any opposing party. (2010 L.M.C., ch. 10, § 1.)

**Sec. 10B-10. Production of evidence.**

(a) The Commission may:

(1) compel the attendance at a hearing of witnesses and parties, administer oaths, take the testimony of any person under oath and, in connection with any dispute, require the production of any relevant evidence; and

(2) issue summonses to compel the attendance of witnesses and parties and the production of documents, records and other evidence in any matter to which this Article applies.

(b) If any person does not comply with any summons issued under this Article to compel the attendance of persons or the production of documents, records or other evidence in any matter to which this Article applies, the County Attorney, on behalf of the Commission, may enforce the summons in a court with jurisdiction. Failure to comply with a Commission summons is also a class A violation.

(c) Any court with jurisdiction may, on request of the Commission, in accordance with state law and the Maryland Rules of Procedure:

(1) require compliance with a summons;

(2) require the attendance of a named person before the Commission at a specified time and place;

(3) require the production of records, documents, or other evidence;

(4) require the transfer of custody of records, documents, or other evidence to the court; or

(5) prohibit the destruction of any records, documents, or other evidence until a lawful investigation by the Commission is ended.

(d) A court may punish any disobedience of any order entered under this Section as a contempt of court. (1990 L.M.C., ch. 33, § 1; 1994 L.M.C., ch. 9, § 1.)

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

(a) The Office may investigate facts and assemble documents relevant to a dispute filed with the Commission, and may summarize the issues in the dispute. The Office may notify a party if, in its opinion, a dispute was not properly filed with the Commission, and may inform each party of the possible sanctions under Section 10B-13(d).

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

(1) the Commission erroneously interpreted or applied applicable law or an association document; or

(2) material issues of fact which are necessary to a fair resolution of the dispute remain unresolved.

(c) Any party may request mediation.

(d) If a party requests mediation, the Commission must notify all parties of the filing and of the mediation session.

(e) The Commission must provide a qualified mediator to meet with the parties within 30 days after a party requests mediation to attempt to settle the dispute.

(f) If any party refuses to attend a mediation session, or if mediation does not successfully resolve the dispute within 10 days after the first mediation session is held, the Commission must promptly schedule a hearing under Section 10B-13 unless a hearing has already been held under Section 10B-13. (1990 L.M.C., ch. 33, § 1; 1994 L.M.C., ch. 9, § 1; 1996 L.M.C., ch. 13, § 1; 2005 L.M.C., ch. 26, § 1.)

**Editor's note**—2005 L.M.C., ch. 26, §§ 2 and 3, state:

Sec. 2. Regulations. A regulation which implements a function transferred to the Office of Consumer Protection by this Act continues in effect until otherwise amended or repealed, but any reference to any predecessor department or office must be treated as referring to the Office

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of Consumer Protection.

Sec. 3. Transition. This act does not invalidate or affect any action taken by the Department of Housing and Community Affairs before this Act took effect. Any responsibility or right granted by law, regulation, contract, or other document, and which is associated with a function transferred by this Act from the Department of Housing and Community Affairs, is transferred to the Office of Consumer Protection.

### **Sec. 10B-12. Hearing Panel.**

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

(b) The chair must choose 2 members of the panel from the voting members of the Commission. The persons selected must represent the 2 different membership groups of the Commission. The 2 Commission members must designate the third member from a list of volunteer arbitrators trained or experienced in common ownership community issues maintained by the Commission. The third member must chair the panel. If a suitable arbitrator is not available, the chair of the Commission must designate the third panelist from among the voting members of the Commission, and must designate the chair of the panel.

(c) Each panelist must not have any interest in the dispute to be heard.

(d) If the Commission chair decides that a hearing should be held by a hearing examiner instead of a hearing panel, the chair, with the approval of the Commission, may designate the Office of Zoning and Administrative Hearings to conduct the hearing.

(e) If the parties to a dispute agree that the hearing should be held and the dispute decided by a hearing examiner instead of a hearing panel, the chair must designate the Office of Zoning and Administrative Hearings or another hearing examiner to conduct the hearing and issue a decision. (1990 L.M.C., ch. 33, § 1; 1994 L.M.C., ch. 9, § 1; 2010 L.M.C., ch. 10, § 1.)

### **Sec. 10B-13. Administrative hearing.**

(a) A hearing panel appointed under Section 10B-12 must hold a hearing on each dispute that is not resolved by mediation under Section 10B-11 unless the Commission finds that:

(1) the dispute is essentially identical to another dispute between the same

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parties on which a hearing has already been held under this Section; or

(2) the dispute is clearly not within the jurisdiction of the Commission.

(b) Sections 2A-1 through 2A-11 apply to a hearing held under this Section. However, the parties need not be given more than 15 days' notice before the hearing is held, if the Commission finds that an expedited hearing is necessary. At any hearing, a party or a witness may be advised by counsel.

(c) If any party, after proper notice, does not appear at the scheduled hearing, the hearing panel may order any relief to another party that the facts on record warrant.

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

(1) filed or maintained a frivolous dispute, or filed or maintained a dispute in bad faith;

(2) unreasonably refused to participate in mediation of a dispute, or unreasonably withdrew from ongoing mediation; or

(3) substantially delayed or hindered the dispute resolution process without good cause.

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

(e) the hearing panel must apply state and County laws and all relevant caselaw to the facts of the dispute, and may order the payment of damages and any other relief that the law and the facts warrant. The decision of the hearing panel is binding on the parties, subject to judicial review under Section 2A-11.

(f) If the hearing has been held under Section 10B-12(d) by the Office of Zoning and Administrative Hearings, the hearing examiner must forward a recommended decision and order to a Commission panel. The Commission panel may adopt, reverse, modify, or remand the recommended decision before issuing its final order as provided in this Section.

(g) An appeal of a decision under this Section must be consolidated with any case filed under Section 10B-9(f) that arises out of the same facts.

(h) The court hearing an appeal must sustain the decision of the hearing panel unless the decision is:

(1) inconsistent with applicable law;

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- (2) not supported by substantial evidence on the record; or
- (3) arbitrary and capricious, considering all facts before the hearing panel.

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

(j) In addition to any other penalty allowed by law, any person who does not comply with a final Commission order issued under this Chapter has committed a class A civil violation. Each day that a person does not comply with a Commission order is a separate offense. (1990 L.M.C., ch. 33, § 1; 1994 L.M.C., ch. 9, § 1; 1996 L.M.C., ch. 13, § 1; 2005 L.M.C., ch. 26, § 1; 2013 L.M.C., ch. 29, § 1.)

**Editor's note**—2013 L.M.C., ch. 29, § 2, states, in part: The Amendments to Section 10B-13 contained in Section 1 of this Act apply to any dispute filed with the Commission after the date this Act takes effect.

2005 L.M.C., ch. 26, §§ 2 and 3, state:

Sec. 2. Regulations. A regulation which implements a function transferred to the Office of Consumer Protection by this Act continues in effect until otherwise amended or repealed, but any reference to any predecessor department or office must be treated as referring to the Office of Consumer Protection.

Sec. 3. Transition. This act does not invalidate or affect any action taken by the Department of Housing and Community Affairs before this Act took effect. Any responsibility or right granted by law, regulation, contract, or other document, and which is associated with a function transferred by this Act from the Department of Housing and Community Affairs, is transferred to the Office of Consumer Protection.

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

(a) Settlement of a dispute by mediation agreed to by the parties is binding, has the force and effect of a contract, and may be enforced accordingly.

(b) The Office may inform any party who has settled a dispute by mediation, or any party who prevails in a hearing held under Section 10B-13, about how the agreement or decision can be enforced. (1990 L.M.C., ch. 33, § 1; 1996 L.M.C., ch. 13, § 1; 2005 L.M.C., ch. 26, § 1.)

**Editor's note**—2005 L.M.C., ch. 26, §§ 2 and 3, state:

Sec. 2. Regulations. A regulation which implements a function transferred to the Office of Consumer Protection by this Act continues in effect until otherwise amended or repealed, but

## MONTGOMERY COUNTY CODE

any reference to any predecessor department or office must be treated as referring to the Office of Consumer Protection.

Sec. 3. Transition. This act does not invalidate or affect any action taken by the Department of Housing and Community Affairs before this Act took effect. Any responsibility or right granted by law, regulation, contract, or other document, and which is associated with a function transferred by this Act from the Department of Housing and Community Affairs, is transferred to the Office of Consumer Protection.

### **Sec. 10B-15. Regulations.**

The County Executive must promulgate, under method (2), regulations for the dispute resolution process. (1990 L.M.C., ch. 33, § 1.)

### **Chapter III. Governing Legal Authorities**

State and County law establish standards for the formation, operation, and management of common ownership communities. This chapter highlights current laws addressing common ownership communities in three sections:

- **Section A** briefly discusses the relevant State laws governing homeowner and condominium associations, and cooperatives;
- **Section B** details the provisions of the Montgomery County Code and Regulations that govern over 1,000 associations in the County; and
- **Section C** provides an overview of the Montgomery County Ethics Commission's decisions relating to Commission activities and Chapter 10B of the County Code.

#### **A. Maryland State Law**

The following summarizes State laws that governs all three types of associations: condominium associations, homeowners associations, and cooperatives.

**Maryland Condominium Act.** This Act regulates the formation, management, and termination of condominium associations in Maryland. While the Act addresses the management of condominiums on a range of topics, it also establishes a dispute resolution process for condominium owners. As detailed in the law, the association board must notify the owner of the alleged violation in writing, including: an explanation of the violation; corrective actions; and a time period of no less than ten days to provide a solution without further sanction. If the owner fails to correct the problem, the board must hold a confidential hearing in which the alleged violator is afforded the opportunity to present a defense, including the calling and cross examining of witnesses. At the close of the hearing the board is required to submit its decision in writing.<sup>1</sup>

**Maryland Homeowners Association Act.** This Act governs the formation and management of homeowner associations (HOAs), including elections, closed and open meetings, and production of the resale package.<sup>2</sup> Similar to the Condominium Act, this Act sets minimum standards for consumer protection.<sup>3</sup> Although a county may enact a more stringent law, the Act grants enforcement duties to the Division of Consumer Protection of the Office of Attorney General. The Act specifically identifies election procedure violations as cases that fall under this provision. Enumerated are complaints concerning date, place, and/or time of elections, manner in which nominations are made, ballot format, use of proxies for an election, or manner in which quorum is defined.<sup>4</sup>

**Maryland Cooperative Housing Corporation Act.** This Act governs the sale, operations and management, and dispute resolution process for housing cooperatives.<sup>5</sup> While the Act provides statutory oversight for meetings, voting, and board responsibilities, as of January 2015, the law also sets minimum standards for a dispute resolution process.<sup>6</sup> The statute requires the governing body to serve the member with a written demand to cease the alleged violation, provide a time frame to correct the violation, and state that failure to correct the violation could result in a sanction. If the violation is uncorrected, the governing body must serve the alleged party with a notice of a hearing. At the hearing the member is afforded the

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<sup>1</sup> Md. Real Property Code Ann. § 11-113 (2014).

<sup>2</sup> Md. Real Property Code Ann. §§ 11B-101 – 118.

<sup>3</sup> See also § 11-130 (2014).

<sup>4</sup> §§ 11B-115,115.1 (2014).

<sup>5</sup> Md. Corporations and Associations Code. Ann. § 5-6B.

<sup>6</sup> § 5-6B-30.

opportunity to present evidence and cross examine witnesses. The governing body publishes the results of the hearing in the community's newsletter and the decision may be appealed in the Maryland Court system. The statute gives the governing body the right to sue for damages or injunctive relief. In addition, the prevailing party is entitled to an award of attorney's fees as determined by the Court.<sup>7</sup>

**Maryland Business Occupations and Business Code.** This section permits the director or officer of a homeowner association, condominium association, or cooperative to represent the common ownership community in a dispute, hearing, or other matter before a board or commission established to oversee common ownership communities.<sup>8</sup>

**Business Judgment Rule.** The Business Judgment Rule states the "decisions of the governing body of an association and its members – usually the board of directors – are assumed to be correct and the courts will therefore uphold them unless certain conditions are met."<sup>9</sup> The rule is a body of principles created by the Maryland Court of Appeals and Courts of Special Appeals that govern the degree to which a court can review the decisions of a corporation's board of directors, etc. Maryland recognizes three distinct business judgment rules.

- Protection of Individual Members of the Governing Body. Individual board members are protected from liability even if they make a decision that was later found to be a bad one or even if it is later found in violation of an association rule or law. Section 10B defines a dispute as a disagreement over the authority of a governing body to do or fail to do something. The Commission interprets this to mean the dispute must involve a decision of the entire board.<sup>10</sup>
- Protection of the Board's Business Judgments. When challenging a board's decision, the complainant must allege that the board either acted in bad faith or fraud, lacked legal authority to take action based on the association governing documents or County and/or State Law, or the decision was arbitrary and capricious. In addition, while the rule protects the board's right to make a decision, it does not protect against the board's failure to make a decision at all. Section 10B-8 recognizes that board's right to exercise judgment, but the board must make a decision when required to do so and within the scope of its legal authority and made in good faith.<sup>11</sup>
- Protection of the Board's Decisions to Enforce its Rules. When a board acts to restrict a resident's rights or penalize a member, it must have a reasonable basis for the decision and the reason must be related to the overall purpose of the association. When the governing body can prove that it acted within its authority and had a reasonable basis (related to the governing documents), the Commission usually respects and upholds the association's decision and will not substitute its own judgment. Further, the Commission has no jurisdiction over a board's decision about whether a person violated a rule or not, if the decision was made in good faith.<sup>12</sup>

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<sup>7</sup> § 5-6B-30.

<sup>8</sup> Md. Business Occupations and Professions Code Ann. § 10-206(b)(6).

<sup>9</sup> Office of the Commission on Common Ownership Communities, "The Staff's Guide to Procedures and Decisions of the Montgomery County Commission on Common Ownership Communities," (2014), pp. 84-91.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

## **B. Montgomery County Code and Regulations**

The County Code sets forth oversight activities and enhances State law in the governance of common ownership communities. This chapter examines the most relevant sections of the County Code and Executive Regulations as they relate to the Commission on Common Ownership Communities.

### **1. County Code Chapter 10B: Common Ownership Communities**

County Code Chapter 10B applies to developments subject to enforcement by homeowner associations, condominium associations, and cooperative housing corporations.<sup>13</sup> Through enactment, the County Council recognized the need for a County Commission to provide advice on a range of issues facing common ownership communities including:

- Ensuring proper establishment and organization of the associations and corporations;
- Promoting education, public awareness, and association membership awareness of the rights and obligations of living in a common ownership community;
- Reducing the number of disputes by encouraging informal dispute resolution;
- Assisting with and overseeing the development of coordinated community and government policies and programs to support these groups; and
- Preventing potential public financial liability for repair or replacement of common ownership community facilities.<sup>14</sup>

The Code lays out three articles pertaining to common ownership communities, including the Commission on Common Ownership Communities (Commission or CCOC); dispute resolution, and open conduct. The dispute resolution section will be discussed in tandem with a description of the process in Chapter Four.

**Commission on Common Ownership Communities.** The Commission consists of 15 appointed members, including property or unit owners in common ownership communities and professionals associated with common ownership communities (i.e. attorneys, developers, property managers). The Code delineates the responsibilities of the Commission as follows:

- Adopt rules and procedures to carry out provisions written in Code;
- Keep a public record of all meetings and minutes;
- Cooperate with the Executive Branch on matters within the jurisdiction of the Commission;
- Examine conditions of common ownership communities resulting in unmet needs through meetings, conferences, and public hearings; and
- Advise the county government and state and federal issues on matters involving common ownership communities and recommend programs and legislation.<sup>15</sup>

The Commission is to be supported by the Office of Consumer Protection. The Office is required to provide the Commission with staff, offices, and supplies and to consider the recommendations of the Commission when selecting staff. The Code delineates the responsibilities of the Office to include:

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<sup>13</sup> § 10B-2.

<sup>14</sup> § 10B-1.

<sup>15</sup> § 10B-6.

- Assemble, analyze, and disseminate data and education materials to assist the Commission;
- Plan and conduct educational programs to promote operations of the Commission;
- Maintain a master roster of homeowner associations, condominiums, and cooperatives and their leadership;
- Develop an information and referral system for all County services related to the Commission;
- Maintain and collect association documents to use as a model and reference;
- Provide technical assistance to governing bodies on elections, transition management, etc.;
- Develop and maintain a reference manual;
- Develop and maintain an operations manual;
- Advise the Commission and property managers on the changes in the law that effect their communities;
- Operate a dispute resolution process that includes mediation and administrative hearings; and
- Assist the Commission in carrying out its duties and implementing decisions under Article 2 Administrative Procedures Act.<sup>16</sup>

**Open Conduct.** This Article of the Code outlines voting procedures and budget document requirements for an association's governing body. Voting procedures include designated time frames for holding elections, election notification and materials, absentee and proxy voting requirements, vote tabulation, and office terms.<sup>17</sup> Budget requirements outline the time frame for informing association members of the proposed budget and the introduction of budget amendments which increase/decrease the budget by more than 15%.<sup>18</sup> This article grants relief via the Commission hearing process, injunctive relief to enforce this article or correct any violation of it, and recovery of damages for a loss sustained as a result of the violation.<sup>19</sup>

## **2. Administrative Procedures Act**

The Administrative Procedures Act (APA) only applies to a hearing held under Chapter 10B, not mediation.<sup>20</sup> Although not one of the enumerated administrative proceedings outlined by the APA, the County Executive, through law or regulation, is authorized to add or delete additional quasi-judicial authorities.<sup>21</sup> One differing application of the APA is that under Section 10B-13, if the Commission finds that an expedited hearing is necessary, parties may receive only a 15 day notice, not the minimum of 30 days granted by the APA.<sup>22</sup> APA procedures and the applicable executive regulations related to the dispute resolution process are discussed in Chapter Four of this report.

## **3. Homeowner Associations**

This provision of the Code establishes a program to assist homeowner associations with the maintenance of roadways that are continuously open to the public as if they were public roadways. The association signs an easement agreement with the County permitting public use of private roadways and the County assists with funding road maintenance. The easement is terminated when it is no longer in the public interest or the homeowner's association fails to comply with the agreement.<sup>23</sup> In 2010, the County terminated funding of this law.

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<sup>16</sup> § 10B-5.

<sup>17</sup> § 10B-17.

<sup>18</sup> § 10B-18.

<sup>19</sup> § 10B-19.

<sup>20</sup> § 10B-13(b).

<sup>21</sup> Montgomery County Code, Administrative Procedures Act, Chapter 2A, § 2A-2.

<sup>22</sup> § 10B-13(b).

<sup>23</sup> §§ 24B-1 - 24B-8.



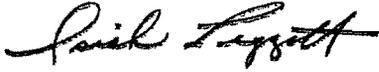
OFFICE OF THE COUNTY EXECUTIVE  
ROCKVILLE, MARYLAND 20850

Isiah Leggett  
County Executive

MEMORANDUM

October 30, 2015

TO: Nancy Floreen, Chair, Planning, Housing and Economic Development Committee  
Marc Elrich, Chair, Public Safety Committee

FROM: Isiah Leggett, County Executive 

SUBJECT: Commission on Common Ownership Communities (CCOC) Amendments to Chapter 10B

This purpose of this memorandum is to transmit my recommendations to amend Chapter 10B, Common Ownership Communities, of the Montgomery County Code in an effort to enhance the Commission's ability to address the purposes for which it was established twenty-five years ago.

Several factors contribute to the timeliness of these proposed changes. Over one-third of Montgomery County's residents now live in common ownership communities, and the Commission has gathered experience regarding a multitude of issues. The Office of Legislative Oversight (OLO) recently submitted a report evaluating the CCOC and offered several recommendations. Montgomery County's Ethics Commission has identified a conflict of interest regarding the manner in which CCOC hearing panels are convened. A review of the nature of the complaints filed, as compared to the mechanisms used to process 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 factors, and to ensure that the CCOC will continue to contribute to the quality of life in Montgomery County, I propose the following changes.

**Dispute Resolution**

Mediation of all complaints, which is currently optional, will be made mandatory. Although the parties need not reach an agreement at a mediation session, they must attend and

Nancy Floreen, Chair, Planning, Housing and Economic Development Committee

October 30, 2015

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participate in good faith. This will facilitate the prompt resolution of complaints without the formalities and costs associated with a quasi-judicial administrative hearing. The majority of CCOC complaints involve conflicts between neighbors in which one party is a resident and the other party is a resident serving as a volunteer on the board of directors of the common ownership community. Because the parties typically will continue to live together in the same community, these types of complaints are best resolved through a mediation process in which the parties agree to a settlement, rather than being resolved through an adversarial administrative hearing in which there is a "winner" and a "loser." Focusing the complaint resolution process on mediated resolutions will ensure that the CCOC functions as an inexpensive and speedy mechanism for resolving complaints. In the event that a complaint is not successfully resolved through mediation, the complaint can be scheduled for an administrative hearing with the CCOC. In addition, the parties retain the option of filing complaints in court.

### Commission Composition

The Commission is currently composed of fifteen commissioners, appointed by the County Executive and confirmed by the County Council, of which eight commissioners are owners/residents and seven commissioners are professionals/managers. In addition, Chapter 10B currently requires that CCOC administrative hearings be conducted by a three-person panel comprised of one owner/resident commissioner, one professional/manager commissioner, and one volunteer panel chair. These volunteer panel chairs are attorneys who practice common ownership community law and are not CCOC commissioners. The Ethics Commission has identified a conflict of interest with this procedure. These volunteer panel chairs may currently have the dual role of serving on a CCOC hearing panel in one case, while representing a party before a CCOC hearing panel in another case. In addition, the volunteer panel chairs are neither appointed by the County Executive nor confirmed by the County Council. Under my proposal, there still would be fifteen commissioners; however, the composition of the CCOC would be amended to include five owners/residents, five professionals/managers, and five public at large individuals. CCOC hearing panels would then be comprised of one commissioner from each of the three categories so that there would not be any need to use volunteer panel chairs. The proposed changes to the composition of the CCOC and the administrative hearing panel would eliminate this potential conflict of interest, while still enabling the CCOC to conduct administrative hearings when needed. Additionally, the changes closely mirror the composition of the Department of Housing and Community Affairs' (DHCA) Commission on Landlord-Tenant Affairs (COLTA), which was a recommendation in the 1989 Task Force Report – the report that guided the formulation of the Commission.

### Staffing

DHCA would serve as the staffing agency to the CCOC, rather than the Office of Consumer Protection (OCP). When the CCOC was first created, it was staffed by Montgomery County's housing department. Currently, staffing for the CCOC is bifurcated. DHCA is responsible for registering common ownership communities and collecting registration fees, while OCP

Nancy Floreen, Chair, Planning, Housing and Economic Development Committee

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administers the complaint resolution process. The CCOC is tasked with providing advice to the County Executive and County Council regarding issues and policies that affect common ownership communities. Many of the challenges faced by common ownership communities are more closely related to housing issues in which DHCA has expertise. Since DHCA administers an established rental mediation program, oversees the COLTA, delivers housing outreach through a variety of avenues, and provides financing solutions for single family and multifamily properties, staffing the program at DHCA allows for greater synergy between the CCOC and these existing housing programs and adds value to impacted residents and communities.

### **Funding**

The numbers and needs of common ownership communities continue to grow in Montgomery County. The purpose and function, as articulated by the 1989 Task Force Report continues to necessitate that there are sufficient resources for the program. In order to address these growing needs, I am recommending an increase to the CCOC annual fee of \$2.00 per unit – from \$3.00 to \$5.00 – which would generate approximately \$266,000 in new revenue. These additional resources will enable DHCA and the Commission to address this growing need and deliver a low-cost, easy, and accessible dispute resolution solution while providing the increased training, technical assistance, and outreach needed to build stronger common ownership communities. The program has long been in need of additional resources and this will ensure that there is a dedicated and adequate level of funding for DHCA to administer an appropriately staffed program refocused on serving the needs of common ownership communities.

Improvements are already underway. OCP, DHCA, and the Department of Technology Services collaborated with the CCOC to develop an online training program to educate all residents serving on boards of directors on key CCOC challenges and issues. We will launch this program on January 1, 2016. In addition, DHCA will launch a new program to ensure that the owners of rental housing in common ownership communities are paying dues to their common ownership communities as well as upgrading its current licensing and registration system to streamline reporting and increase customer responsiveness.

### **Draft Legislation**

Amendments to Chapter 10B are needed to accomplish the above recommendations. In the near future, I will forward such legislation to the Council for its consideration.

Nancy Floreen, Chair, Planning, Housing and Economic Development Committee

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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 twenty-five years, changes are needed, and I look forward to working with the Council and the Commission to accomplish these goals. We will meet with the entire Commission soon to provide a detailed briefing on these proposed changes.

IL:wd

cc: George Leventhal, Council President  
Timothy L. Firestine, Chief Administrative Officer  
Eric Friedman, Director, Office of Consumer Protection  
Marc Hansen, County Attorney  
Jennifer Hughes, Director, Office of Management and Budget  
Fariba Kassiri, Assistant Chief Administrative Officer  
Bonnie Kirkland, Assistant Chief Administrative Officer  
Connie Latham, Special Assistant to the County Executive  
Sonny Segal, Director, Department of Technology Services  
Clarence Snuggs, Director, Department of Housing and Community Affairs



## Commission on Common Ownership Communities

Rm. 330, 100 Maryland Avenue, Rockville, Maryland 20850

To: The Honorable Isiah Leggett, Montgomery County Executive  
The Honorable Councilmembers, Montgomery County Council

From: Rand H. Fishbein, Ph.D., Chair  
Aimee Winegar, CMCA, LSM, PCAM, Vice-Chair  
Richard Brandes, Commissioner  
The Hon. Jim Coyle, City of Rockville Mayor (Ret.), Commissioner  
Terry Cromwell, Commissioner  
Marietta Ethier, Esq., Commissioner  
Mark Fine, Commissioner  
Bruce Fonoroff, Commissioner  
David Weinstein, Commissioner  
Donald Weinstein, Commissioner  
Ken Zajic, Commissioner

Date: November 16, 2015

Re: CCOC Response to the County Executive's October 30, 2015, Memorandum:  
Proposed Amendments to Chapter 10B

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On November 4, 2015, at its regular monthly session, the Commission on Common Ownership Communities, meeting in open session and by a unanimous vote of the members present, authorized the CCOC Chair and Vice Chair to respond to the County Executive's October 30, 2015, memorandum: "*Commission on Common Ownership Communities (CCOC) Amendments to Chapter 10B.*"

The Commission also authorized the transmittal to the Council and the Executive its vision of how the CCOC should be resourced and administered going forward so that it can thoroughly and effectively carry out all of its statutory mandates. This document, entitled: "*Emergency Relief Request for Montgomery County Commission on Common Ownership Communities,*" November 16, 2015, is being transmitted under separate cover.

### **Executive Leggett's October, 2015, Recommendations**

On October 30, 2015, County Executive, Isiah Leggett, responded to a request by the Council's PHED and PS Committees for recommendations on the future of the CCOC and its resource needs.<sup>1</sup> While the Commission is gratified that Mr. Leggett desires to "enhance the Commission's ability to address the purposes for which it was established twenty-five years ago," it strongly questions the emphasis placed on dispute resolution to the exclusion of other aspects of the CCOC's mandate such as education.

It might have been better if the CCOC had been consulted prior to transmittal of the recommendations to the Council. Its long years of service, combined with an intimate knowledge of how the Commission operates, or should operate, could have provided important "ground truth" as the Executive deliberated its recommendations. Still, we are hopeful that the positive attention the Commission's work now is receiving from the County's leadership, will serve as the catalyst for a serious dialogue on how the CCOC can be staffed to better serve the nearly 340,000 residents (36% of the housing stock of Montgomery County), that reside in common ownership communities.

#### **Dispute Resolution:**

It is the Commission's considered opinion that several of the Executive's recommendations are based on a false premise, namely, that "... (the) CCOC dispute resolution program has strayed from its original intent to function as an alternative to court litigation." The Executive may not be aware that these allegations have been thoroughly discredited by the report of the Office of Legislative Oversight (OLO) and the Commission's own statistics.

Additionally, we believe that it is a mistake to place total reliance on formal mediation to resolve disputes. Experience teaches that a one-size-fits-all solution to conflict resolution does not work and that the number and intensity of disputes will diminish with education and training. Conflicts, in any sphere, fall along a continuum. Disputes start small and grow in intensity with time and inattention. If and when conflicts do arise they should be addressed at the earliest possible moment. As every medical practitioner knows, early intervention often is the key to minimizing risk and improving outcomes.

The CCOC's Process and Procedures Committee has spent many months examining ways to streamline the present case management system. Several recommendations under evaluation include the use of an investigator to meet the parties on site for "informal" mediation discussions. Mediation is a broad concept, defined as "an act or process of

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<sup>1</sup> Isiah Leggett, County Executive, to Nancy Floreen, Chair, Planning, Housing and Economic Development Committee, and Marc Elrich, Chair, Public Safety Committee, Memorandum, Subject: Commission on Common Ownership Communities (CCOC) Amends to Chapter 10B, October 30, 2015. The request for recommendations from the County Executive came during a work session of the PHED and PS Committees, meeting in joint session, on June 18, 2015. The request from chairs Floreen and Elrich were made to OCP Director, Eric Friedman, and DHCA Director, Clarence Snuggs, testifying on behalf of County Executive Leggett on the subject of the resource needs of the CCOC.

...intervention between conflicting parties to promote reconciliation, settlement, or compromise." We do not want to deny the importance of "formal" mediation, but this avenue often comes too late in the process. Experience shows that when the parties to a dispute are presented with the facts and options at the earliest possible stage of a disagreement they are much more willing to compromise.

Disputes involving common ownership communities are no different than disputes in any other field. Even with the best of intentions, some simply cannot be resolved through early intervention or mediation. They may involve issues of first impression or basic disagreement on the law, its application and interpretation. Who, then, is best equipped to hear and decide these complaints? Is it a court of law with a crowded calendar, a requirement that attorneys must represent the parties and where the trier of facts has limited understanding of this specialized area of the law, or the CCOC whose members know the law, are familiar with the factual situations of most complaints and are volunteers thereby saving the County considerable expense.

#### **RECOMMENDATION #1**

*That consideration of the Executive's recommendations on this issue be postponed until the Committee on Process and Procedures has had time to meet with representatives of the Executive's Office and the Council. All parties share the same objectives and the Commission is reasonably certain that all parties can reach a policy consensus.*

**Composition of the CCOC:** The Executive has recommended that the CCOC's charter be amended to include five public at-large individuals as members of the Commission along with five owner/residents, and five professionals/managers.

This is a baffling suggestion since it would mean that instead of striving to enhance its talent pool with ever more qualified and experienced experts in common ownership law, the Commission, is being asked to lower its standards and accept individuals bereft of such specialized knowledge. The Commission understands that the new "at-large" commissioners would **not**, by definition, be attorneys. How this approach would enhance the delivery of justice, and ensure that the rights of all parties to a dispute are protected, is a question that the proposal leaves unanswered.

While this proposed change in the Commission's composition might work for the Office of Landlord-Tenant Affairs, it is unsuited to the CCOC. The issues addressed by the Office of Landlord-Tenant Affairs primarily involve leasing contracts and security deposits, two relatively narrow areas of the law. By contrast, common ownership disputes involve knowledge of several different areas of the law as well as the ability to understand lengthy and complex governing documents. Today, it has come into its own as a legal specialty, requiring unique training and years of experience to develop the required proficiency in its application.

The Commission believes strongly that there are significant public benefits from having experienced attorneys fully engaged in the hearing process. That their decisions are based upon a nuanced knowledge of the law, often is what is responsible for the fact that CCOC rulings being upheld on appeal well in excess of ninety-five percent of the time.

Lastly, the Executive's comments are based on a misunderstanding. Not all panel chairs are subject to the alleged conflict of interest identified by the Ethics Commission. The Ethics Commission only focused on the use of lawyers as chairpersons of the CCOC's hearing panels when those same lawyers might represent private parties in other, unrelated disputes that might come before the CCOC at another time. **Only half of the CCOC's sitting panel chairs practice before the CCOC; the others do not.**

Like all licensed attorneys in the State, Commission attorneys are subject to the *Rules of Professional Conduct*<sup>2</sup> and the sanctions that attend proven misconduct. Attorneys who practice common ownership law are no different than attorneys in any other legal niche with respect to their susceptibility to conflicts of interest. The fact that no CCOC attorney panel chair in the twenty-five year history of the Commission ever has been found "guilty" of a conflict of interest speaks for itself.

That said, the Commission stands committed to the highest level of professional conduct in all of its dealings. We always will strive to eliminate not only the potential for an actual conflict of interest among our volunteer attorneys and non-attorneys, but the perception of a conflict of interest as well. The CCOC will comply fully with the opinions of the Ethics Commission.

### **RECOMMENDATION #2**

*That the question of changes to the composition of the CCOC be tabled and that the Executive engage the Commission in dialogue on how the operation of hearing panels might be improved and the policies designed to strengthen judicial fairness and due process strengthened.*

### **Transfer of CCOC to DHCA**

The Commission believes that neither the Office of Consumer Protection nor the Department of Housing and Community Affairs is the right home for the Commission. Each has its own well-defined mission and a budget and trained staff tailored to carry out very specific responsibilities.

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<sup>2</sup> <http://www.courts.state.md.us/attygrievance/rules.html>

By contrast, common ownership communities have their own set of unique challenges. They operate under specialized statutory authorities and are subject to rules and regulations applicable to the needs of legally distinct constituencies. COC's operate under corporate law. The conflicts that arise with COCs are between neighbors, each of whom is an equal shareholder in their community. The residents of COCs are not consumers or businesses regulated by OCP, nor are they landlords or tenants as regulated by the Office of Landlord-Tenant Affairs within DHCA. To place the CCOC within either OCP or DHCA is simply to mix apples and oranges and to unnecessarily complicate the management responsibilities of those in charge of overseeing these large and complex operations.

Fortunately, the CCOC is composed of a dedicated, knowledgeable and skilled group of volunteers. Its leadership is intensely and passionately interested in making the Commission the model resource for COCs that will be the envy of all jurisdictions. We know we can do it. What the Commission needs is strong support and advocacy at all levels of the County government.

### **RECOMMENDATION #3**

*That representatives of the Council and the Executive, in close consultation with the Commission on Common Ownership Communities, consider where the CCOC ultimately should reside and under what conditions (e.g. where it would report on the organization chart of the agency chosen), mindful that the Commission must be appropriately funded, staffed, and equipped to carry-out its statutory mandate to the best of its ability. Moreover, the responsibility for the Commission's budget and policy must be aligned under a single authority; the Commission must have a strong advocate at the helm and be allowed to continue to provide advice directly to the Executive, the Council and other entities as currently provided for under Chapter 10B. The Commission has provided both the Executive and the Council with four alternative options for a future home and respectfully asks for their consideration.*

#### **Increased Staffing and Funding:**

There appears to be broad agreement between the Executive, the Council, the Commission and the constituency it serves, that the CCOC needs additional resources to function as the law intends. However, an issue hangs over the Commission that first must be addressed.

Why are over 60 percent of the fees collected to support the Commission used to support indirect administrative expenses with little or no measurable direct benefit accruing to CCOC operations?

The Executive has proposed increasing financial support for the CCOC support by raising the fees charged to communities. But what first must be asked is whether any of these new funds will be subject to a 60 percent administrative charge as well? If so the increase in

fees will not have little appreciable impact on the CCOC's urgent need for additional staffing, office IT modernization, the new online training mandate or general program support. At some point common ownership communities will question how their money is being spent.

It bears reminding that currently the CCOC has no authority over its own budget. It does not control its own funds. It lacks the technology to track its own expenses. It has no oversight over the collection or disbursement of its funds or their allocation to the indirect costs assumed by other government entities that act on its behalf. It submits no annual budget presentation to the Executive or the Council and is not authorized to make any independent budget decisions.

The Commission operates solely on the basis of the fees collected annually from the residents of common ownership communities at the rate of \$3.00 per unit. According to a recent OLO report, that amounts to \$408,000 in FY 2014. Since the Commission never has been provided a full accounting of how its operating funds, it is impossible to estimate with any precision how all but about \$160,000 is allocated. To the best of our knowledge, the CCOC receives no direct operating funds from the County's general revenue.

Poorer communities may oppose an increase in fees since a number of COCs have serious fiscal issues and are having difficulty paying the current fees. There also is the question of timing. Most COCs already have approved budgets for the next fiscal year. Any funding plan may require that the County pay for staffing out of general funds for a period of time to allow communities to adjust to this additional expense.

On September 15, 2015, three commissioners met with DHCA staff to discuss how DHCA collects fees and administers data collection. Serious fault lines were identified which must be addressed since association numbers may be much greater than previously thought. There seems to be no system to collect fees from delinquent COCs, data is imputed manually and basic data essential for the implementation of the training of association directors is missing. The Commission has sent DHCA staff a letter suggesting improvements. We are hopeful that DHCA is working to resolve the issues we have raised. However, we believe DHCA would agree that it is essential that these shortcomings be addressed simultaneously with the discussion on funding and staffing.

Finally, the Commission has a pressing need which cannot be ignored and must be factored into the discussion of staffing and funding. At the beginning of 2015 the County enacted a bill that requires the training of an estimated five thousand directors who serve on the boards of over one thousand associations across the County. A provision of the new law requires that the compliance be monitored and enforced. This means that a system will have to be devised to track not only the 5,000 active directors, but the thousands more who have taken the test at some time, but who are not currently sitting as directors. At present, the CCOC has no IT infrastructure or staff that to carry out this important function.

#### **RECOMMENDATION #4**

*That the County develop a reliable data base listing all pertinent information about COCs in the county and that a system be instituted as soon as possible for collection and enforcement of delinquent fees. Additionally, the Commission will provide the Executive and the Council with a plan for addressing its immediate and long-term staffing, IT and funding needs as soon as reasonably possible. This will give the Commission an opportunity to engage Executive and the Council in a meaningful and comprehensive dialog on how best to support the CCOC on a sustainable basis.*

#### **Conclusion**

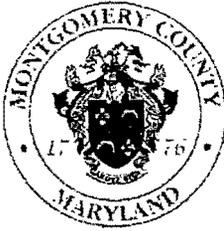
The citizens of Montgomery County who live in common ownership communities are grateful for the central role played by the County Executive in the establishment of the CCOC. His was an inspired vision that has brought rising home values, jobs and an enviable lifestyle to a sizeable portion of the region.

As the Homeowners' Association Task Force that gave rise to the CCOC noted in its landmark 1989 study:

*"Members of common ownership communities are in effect citizens of quasi-governments, which provide services in lieu of government services, levy taxes (assessments), and otherwise have significant impact on the lives of residents and their most significant financial investment – their homes. Accordingly, all residents of such communities deserve the protection of democratic governance. To the extent that owners are satisfied with living in common ownership communities, and problems are minimized, potential purchasers will be more likely to buy into such communities, their values will increase, and the County property tax base will expand."<sup>3</sup>*

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<sup>3</sup> Final report of the Homeowners Association Task Force, established by the Montgomery County Council in 1989 to study the problems and make recommendations regarding homeowners' associations, condominiums and cooperatives.



## Commission on Common Ownership Communities

Rm. 330, 100 Maryland Avenue, Rockville, Maryland 20850

To: Francene Hill, Chief of the Office of Licensing and Registration, DHCA  
Gaël Le Guellec, IT Manager, DHCA

Cc: Marsha Carter, Management and Budget Specialist, OCP  
Lorena Bailey, Investigator, OCP  
Peter Drymalski, Esq., Professional Staff

From: Rand H. Fishbein, Ph.D., Chair *RHF*  
Aimee Winegar, CMCA, LSM, PCAM, Vice-Chair  
Marietta Ethier, Esq., Commissioner  
Jim Coyle, City of Rockville Mayor (Ret.), Commissioner

Date: September 24, 2015

Re: Request for: Real-Time Data, IT Database Connectivity, DHCA-CCOC-OCP Policy  
and Procedure Reform, Fee Collection Tracking and Compliance Enforcement,  
and Related Matters

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This purpose of this memorandum is to serve as a formal request to the Department of Housing and Community Affairs (DHCA) for specific services, data sets and policy changes that the representatives of the Commission on Common Ownership Communities (CCOC) believe are urgently needed to carry out the duties of the CCOC under Chapter 10B of the County Code.

On September 15, 2015, a meeting was held in Suite 330, 100 Maryland Avenue, Rockville, Maryland, between representatives of the DHCA, the CCOC, and the Office of Consumer Protection (OCP). The purpose of the meeting was to discuss the needs of the CCOC in three principal areas:

- Database development, access and analysis,
- Fee tracking, collection, and enforcement, and
- Inter-office database connectivity, procedures and reporting.

### **Applicable Authorities**

Under Chapter 10B-4, OCP is tasked to provide administrative support to the CCOC. As part of this responsibility, it is understood that the OCP has entered into an agreement with DHCA to perform certain services for which it has a resident capability not found at OCP. The following are the statutory authorities that define the responsibilities of OCP in supporting the CCOC.

#### **Sec. 10B-5. Duties of the Office of Consumer Protection**

The Office, in consultation with the Commission, must:

- "maintain a master roster of homeowners' associations, condominiums, and cooperatives, their leadership, and their professional management companies if applicable," Sec. 10B-5(b);
- "maintain a collection of common ownership community association documents for use as a model and for reference," Sec. 10B-5(b);
- "assist the Commission in carrying out its duties and in implementing Commission decisions under Article 2. (1990 L.M.C., ch. 33, §1; 1994 L.M.C., ch.9, §1; 1996 L.M.C., ch. 13, § 1; 2005 L.M.C., ch.26, § 1.)," Sec. 10B-5(J);
- "Each common ownership community must register with the Commission annually, and identify its elected leadership and managing agents, on a form provided by the Commission," Sec. 10B-7 (a)(1).

#### **Request for Data Sharing<sup>1</sup>**

The CCOC respectfully requests that DHCA:

1. Report to the Commission, upon its request and not less than quarterly, on the number of COCs in the county, the status of registrations for them (billing schedule, etc.), and accounts received and payable.
2. Provide quarterly financial statements from DHCA showing how fees collected on behalf of the CCOC and used by DHCA,<sup>2</sup> are allocated. This document should be accompanied by a report of the tasks and the staff hours spent to support the CCOC mission.
3. Provide to the CCOC a functioning and up-to-date electronic email list to assist Commission staff in communicating with all community leaders and property managers

<sup>1</sup> Unless otherwise communicated by DHCA to the CCOC, we assume that the requests for data and changes to policies and procedures by DHCA can be carried out within the amount of funding currently being provided to DHCA from fees collected on behalf of the CCOC.

<sup>2</sup> In its FY 20115 report, the OLO noted that DHCA charges the CCOC approximately \$67,000 for the services it provides to the Commission.

and acquiring, as necessary, information as it deems appropriate for its work.<sup>3</sup> This list may also be used to track compliance with the directors' training mandate.

4. Report on the disposition of all COC governing documents collected from associations over the last five years to the present as required under Chapter 10B.
5. Provide access to standardized DHCA accounting reports that show how service fees paid to the Department are allocated across personnel and activities used in support of CCOC requirements.

### **Request for Changes in Policy and Procedures**

The CCOC respectfully requests that DHCA:

1. Develop a robust process for the identification of all existing and new COCs in the county, with a designated point of contact for this purpose. This list should be cross-checked and updated annually. There are various sources of information where the DHCA can obtain such information: HOA registrations in Park and Planning, Land Court, State Department of Corporations, Department of Taxation, etc.
2. Develop a fee collection policy, such as is required of associations, for tracking billing and payments. This should include a procedure for reporting and follow-up with associations that do not pay.
3. Introduce, no later than December 1, 2015, a new COC registration form prepared by the Commission and requesting of associations information essential to Commission work as provided for in Chapter 10B. (See attachment entitled: ***Registration for Communities with No Unit Changes***)
4. Implement a database access agreement between DHCA and the CCOC that will provide 24/7 electronic connectivity for the access of DHCA-held data collected on behalf of the CCOC. This data should be made available in a format easily readable and manipulated by CCOC staff and Commissioners. Provision should be made for the security protection of this data.
5. Upgrade the CCOC database to include basic data about each common ownership community in the County (HOA, Condominium and Cooperative), with the data to be identified in the attached form. Specifically, we are seeking the following:
  - a. Points of contact for all levels of leadership – this is essential to disseminate information about county laws, educational information, etc.,

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<sup>3</sup> This presumes that there is also an email system capable of handling a mailing list of managers and board members that will presumably number in the thousands.

- b. Financial information so that we can begin to perform some rudimentary analysis of COC financial conditions – this would help us direct our educational efforts,
  - c. Information about the members of boards of directors so that the Commission can ensure compliance with the council's education mandate. This data will need to be tracked in perpetuity, as volunteers come and go over decades of voluntary service, and the mandate requires training only once, and
  - d. Information about management companies and managers.
6. Develop a protocol to ensure that data collected for the CCOC is being keyed in and updated in a timely manner. We were told by DHCA staff at our meeting on September 15<sup>th</sup> that clerical staff is available for this purpose. As the commission has not seen any reports or data to date, we have not developed specific requests for reporting. At a minimum, we would request the following:
- a. a monthly report on COC registration and payments,
  - b. the number of vacant board seats county-wide,
  - c. the number of board members who are due for training,
  - d. the number of board members who have been trained,
  - e. the number of board members who are overdue for training, and
  - f. the number of board members who have accessed the on-line training course and any feedback that they have provided.
7. After we have gathered financial data for the COCs, we would like to receive reporting on their financial condition, to include, but not limited to:
- a. total assets under management,
  - b. total delinquencies,
  - c. delinquency rates, and
  - d. total reserve funds invested.
8. The Commission requests a copy of the guidance document that provides instructions/procedures to DHCA staff on how to go about collecting information to better serve the County's needs and provide the CCOC with basic information that is essential for fulfillment of its mandate.

### **Conclusion**

The Commission looks forward to working with DHCA to improve not only the quality and timeliness of the information collected annually from common ownership communities, but also the manner in which it is communicated to the CCOC for analysis and the subsequent enhancement of CCOC services. Thank you for your cooperation and willingness to be of assistance.

## ATTACHMENT



### MONTGOMERY COUNTY COMMISSION ON COMMON OWNERSHIP COMMUNITIES

### Common Ownership Community Registration

100 Maryland Avenue, 2<sup>nd</sup> Floor

Rockville, MD 20850

### Registration for Communities with No Unit Changes

Please note that pursuant to Montgomery County Code Section 10B, all common ownership communities are required to annually notify their members of the existence and role of the CCOC. A sample notice form may be found at the CCOC web site at [www.XXXXXXX](http://www.XXXXXXX).

Please note that pursuant to Montgomery County Code Section 10B, as of January 1, 2016, all members of the governing body of a common ownership communities must successfully complete the educational curriculum developed by the CCOC or a similar educational curriculum administered by another organization that is approved by the CCOC within 90 days after being elected or appointed to the governing body for the first time after January 1, 2016. Please see the CCOC web site for more information.

To complete this form:

- Please print clearly.
- This form must be completed and emailed to XXXX
- The annual fee is \$\_\_\_\_\_ per unit, payable by check or money order to Montgomery County, MD.
- Master associations are required to complete the form but do not pay the registration fee.

If you have any questions about how to complete this form, please call XXXX and leave a message. Your call will be answered in a timely manner. You may also send inquiries by email to XXXX.

**COMMUNITY INFORMATION**

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Name of Common Ownership Community \_\_\_\_\_

Please write the full legal name of the entity as it appears in the Declaration.

Corporate Address (include city, state, zip) \_\_\_\_\_

Preferred Phone Number \_\_\_\_\_ Preferred Email \_\_\_\_\_

Primary Contact Name / Title \_\_\_\_\_

This should be the Board President or professional community manager, if any.

Is this community part of an umbrella/master organization? If yes, name: \_\_\_\_\_

Is this community: an umbrella/master organization?  condominium?

cooperative?

Date incorporated \_\_\_\_\_ Date of turnover to members \_\_\_\_\_

Total number of residential units of all types \_\_\_\_\_ Dollar amount of CCOC fee paid \_\_\_\_\_

**FINANCIAL INFORMATION**

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Total projected annual budget income from assessments for the current fiscal year \_\_\_\_\_

Projected reserve contribution for the current fiscal year \_\_\_\_\_

Reserve fund balance as of December 31 of the previous year \_\_\_\_\_

Total dollar amount of accounts receivable as of December 31 of the previous year \_\_\_\_\_

Total number of units that are more than one year in arrears \_\_\_\_\_

Total number of units that are in foreclosure and/or bank owned \_\_\_\_\_

**ADMINISTRATIVE INFORMATION**

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Date of current year's annual meeting \_\_\_\_\_

Number of seats on the board of directors required by the governing documents \_\_\_\_\_

Number of vacant board seats as of current date \_\_\_\_\_

Length in years of board member terms \_\_\_\_\_

**BOARD OF DIRECTORS INFORMATION**

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Director Name	Office/Title	Date of election/appointment to the board	Date of training as required by county code	Email/Telephone

**MANAGEMENT INFORMATION**

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Is this community "self-managed"? Yes

If self-managed, please provide the name and email for a point of contact \_\_\_\_\_

*If managed by a manager or management company, please complete the information below.*

Name of Management Company \_\_\_\_\_

Name of Manager \_\_\_\_\_

Phone Number \_\_\_\_\_ Email \_\_\_\_\_

Mailing Address \_\_\_\_\_

**FEEDBACK**

Please provide any comments you may have for the CCOC on services provided by the CCOC and/or needs that you believe should be filled.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**SIGNATURE**

This form must be signed by the Board President. An agent signature is not acceptable.

I affirm under penalty of perjury that the information provided is true to the best of my knowledge and belief. I also understand that if there are any changes in information, the community must notify the Commission on Common Ownership Communities within 10 days of the change.

Board President Signature \_\_\_\_\_

Print or Type Name \_\_\_\_\_

Date \_\_\_\_\_

**Notice**

All condominium, cooperative and homeowner associations within Montgomery County Government jurisdiction are required by Chapter 10B of the Montgomery County Code to register with the Commission on Common Ownership Communities through the Department of Housing and Community Affairs. Registration requirements as outlined in Chapter 10B of the Montgomery County Code do not apply to properties within the incorporated municipalities of Chevy Chase Village, Town of Chevy Chase, City of Gaithersburg, Town of Garrett Park, Town of Kensington, Town of Laytonsville, Town of Poolesville, town of Somerset, and town of Washington Grove. Contact local municipalities for further information or requirements.

#### 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.<sup>24</sup>
- 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.<sup>25</sup>

#### → 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.<sup>26</sup>

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.<sup>27</sup>

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.

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<sup>24</sup> COMCOR 10B.07.01.01

<sup>25</sup> COMCOR 10B.07.02.01

<sup>26</sup> § 19A-12.

<sup>27</sup> § 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.”<sup>28</sup>
- 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

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<sup>28</sup> 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

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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.<sup>1</sup> 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

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<sup>1</sup> “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.<sup>2</sup>

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

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<sup>2</sup> 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.

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Montgomery County Ethics Commission

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



## 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

### **OFFICE OF CONSUMER PROTECTION**

100 Maryland Avenue, Room 330 • Rockville, Maryland 20850 • 240/777-3766, fax: 240/777-3768  
[www.montgomerycountymd.gov/ccoc](http://www.montgomerycountymd.gov/ccoc)

Letter to the Montgomery County Ethics Commission  
April 4, 2014

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.<sup>1</sup>

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

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<sup>1</sup> 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

Letter to the Montgomery County Ethics Commission  
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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:

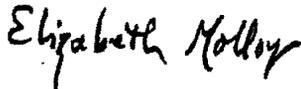
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(c) Each panelist must not have any interest in the dispute to be heard. Notwithstanding Section 19A-12, the list of volunteer arbitrators that chair panels under subsection (b) may include attorneys that represent parties before other hearing panels 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](mailto: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.

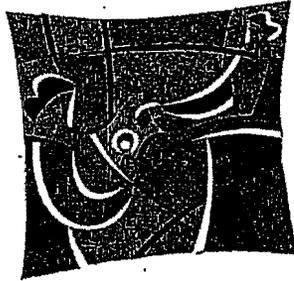
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Peter Drymalski, Investigator  
Office of Consumer Protection  
100 Maryland Avenue, Room 330  
Rockville, Maryland 20850

\* 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:

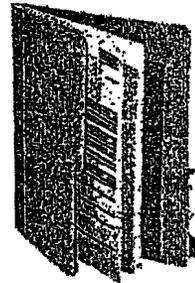
- The date and place of the hearing;
- the issues to be resolved at the hearing;
- \* • the names of the 3 members of the hearing panel; \*
- \* • the right to object to a panel member for good cause; \*
- the right to conduct discovery (see below);
- the right to request subpoenas;
- Other rights under 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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100 Maryland Avenue, Room 204, Rockville, MD 20850  
OFFICE 240-777-6670, FAX 240-777-6672

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.<sup>1</sup> 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

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<sup>1</sup> 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.<sup>2</sup> 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

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<sup>2</sup> “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



## Commission on Common Ownership Communities

Rm. 330, 100 Maryland Avenue, Rockville, Maryland 20854

July 9, 2015

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

**Re:** *Request for waiver of restrictions identified by Ethics Commission that prevent licensed attorneys who practice before the Commission on Common Ownership Communities (CCOC) from also serving as volunteer Panel Chairs in quasi-judicial hearings of the CCOC, in accordance with Section 19A-8 of the Montgomery County Code.*

Dear Chairwoman Barrow:

On behalf of the Commission on Common Ownership Communities (CCOC), I would like to request, respectfully, that the Ethics Commission give favorable consideration to the following four matters at its earliest convenience:

- **Request 1:** To approve new CCOC Ethical Standards, dated July 9, 2015, covering the participation of Hearing Officers serving on quasi-judicial Panels of the CCOC (Attachment 1),
- **Request 2:** To approve a new CCOC Conflict-of-Interest Disclosure form, dated July 9, 2015, applicable to attorneys who practice before the quasi-judicial Hearing Panels of the CCOC and who, on occasion, may also serve as volunteer Hearing Panel Chairs (Attachment 2),
- **Request 3:** To approve a new Litigant Consent Form dated July 9, 2015, that would permit the parties to a dispute before a CCOC quasi-judicial Hearing Panel voluntarily, and by mutual consent, to agree to permit an attorney who practices before the Commission, also to serve as the presiding officer (the Panel Chair), in their case. Either potential party would have the option to reject a Panel Chair selected by the Commission and request an attorney who does not practice before the CCOC and so has no pecuniary interest (Attachment 3), and

- **Request 4:** To grant a “class waiver” under Section 19A-8 of the County Code for attorneys who practice before the CCOC and who also volunteer to serve as Panel Chairs in the quasi-judicial hearings of the Commission.

### **Background**

The aforementioned requests are an outgrowth of discussions held between the CCOC and the Ethics Commission on the question of whether there are any circumstances under which attorneys who practice before the Commission on Common Ownership Communities might be permitted to continue their service as volunteer Panel Chairs of CCOC quasi-judicial hearings. As we understand the Ethics Commission’s position, Panel Chairs should disclose more fully any pecuniary interest they have in the CCOC and litigants should have the option of declining a panel chair they feel may have an inherent bias against them. In other words, improvements in transparency would go a long way to enhancing the operation and credibility of the CCOC.

At its June 17, 2015, public meeting, members of the Ethics Commission kindly shared with representatives of the CCOC some of their concerns regarding CCOC’s practices as well as ideas on how we might begin to frame a solution to address them. Indeed, it was pointed out that §19A-8 of the Montgomery County Code provides the Ethics Commission with the authority to grant “a public employee or a class of public employees” a waiver from prohibitions under the Code should one or more enumerated conditions in the law be satisfied.

Working with our Counsel, CCOC Commissioners have tried to satisfy these conditions by crafting a proposal that reasonably and constructively mitigates the conflict-of-interest issue. It does this by:

- Crafting ethical guideless that more clearly spell out the obligations of panel chairs to the principles of fairness and integrity,
- Requiring that attorneys serving as panel chairs file a conflict-of-interest disclosure form that reveals any and all pecuniary relationships they might have with the CCOC, and
- Informing the parties to a case that they are not bound to litigate before a Panel Chair who also practices before the Commission unless they both sign a form consenting to that individual.

The Commission on Common Ownership Communities (CCOC) is committed to transparency and integrity in all of its activities. As such, we welcome the opportunity to work with the Ethics Commission to make sensible changes to our processes and procedures that are in keeping with both the letter and the spirit of the law – changes

that reinforce our twenty-five year reputation for fairness and impartiality in the handling of homeowner disputes.

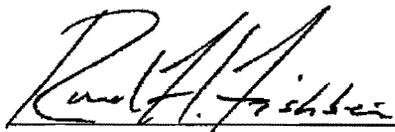
### Conclusion

The CCOC is hopeful that its proposals will further enhance the confidence that litigants have in our adjudication process. At the same time, we believe that it is in the interest of all parties who come before the CCOC to have access to Panel Chairs who are schooled in common ownership law and are fully versed in CCOC procedures.

Utilizing Panel Chairs that have more than just a passing familiarity with the complex and ever-changing field of common ownership law helps to ensure that Panel decisions not only are fair and just, but stand the best chance of withstanding rigorous court scrutiny if appealed. Presently, well over 95 percent of CCOC Panel decisions are upheld on appeal to the Circuit Court, a testament both to the strength of their reasoning and the expertise of the attorneys we recruit into our ranks.

The CCOC is grateful for the opportunity to partner with the Ethics Commission in the service of both justice and good governance in Montgomery County.

Respectfully,



Rand H. Fishbein, Ph.D.  
Chair, CCOC



## Commission on Common Ownership Communities

Rm. 330, 100 Maryland Avenue, Rockville, Maryland 20854

### Standards of Conduct for CCOC Panel Chairs

The Standards of Conduct for Panel Chairs of the Montgomery County Commission on Common Ownership Communities (CCOC) have been adopted by the CCOC and approved by the Montgomery County Ethics Commission under the following provisions of the Montgomery County Code ("County Code"):

- §10B-6 (a) (Duties of the Commission on Common Ownership Communities);
- §19A-6 (a) (Authority and duties of Commission; appeal of Commission decisions); and
- §19A-8 (b) (Waivers).

The Standards of Conduct for CCOC Panel Chairs are intended to supplement ethical requirements as set forth in statutes, regulations or rules for administrative Panel Chairs that apply to the Commission on Common Ownership Communities, either presently or in the future and to supplement the Code of Ethics governing attorneys practicing law in Maryland. Nothing in these Standards is intended to contradict, overrule, or replace any such requirements.

As used herein, "Panel Chair" means any person assigned to act as the chairperson of a CCOC hearing panel under Section 10B-12 (b) of the Montgomery County Code.

#### **Standard I – Impartiality**

- A. A Panel Chair must recuse him/herself if the Panel Chair believes he or she cannot conduct the hearing process in an impartial manner.
- B. Panel Chairs must conduct themselves in such a way that no one could reasonably believe that any person or agency could improperly influence them in the performance of their duties.

1. Panel Chairs must not conduct or participate in deciding the outcome of any proceeding in which their impartiality might be reasonably questioned. An appropriate ground for disqualification of a Panel Chair is personal knowledge of the evidentiary facts in a case, other than: (a) that obtained in the course of the Panel Chair's official duties with regard to a prior case involving a party, or (b) that obtained from the official transcript in a prior case involving a party.
  2. Panel Chairs must preside without bias or prejudice and without discrimination or any prohibited basis against any person involved in the proceeding, and should control the proceedings to prevent such discriminatory behavior by any other person involved.
  3. A Panel Chair must neither give nor accept a gift, favor, loan, services, meals, or other item of value that raises a question as to the Panel Chair's actual or perceived impartiality.
- C. If a Panel Chair must recuse him/herself, the Panel Chair must return case to Commission Staff for immediate reassignment.

#### **Standard II - Conflicts of Interest**

- A. Panel Chairs must avoid a conflict of interest or the appearance of a conflict of interest before, during, and after a proceeding. A conflict of interest can arise from involvement by the Panel Chair with the subject matter of the dispute or from any relationship between the Panel Chair and any participant, whether past or present, personal or professional, that reasonably raises a question of the Panel Chair's impartiality. However, the fact that the Panel Chair may be acquainted with a party or witness, or may have taken a position in another proceeding or public forum on a legal issue involved in the dispute, is not, by itself, a conflict of interest disqualifying the Panel Chair from the acting as a panel chairperson.
- B. The Panel Chair must make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the Panel Chair.
- C. Unless the Panel Chair recuses himself or herself on the Panel Chair's own motion, the Panel Chair must promptly disclose all conflicts of interest that are known to the Panel Chair. The Panel Chair must make such disclosure to the CCOC staff and to the parties or the parties' counsel if any. The parties may agree to allow the Panel Chair to preside after the disclosure has been made. The parties must use the attached consent form for this purpose.
- D. Subsequent to a Panel hearing, a Panel Chair must not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the proceeding. When a Panel Chair develops personal or professional relationships with parties, other individuals, or organizations

following a proceeding in which they were involved, factors such as time elapsed following the proceeding, the nature of the relationships established, and the services offered when determining whether the relationships might create a perceived or actual conflict of interest should be taken into consideration.

- E. It is a potential, but not actual, conflict of interest for a Panel Chair to preside over a hearing panel when either of the parties is represented by an attorney who is also a Panel Chair in other disputes coming before the CCOC. In such a case, the Panel Chair must make the disclosure required under Paragraph C, above. This potential conflict does not automatically disqualify the Panel Chair from serving on the hearing panel

### **Standard III – Competence**

- A. Panel Chairs must demonstrate and maintain competencies as follows:

1. I) At a minimum, a Panel Chair must:
  - a. not be a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;
  - b. possess knowledge of, and the ability to understand, the provisions of applicable laws and regulations pertaining to the exercise of authority over and within common ownership communities in Montgomery County, Maryland;
  - c. possess the knowledge and ability to conduct hearings in accordance with appropriate legal standards; and
  - d. possess the knowledge and ability to render and write decisions in accordance with appropriate legal standards as described in Article I, Chapter 2A (Administrative Procedures Act) of the County Code.
2. The CCOC must keep a list of the persons who serve as Panel Chairs. The list must include a statement of the qualifications of each of those persons.

### **Standard IV – Professional Conduct**

Panel Chairs must:

1. Always act in a manner that promotes public confidence in the integrity, impartiality and efficiency of the hearing process;
2. Maintain high standards of professional conduct;
3. Follow relevant procedures required by the County Code, exercising their permissible discretion in the interest of fairness and adjudicative efficiency when consistent with the requirements of due process; and

4. Punctually fulfill their professional commitments within the specified timelines under applicable law.

#### **Standard V – Confidentiality**

1. Panel Chairs must not disclose confidential or private information obtained by reason of official position or authority as required by law.
2. Panel Chairs must never seek to use such confidential information to further their personal interests.
3. Panel Chairs must follow CCOC rules or policies regarding media contacts. In any permitted contact with the media, Panel Chairs must limit the sharing of information to that which does not identify individuals and should never discuss the merits of any specific case.
4. Panel Chairs must avoid ex parte communications about a case with anyone (including family, friends, and associates), unless authorized by statute or agency regulations. However, Panel Chairs may in confidence discuss cases with other Panel Chairs, members of the hearing panel, and County staff. If the Panel Chair has any ex parte communication with any party on the merits of a pending dispute, the Panel Chair must promptly disclose that fact to the parties and the CCOC staff.

#### **Standard VI - Personal Conduct**

1. Panel Chairs should not present themselves in such a way as to convey the impression that they speak for or on behalf of the CCOC in any public presentations, speaking engagements, articles, etc. This section does not prohibit a Panel Chair from discussing CCOC rulings or policy, or from making decisions on behalf of a hearing panel in any pending case.
2. Panel Chairs should treat all participants with equal courtesy and dignity and require the same treatment of the Panel Chairs by participants. Panel Chairs should refrain from social conversation that is inconsistent with the formality and gravity of the situation, and should assure that every participant is addressed with the degree of formality that such participant prefers.
3. Whenever an assigned Panel Chair has reason to believe that he or she has an actual or potential conflict of interest, that Panel Chair must notify Commission Staff of the situation, along with the date upon which a decision about the conflict must be made by the parties and reported to the Panel Chair by Commission Staff. The Panel Chair will give no more than ten (10) days for this process to be completed.

4. CCOC staff must notify the parties or their attorneys (if any), of the potential conflict and of their right to object to, or waive their objection to, the appointment of the Panel Chair.
5. Commission Staff will notify the parties to a conflict of their respective decisions regarding waiver of the conflict.
6. If both parties do not agree to waive the conflict, Commission Staff will notify the Panel Chair that the conflict cannot be waived, with no mention of which party did or did not agree to a waiver.
7. The Panel Chair immediately will recuse him or herself from the pending hearing, and as soon as is practical, the CCOC Chair will reassign the case to another Panel Chair.
8. If both parties to a dispute agree to waive the conflict, then each party or its attorney (if any) will complete and sign the "Consent Form for Waiver of Panel Chair Conflict" and will forward it to Commission Staff in sufficient time to allow Staff to advise the Panel Chair of the parties' decision within the timeframe set by the Panel Chair.
9. If either party does not provide a response to the Commission Staff in sufficient time for Staff to abide by the deadline set by the Panel Chair, it will be assumed that the party consents to the waiver. This provision does not apply if the Staff knows that the notice was not delivered to the party.



## Commission on Common Ownership Communities

Rm. 330, 100 Maryland Avenue, Rockville, Maryland 20854

### Consent to Assignment of Volunteer Panel Chair Who Practices Before the CCOC

1. CCOC hearing panels have three members. Two CCOC members are selected by the CCOC Chair: one who is "from unit or lot owners or residents" of common ownership communities and the other from "persons who are members of professionals associated with common ownership communities (such as persons involved in housing development and real estate sales and attorneys who represent community associations, developers, housing management or tenants)."
2. The two CCOC panelists appointed by the CCOC Chair select a panel chair from a list of volunteer arbitrators trained or experienced in common ownership community issues. Almost all volunteer panel chairs are lawyers.
3. Some of the volunteers are attorneys who occasionally represent clients (either associations or members or both) before CCOC hearing panels in other cases. The attorneys on the list more often than not represent homeowner associations. They will not act as panel chairs in any case involving their own clients.
4. The Montgomery County Ethics Commission issued guidance on April 10, 2014, finding that the use of attorneys as panel chairs who practice before other CCOC panels in other cases was inconsistent with the Montgomery County Public Ethics Law. That guidance can be found at <http://www.montgomerycountymd.gov/Ethics/Resources/Files/pdfs/CCOC%20Disposition%20FINAL.pdf>.
5. This guidance by the Ethics Commission has resulted in the CCOC not being able to use several of the persons on its list of panel chairs even though those lawyers are usually experts in community association law and knowledgeable about past CCOC decisions. Further, the CCOC has had difficulty meeting demand for hearing panels due to the reduced number of eligible panelists.

6. As a result of the CCOC's concerns, the Ethics Commission issued a limited waiver of the law otherwise prohibiting the participation of attorneys who practice law before the Commission. The waiver is based on the condition that both parties to a CCOC dispute agree to the panel chair selected by the CCOC.
7. CCOC hearing panels have 3 members, including the Chairperson. Each member has only one vote in its decisions.

**Please Sign Either Paragraph. If You Do Not Sign Either Paragraph, It Will Be Assumed That You Consent.**

**Consent**

I, being a party to the matter of \_\_\_\_\_  
before the CCOC, consent to having \_\_\_\_\_ (name), an  
attorney who practices before other CCOC panels in other cases, be appointed as the  
Chairperson of the hearing panel in this case. I understand that if either I or the other  
party do not consent to such an appointment, then the CCOC Chair will appoint a  
person who is on the CCOC's list of eligible panel chairs and who does not represent  
parties before other CCOC panels to chair the hearing panel of the above matter.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Printed name

\_\_\_\_\_  
Title

**Do Not Consent**

I DO NOT CONSENT to having an attorney who practices before other CCOC panels  
appointed as the Chair of the panel that will decide the matter to which I am a party.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Printed name

\_\_\_\_\_  
Title



# Commission on Common Ownership Communities

Rm. 330, 100 Maryland Avenue, Rockville, Maryland 20854

## Consent Form for Waiver of Potential Conflict of Interest by a Panel Member

One of the members of the hearing panel assigned by Commission Staff to the quasi-judicial hearing has indicated that, despite the possible conflict of interest, he/she does not believe that it will affect his or her ability to decide this case fairly and impartially, and according to the law and the facts. The panel member has referred this matter to Commission Staff so that it can notify both parties. The parties can object to the panel member, or can waive their objections.

Your decision to consent, or not to consent to this panel member for [Case No.] is entirely voluntary. **If you do not sign and return your objection, it will be assumed that you do not object.**

Objections to the participation of an assigned panel member must be for good cause. They will be decided by the Chairperson of the Commission on Common Ownership Communities in consultation with the Office of the County Attorney.

Check one:

I consent (agree) to panel member [Name] deciding Case No. [ ].

OR

I do not consent (agree) to panel member [Name] deciding Case No. [ ]. State the reason for your objection: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Printed Name and Title of Party

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date



## 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**

100 MARYLAND AVENUE, ROOM 204, ROCKVILLE, MARYLAND 20850  
OFFICE: 240.777.6670 FAX: 240.777.6672

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.<sup>1</sup> 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.

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<sup>1</sup> 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.<sup>2</sup>

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

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<sup>2</sup> 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.

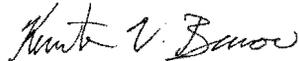
Lack of Suitability of a Class Waiver

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.<sup>3</sup> 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.<sup>4</sup>

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

<sup>3</sup> 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).

<sup>4</sup> 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.

**TESTIMONY ON BEHALF OF COUNTY EXECUTIVE ISIAH LEGGETT**  
**BILL 50-15, COMMON OWNERSHIP COMMUNITIES – COMMISSION ON COMMON**  
**OWNERSHIP COMMUNITIES – COMPOSITION – DISPUTE RESOLUTION**  
**THURSDAY, JANUARY 21, 2016**  
**7:30 P.M.**

Good evening, my name is Clarence Snuggs. I am the Director of the Department of Housing and Community Affairs (DHCA). I am testifying today on behalf of County Executive Isiah Leggett in support of Bill 50-15.

As you may know, the County Executive sponsored the legislation that established the Commission on Common Ownership Communities (CCOC). After twenty-five years, changes are needed. The County Executive believes that these changes are consistent with his desire to see that the CCOC is strengthened and properly sustained for the future and will help ensure that it is.

The production and preservation of quality affordable, workforce and market-rate housing have been top priorities for the County Executive throughout his tenure. In tandem with this is the County Executive's commitment to providing sensible solutions and services to county residents. That is what this bill does. It brings the Common Ownership Community (COC) program back to DHCA and makes mediation mandatory, adding value to impacted residents and communities by facilitating the prompt resolution of complaints without the formalities and costs associated with a quasi-judicial administrative hearing.

This evening, you may hear from individuals who oppose certain aspects of the bill including the placement and/or cost of the program. We understand these concerns. Prudent fiscal stewardship is a priority at DHCA, and the department strives to operate in a fiscally responsible manner. Many of the challenges faced by common ownership communities are housing and community-based issues in which DHCA has expertise. DHCA will continue to strive to keep costs down while recognizing that the program may require additional resources including financial, human, technology, educational and outreach to help the program meet the needs of the public and achieve the goals it is designed to address.

It makes sense to staff the program at DHCA. DHCA administers an established rental mediation program, oversees the Commission on Landlord- Tenant Affairs, delivers housing outreach through a variety of avenues, and provides financing solutions for single family and multifamily properties. Bringing the program back to DHCA allows for greater synergy between the COC program, the CCOC and these existing housing services.

Along with relocation and mandatory mediation, this bill proposes changes to the composition of the CCOC and the administrative hearing panel. The purpose of this is to eliminate a potential conflict of interest while continuing to enable the CCOC to conduct administrative hearings when needed. The CCOC is an extremely important presence in Montgomery County. DHCA looks forward to working with the Commission in order to strengthen our common ownership communities and the quality of life for their residents.

The County Executive and I look forward to working with the Council and the Commission on this bill. Thank you for the opportunity to testify.

# TESTIMONY

Before the Montgomery County Council

Rand H. Fishbein, Ph.D.

Chair, Commission on Common Ownership Communities

January 21, 2016

Madame President, honorable members of the Council. My name is Rand Fishbein. Currently I have the privilege of serving as the Chair of the Commission on Common Ownership Communities, one of the premier alternative dispute resolution programs in the nation.

I am here today to convey the Commission's **strenuous and united opposition to Council Bill 50-15** – legislation that its proponents erroneously claim is intended to reform a program that has lost its way. Nothing could be farther from the truth. In fact, the bill is a poison pill. If enacted, it will destroy the operational and judicial integrity of the CCOC and, most likely, the Commission itself.

Particularly disheartening, is the notion that the bill was conceived in secret with absolutely no consultation with the Commission. This raises serious questions about the commitment of the Executive to the CCOC, and whether the County would be just as happy to see it go away.

These facts have not been lost on the public. Those who have contacted the Commission have been forceful in their opposition to what is being proposed. Bill 50-15 must be defeated and the CCOC must be appropriately staffed and funded now if it has any hope of surviving! Here are the particulars:

**First**, the legislation bars licensed attorneys from serving as panel chairs. This proposal is as short-sighted as it is misguided. It would ensure that many future decisions flowing from our hearing panels would lack the keen parsing of argument and law that only seasoned lawyers can provide.

The Executive justifies its proposal by pointing to the recent decision of the Ethics Commission regarding the “potential” for a conflict-of-interest among panel chairs who also practice before the Commission. This is a complete red herring. There has never been a proven instance of conflict-of-interest among our panel chairs in the 25 year history of the CCOC. Moreover, today, not a single panel chair attorney also practices before the Commission. That ended in 2014. The Ethics Commission did not find fault with the use of panel chairs, nor did they recommend that attorneys not serve in that capacity. So why is there any need to upend a system that works remarkably well and provides great value to the County?

**Second**, under the bill, the composition of the Commission would change dramatically from 8 residents and 7 professionals to 5 residents, 5 professionals and 5 miscellaneous citizens with no connection to common ownership living. This makes absolutely no sense. The only people who should serve on the Commission are those with a personal stake in the future of common ownership communities and who understand the rights and responsibilities that accompany that choice of lifestyle. Association residents with whom I have spoken are outraged that their voice on the Commission will be significantly diluted under the proposal.

**Third**, the Executive proposes moving the Commission from the Office of Consumer Protection to the Department of Housing (DHCA), where evidence suggests it will be slowly transformed into an advocacy voice for the County's affordable housing program. While increasing the stock of affordable housing is a laudable goal, it also is a political agenda that differs greatly from the statutory mandate and core mission of the CCOC. Unless strong protections are enacted to guarantee the integrity, independence, and fiscal stability of the Commission, a move to DHCA should be off the table.

**Fourth**, the bill would give the Director of DHCA, a political appointee, pre-emptory authority to intervene, at his sole discretion, in the Commission's quasi-judicial process. He would be empowered to manage mediations and to decide whether or not a case qualified for a panel hearing. This type of interference is unacceptable in a legal setting and is fundamentally at odds with our nation's sacred commitment to the principle of Separation of Powers. The CCOC should remain, free and independent of political influence.

**Fifth**, and finally, the bill proposes that mediation be made mandatory in all cases brought before the CCOC. This issue has been examined exhaustively by the Commission over the years with the following consensus having been reached: While every effort should be made to encourage mediation, it is difficult to compel parties to come to the table against their will. This is particularly true when the issues of fact and law are complex, and where the relationship of the contesting parties may have soured beyond repair. Legislating mandatory mediation will only make dispute resolution more costly and more time-consuming for complainants and respondents alike.

Esteemed Members of the Council, the bottom line is this. The problems faced by the CCOC today are fundamentally **resourced-based** – not process-based. You know this because this was the principal conclusion of the Office of Legislative Oversight in its 2015 report on the CCOC.

Instead of misguided legislation, what the CCOC needs is for the County to ensure that all of the fees earmarked in statute for the Commission actually go to the Commission instead of being diverted – as they appear to be - for other government purposes.

Over the last two years, Members on this Council, along with the Executive, have noted, sympathetically, that the CCOC operates with just a single overburdened staffer. Many

of you have acknowledged, publicly, that the Commission has no modern IT infrastructure, no ability to track associations, no effective case management system, and no ability to communicate efficiently with its constituency, conduct real time surveys or deploy investigators and trainers to communities in need. Relief has been promised, but sadly, none has materialized.

Bill 50-15 would do **absolutely nothing** to solve these problems. The decision not to allow the CCOC full access to the fees to which it is entitled is a choice made by the County. Punitive legislation will not cure the Commission's resource problems. It only will make matters worse. Similarly, a move to DHCA, without adequate safeguards to protect the Commission's independence, budget and existing authorities, is sure to lead, in time, to the dissolution of the CCOC.

Please know that my fellow Commissioners and I are exceedingly grateful for your understanding and support. But understanding is not enough. What we urgently need is your leadership.

Lastly, please remember that the CCOC is the first avenue of redress for citizens and boards. Weaken the CCOC, and those who cannot afford to take their cases to civil court will look to the Council to solve their problems. Today, the Commission resolves contentious homeowner issues affordably and according to a proven legal framework. Tomorrow, they will make their way to your doors, and require that your staffs and you devote your precious time to their resolution. Absent Commission volunteers, your involvement in this process will be at considerably greater expense to the taxpayer than presently is the case.

Bill 50-15 is a toxic bill. The ONLY responsible course of action is for the Council to reject this legislation in its entirety and begin anew. The Commission respectfully asks that this time it be given a seat at the table. Working together with our county partners, in an open and transparent fashion, I am confident that a win-win solution could be found that satisfies the needs of all those who care about the future of the CCOC.

Thank you for your time and support of the CCOC.

Board of Directors, Leisure World Community Corporation

3701 Rossmoor Boulevard, Silver Spring, MD 20906

301-598-1000

**Statement to the Montgomery County Council**  
**on Council Bill 50-15 – Common Ownership Communities**

I am David Frager, chair of the Board of the Leisure World Community Corporation. As one of the largest common ownership communities in Maryland, Leisure World is pleased to comment on this bill that would change the structure of Montgomery County's Commission on Common Ownership Communities (CCOC).

We congratulate the County Executive for looking carefully at CCOC operations 25 years after it was established. We support his request to include CCOC in the Department of Housing and Community Affairs.

But, we have three major concerns: Public members, hearing panels without legal advice, and nearly total focus on mediation with little or no mention about "informal resolution." None of these were part of the Office of Legislative Oversight (OLO) recommendations in what we think is its very comprehensive look at the CCOC.

**Public Members.** Common Ownership Communities are governed by laws (both state and local), Bylaws and policies, boards of directors, and Councils of Owners. Living in a common ownership community (COC) is quite different from owning your own home in a subdivision. This bill would eliminate five COC residents and professionals and substitute five "public members." Public members can learn about COC living, but it will be a steep learning curve. The OLO evaluation study of CCOC states, on page 32, "new Commission members enter their appointments with varying degrees of familiarity with common ownership community laws and policies. . . stakeholders reported a need to offer training to new Commission members prior to their first meeting." Public members will need even more training.

**Role of Attorneys.** The CCOC has appointed volunteer attorneys with knowledge of COC laws to chair its three-member hearing panels. Some of these attorneys also represent clients before the CCOC in other hearings. The Montgomery County Ethics Commission has found this practice in conflict with county Ethics Law, and we agree that the practice could be suspect. However, the OLO report states, on page 32, "These stakeholders state that the attorneys have a knowledge of common ownership law which is crucial to providing an efficient, effective, and fair hearing." Furthermore, both the current law and the proposed amendments state: "The hearing panel must apply state and county laws and all relevant case law to the facts of the dispute . . ." (lines 155-157). Who on a hearing panel will know those laws?

From these comments, we conclude that an efficient, effective and fair hearing process will require people who are, if not attorneys, very experienced with housing and COC laws. Perhaps

the law should require a hearing examiner, such as those from the Office of Zoning and Administrative Hearings who already conduct some of the CCOC hearings.

**Informal Resolution.** The OLO report said that in their examination of 178 cases closed in a three-year period, 47% were resolved by informal means; 29% through mediation; and 12% through a formal hearing. We believe the proposed amendments to the law fail to stress the "informal resolution" process and would move most issues directly to mediation. On page 5 of the bill, line 101, it says: ". . . The director must attempt to resolve the matter through mediation." We believe that informal resolution should continue to have a role since it was successful in nearly half the cases OLO examined.

We urge you to reexamine the need for "public members," the role of attorneys in the CCOC mediation and hearing processes, and continuing to use informal means to resolve issues since that has been so successful in the past. We look forward to working with the Council and Executive, contributing our experience in common ownership communities to create a workable dispute resolution, regulatory and educational process.

Copies to:     Isiah Leggett, County Executive  
                  Clarence Snuggs, Dept. of Housing & Community Affairs  
                  Eric Friedman, Office of Consumer Protection  
                  Rand Fishbein, Ph.D., Chair, CCOC



**TESTIMONY OF THE GREATER CAPITAL AREA ASSOCIATION OF REALTORS®  
BEFORE THE MONTGOMERY COUNTY COUNCIL ON  
Bill 50-15, “Common Ownership Communities – Commission on Common Ownership  
Communities –Composition – Dispute Resolution”  
Position: Support intent, with needed clarity & concerns noted on technicalities  
January 25, 2015**

Council President Floreen and members of the County Council, my name is Katalin Peter and I serve as Legislative Counsel for the Greater Capital Area Association of REALTORS® (“GCAAR”) – the voice of Montgomery County and the District of Columbia’s more than 9,000 REALTORS®, property managers, title attorneys and other real estate professionals. GCAAR is also a voice for many homeowners throughout the region on property rights and land use issues. GCAAR supports the intent of Bill 50-15, “Common Ownership Communities – Commission on Common Ownership Communities –Composition – Dispute Resolution,” to improve the operation of CCOC’s, but we are asking for clarity and noting concerns on certain technical aspects of the Bill.

A large percentage of GCAAR’s membership is involved with common ownership communities (“COCs”), both for personal and/or business purposes. We recognize how critical it is that they operate effectively and are financially sound. Unfortunately, when disputes arise within COC’s it not only negatively impacts those directly involved, but also the livelihood of entire community. GCAAR specifically notes the serious problem certain COCs have with collecting delinquent dues. Having a professional and cost-effective option to resolve such disputes is vital to the thousands of residents who live in COCs.

Overall, the Commission on Common Ownership Communities (“CCOC”) is one of the greatest tools the County has to strengthen the self-government structure of COCs. Its impartial dispute resolution option can be particularly valuable for residents who seek fair and expedient solutions to their disputes, as well as to the COCs who do not have sophisticated resources to resolve them internally. Nevertheless, GCAAR understands that the current adjudication processes may need to be administratively streamlined to meet the CCOC’s goals. One example—noted by the Council—is parties must often go through hearings with complex rules of procedure. This process may be

difficult for residents to understand and to administer. The private option of court orders can be even more costly and time-consuming.

GCAAR generally supports making informal mediation the standard course of action. We agree with the Council that this would generally simplify the process for the parties, could improve the efficiency of the CCOC, as well as benefit the broader COC community. We would, however, like clarity as to whether the formalized hearing process remains an option for more complicated disputes. Particularly with the structure of the informal mediation also being somewhat ambiguous based on the language of the Bill, we want to ensure parties are able to address their disputes fairly—either formally or informally.

Further, GCAAR respects the Council's concern that the CCOC is generally working beyond its capacity and may not have adequate resources to carry out its mission. Bill 50-15 strives to remedy this potentially serious problem by transferring the CCOC's duties from the Office of Consumer Protection to the Department of Housing and Community Affairs ("DHCA"). GCAAR is confident the institutional knowledge within DHCA would be a great asset to the CCOC, however, such a structural change should be thoroughly reviewed by all the agencies involved to ensure it is in the best interests of the residents they are serving.

GCAAR also has questions regarding provisions related to the structure of the CCOC and the hearing panels. We see Bill 50-15 alters the composition of the three member hearing panel and the CCOC to include members of the public. How would those members of the public be chosen and what qualifications would be required? We also see from the Council's analyst packet that this particular change is intended to address concerns of "conflict of interests." What is the nature of those conflicts, and how would the newly structured CCOC not be subject to similar issues? We understand CCOC members may encounter practical difficulties throughout their tenure and hope Bill 50-might address this by implementing objective protocol standards.

In conclusion, GCAAR commends the Council for proactively seeking to improve the CCOC dispute resolution program. Bill 50-15 is great opportunity to work together towards a stronger partnership between the government and a healthier real estate community. GCAAR sincerely thanks the members of the Council for consideration of our Association's perspective.



**MONTGOMERY VILLAGE FOUNDATION, INC.**

10120 APPLE RIDGE ROAD  
MONTGOMERY VILLAGE, MARYLAND 20886-1000

(301) 948-0110 FAX (301) 990-7071 www.montgomeryvillage.com

January 21, 2016

**County Council Hearing on Bill 50-15**

Testimony of  
**Pete Young**

**Vice- President of MVF Board of Directors**

Good Evening President Floreen and Members of the County Council:

I am PETE YOUNG, Vice-President of the Montgomery Village Foundation Board of Directors.

I want to start off by telling you that our staff has commented very favorably on the new online training program for Association Board members that CCOC has launched.

Moving on to Bill 50-15, I have to report that we canvassed the Presidents of 20 Associations in Montgomery Village, and we did not receive a single positive comment. So you should know that the perspective of the Associations is that they do not support any increase in the CCOC registration fee, and they really question whether the other changes in bill 50-15 are warranted and will have any positive impact on them.

At MVF, we also have a large number of staff and Community Managers who have been involved with CCOC during its 25 year history. In their experience, the volunteer attorney Panel Chairs have contributed greatly to the success of the dispute resolution hearings and decisions, and our managers do not support the change in the composition of the Commission to include Commissioners with no community association knowledge to replace the attorney panel chairs. Keeping the volunteer attorney panel chairs, but prohibiting them from practicing before the Commission would be a better solution.

The Managers also oppose the change to mandatory mediation, because they believe it will lead to even more instances of CCOC proceedings on matters that the Commission has never determined are within its subject matter jurisdiction.

The MVF Board also opposes both of those changes, and in particular, we believe that mandatory mediation ignores the fact that most Associations don't have the flexibility to mediate away requirements that are imposed on them by their governing documents. Many disputes simply come down to an owner not liking the regulations that the Association is obligated to enforce.

The MVF Board shares the concerns of the Associations about fee increases.

If an increase in the registration fee is inevitable, we believe the best approach is for the Council to adopt gradual increases, and to consider the typical association's budget cycle (budget adoption in the fall, followed by implementation on January 1) in determining the effective date for any increase in the registration fee.

The MVF Board recognizes the goal of getting the best human and technology resources for the Commission and it seems logical to place the CCOC within the Department of Housing if this will increase CCOC's resources.

Thank you.

**Montgomery County Council Public Hearing**  
**Bill 50-15: Common Ownership Communities/CCOC**  
**Thursday, January 21, 2016**

**Vicki Vergagni**  
**President, Board of Directors and**  
**On-Site Community Manager**  
**Glen Way Gardens Condominium**

My name is Vicki Vergagni. I represent 214 master-metered condominium units in Glen Way Gardens. My positions are based on 40 years of owning and living in a condominium, 15 years of leading the community as the Board president and serving as its on-site manager, and five years of serving as a Commissioner on the County's CCOC – with two years as Vice Chair. **As the representative of my community and as an individual, we are opposed to Bill 50-15 because it does not address the issues that currently make the CCOC less effective than it could be:**

1. Bill 50-15 increases a special tax but does not assure that it will be used for its intended purpose.
2. Bill 50-15 does not assure that all aspects of the CCOC's three-fold mission will be addressed in a significant manner.
3. Bill 50-15 does not assure that DHCA will provide the resources and support necessary for the CCOC to meet its three-fold mission.
4. Bill 50-15 does not assure that the CCOC will have the authority and the mechanisms essential to communicate with, and on behalf of, its constituents.
5. Bill 50-15 does not assure an accurate broker of information to County officials for the CCOC.
6. Bill 50-15 does not assure the integrity of the mediation process that by definition requires voluntary participation.
7. Bill 50-15 does not assure that the "public at-large" Commissioners would have the knowledge base and commitment to the concept of common ownership communities.
8. Bill 50-15 does not assure the integrity of the hearing panel process by requiring non-lawyers to chair the panels and write the decisions.
9. Bill 50-15 does not assure that Commissioners will not be further abused with an increased workload in an environment that tasks them for volunteer service without valuing their input into policies and procedures.

**For these reasons, we support the tabling of this bill until such time as owners, residents, and service providers to these communities, along with members of the CCOC, are invited to collaborate on how best to strengthen the CCOC.**

## Context

As you are aware, common ownership communities currently represent one-third of the housing inventory in Montgomery County – and the vast majority of housing starts are for this form of housing due to the County’s public policy. This is an important topic simply because the issues associated with these communities will continue to grow, and we must be more proactive in assuring that public policy catches up to the existing and yet-to-be-realized problems that have not been addressed to date. As many of you are acutely aware, inattention to the plight of these communities has resulted in dramatically lowered property values in many of these communities, and therefore reduced income to the County in the form of property taxes. Additionally, many of these communities are now costing the County tax dollars to save those on the verge of bankruptcy with the most vulnerable being the older, master-metered condominiums. These communities in peril are the County’s inventory of non-subsidized “affordable” housing that provides homes for the lower-income wage-earners upon which all of us rely every day for basic services. Bottom line: **Not only is this type of housing growing and the key provider of non-subsidized affordable housing, but its issues largely remain unaddressed, the property values have dropped dramatically and are not recovering relative to other properties, and these communities are now costing the County tax dollars instead of generating revenue.**

The CCOC has suffered from a lack of support for its mission from the County Executive and the Director of the Office of Consumer Protection (*i.e.*, Eric Friedman, political appointee under whom the CCOC operates) from the time that I served as a Commissioner on the CCOC in 2005 to date. It has been disheartening as a Commissioner who has been wholeheartedly committed to the welfare of common ownership communities to have asked questions, particularly related to monies that were collected from common ownership communities to support their unique housing issues, only to find that the special tax that we pay is simply dumped into the general fund. CCOC monies that were “handed over” to the CCOC were eaten up by DHCA and OCP overhead that contributed little value to the mission of the CCOC. Also of paramount concern was the lack of support on significant policy issues that support the welfare of common ownership communities and the inaccurate reporting by Mr. Friedman of the Commission’s positions on issues – sometimes in direct conflict with the votes that the Commissioners had taken. When representatives of the CCOC attempted to get answers on specific issues that they could not get from Mr. Friedman, and when they attempted to correctly inform the Council and other County entities of the Commissioners’ positions on issues, Mr. Friedman firmly told sitting Commissioners and staff that they had no right to “lobby,” and that their proper role was “advisory” only. It appeared to me then -- and now -- that the difference between “lobbying” and “advising” in Mr. Friedman’s mind has more to do with whether or not the Commission’s position is compatible with either Mr. Friedman’s position or that of the County Executive.

**The CCOC has not flourished under the auspices of the Office of Consumer Protection as led by Eric Friedman. Bill 50-15 does not address the issues that plague the potential effectiveness of the CCOC, and in turn, the lack of essential services for the common ownership communities that it represents.**

This evening many of us are here to prevent yet another nail being driven into the coffin of these communities – and I do believe that is the correct phrase given that some government officials now are trying to figure how to “unwind” these communities and turn them into rentals. The CCOC, while a ground-breaking concept when Councilmember Leggett introduced his bill, has become a toothless tiger under County Executive Leggett -- in spite of the dedication of talented and knowledgeable leaders of these communities, as well as professionals who struggle every day to assure the financial viability and quality of life for the owners and residents of these communities. Legislative, executive and judicial bodies need to understand the urgent issues at hand and to craft appropriate solutions to eliminate the threat to these communities’ very existence.

No doubt there are problems with the CCOC; however, these problems are not the making of the CCOC Commissioners or staff. The process of drafting this bill further demonstrates why the CCOC has not, and will not, succeed in its three-fold mission. During the drafting of this bill, experts committed to the well-being of these communities (*i.e.*, owners, residents, service providers, CCOC Commissioners) were not consulted by the County Executive or his staff. It also appears that, in spite of eight or nine months after the issuance of the report on the CCOC by the Council’s OLO, there was minimal regard for the findings and recommendations contained within that study. Bill 50-15 is yet another assault on these communities and represents another foray into the wholesale dismantling of the CCOC. **While the County Executive purports that Bill 50-15 will strengthen the CCOC, in fact Bill 50-15 is a model for assuring the ineffectiveness of any organization, including the CCOC, for the following reasons.**

- **Bill 50-15 increases a special tax but does not assure that it will be used for its intended purpose.** The County collects fees in the name of the CCOC and promotes the CCOC’s services; then fails to deliver those fees to the CCOC for which they were intended which leaves the CCOC hamstrung to meet its three-fold mission -- and disappoints its constituents. Since the inception of the CCOC, common ownership communities have paid a special tax; however, those taxes have never been fully provided to the CCOC with the lion’s share of the monies swept up in overhead for DHCA and/or OCP with other monies going into the general fund. **Until the CCOC receives all of the back fees that were dumped into the general fund, there should be no increase in the fee.**

- **Bill 50-15 does not assure that all aspects of the CCOC's three-fold mission will be addressed in a significant manner.** The County has created expectations that the CCOC will provide services in the areas of education, public policy and dispute resolution – but those have not been met. Dispute resolution took over, and education and public policy were ignored for lack of resources that should have been provided to the CCOC – which, I believe, has contributed significantly to today's sorry state of common ownership communities. For all of the years that the CCOC has existed, it has been deprived of the resources that have been collected from those the Commission was to serve and that were needed to meet its three-fold mission. **The CCOC should receive every dollar of special tax paid by the common ownership communities so that it can fulfill its three-fold mission.**
  
- **Bill 50-15 does not assure that DHCA will provide the resources and support necessary for the CCOC to meet its three-fold mission.** Clearly DHCA has more resources than OCP, and clearly the Director of DHCA has broader job responsibilities than does the Director of Office of Consumer Protection. Bill 50-15 does not assure that DHCA will provide the resources (*e.g.*, administrative support, information technology) as needed for the CCOC to be effective. Of particular import is IT. While the new online education module for members of common ownership community boards of directors is a worthy application, there is far more that should be done with IT to benefit these communities. For years it would have been helpful for the CCOC to have data related to the operations of common ownership communities. Such data would facilitate the development of public policy to support the ability of common ownership communities to thrive. One obvious example is the current financial crisis in which many common ownership communities, particularly those that are master-metered, find themselves. The making of public policy requires more than empirical data, and having a heads-up on this issue potentially could have saved the County several hundred thousand dollars from lost revenue and now taxpayer money being spent to save these communities. Bill 50-15 also does not assure that the DHCA Director will provide the level of attention congruent with the needs of the CCOC. **Until the CCOC has received its proper share of the financial pie and had a chance to become more effective, it may be appropriate for it, like similar organizations, to come under the umbrella of the Council.**
  
- **Bill 50-15 does not assure that the CCOC will have the authority and the mechanisms essential to communicate with, and on behalf of, its constituents.** All communications (*e.g.*, quarterly newsletters, announcements of events or services) have had to be cleared by the Director, OCP, which has made many of the communications too late to be effective. And only the Director, OCP, has been able

to authorize the dissemination of CCOC communications. The CCOC cannot e-blast boards of directors about issues that will impact their communities – including this very piece of legislation. Why are there so few folks in the room tonight given the gravity of this bill? While the CCOC sent me two “paper” notices about the County’s mandatory education of board members, the CCOC was unable to issue a “call to arms” with regard to this legislation. Why is that? The simple answer is that DHCA does not share with the CCOC the database that CCOC monies pay for, and all communications from the CCOC must go through the Director for approval of content and time of distribution. **With the advice of the CCOC’s County counsel, the CCOC staff person should have the authority, and access to the mechanisms, to communicate with, and on behalf of, the CCOC’s constituents in a timely manner.**

- **Bill 50-15 does not assure an accurate broker of CCOC information to County officials.** The Director, OCP, has assumed the role of public relations on behalf of the CCOC, oftentimes espousing positions directly in opposition to Commission votes. CCOC Commissioners and its staff person have been badgered and belittled repeatedly by the Director of OCP with regard to speaking with other government officials. They have been warned that they are not to “lobby”. It appears that the Director’s definition of “lobby” is speaking with other government officials when their position disagrees with that of the County Executive. It is imperative that there be autonomy and transparency in communications for those most knowledgeable of the needs of the CCOC, and that they be empowered to communicate with County agencies without retribution. **With the advice of the CCOC’s County counsel, the CCOC staff person and Commissioners should have the authority to represent the CCOC’s positions to County officials.**
  
- **Bill 50-15 does not assure the integrity of the mediation process that requires “voluntary” participation.** Mediation is clearly a helpful approach to resolving issues between owners/residents of common ownership communities and their governing bodies. To date, mediation has been the preferred approach to dispute resolution when complaints are filed with the CCOC. In fact, the CCOC has made it clear to all complainants that any party that refuses to participate in mediation in good faith risks sanction by the CCOC during the hearing process. While mediation certainly should be the first step in dispute resolution, no one can be forced to participate in good faith. The County’s own Conflict Resolution Center defines mediation as a “voluntary” process. **“Mandatory mediation” is an oxymoron by definition and by operation, and the CCOC’s approach to mediation should be maintained.**

- **Bill 50-15 does not assure that “public at-large” Commissioners would have the knowledge base and commitment to the concept of common ownership communities.** The issues that come under the purview of the CCOC are typically complex with legal differences among condominiums, cooperatives and homeowner associations. The bodies of law (*i.e.*, Federal, state, county), as well as each community’s unique set of governing documents, are highly technical. Having even one Commissioner that lacks the knowledge to serve in any of the three CCOC areas of service (*i.e.*, education, public policy, dispute resolution) is a distraction from the Commission’s work and a burden to fellow Commissioners. While “lay” Commissioners may work well in “generic” arenas of subject matter, such is not the case with common ownership communities. **As a Council, you have recently recognized the importance of educating these communities’ boards of directors.** Even new board members with little knowledge of governance are light years ahead of lay members of the public when it comes to understanding the nuances of common ownership law and its application. **It would be hypocritical for the Council to now endorse a Commission with one-third of its members lacking knowledge of common ownership communities.** It also is essential that Commissioners be committed to the well-being of common ownership communities. Finding individuals who have no “dog” in this arena and expecting them to jump in with both feet -- which is what is required to advance the CCOC -- is utter nonsense. **The composition of the Commission should not be changed.**
  
- **Bill 50-15 does not assure the integrity of the hearing panel process by requiring non-lawyers to chair the panels and write the decisions.** As a quasi-judicial body, hearing panels are charged with the finding of facts and the interpretation of law with regard to those facts. The decisions must be legally correct and written to withstand appeal. Contrary to the belief of many, the issues before the CCOC are typically complex as opposed to being simplistic (*e.g.*, having/not having a purple front door). As a sitting Commissioner with nearly thirty years of experience owning a condominium unit and several years serving on the condominium’s board of directors, I had to study and rely on the expertise of fellow Commissioners to assure that I understood each issue associated with a homeowners association since they differ considerably from those of a condominium association. Even “professional judges” in the Office of Zoning and Administrative Hearings that currently take “overflow” cases for the CCOC make significant errors – not necessarily in findings of fact, but in the application of the laws and the communities’ governing documents. Having one-third of the Commissioners with no knowledge on these issues, other Commissioners and staff would necessarily have to spend time in an endless series of in-service education sessions. And to expect such individuals to conduct hearings and to write decisions consistent with legal procedures is sheer lunacy. As a long-

serving Commissioner with experience on at least 30 hearing panels, I would not feel confident either chairing a hearing or writing a decision. There is no doubt in my mind that with the proposed composition for hearing panels, a higher percentage of decisions would be appealed, consuming CCOC resources that could be better spent on other issues. And there is no doubt in my mind that a higher percentage of those decisions would be overturned -- and that the reputation of the CCOC would be diminished significantly. **The CCOC hearing panels should remain as presently constituted. The CCOC has complied with the Ethics Commission Advisory Opinion and should continue to have hearing panels chaired by, and decisions written by, attorneys who do not practice before the CCOC.**

- **Bill 50-15 does not assure that Commissioners will not be further abused with an increased workload in an environment that tasks them for volunteer service without valuing their input into policies and procedures.** To wit, I bring to your attention the recent issuance of the training program for board members. One of the Commissioners spent considerable time writing the module. Once it was finished, it was pirated by the Director, OCP, and given to IT personnel to transform it into an online course. In spite of repeated requests by the CCOC Commissioners, the module was released – without preview by involved Commissioners, without testing, and without setting up a system to track completion of the course. This is just one example of how the “chain of command” has negatively impacted a CCOC program as well as the enthusiasm of the volunteers who do all of the work but receive no respect for their participation. To say that the remaining Commissioners are demoralized is an understatement. Our communities rely on volunteers to run them, and this certainly is not how we could treat them and expect to retain them as the valuable resources that they are. **It is imperative that County executives repair the damage that they have done and sincerely open communications so that volunteers feel included instead of used.**

### Summary

**Bill 50-15 does not address the issues that encumber the effectiveness of the CCOC. Therefore, it should be tabled until such time as owners, residents, and service providers to these communities, along with members of the CCOC, are invited to collaborate on how best to strengthen the CCOC.**

Common ownership properties are in trouble today, particularly master-metered condominiums, primarily due to a lack of informed public policy. Each government jurisdiction, from Federal to local, continues to add burdensome requirements to these types of communities

without providing corresponding relief. Not only are common ownership properties proportionally paying more taxes than single-family homes, but they are providing at their own expense mandatory reporting that benefits only the government, particularly the County. Similar burdens are not borne by single-family homeowners. Now many of our common ownership communities find themselves in financial holes that have deep roots in unbalanced public policy, including the greed of lenders who make bad loans and “own” properties via “zombie foreclosures,” as well as owners who abuse the bankruptcy process. Both the lenders and the owners in bankruptcy avoid paying a single fee to the community for years on end. This, in turn, means that

- those who do pay their fees must pay higher fees to cover the shortfalls of the lenders and deadbeats;
- which means that fewer individuals are able to pay their fees;
- which means that delinquency rates are so high that properties do not qualify for FHA, VA, FNMA, FreddieMac;
- which means that property values fall;
- which means that fewer property taxes are collected by the County;
- which means that the County is having to use public resources to bail out some of these communities;
- which means that Montgomery County, like other jurisdictions nationwide, has serious financial problems related to this form of housing.

It is time for government officials to recognize that public policy should not assume that all owned homes are single-family homes.

It is time to level the playing field for those who own in common ownership communities and are paying a disproportionate amount of their income for housing.

It is time to understand the unique issues that face common ownership communities and to enact enlightened public policy to support them.

**As the preferred type of housing development in dense localities, informed public policy is the only way that these communities will not only survive, but thrive.**

Thank you for this opportunity to comment on these issues of concern to the people who own and live in my community and similar ones.

**STATEMENT OF MARK FINE**

**ON BILL 50-15**

**Madam Chairperson and Honorable Members of the Montgomery County Council:**

**My name is Mark Fine. I am a member of the CCOC and I reside at 13613 Colefair Drive, Silver Spring, MD. I am also the president of 2 homeowner's association's and I am also Chairman of the Charles County Homeowners Association Dispute Review Board.**

**I am speaking to you tonight about a vital topic that is NOT included in Bill 50-15 but should be. That is the issue of funding the CCOC and how those funds are used. Mr. Leggett's October, 2015, memorandum stated that he agreed with the March 2015 report of the Office of Legislative Oversight (OLO). That report found that the CCOC was underfunded and understaffed and he recommended increased funding. But the Bill before you does not authorize any additional funding for the CCOC. Moreover, simply raising the fees will not benefit the CCOC if those funds are controlled by other agencies to be used as they see fit. In the OLO report it stated the following \*(Page 35-36) 2. "The Commission received \$408,770 in association fees in FY14. These fees fund one full time Commission staff member and a part of six other employees' salaries who support Commission staff when needed and available.**

**Common ownership communities are required to pay the Commission an association fee of \$3 per property unit. This revenue funds one full-time Commission staff position, along with the following employees who have additional duties outside of work related to the Commission. OLO did not perform a desk audit to determine their workload related to the Commission.**

- Administrative aide who schedules hearings and mediations, prepares hearing packages, and completes data entry (.3 WYs);**
- Program aide who replies to citizen requests and distributes education materials (.3 WYs);**
- A manager who provides program oversight (.2 WYs); and**
- An investigator who is responsible for webpage maintenance (.1 WYs).**

**In FY14, approximately 16% of Commission fees went to the Department of Housing and Community Affairs to fund part of the salary (.6 WYs) of staff responsible for the annual registration and collection of registration fees from**

the member associations. The Commission reports that it does not participate in the formation of the Commission's budget. " (end quote) This equates to approximately \$182K spent in FY14, by OCP without our knowledge of where it went.

	FY14 Actual Expenditures	FY15 Approved Expenditures
<b>Office of Consumer Protection (1.9 WYS)</b>		
Personnel	\$330,445	\$266,714
Operating	\$11,858	\$46,025
<b>Department of Housing and Community Affairs (.6 WYS)</b>		
Personnel	\$66,016	\$69,007
Operating	\$2,365	\$6,680

No matter where the CCOC's staff comes from, it is vital that the law give the CCOC more oversight over how its funds are used. Section 10B of the County Code states that the Executive must provide the CCOC with the staff and other support that are appropriated to it. This means that the CCOC's registration fees should be used only for the CCOC's needs. But I tell you frankly, that the County has ignored our repeated requests for a detailed accounting of how the funds are spent. Nor in the past has the CCOC been asked to participate in the drafting of its budget or in the Council's hearings on its budget. The CCOC's funds seem to be allocated at the sole discretion of the directors of DHCA and Consumer Protection without consultation with the CCOC. In spite of the language of the law, it seems likely that any funds appropriated to the CCOC but not spent at the end of the fiscal year are not carried over to the next CCOC budget but rather are lost to the CCOC and used by the County for other purposes.

I hope that when you consider the issue of where the CCOC should be located, you will also take steps to ensure that the funds collected on its behalf will actually be used for the CCOC and the communities it serves.

\* Taken from the OLO Report 2015-8, March 10, 2015

**Testimony Before the Montgomery County Council  
Regarding Bill 50-15, Common Ownership Communities**

**January 21, 2016**

**By Aimee Winegar, CMCA®, LSM®, PCAM®**

Good evening. My name is Aimee Winegar, and I am a resident of a homeowners association in Montgomery County. Professionally, I have worked in the field of community management for almost 30 years, currently managing a large scale community in Frederick County. I work for a regional community management firm headquartered here in Montgomery County. Although I serve as the Vice-Chair of the Commission on Common Ownership Communities, I am speaking tonight as a county resident who is deeply concerned about the future of the CCOC. I strongly oppose Bill 50-15.

The first thing I want you to know is that the CCOC matters. It may be small, but it matters. Community associations are a growing component of local governance. These resident-run groups maintain assets similar to those that the county maintains for their non-association counterparts. Association residents pay after-tax dollars to maintain streets, parks, trees, storm water management systems, etc. that would be maintained through county tax dollars if they were not association assets. The services provided by associations deserve respect, and so do their needs. The CCOC was created to meet some of those needs. Those needs and disputes may seem small and petty to you, but to the residents who are complaining, or to the board members staying up late to finalize a budget on time, or to the managers who are working uncompensated overtime this weekend to prepare for a winter storm, association needs are important and they do deserve **your** attention.

Soon after I joined the Commission three years ago, I and several other commissioners began asking hard questions about CCOC resources and responsiveness. I believe this bill does nothing to respond to those questions, and is potentially devastating to the commission.

This bill proposes to dilute resident participation on the CCOC from a majority to 33% by incorporating non-resident, non-professional members. This change will be an instant burden to the commission. Unlike landlord-tenant law, covenants governing communities vary widely from association to association. The CCOC needs people who are familiar with reading and understanding these documents, from either a residential or professional perspective. People who have chosen to neither live nor work in associations will not have that experience. I would be astonished if we can even find five people who have the interest.

As a side note, the CCOC is currently nearing a critical shortage of volunteers because the executive has not appointed commissioners to replace those who have resigned or whose terms have expired. We currently have so many vacancies, we have trouble making quorum at our meetings. Appointing five individuals who will have limited motivation to participate fully increases the probability that we will not have a quorum going forward. It has been suggested that the change in composition will make the CCOC more like the Landlord-Tenant Commission, but it should be stressed that unlike landlord-tenant conflicts, which can affect many people who are neither (such as neighbors, vendors, associations), association disputes under the Commission's purview, by definition, do not involve people

who neither work nor reside in an association. The composition of the commission should not be changed.

The CCOC was created to provide alternative dispute resolution options for homeowners and boards. The bill mandates mediation, which sounds good in conversation, but mandated mediation is not appropriate in all cases, and it is already recommended every time there is a possibility that it could facilitate resolution. As a commissioner, the most difficult cases involve those where mediation has failed. Not only has a dispute then had the time to fester, the parties have lost trust in each other and the system. I encourage you to continue to trust staff and the commission to identify those cases where mediation can provide a meaningful solution and to permit the others to move forward through the hearing process as is presently done. It should also be noted that the CCOC does not have a paid mediator – we currently have only the services of a volunteer part-time mediator. If mediation is mandated, the costs for commission operation will necessarily rise, as our volunteer cannot possibly keep up with all of the disputes.

Over the years, the CCOC has been moved from the DHCA to OCP and now Bill 50-15 proposes to move it back to DHCA. I do not believe DHCA is a good fit for the CCOC, if for no other reason than that DHCA leadership has advanced political positions and agendas that in some cases undermine association goals. I believe that the relocation of CCOC to DHCA will create the appearance of conflict of interest in important areas of association governance, will damage the appearance of CCOC objectivity, and will place the CCOC in the position of being manipulated politically. Some of the bill's other changes to staff roles appear to provide the Director of DHCA with the ability to manipulate the CCOC within the dispute resolution process. OCP may not be a perfect fit, but moving to DHCA is no less imperfect, notwithstanding that both DHCA and CCOC deal with residential housing.

The CCOC is tasked with representing and assisting associations that are heavily regulated by law. Associations are required to be open, accountable, and transparent. The CCOC should be similarly open, accountable and transparent and that should begin with its budget. Bill 50-15 does nothing to ensure that fees collected for the CCOC are directed to its function. The county should be setting an example for transparent stewardship, and I can tell you that the CCOC's fees are not treated in a transparent and accountable way. Any new legislation should direct fees collected for the CCOC to be used under Commission oversight. The CCOC's budget and expenditures should be held to the same level of scrutiny and openness as is required of associations in dealing with their budgets.

- The CCOC composition should not be changed to include non-resident non-professionals.
- Dispute mediation should not be mandatory.
- The CCOC should not be moved to DHCA at this time.
- Knowledgeable attorneys in the field of association law should again be permitted to serve as panel chairs.

Bill 50-15 was developed without commission input and does not respond to the needs we identified. Most if not all of the commissioners oppose this bill in its entirety. I request that the council vote in opposition to the bill and establish a working group – which should include commissioners – to develop recommendations for a future bill to address CCOC function, transparency, resources, and responsiveness.

January 21, 2016

Montgomery County Council  
c/o Nancy Floreen, President  
100 Maryland Avenue  
Rockville, Maryland 20850

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

Dear Council members:

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

Bill 50-15 would make several amendments to the Montgomery County Code Chapter 10B - Common Ownership Communities, the Commission on Common Ownership Communities, (CCOC).

WMCCAI would like to address three components of this Bill: 1. Mandatory Mediation, 2. The transfer of duties assigned to the Office of Consumer Protection (OCP) to the Department of Housing and Community Affairs (DHCA), 3. Alter the composition of CCOC to include members of the public and alter the three member hearing panel.

**Mandatory Mediation**

We believe that the concept of mediation is good, however the essence of mediation is voluntary and should remain voluntary. With mediation, a third party mediator who offers evaluation of a claim might be able to get the matter resolved without a hearing. In cases where associations and owners who have already vetted the dispute over many years and have staked their position in the sand, a mandatory mediation may not resolve the conflict further it requires that the parties mediate

even if there is no Dispute. If mediation is to be mandatory, it should be limited to after the CCOC has determined that a dispute exists.

In order to minimize disputes, the Commission should expand its education and communication between the parties prior to the dispute phase.

#### Change from OCP to DHCA

The Office of Legislative Oversight (OLO) recommended transfer of the CCOC to DHCA. Whether or not this transfer takes place, it is important that 100% of the funding goes directly to CCOC to insure appropriate staffing and IT modernization to service the growing number of the common ownership communities in Montgomery County.

OLO has stated that in 2014 fees in the amount of \$408,000 were collected from Common Ownership Communities. Of the \$408,000 CCOC received \$158,000.

There may be other alternatives than transferring CCOC to DHCA - which may be having its own budgetary and administrative constraints:

1. The Commission becomes an independent agency
2. The Commission is under the authority of the County Council
3. A new county agency is established bringing together other agencies that perform quasi-judicial functions

#### Composition of the Members of the Commission and the Members of the Hearing Panel

WMCCAI generally opposes the inclusion of 5 members at large on the Commission and believes the composition should remain the same.

We are concerned that the proposal to add "public" members will eliminate the Commission's use of volunteer panel chairs who are attorneys and who are knowledgeable about common ownership law and replace them with members who are either not involved in common ownership communities or who do not have the necessary training and experience to conduct a formal hearing and to write the decisions.

A panel chair should have the experience on producing a record base decision given that the Commission's rulings are appealable. By having experienced attorneys in the hearing process, over ninety-five percent of the rulings have been upheld on appeal.

Further, the issues that arise in community association context are often unique, and it may be difficult for those not familiar with community associations to appreciate

the importance of the issues. The current allocation of membership in the CCOC appears to be sufficient, and we do not see a benefit in changing the allocations as proposed.

WMCCAI would like to thank the Council members for giving us the opportunity to present our views, and for considering our recommendations to Bill 50-15.

Sincerely,

Mitchell Farrah, co-Chair  
Maryland Legislative Committee

Cc: Matt Rankin, Executive Director,  
Washington Metropolitan Chapter Community Association Institute

Ronald M. Bolt, Esq., co-Chair, Maryland Legislative Committee  
Ruth Katz, Esq., Maryland Legislative Committee

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**LAW OFFICE OF GREG S. FRIEDMAN**

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**TESTIMONY BEFORE MONTGOMERY COUNTY COUNCIL**

SUBJECT: Commission on Common Ownership Communities

DATE: January 21, 2016

Honorable Councilmembers, my name is Greg Friedman. I am a lifelong resident of Montgomery County and have practiced real estate law in the County since 1976. In the course of my law practice, I have represented homeowners associations and occasionally have represented homeowners in proceedings before the Commission on Common Ownership Communities (the "Commission"). For the past 10 years, I also have had the privilege of contributing my time as a Panel Chairman presiding over hearings of the Commission on Common Ownership Communities.

Last year, the County Ethics Commission determined it to be a conflict of interest for attorneys who represent clients in Commission proceedings to also serve as Panel Chairpersons on matters unrelated to any of our respective clients. Although every member of the Commission and every attorney who has served as Panel Chairpersons universally disagreed with the findings of the Ethics Commission, we have adhered to the new ethical rules which forced several qualified Panel Chairs to cease providing a valuable *pro bono* service to the County and its citizens. I opted to continue to serve as a Panel Chairman and thereby to sacrifice potential future income appearing as an attorney before the Commission. I do not say this in order to ingratiate myself before the Counsel but so that you will recognize how important a role I believe the CCOC plays in our community.

I am here this evening to articulate what I believe to be a serious error in the proposed alteration of the composition of the Commission. Subsequent to introduction of the Bill, I also have raised my concerns in a conversation with the County Executive. I expressed my opinion that the proposed composition is inherently flawed. My concerns are two-fold.

Although the elimination of attorneys acting as Panel Chairs will once again entitle me to be compensated for representing clients before the Commission, I submit that the hearing process will be significantly

impaired by removing the member of each panel with experience trying cases, knowledge of the rules of evidence and the administrative hearing process, and experience writing hearing decisions.

However, much more importantly, I believe that the proposed composition will destroy the CCOC, a model program for which Montgomery County has been recognized nationwide. Reducing the number of members who are real estate Professionals or association Residents to just five persons each, rather than the current 7 and 8 persons, will require each Commission member to preside at approximately 50% more hearings which is a significant time commitment to expect of a person who is not being compensated for his/her time. However, my greatest concern is the inclusion of 5 persons who would be neither residents nor professionals. It is unrealistic to believe that it is even remotely possible that 5 people who have no interest in condominiums or homeowners associations are going to come out of the woodwork to work for free in a sphere in which they have absolutely no interest. I have spoken to a number of people who reside in rental properties or own homes which are not in an HOA. One, an unemployed attorney, said she might consider becoming a member of the CCOC if it does not involve "too much time". Everyone else thought I was crazy to even ask this question. Seeking unaffiliated, disinterested persons to serve on the CCOC would be akin to asking someone who has never found it important to vote to devote a substantial amount of time to serve as an election judge. This requirement alone will be the death knell of the Commission on Common Ownership Communities.

Before the Montgomery County Council

**Bill 50-15, Common Ownership Communities - Commission on Common Ownership Communities - Composition - Dispute Resolution**

Hearing on Thursday, January 21, 2016

**Testimony of Paul M. Bessel — Support with an Amendment**

I am testifying in support of Bill 50-15 with a very important amendment.

My name is Paul M. Bessel. I live in Leisure World of Maryland but I am testifying only as an individual, not representing any group.

I am familiar with the governance structure of Leisure World and common ownership communities. I am also familiar with the CCOC, having filed a complaint against Leisure World in December 2010, and successfully negotiated a settlement of that complaint that resulted in many progressive reforms in the way Leisure World is governed. (See attachment A for a description of how the result of my CCOC complaint benefitted Leisure World and its residents.)

I support everything that is in Bill 50-15, but urge the Council to add to it. Unlike some of my neighbors, I do not see any problem with including 5 members of the general public among the members of the CCOC — **so long as they and all members of the CCOC receive proper training so they can perform their duties properly.** (See attachment B for the exact language that should be added to Bill 50-15)

Bill 50-15 should be amended to add a training requirement for all members of the CCOC. The CCOC supported a training requirement for all members of boards of condominium and homeowner associations in 2014. In testimony on October 21, 2014, the Chair of the CCOC said: "

The CCOC believes that education for members of boards of common ownership communities is an important aspect of good governance and we have committed ourselves to making such education available in many forms.

The exact same reasons for supporting that training requirement apply to the CCOC — in fact even more so. The CCOC members make decisions that affect thousands of residents in Montgomery County and our citizens have a right to expect that the every CCOC member will be properly trained to perform his or her duties. To paraphrase the CCOC, "Education for members of the CCOC is an important aspect of good governance." Any suggestion that this will make it more difficult to obtain volunteers for the CCOC should be met with the exact same argument that was made by COC board members who made exactly the same argument when a training requirement was imposed on them. (Bill 45-14,,

enacted February 3, 2014, signed into law February 11, 2014, as Chapter 2 Laws of Montgomery County 2015, effective January 1, 2016) The CCOC and the County Council said that imposing a training requirement would probably not make it more difficult to find volunteers, and even if it did, that was a reasonable thing in order to obtain well-trained board members. The Council even deleted a proposed sunset provision that was proposed to be added in case the new law resulted in a failure to find enough volunteers for COC boards. (See page 4 of the Action Packet of Bill 45-14, dated January 3, 2014.)

**The first part of the CCOC training** should be a requirement that all members of the CCOC take the exact same training as that required of condominium, homeowner association, and cooperative board members. If the CCOC is part of the process of administering this requirement, every member of the CCOC should be equally familiar with, and required to take and pass, this training.

**The second part of the CCOC training** should be a requirement that all its members thoroughly know and understand the laws it administers, and the actions and decisions the CCOC and courts have made in the past on subjects under the CCOC's jurisdiction.

1. Maryland Condominium Act  
Annotated Code of Maryland, Real Property Article, Title 11, sections 11-101 through 11-143
2. Maryland Homeowners Association Act  
Annotated Code of Maryland, Real Property Article, Title 11, sections 11B-101 through 11B-118
3. Maryland Cooperative Housing Act, Corporations and Associations, Title 5 - Special Types of Corporations, Subtitle 6B - Maryland Cooperative Housing Corporation Act, Section 5-6B-01 through 5-6B-20
4. Montgomery County Code, Chapter 10B, Common Ownership Communities

**The third part of the CCOC training** should consist of a basic course in how to be the chair or a member of a hearing panel. Some opponents of Bill 50-15 say lawyers are needed to chair these panels because only they know the laws applicable to the hearing panels. Also said, but unwritten in testimony, is that the lawyers on the hearing panels have until now written all the opinions of the hearing panels, relieving the other CCOC members of some of the work they should do.

It should be fairly easy to develop a training program in how to chair and be a productive member of hearing panels, and to write opinions. Those who have had this duty in the past probably would be willing to do it. If not, I would be happy to volunteer to assist.

**The fourth part of the CCOC training** should consist of requiring all members of the

CCOC to take the online course in Open Meetings that is provided online by the Maryland Attorney General's office. Maryland law requires that one member of each public body, or its staff, take this Open Meetings training. I propose that every member of the CCOC be required to take this training.

There is no reason why this training requirement should not apply to all members of the CCOC. Just as the CCOC said all members of condo, homeowner, and cooperative boards should be knowledgeable about laws that apply to their work, the members of the CCOC should all be knowledgeable about laws that apply to their work on the CCOC. The Attorney General's office training on Open Meetings is said to take about 2 to 2½ hours to complete.

**The fifth part of the CCOC training** should be how to run and participate in meetings efficiently using parliamentary procedure. I have attended meetings of the CCOC and can say from first-hand knowledge that CCOC meetings do not consistently follow Robert's Rules of Order with its rules that insure efficient, speedy, and effective meetings and protection for majorities, minorities, and individual members. For example, at one CCOC meeting that we attended the chairperson said there should be discussion of a subject before a motion could be made. The correct answer is exactly the opposite. I also saw a chairperson clearly invoking the informal procedures for committees but then refusing to allow a motion to go to discussion for lack of a second, even though a second is not required under informal procedures.

There is an organization in Maryland that could assist with this training on how to run meetings properly using Robert's Rules of Order. It is called the Maryland Association of Parliamentarians, or MAP. As the current President of MAP, I have consulted with the other MAP officers who are able and willing to supply this training to all CCOC members at no cost to the county. MAP has provided training for other government groups and could do so for the CCOC.

The only possible argument that might be made against requiring this training for every member of the CCOC is that it is that they are not also being imposed on other boards, committees, and commissions (BCCs). The answer to that is that it would be helpful to have a training requirement for all of them. The Open Meetings training already exists and all that is needed is a Council bill to require that all members of BCCs to take it. The parliamentary procedure training can be put together quickly and can be made to apply to all BCCs. And then each BCC can put together the specialized training for that body based on the statutes that it administers and the history of that body. If the staff of those BCCs say they do not have time to produce this, I will volunteer to assist in those efforts because I believe so much in the need for training for all members of BCCs.

Please note that I am not recommending that failure of a CCOC member to take the required training be subject to the same penalty as was imposed on COC board members by Bill 45-14. As stated in the Action Packet for that bill, the Montgomery County Code, section 10B-13G, makes a failure to comply with a CCOC order, or the training requirement

for COC board members, a Class A civil violation, which carries a civil penalty of up to \$750 and a criminal penalty of up to \$1,000. The only penalty to be imposed on a CCOC member, or potential CCOC member, for failure to take and successfully pass the training requirement I am suggesting, is an inability to serve or continue to serve on the CCOC. Since the public has a right to expect CCOC members to be knowledgeable about the work they are expected to do, this is a reasonable suggestion.

## Attachment A

To: The LWCC Board of Directors, and the LW Executive Committee  
From: Bob Conn and Paul M. Bessel  
Date: January 7, 2012  
Subject: CCOC complaints - conclusion

### Background and Conclusion

In December 2010 two CCOC complaints were filed against LWCC, but both made it clear they were directed at the way in which LWCC was being run by its then-top officers. Those officers are no longer in office.

In addition, during the past year the two CCOC complainants met with the LW Executive Committee in a spirit of cooperation and working together for the benefit of all. The goals of the CCOC complaints were achieved. We especially appreciate the senior member of the LWCC Board who proposed this approach, and thus saved LW a great deal of money and paved the way for a better method to resolve disputes.

Therefore, the CCOC complainants no longer see any need to continue the complaints. As we believe was said by the same most senior member of the LWCC Board: "There are not two sides. There is only one side: the benefit of all Leisure World residents."

We suggest that the LW Executive Committee cancel the meeting scheduled for January 13, 2012, with the CCOC complainants. We in turn will inform the CCOC that these cases were successfully resolved through cooperative negotiation and a change in the officers of LWCC, and that these cases are concluded.

### Summary of Achievements

1. LWCC Board members are now given **sufficient time to study issues** and talk with LW residents before voting on those issues. Before these CCOC complaints were filed, LWCC Board members were sometimes told by the then-leadership that they had to vote immediately on issues that had just been presented to them.
2. The **open meeting** policy of the Maryland Homeowners Association Act will now be strictly applied to all governance bodies, including the LWCC Board and its committees, subcommittees, task forces, working groups, and all other governance bodies. The LWCC Board unanimously agreed that **LW is a homeowners association**.
3. The previous LWCC top officers held secret meetings that even many Board members didn't know about, supposedly to set the agenda for the Board, but no one knew exactly what happened at these meetings. The new Chair has already announced that **all meetings, including agenda-setting meetings, will be open to all LW residents** – except those meetings which fall within the specific criteria for closed meetings in the Maryland Homeowners Association Act

4. **LW residents can now offer suggestions to the LW Board** and other LW governance bodies before those groups vote on issues. Before these CCOC complaints were filed, LW residents were only allowed to comment on things after the Board and other groups had already voted on them.
5. **LW residents' letters** to the LW Board and Executive Committee are now **included in the agenda packets**. Before, the then-Chairperson excluded some residents' letters from being seen by LWCC Board members and others.
6. **LW Board meetings are now videotaped** so they can be shown on the LW television channel and LW residents can borrow dvd's showing what happened. Also, it appears that it is now agreed that LW residents may **record** open meetings they attend, just as the LW staff records those meetings. Before, LW residents who couldn't attend meetings had no good way to find out what really happened there.
7. The leaders of LW have agreed that they and others involved in LW governance will take **training to learn how to properly conduct meetings** in accordance with Robert's Rules of Order. Before, members of the LWCC Board as well as other LW residents often left meetings wondering what had happened because they were run so poorly.
8. LW private **clubs** are permitted to establish membership policies they feel are best suited to the objectives of each club. Before these CCOC complaints were filed, the then-two top LWCC officers had attempted to impose policies on clubs.
9. There is a **residents' committee to supervise the policies and content of the LW News newspaper**. *LW News* now includes a **Residents' Forum** where letters from residents will be published. **Censorship** of articles, particularly those of residents' activist organizations, has been eliminated. Before these CCOC complaints were filed, LW management employees made all decisions about LW News, and residents were forbidden to have their opinions published.
10. The LW **budget** was revised to make it clearer to LW residents. Before these CCOC complaints were filed, the LW budget was extremely difficult to understand because some items, such as money budgeted for LW staff raises, were not described properly or at all.
11. It was agreed that management should provide better oversight of how LW money is spent; and specific **LWCC Board authority will be necessary for any expenditure** for any item in excess of approved budgets or projects.
12. It was agreed that there should **not be any attempts to intimidate LW residents** who avail themselves of the right to file CCOC complaints. With a past CCOC complainant, efforts were made by LW officers to attempt to burden him with the legal costs of LW defending against his complaint, even though the CCOC ruled that LW had violated the law. This type of action should now be ended.

Attachment B

An Act to [add 7]

(7) provide for mandatory training for members of the Commission on Common Ownership Communities

10B-3 (line 19)

add after line 38, the following:

(4) All existing members of the CCOC and all future members of the CCOC must take and successfully complete training in (a) the same training required of common ownership community board members, (b) the laws and administrative and court decisions on matters within the jurisdiction of the CCOC, (c) how to be an efficient and productive chair and/or member of a CCOC hearing panel, (d) the Maryland Open Meetings Act, (e) and running or participating in meetings efficiently using Robert's Rules of Order Newly Revised. All parts of this training must be taken and successfully completed by current members of the CCOC within 30 days of the effective date of this statute, and by new members of the CCOC before they can take their seats on that body. If this training is not successfully completed, existing CCOC members will be removed from the CCOC and new members will not be permitted to take their seats on the CCOC.

Good evening Council Members.

My name is Dinah Stevens. I am a Volunteer Panel Chair for the Commission on Common Ownership Communities. I was one of the original panel chairs appointed in 1991 and have served continuously ever since.

My experience includes almost 30 years practicing contract law in the private and public sectors, 30 some years as a condominium unit owner in Maryland and in a vacation house in Vermont, serving on the condominium boards for about 15 of those years, in addition to the almost 25 years of service to the Commission.

In my years of service to the Commission I have chaired about 80 cases, probably more than any other chair by dint of longevity.

I am here to oppose the proposed changes in the composition of the Commission, the changes to the dispute resolution process, and to making mediation mandatory. While my role has been limited to the dispute resolution process, I have always believed that the other elements of the Commission's mission were more important and challenging.

I would like to share some information about the process of chairing a case under the current practice. First, it is important to recognize that the Declaration of Covenants and Bylaws are a contract among all of the unit owners to which they are bound by virtue of owning their unit. These documents set forth the rights and responsibilities of the owners to the community and each other. They can be amended by democratic process. The Board is responsible for administering and enforcing the provisions of these documents.

Almost all of the cases (a phrase I use out of a lawyer's reluctance to use always or never) that are resolved by hearing require one or more determinations that are legal, that is an interpretation of an applicable statute or community document, in order to reach a correct result. These cases have an objectively correct legal resolution that is important to the integrity of the community and to the integrity of the Commission process. Even the cases involving what appear to be minor issues that also appear to have a subjective resolution are cases for which the Commission should only review the association process to assure that they were handled correctly in accordance with the correct legal standard, again a series of legal analyses. The Commission should never put itself in a position negotiating or otherwise second guessing properly determined architectural and other community decisions.

Complex decisions include those involving insurance and deductible issues, an issue on which the law has changed during the past 20 years; or a rogue board that has avoided all of the transparency required by statute and community documents; or the process of adopting and implementing rules and regulations.

The hearing process chaired by an attorney facilitates orderly fact finding and legal analysis. For the cases that are best resolved by hearing the current process is appropriately designed. The insights of Commissioners who are experienced and knowledgeable about common ownership issues, laws and structure are also invaluable.

The process is formal and like litigation only in the sense that the issues are identified at the beginning or along the way so that everyone knows what they are prior to the hearing and can prepare and that the hearing is generally kept to addressing those issues. The hearings that I chair are much less formal than a court proceeding. It is my perception from experience that one of the purposes of the Commission hearing process is to allow for some venting of pent up frustrations. It needs to be within reason both to control the time spent in the hearing and to protect the other party, which is usually management and board members. A significant number of cases get to a hearing because the board and management do not adequately evaluate the issue, or do not provide the unit owner with adequate explanation of their action in the disputed situation. The panel chair oversees discovery so that relevant information is exchanged but the approved requests are not unnecessarily burdensome. Commission hearings are not covered by strict evidentiary rules so it is up to the panel members to sort out the relevant information and credibility of statements that are not based on personal knowledge.

This limited jurisdiction forum in which the panel has expertise and experience in the specialized law, business model and ownership regimes but is more flexible than a court would be is ideal for the cases that need a hearing. My experience is that there is a need for the structured process which results in a written determination of the dispute with a clear statement of facts and law rendered by a neutral body.

The Office of Legislative Oversight (OLO) found in their March report that in the two year period they reviewed only 12% of the cases required a hearing. That shows that the effort to use mediation is working for those who are willing to use it. The hearing itself is extremely inexpensive and some part of the limited costs

are paid for by the required filing fee. The OLO reports that there are eight volunteer panel chairs who do not have the conflict identified by the Ethics Commission. Those who do have that conflict have not been chairing cases since the conflict was identified.

Since those who decline mediation or use mediation and still want a hearing are such a small proportion of the cases filed, requiring mediation will add a burden to the use of this alternative dispute resolution process. A unit owner and a member of the board will need to take time during the business day (according to the OLO report mediation is offered during weekday mornings) and the association may want to have their manager, who cannot represent them, and/or their attorney, both of whom may incur additional costs. Nothing in the record at this time indicates that this will benefit the parties to these cases.

It is not clear in the OLO report what stakeholder(s) may have considered the dispute resolution too formal or what they meant by that. The panel chairs have met and would be willing to work with county government staff to find reasonable ways to address this concern.

Lest you think that I have a vested interest in perpetuating my role in this process, let me remind you that the pay is terrible and the hours are just as bad. A simple straight forward case takes approximately 15 hours but most will take at least 40 to 50 hours, including prehearing discovery decisions, prehearing conferences, multiple hearing sessions and writing the decision, and a few cases require many more hours. I have found the issues and conflicts interesting enough to dedicate this time. I would not be willing to be a Commissioner and do cases. I am not willing to dedicate the time I believe is necessary to be an effective Commissioner and to oversee dispute resolution cases.

A lot of staff time goes into the effort to resolve cases without a hearing as well as to get those that go to hearing ready.

It seems likely to me that the limited resources available for staffing the Commission are more significant than the hearing process in hampering the ability of the Commission to address the other activities in their mission. I am among those who feel strongly that the dispute resolution process, while important, is far from the most important part of the Commission mission. The OLO report makes clear that despite the shortage of resources the Commission has accomplished a lot.

It seems likely that finding five public at large individuals who have knowledge and experience related to common ownership communities that will add value to the Commission in its work will be difficult. If the five do not have knowledge and experience they will add little value and may hamper the Commission's ability to accomplish its mission. The proposed Code changes do not establish any qualifications for the public at large members. The combination of common ownership unit owners and professionals in the field with volunteer attorneys for panel chairs who do not serve as Commissioners, provides the optimal level of knowledge and experience in each role and spreads the time demand in a way that allows Commissioners to dedicate more time to the elements of the mission that are not dispute resolution.

Nothing in the public record supports or explains the proposal to dilute the stakeholder composition of the Commission or to abandon the use of non-conflicted volunteer attorneys in the dispute resolution process (which incurs the cost of additional time anticipated to be required of the County Attorney's office, further reducing the resources available to the Commission).

In summary, it seems to me that a Commission composed entirely of people who are invested in common ownership communities is more likely to result in progress in the Commission's mission. The Commission needs more effective support. Clearly, as reflected in the OLO report, Mr. Drymalski has done an outstanding job. Equally clearly, more resources and/or more efficient allocation of resources are necessary to support the efforts of the volunteers who are the Commissioners.

I strongly recommend that, at a minimum, you amend the proposed amendments to Chapter 10B so that the composition of the Commission is not changed and mediation is not mandatory.

When I began serving as a panel chair the Commission was in the Department of Housing and Community Affairs (DHCA). More personnel resources were provided to staff Commission activities then. My suggestion is that the Commission be moved back to DHCA and no other changes in the Commission or its procedures be made at this time.

**STEVEN MUSE  
 FOUNTAIN HILLS COMMUNITY ASSOCIATION  
 GERMANTOWN, MD  
 COUNSEL BILL 50-15 TESTIMONY**

My name is Steven Muse. I am a county resident, an original 20+ year owner in Fountain Hills Community Association (900+ homes), a formal and informal volunteer, a committee chair, a BOARD MEMBER and a complainant in 52/67-12; Muse & McBeth vs. Fountain Hills Community Association. That case was chronicled in the August 12, 2014 issue of the Gazette.net entitled, GERMANTOWN HOA COMPLAINTS YIELD OPEN MEETINGS REMINDER and was one of the longest, most expensive and complicated cases in CCOC history.

I became involved with the CCOC when I contacted them for advice on how to act on information that I received from a Board member in early 2012, who at the time contacted me and informed me that the Board of Directors was purposely violating several statutes of the MD HOA Act that personally affected me and my family.

If I knew then what I know now I would have walked across the street and filed with the District and Circuit court for less \$150. That would have been much cheaper, quicker, and more equitable than the experience I had with the CCOC.

Instead, I filed a complaint with the case in Nov 2012. I didn't receive closure from my case until August 2014, almost 2 years later and approximately \$180K later, so I speak from experience when I tell you that the CCOC as it's currently constructed is and has been broken, doesn't benefit the most important member of the CCOC, the homeowner and that Council Bill 50-15 is a great start, but needs more enhancements for the "pro se" home owner. doesn't

You see, what you probably won't hear tonight from the CCOC volunteers, attorneys, management companies or HOA Board members is that the CCOC is the epitome of the phrase, "YOU CAN'T BEAT CITY HALL!" and that needs to change, and although 3 minutes isn't nearly enough time to explain the atrocities that I experienced as a "pro se" homeowner and how they could be remedied by Bill 50-15, I'll try to address as many points as I can, so that future homeowners don't have to go through what I went through.

**Bill 50-15 needs more homeowner protection and equity:**

- The 1st piece of literature you receive from the CCOC on how to prepare for your case states that homeowners file three times as many complaints as associations do, but associations are more likely to be successful.
- The FOREWORD and DEDICATION section of The STAFF'S GUIDE to the PROCEDURES AND DECISIONS of the MONTGOMERY COUNTY COMMISSION ON COMMON OWNERSHIP COMMUNITIES acknowledges the assistance of assembling the STAFF GUIDE to the very attorney your about to go up against.
- Almost all CCOC decisions (over 99%) in the last 20 years have been unanimous.
- The CCOC has a 95% appeal victory rate

- As a pro se resident you're preparing your own defense AND financing the HOA's defense with your dues.

**Make mediation a mandatory component of dispute resolution when complaints are filed with the CCOC**

- In my case, the CCOC allowed the respondent to refuse to well over 2 dozen mediation requests, which resulted in the case taking over 18 months and racking up well over 180K in legal fees, which the respondent then attempted to recover from me and my co complainant, simply for exercising my right to file a complaint.
- Simple disputes do not require a hearing. You can either paint your door purple or you can't. (information is readily available that allows this simple determination to be made: by-laws/ ARC rules etc.and resolved at the mediation level)

**Change the composition of the Commission to require that one-third of the Commissioners is selected from citizens.**

- I am a commander in a State Law Enforcement Agency who has testified in court which includes but was not limited to District, Civil, Circuit, and Administrative throughout the state. ALL of those testimonies were heard by everyday citizens. Can you imagine if you were involved in a law suit against the Health Care industry and the Panel Chair hearing and deciding your case was also an attorney who represented Health Care organizations and assisted the Health Care industry in writing their guide book? You wouldn't have much faith in that decision would you.

**Replace highly skilled attorneys who currently serve the Commission with non-experts in community association law.**

- The relationship between the CCOC, HOA Board, Management companies and especially the attorneys who represent the HOA's can best be described as incestuous. In my case:
  - There were multiple "ex parte" communications between the Panel Chair and the attorney representing the HOA. An attorney whose associate assisted in writing the guide and who also served as a Panel Chair when not representing clients.
  - The CCOC staff routinely forwarded my emails to the respondents' attorney. On one occasion, several months after the attorney were no longer representing the association.
  - Served as a Panel Chair for the CCOC and w/ members of the panel.
- The Montgomery County Ethics Commission has correctly ruled that representation of clients by CCOC panel chairs before the CCOC is inconsistent with the Montgomery County Public Ethics Law, Chapter 19A, and allowing attorney 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

**Give the Director of DHCA authority to intervene in CCOC pending cases.**

- The commission and or staff in their current state have over though themselves. All of the corrections to the CCOC's problems were easily remedied and most would not have cost a nickel and those solutions that cost money would've realized savings in the end for at least the prevailing party and public at large (costs are kept down in regard to the cases and operate more efficiently)
- The current configuration of the CCOC staff does not have the power to issue subpoenas.

Tuesday August 12, 2014

## Germantown HOA complaints yield open meetings reminder

By Gazette Staff

This story replaces a previous version that contained

inaccuracies. An explanation follows the story.

A long-running dispute between Germantown's Fountain Hills Community Association and two residents ended with a county commission rebuking the homeowners association for not adhering to the state's open meetings requirements.

But the residents — one a current board member and the other a former board member — said the protracted and costly proceedings could and should have been avoided. The dispute has cost the association more than \$100,000 in legal fees, according to documents on the association's website.

Vernard McBeth, the former board member, and Steven Muse, a current member representing single-family homes, filed their complaints in 2012 with the Montgomery County Office of Consumer Protection.

"I thought it would be over quickly and painlessly," McBeth said.

The only monetary issue was raised by McBeth, who claimed the association failed to repair damage caused to his lawn stemming from concrete work it performed during summer 2012. The Montgomery County Commission on Common Ownership Communities, which oversees homeowner associations, ruled that requiring the association to make repairs was beyond its purview.

According to its 2015 operating budget, the Fountain Hills community is 872 units strong, comprising 472 townhomes, 222 condominiums, 163 village homes and 15 single-family detached homes.

The Fountain Hills association "spent that much money, when there was nothing for them to gain," McBeth said. "They literally spent \$100,000 to not have to pay, at most, \$500 [for my lawn]."

Muse claimed the association denied him access to community records and improperly revoked his family's pool passes. Both men complained that the association improperly held closed meetings by email, improperly conducted an election in permitting nomination from the floor of a candidate who was not present, and failed to maintain complete and accurate minutes.

According to the county commission's ruling, Muse and McBeth claimed that other board members conferred in emails about removing them from the association's Enforcement Committee, which they argued was a decision made in a closed meeting.

The commission on May 1 found that Fountain Hills does not have a properly adopted community rule requiring that a candidate for the board be present at the annual meeting, and that there had been no violation of community documents or rules in electing such a candidate.

It also stated, however, that the association board had "on a number of occasions and in a variety of ways failed to comply with the open meetings requirements of Maryland Homeowners Association Act." To this end, the commission ordered the board to review the open meeting requirements of the act and to conform to its requirements.

"Three years and \$100,000 later, what was the ruling? 'You guys have to follow the rules,'" Muse said.

"If I'd had known it was that much of a kangaroo court, I would have gone straight to the Circuit Court," Muse said. "The crime of that case is that Muse and McBeth are the names people associate with the money, when we didn't spend a dime of it."

The deadline to appeal the commission's decisions with the Montgomery County Circuit Court was June 1.

Vanguard Management Associates Inc. of Germantown, the company that managed the homeowners association until recently, did not return a call for comment.

According to minutes from a June meeting of the Fountain Hills Board of Directors, the board announced The Management Group Associates Inc. of Germantown as the new management company for Fountain Hills Community Association. An individual who answered for the Fountain Hills Community Association office declined to give her name or comment for this story because she said she had not been involved with the complaints. She said she could not refer The Gazette to anyone who would be able to discuss the complaints.

Attorney Thomas Schild of Rockville, who represented the Fountain Hills association, declined to comment.

Explanation: A previous online version of this story misidentified the complaints filed by Steven Muse and Vernard McBeth as lawsuits. It also incorrectly stated that the county commission had found that the Fountain Hills association had not violated rules in regard to open meeting requirements. The commission's ruling states, "The Fountain Hills Board has on a number of occasions and in a variety of ways failed to comply with the open meetings requirements of Maryland Homeowners Association Act under Md. Code Ann. Real Prop. § 11B-111."



# JACKIE SIMON HOMES L L C

14

Bill 50-15 Commission on Common Ownership Communities Jan 21, 2016

Members of the Council, I'm showing my age by bringing some County History this evening. In 1988 a Homeowners Association was appointed by the Council to study issues that were burdening Council related to Common Ownership Communities. At that time these communities were a substantial part of the affordable housing stock here. Carl Auvil and I served as co-chairs of the Task Force. The Task Force was broadly representative of persons knowledgeable stakeholders in this area of real estate. 17 persons (among them were Pat Huson, Jeffrey Van Grack, Charles Chester Steven P. Hollman and others) donated over 2500 hours over a period of a year and a half and produced three volumes of recommendations. We were ably staffed by Michael Fadden and Linda Lauer.

These community leaders controlled millions of dollars in assets and provided their residents with services that relieved the county taxpayer of providing such services. They operate in a fiduciary capacity. Few had understanding of their roles or the need to govern transparently and ethically.

As a result unrest and conflict among neighbors had no place to turn for resolution other than suing each other which led to discord. There was no place to learn about the significant responsibilities the leaders could turn to. I've attached The Executive Summary which I hope you will review before you move any further with Bill 50-15 before you.

Based on the work of the Task Force, and the early years I Chaired the Commission that was created at the recommendations of the Task Force, I strenuously oppose the following items in the Bill.

-Any change in the make-up of the Commission and the Panels by replacing members with persons having no knowledge, no interest and no experience with common ownership communities

-Mandatory Mediation which formalizes and aggravates disputes among neighbors when a less formal and neighborly discussion would better serve all. Formal mediation should be a second or third step in the resolution, not the first.

*Homes for a lifetime of living*

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(131)

Consistent with the earlier work conclusions, I support

-Moving the office to DHCA. These are Housing matters and I believe the County would have become active much earlier in the current condo financing if the operation had been in the Housing Dept. Initially. Currently 80% of the county's condos have lost financial eligibility making many Families unable to refinance or sell their homes and seriously affecting their net worth.

-Providing adequate Professional and Clerical staff to broaden efforts at education, addressing the turnover of the communities from Builder/Developer to unit Owners, Assistance in effecting Reserve Studies, Elections consistent with governing law and the requirement of transparency and ethical governance.

*Jackie Simon*

My name is Katharine Sharon Borgogni  
My husband and I own, in Trusts, a condominium located at:  
15101 Interlachen Drive #123  
Silver Spring, MD 20906

We owned and lived in condominiums in the District of Columbia and Virginia for over 20 years before we retired and moved into Leisure World of Maryland about 19 years ago. I am proud to be a happy and experienced condo owner.

Before retiring, I did not have time to serve on boards and committees of the places in which I lived, but since 1997 I have continuously volunteered service to our condominium (as a director and president of the Board) and to Leisure World (as a director of the master HOA).

For members of the public who might not know, condo management and boards of directors not only have the fiduciary responsibility of the buildings and grounds, but have on-going issues with owners and renters spending much of our time and energy explaining to them why we have so many rules and regulations. I can't tell you how valuable CCOC is and has been to the common ownership communities in Maryland. It is the perfect "fit" for this specialized form of home ownership.

Unlike single family home ownership and the rental market, our housing is based on actual corporations in which individuals own "stock." There are some minor differences between condos, cooperatives and homeowner communities but the fact is that all owners have a "vote" in their "corporation" that answers their specialized needs.

Like corporations, they are guided by highly specialized attorneys who understand how they work and how they are affected by the Maryland Condo Act, County Law and their own governing documents. These people keep us on the straight and narrow.

If the composition of the Commission were changed to include one-third of its members from the general public, losing input by our specialized volunteer attorneys who understand the Maryland Condo Act and the Bylaws under which we operate, we would soon find ourselves mired in petty quarrels between unit owners/management/boards of directors until operating these corporations would come to a standstill with nobody willing to serve on the Boards and Committees and ending up crowding Court dockets with their issues and points to prove.

If the composition of our three-person panels is also changed to include a member of the general public (unschooled in common ownership and its corporate structure) and is left with no attorney to assist in making certain that decisions reached are in line with the community Bylaws and the Condo Act, all of us in these common ownership communities will be poorly served. NO business corporation would make decisions without input from specialized legal direction.

Montgomery County's unique CCOC has effectively fulfilled its mission for 25 years, and has earned national recognition in doing so. As the saying goes, "If it ain't broke, don't fix it."

I strongly urge the Council to vote against Bill 50-15

January 6, 2016

To: Montgomery County Council  
From: Kathleen Hastings  
332 Soapstone Lane, Silver Spring, MD. 20905

Re: Testimony in the matter of Montgomery County Council (MCC) Bill 50-15

### Goal

My goal is to ensure homeowners have a fair shake at a just resolution of their disputes with a Homeowners' Association (HOA). The higher purpose is to protect homes and their value by securing homeowners' rights under the law, and ameliorating the inherent disparity favoring HOAs.

### Background

My testimony is based on firsthand experience, and valuable insights from a retrospective of two complaints to the Commission on Common Ownership Communities (CCOC), #18-13 and #37-13, Kathleen Hastings v. Naples Homeowners Association, Inc. (Naples HOA). Immersion into Naples HOA and CCOC processes and practices spanned the entirety of 2013 and 2014, expended hundreds of hours including those of CCOC staff and tens of thousands of dollars in personal funds. Uncannily this extraordinary effort was to uphold already existing law in order to protect my home's value, and correct violations of Maryland laws, thereby restoring homeowners' legal rights.

The end result was a Mediation Agreement negotiated under a potential conflict of interest, (conflict of interest does not solely begin or end on a hearing panel). The Mediation Agreement was breached by Naples HOA within a week of signing, causing me to believe it was signed in order to avoid a hearing and order-- that is exactly what it did.

After the breach, I requested a hearing by the CCOC, however, the Commission unanimously denied my request based on Montgomery County Code (MCC) 10-B 14 (a). The Commission's opinion was that my remedy would be to file a lawsuit for "breach of contract." How many homeowners can afford the cost of going to court; yet the Commission seemed insensitive to this in their refusal to hear my complaint.

(Ladies and Gentlemen of the Council another \$30,000 in legal fees for a lawsuit was prohibitive to me pursuing a just dispute resolution in court. It was simply a showstopper regrettably conceived when I signed a mediation agreement in good faith and signed away further help from the CCOC to actually resolve my dispute).

As written in the CCOC 12/3/14 minutes, then CCOC Chairwoman Elizabeth Molloy said she would have the Ad Hoc Committee on Dispute Resolution take up the issue of Mediation Agreements and their enforceability. Did she do this and what was the outcome? Furthermore, to quote the minutes "Staff agreed that it was possible to word a mediation agreement in such a way that the complaint could proceed to a hearing if a party failed to comply with the terms of the agreement. . . ." But I was unprotected.

### Root Causes of Homeowner Disparity

Realistically, the dispute resolution playing field can never be level for a homeowner because of “gravity issues” involving the HOAs’ huge legal and financial powers, i.e. the “Business Judgement Rule” protecting even “bad” decisions by the Board of Directors (Board), corporate indemnification of the Board, assistance of professional Community Managers (CM) and funding from hundreds of member homeowners, etc. Additionally, a Board often operates carte blanc unchecked by homeowners due to widespread apathy, i.e., homeowners who only attend meetings when their own home or pocketbook is impacted.

Nevertheless, there are concrete steps that can give homeowners a fair shake for a just resolution of their dispute. Input below is categorized according to Josh Hamlin’s letter of December 4, 2015 introducing Bill 50-15:

### Corrective Action

**“(1) make mediation of certain disputes regarding common ownership communities mandatory;”**

#### **Input**

First, any HOA against which a complaint is filed must be required to attend CCOC Training of Board Members within 30 days and prior to mediation. Too often, I saw the Naples HOA Board look to the Community Manager for interpretation of association documents and Maryland Law, some interpretations were very problematic.

Secondly, prevent the strategy of signing Mediation Agreements to avoid a hearing.

Suggested concrete actions to improve a homeowner’s chance of a good faith Mediation Agreement are:

Include language in all Mediation Agreements that will help a homeowner should a breach occur.

For example, as excerpted from Settlement Agreement in Case No. 383580V Tanie A. Guirand et al v Bel Pre Recreational Association Inc.

“In any suit to enforce this Settlement Agreement or recover expenses incurred due to a breach of this Settlement Agreement, the non-breaching party shall be entitled to recover from the breaching party all attorney’s fees and expenses incurred in connection [sic] the enforcement of the Settlement Agreement or recovery of such expenses.”

Similar protective language must be added to 10-B in order to give homeowners justice without spending \$30-40K on a breach of contract law suit.

Alternatively, in discussing the HOA breach of my Mediation Agreement, the CCOC states in their 12/3/14 minutes:

“ . . . it was possible to word a mediation agreement in such a way that the complaint could proceed to a hearing if a party failed to comply with the terms of the agreement. . . .”

Lastly on the topic of mediation, preclude Community Managers from active participation at the mediation table. It not only gives HOAs' greater advantage in numbers, and the CM is not vested in the HOA. More importantly CM participation at the table is a conflict of interest. As I saw it, the CM functioned in my dispute as a “chief of staff” to the Board of Directors. Furthermore, in taking an opposing position to my dispute, the CM engaged in a conflict of interest, i.e., opposing a homeowner whose HOA fees contribute to her salary.

**“(2) alter the composition of the three member hearing panel;”**

**Input-** Bill 50-15 provides for attorneys to sit on the Commission [10B 3 (2)] and to serve on hearing panels composed of Commissioners per 10b 12 (b). No matter if a lawyer is a volunteer hearing panelist as in the past or a CCOC Commissioner as proposed, any potential for conflict of interest, even the mere appearance of such must be prevented. Bill 50-15 must uphold the Montgomery County Ethics Commission (MCEC) guidance spelled out by Chair, Kenita Barrow's letter of 4/10/14 referencing Montgomery County Code: “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).”

I would add that nor should any attorney who is a Commissioner mediate on behalf of a client under the auspices of the CCOC.

**“(3) alter the composition of the Commission on Common Ownership Communities to include members of the public;”**

**Input**

With the oversight of the MCEC, develop for use in an interview, a rigorous screening tool with filters for potential conflict of interest, financial benefit, etc. to being a commissioner.

**(4) transfer duties assigned to the Office of Consumer Protection (CP) to the Department of Housing and Community Affairs;”(DHCA)**

**Input –** CCOC by nature of its role in housing, is more closely aligned with DHCA than CP. If a CCOC complaint evolves into persistent selective enforcement, harassment, etc., DHCA provides stronger continuity with the CCOC and a more seamless handling of housing discrimination.

**“(5) provide for certain transition provisions;”**

**Input-** Reserve comment until I learn more about the change.

**“(6) generally amend County law concerning common ownership communities.”**

**Input –**

In order to increase professionalism and knowledge, and to hold Community Managers (CM)s accountable to homeowners, require training, (say a version of CCOC Training for Directors) testing and licensing of CMs. The DHCA already has experience with licensing, e.g. rental units.

In my opinion, Naples HOA CM acted more as a “chief of staff” to the HOA Board of Directors rather than for the whole community . Further in overreaching CM responsibilities by interpreting association documents and Maryland law, the CM was counterproductive to the dispute resolution process.

Although CM licensing bills keep coming up in the General Assembly they do not pass. Montgomery County needs to lead the state on this.

### **Summary**

Bill 50-15 can be a path forward for fair and just dispute resolutions that would be bolstered by concrete lawmaking as outlined above, aimed at protecting over one third of Montgomery County residents and their homes in an HOA.

- **Comply with Montgomery County Ethic Commission (MCEC) guidance by ensuring that lawyers who represent clients at the CCOC do not sit on hearing panels, nor should any Commissioner take part in mediation on behalf of a client.**
- **Ensure that every mediation agreement includes protection against breaches.**
- **Preclude CM participation at the mediation table.**
- **Be the first jurisdiction in Maryland to License CMs.**

Vernard McBeth  
 Bill 50-15  
 January 21, 2016

If it is indeed the goal of Bill No. 50-15 before this body to improve the efficiency and effectiveness of the (Commission on Common Ownership Communities) CCOC, as currently written the bill does not go far enough to effect the mission of the CCOC.

The following changes do little to address what is wrong with the CCOC at its core. Those changes per the most recent draft legislation are: make mediation of certain disputes regarding common ownership communities mandatory; alter the composition of the three member hearing panel; alter the composition of the Commission on Common Ownership Communities to include members of the public; transfer duties assigned to the Office of Consumer Protection to the Department on Housing and Community Affairs; provide for certain transition provisions; and generally amend County law concerning common ownership communities.

From my practical experience these proposed amendments and deletions will not get to the root cause of the problems at the CCOC which are both systemic and systematic in nature. The most pressing issue for the CCOC is that it is schizophrenic; it, through its professional staff and volunteers have to decide if it is a court of original jurisdiction that can issue binding agreements or if it is an administrative agency with the ability to hold hearings on a limited subject-matter, that can issue non-binding agreements. At present, the CCOC and at least the panel-chair in my case is desirous to be both. This is an agency in the Office of Consumer Protection, which tells a consumer, that as an individual you will likely lose your case because of the business judgement rule and that the other consumer, the HOA almost always wins. With its interpretation of the business judgement rule, fleeting and varying between the perspectives of "neutral" panel chairs, a prudent and logical person would have to ask what the purpose of the CCOC? While the legislation as proposed does not address the questions I raised here, I will take the opportunity to raise positive points in which I think the legislation as proposed can propound its desired legislative intent.

Speaking directly to the legislation as proposed making mediation mandatory is incredibly invaluable, particularly if both parties understand the consequences for not seriously and materially participating. In my case in particular, my HOA has spent \$200,000 in legal fees to fight a case just not to be wrong, not to protect themselves from debilitating monetary damages or from setting a precedence of settling frivolous claims making itself a perpetual victim, just not to be wrong; this in and of itself, I would hope to a prudent and ordinary person would find onerous and there was no judgement, let alone sound business judgement evident. Mandatory mediation would hopefully accomplish moving the proverbial needle and prevent inane complaints from being drawn out, if not brought in the first place. Moving the CCOC from one agency to another does nothing to impact or change the operation of the CCOC as that function ultimately lies with its professional staff, Chairman and executive committee and lastly panel chairs and Hearing Panels. If the CCOC operates as a comedy of errors under the OCP how does moving to another agency (DHCA) preclude and prevent the circus-like behavior? The CCOC simply needs direction from the Director of the OCP as to how it is to operate under the scope of the law to implement its legislative intent. The question is what is the legislative intent of the CCOC? It is my understanding the answer to the question is to efficiently and inexpensively settle disputes between HOA's and their members. I can tell you, again from

practical and personal experience, that this is not the case. My case took 2 years to adjudicate and the HOA spent \$200,000 in legal fees. Ironically, that means I was spending money to prosecute my case and defend myself, from, myself. The CCOC is largely culpable and shares a great deal of responsibility as to why this occurred. The reasons are numerous and varied and only one is addressed by this legislation. Altering the composition of the hearing panel is imperative for the CCOC to be successful. There are at least two reasons, one of which is the inherent conflict of interest of the panel chairs (addressed by the Ethics Commission), that are members of small bar, that serve as panel chair in one instance and then practice in front of the CCOC in the other, in the same week. The other is there is no necessity that the panel chair be an attorney. The vast majority of cases brought before the CCOC are simple and can be resolved with a cursory reading of the communities' in question by-laws and covenants, a rudimentary understanding of parliamentary procedure and intimate familiarity of 10B, the Maryland HOA and condominium Acts. When you volunteer to be a member of the CCOC; this is what you are volunteering to learn to comply with responsibilities that are associated with the title Commissioner. A vast majority of the time there are very little opportunities for subtle nuances; you can either paint your door Mojave Taupe or you cannot; erect a swing set or not. For the complex cases, the County Attorney's office has a staff attorney that advises the CCOC and could very easily give guidance on decisions reached by panel chairs that are not attorneys. Altering the composition of the CCOC also does very little to change its culture or increase the level of competence. I would submit that having a member of the public at-large is good idea but this bloc having the same equity stake as the other constituency group does little to help or effect any positive change. With this in mind I would suggest that the commission be altered in the following manner seven (7) homeowners, seven (7) managers/attorneys/other professionals, and one (1) citizen in neither group. It seems to me that the constituency or group with the most reasoned position drives the policy and decision making with that configuration. The other changes are superficial and complementary to the more substantive changes and so I will not speak to them. I know without a shadow of the doubt the CCOC has to change how it conducts its business. While I am in favor of whatever legislation or policy directives that will be the catalyst for those changes, this legislation as proposed does not go far enough to accomplish the necessary changes.

In conclusion, it would not be fair to all concerned if I did not elucidate upon the changes I mentioned throughout my written testimony. The fact of the matter is they are numerous; however a preponderance of them are cultural and no legislation can change the culture of an organization. The balance of the problems are operational and can be addressed with a direct order from a supervisor. As an example, the CCOC has a single staff person (it is my understanding they are budgeted for 2.5). If he is not at work, then everything comes to screeching halt until his return if he has not delegated his responsibilities to someone. So while the CCOC is pretending to be a court, as a complainant you may have a 30 day timeline to meet but are unsure are unaware if you met it because the single staff person is not available to answer your procedural question. This is just one example of many. I believe that the CCOC is a wonderful idea in theory but a terrible one in practice.

Respectfully Submitted,

Vernard McBeth

## Hamlin, Joseph

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**From:** LARRYDORNEY@aol.com  
**Sent:** Sunday, March 06, 2016 4:59 PM  
**To:** Floreen's Office, Councilmember  
**Cc:** Ike Leggett; Firestine, Timothy; County Council; Berliner's Office, Councilmember; Elrich's Office, Councilmember; Hucker's Office, Councilmember; Katz's Office, Councilmember; Leventhal's Office, Councilmember; Navarro's Office, Councilmember; Rice's Office, Councilmember; Riemer's Office, Councilmember; Hamlin, Joseph; Charter Review Commission; besselpaulm@comcast.net; Ethics Commission; Cobb, Robert; info@caidc.org; mrankin@caidc.org; INTAKE, Community; Snuggs, Clarence J.; Commission, Human-Rights; Stowe, James L.; Consumer Protection; Carter, Marsha; Drymalski, Peter; CCOC; fishnet@pipeline.com; OLO OFFICE; Cihlar, Chris; larrydorney@aol.com; mail@marylandhomeownersassociation.info; jnketley@comcast.net; justus.lwmd@gmail.com; glenwaye2@aol.com  
**Subject:** Comments re Proposed Bill 50-15 (CCOC) - Issue #7

Date: March 6, 2016

From: Lawrence Dorney  
10204 Rockville Pike, Unit 202  
North Bethesda, MD 20852-3304  
Tel: (301) 564-6240  
Fax: (301) 564-6240  
email: [larrydorney@aol.com](mailto:larrydorney@aol.com)

To: County Council  
Council Office Building  
100 Maryland Avenue, 5th Floor  
Rockville, MD 20650-2322  
Tel: (240) 777-7900  
Fax: (240) 777-7989  
Legislative Information: (240) 777-7910  
email: [Neil.Greenberger@montgomerycountymd.gov](mailto:Neil.Greenberger@montgomerycountymd.gov)

Subject: Comments re: Proposed Bill 50-15 (CCOC) -  
Issue #6

### References:

a) Proposed Bill 50-15 (CCOC) Packet  
[http://montgomerycountymd.granicus.com/MetaViewer.php?view\\_id=136&event\\_id=4712&meta\\_id=94970](http://montgomerycountymd.granicus.com/MetaViewer.php?view_id=136&event_id=4712&meta_id=94970)

b) Homeowners Associations and Condominium Associations Forum  
[https://www.youtube.com/watch?v=A\\_yPosvaJPY](https://www.youtube.com/watch?v=A_yPosvaJPY)  
VIDEO 1 Hour 35 Minutes

c) Public Hearing on Bills 45-14 & 45-15, CCOC PHED Committee  
[http://montgomerycountymd.granicus.com/MediaPlayer.php?view\\_id=136&clip\\_id=8115](http://montgomerycountymd.granicus.com/MediaPlayer.php?view_id=136&clip_id=8115)  
VIDEO 1 Hour 8 Minutes

d) Public Hearing on Proposed Bill 50-15, CCOC  
[http://montgomerycountymd.granicus.com/MediaPlayer.php?view\\_id=136&clip\\_id=10861](http://montgomerycountymd.granicus.com/MediaPlayer.php?view_id=136&clip_id=10861)

VIDEO 1 Hour 3 Minutes

e) CCOC Complaint 168-0 (filed Sep 1992, accepted by CCOC Dec 1992, Tribunal decision Jun 1993)

1 - CCOC Case Summary

<http://www.montgomerycountymd.gov/ocp/ccoc/Decisions/168summary.html>

2 - Decision

[http://www.montgomerycountymd.gov/ocp/resources/files/ccoc\\_decisions/168.pdf](http://www.montgomerycountymd.gov/ocp/resources/files/ccoc_decisions/168.pdf)

Comments:

Attention - Ms. Nancy Floreen, President, County Council, and Chair, PHED Committee

Ms. Floreen

Thank You for your response which is in the forwarded email.

You very effectively presented the issues in Bill 50-15:

1) Make mediation of certain disputes regarding common ownership communities mandatory.

***I believe in negotiation both formal and informal. But I can't support Formal Negotiation as it is now constructed. If the CCOC or Executive Branch had the authority to enforce a Consent Agreement to protect a condo unit owner then that would enable successful negotiations - and I would support it. Also, the mandatory requirement to participate in a Formal Negotiation may intimidate a unit owner into thinking that he/she is required to sign a Consent Agreement - the language imposing this mandate is important.***

***BTW, giving the parties free range to conduct informal negotiations (as Peter Drymalski, former CCOC Attorney Investigator, did for many years) provides the best agreement and resolution.***

2) Alter the composition of the three member hearing panel.

***Why? The CCOC has accepted and addressed the ethical concerns about conflict of interest raised by the county's Ethics Commission. There will be no more CCOC Hearing Tribunal Chairs who practice before the Commission. The County Executive is trying to pack the CCOC so that he can exert command influence on the deliberations and decisions of the Commission.***

***I am withdrawing my suggestion that retired Circuit Court Judges be retained to make the legal decisions. My suggestion was based on Dan Wilson & my experience with Elizabeth Hileman, ESQ., the GPIV Attorney, when she was a designated CCOC Hearing Tribunal Chair.***

***I now support the new CCOC policy that Tribunal Chairs can not practice before the Commission.***

3) Alter the composition of the Commission on Common Ownership Communities to include members of the public.

***Why? The CCOC has always consisted of 15 Commissioners. Composition was 6 Residents, 6 Professionals, and 3 Real Estate Agents. In 2005, the composition was changed to 8 Residents and 7 Professionals. Harold Huggins, a well known Real Estate Broker, who served 6 years on***

**the CCOC - the last 3 as Chair - recommended that Real Estate Agents should serve as Professionals.**

**The County Executive is trying to pack the CCOC so that he can exert command influence on the deliberations and decisions of the Commission for his agenda, his social agenda.**

**If the composition is change to 5 Residents, 5 Professional, and 5 members of the public, then I will encourage and campaign for that nationally known Montgomery County Attorney Robin Ficker to be on the CCOC as a member of the public. Mr. Ficker has been a well known activist, public activist to reform government. He is also an attorney which will be an asset to the CCOC.**

**Mr. Ficker may have negatives, but Hilary Clinton has many, many more negatives. The Council is in the bag for the election of Hilary Clinton for President of the U.S. Clinton, the Council, and Executive are all Democrats while Ficker is a Republican. That's no reason why Ficker should be denied being on the CCOC as a member of the public. Since 1960 when I first voted, I have always been non affiliated.**

**The Council members have negatives too. The Council and Executive can tolerate Robin Ficker on the CCOC as a member of the public. That is if the Council accepts and mandates County Executive Isiah Leggett proposal to his Triple Nickel (5-5-5) composition of the CCOC.**

**My personal position is that the Council and Unit Owners should be friends, and friends don't hurt each other.**

4) Transfer duties assigned to the Office of Consumer Protection to the Department of Housing and Community Affairs.

**Why? The Council should remember that unpaid, volunteer citizens who serve on government Commissions and Committees are not to be subject to command influence (command interference) otherwise the government claims the Commissions and Committees represent the citizens views and recommendations are voided per the MD Court of Appeals in Baltimore.**

**Commissions and Committees are not to be influenced or act as covers supporting elected government officials' personal political agendas.**

**Where a Commission or Committee is housed is not the issue. The issue is whether or not the Commission or Committee is independent, totally free in its deliberations and decisions. The Commissions and Committees are to be subject to oversight by the government and public. The Commissions and Committees are to generate the necessary reports. The Commissions and Committees are to be audited by the government. But in the final analysis, the Commissions and Committees are to be independent, totally free to deliberate and make decisions without government interference.**

**The CCOC could be housed in the Department of Permitting Services (DPS). However, the CCOC must be provided the resources and data that the Commissioners require to conduct their deliberations and make their decisions without being subjected to Command Influence. The resources would include administrative resources, IT resources, etc. The necessary data would include data concerning COC's that the DHCA has, but the DHCA has been unwilling to share with the CCOC. These resources are to be provided in a reasonable and effective manner. The Door Tax will provide the necessary financial support for the CCOC.**

***I have no objections to the CCOC being housed in the DHCA providing the above requirements are imposed and the CCOC is to be independent, totally free in their deliberations and the decisions they make.***

***I had a discussion with Mr. Clarence Snuggs, Director of the DHCA, after the January 21, 2016 Council meeting (reference d). We had a good discussion. My condo board had told me they were no longer enforcing the invalid, unenforceable, & racist lease addendum - why was I making a fuss. I explained I take strong exception to the fact the lease addendum hasn't been rescinded - it has been a house rule since 1995 - enforced from 1995 to 2005 - an existing house rule today, 2016, waiting to be enforced again. I'm personally insulted because I am an owner of the condo. Mr. Snuggs shared he had the same sentiments.***

***I then discussed with him the way the CCOC was treated when it was housed in the DHCA until 2005 when the Council removed the CCOC from the DHCA and had the CCOC reporting directly into OCE - Douglas Duncan was the County Executive - Isiah Leggett, the current County Executive, was a Council member then.***

***I stated the CCOC should be treated with respect and dignity. Mr. Snuggs agree.***

***I found Mr. Snuggs to be a good, competent, and fair person - he has one handicap - he serves at the pleasure of the County Executive.***

***Currently the County Executive Isiah Leggett receives the Door Tax money, decides how much of it to fund the CCOC, and gives the rest to the OMB to use as general revenue. The current Door Tax is \$3 per year. I would support \$6 per year (50 cents per month). But I won't support any increase until there is a full accounting of the Door Tax money collected.***

***In fact, I would encourage and endorse the Condominium Boards to go on a rent strike not paying the Door Tax until we get a full and honest accounting of the Door Tax.***

***I refer the Council to comments made by Vicki Vergagani at the January 21, 2016 County Council meeting regarding Mr. Leggett's Door Tax (Reference d at the 18 minute mark).***

***I also refer the Council to the comments made by Kathy Hastings at the January 21, 2016 Council meeting regarding 'Catch 22' (Reference d at the 54 minute mark). I discussed 'Catch 22' not only in Item 1 above, but also in detail in my email titled "Comments re Proposed Bill 50-15 (CCOC) - Issue #6" dated February 29, 2016. If the Council mandates the parties to a CCOC Complaint to participate in a Formal CCOC Negotiation without amending the law eliminating 'Catch 22', the Council's action will be hypocritical.***

***Ms. Hastings, a lay person, knows the law. Michael Lang, an attorney, the officially appointed Negotiator for the Formal CCOC Negotiation does not know the law - 'Catch 22'.***

***Vicki Veragagni's comments and Ms. Jackie Simon comments (Reference d at the 47 minute mark) both concerned the three assigned duties to the CCOC: Dispute Resolution, Education, and Public Policy. The CCOC has only been involved in Dispute Resolution due to the inadequate funding of the CCOC by the County Executive. I attended last Wednesday, the March 2, 2016 CCOC meeting - the meeting ran from 7 PM to 10:10 PM. Whn the CCOC were discussing their Education mandate, it is my opinion (perception) that Eric Friedman, Director, OCP threw rocks at the CCOC to delay and deter the Commissioners from working & deliberating on their Education mandate.***

Ms. Floreen, you further wrote:

"The Committees will consider especially the proposed changes in the composition of the Commission and the hearing panels. There is currently some concern that the existing composition of the Commission and hearing panels may result in conflicts of interest that are impermissible under the County's Code of Ethics."

***The information in 1) above has resolved these concerns. The issue is mute - DEAD!***

***The problems that the broken CCOC has and are being investigated by the 'alphabet' agencies of the county government are the result of the County Executive's actions. The solutions are in his hands.***

***But, for God's sake, get the CCOC out of the Office of Consumer Protection.***

All my comments are to be submitted by the end of the day, Monday, March 7, 2016 to Joseph Hamlin, Staff Attorney, County Council. Mr. Hamlin requires 2 days, Tuesday & Wednesday, to generate the work package for the PHED and PS Committees for their work session on Thursday regarding Bill 50-15. I worked on Proposals when I with IBM. I fully understand and am sympathetic to his time requirements.

However, I will continue to submit my comments to the Council. I have a raised a number of issues in this email.

I will address these issues in follow up emails.

Yours Respectfully,  
Lawrence Dorney

cc:

Isiah Leggett, County Executive  
Timothy Firestine, County Administrative Officer  
Councilmember, Nancy Floreen, President  
Councilmember, Roger Berliner, Vice President  
Councilmember, Mark Elrich  
Councilmember, Tom Hucker  
Councilmember, Sidney Katz  
Councilmember, George Leventhal  
Councilmember, Nancy Navarro  
Councilmember, Craig Rice  
Councilmember, Hans Riemer  
Joseph Hamlin, Staff Attorney, County Council  
Charter Review Commission  
Paul Bessel, Chair, Charter Review Commission  
Ethics Commission  
Robert Cobb, Chief Counsel/Staff Director, Ethics  
Commission  
WMA CAI Chapter  
Matt Rankin, Executive Director, WMA CAI Chapter  
(Legislative Committee)  
DHCA  
Clarence Snuggs, Director, DHCA  
HRC



## Commission on Common Ownership Communities

Rm. 330, 100 Maryland Avenue, Rockville, Maryland 20850

To: The Honorable Isiah Leggett  
Montgomery County Executive

The Honorable Nancy Floreen  
President, Montgomery County Council

From: Rand H. Fishbein, Ph.D.  
Chair, CCOC

Date: March 10, 2016

Re: ***Analysis of Council Bill 50-15: A Bill to Amend Chapter 10B – Common Ownership Communities – Commission on Common Ownership Communities – Composition – Dispute Resolution***

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This memorandum, approved by a vote of the Commission on Common Ownership Communities (CCOC), analyzes Council Bill 50-15 as proposed by the Executive on November 23, 2015 and introduced by the Lead Sponsor, Council President Floreen, on behalf of the County Executive on December 8, 2015. The bill would amend Chapter 10B of the County Code and the authorities governing the operation of the Commission on Common Ownership Communities (CCOC). Commissioners, attorney Panel Chairs, Staff and others (hereinafter referred to as "Commission stakeholders"), have contributed their assessments to this document.

### **Recommendation**

#### **Oppose Council Bill 50-15**

The Council should table Bill 50-15 in its entirety and immediately convene a task force of stakeholders to include, but not limited to, the County Council, the Executive, CCOC, affected communities and others, to discuss how best to address outstanding issues involving the Commission. The goal should be to find ways to improve the delivery of alternative dispute resolution services, as well as good governance education and training services, to common ownership communities throughout the County. Policy

and procedural changes, rather than Bill 50-15, should be the preferred method for addressing the County's concerns regarding CCOC operations.

### **General Exceptions to the Executive's Bill**

Commission stakeholders take general exception to Council Bill 50-15 on the following grounds:

- The Commission was never consulted on the provisions of the bill or even that it was being contemplated by the Executive.
- The bill uses the heavy-hand of statute to effect changes in CCOC operations that rightfully should be policy decision within the purview of the Commission.
- **The principal problem facing the CCOC is lack of resources.** The bill makes no attempt to address this issue even though the Executive has been aware for some time that that Commission was at the breaking point with only one full-time staffer, no consistent clerical or administrative support, and no modern digital case management or database system.
- The bill is premised upon false and misleading information regarding the manner in which the CCOC operates, the resources at its disposal to carry out its statutory mandates and the actual statistical data regarding its case load,
- The bill seeks to shift essential decision-making authority over CCOC business away from the Commission to the Director of DHCA, thereby effectively neutering the body, nullifying its independent quasi-judicial role and significantly diminishing its influence and ability to carry out its functions,
- The bill ignores the ongoing and laborious effort by the Commission's *Process and Procedures Committee* to improve the operation of the CCOC through policy reforms, consistent with the recommendations contained in the 2015 OLO Report and the suggestions received from the Council, the Executive and the public,
- By giving the Director of DHCA broad powers with respect to the management of CCOC cases, the Executive has undermined, potentially, the judicial independence of the CCOC and set up a potential conflict of interest between the needs of the Commission and the policy agenda of DHCA,
- The bill fails to address in any meaningful way the true source of the CCOCs management difficulties: 1) the Executive's systemic and persistent neglect of CCOC needs, 2) a punishing resource deficit occasioned, in large part, by earmarked CCOC fees being redirected away from Commission priorities to

other County needs, 3) no modern office IT capability, 4) enactment of the new director's training program as an unfunded mandate, and 5) no Commission oversight or control of its own annual budget,

- The bill would return the Commission to DHCA where it was housed, unsuccessfully, a decade ago. The statutory missions of DHCA and the Commission are not fully congruent. In any internal competition over resources, it is likely that the needs of DHCA's components would take precedence over those of the Commission.
- The principal focus of DHCA is: 1) the promotion of affordable housing by increasing the supply of moderate priced units, and 2) the improvement of neighborhoods by helping to subsidize major repairs in designated condominiums. These are noble goals, to be sure, but ones that address only a small fraction of the population served by the CCOC. A large percentage of associations in the county are self-sustaining. Their focus, and one of the three principal mission areas of the CCOC, is to "enhance the value of residential property in community associations." The Commission does this by promoting best practices on responsible financial management and good governance initiatives.<sup>1</sup>
- The bill is silent on the need to ensure: 1) that all fees collected on behalf of the Commission are made available only for activities that the Commission deems necessary and beneficial for its operation and for no other purpose; 2) that DHCA provides for the timely and full modernization of the Commission's office IT capacity; 3) that the Commission be granted full budgetary authority over the obligation and expenditure of its funds, and 4) that funds not expended by the Commission in one fiscal year may remain available to the CCOC until expended.
- The bill fails to provide authorization for any increase in funding for the Commission. The Executive acknowledged this need in the memorandum he transmitted to the Council on October 30, 2015.

**In short....**

- ***Many supporters of the Commission are deeply concerned that enactment of Council Bill 50-15 would irrevocably harm the Commission on Common Ownership Communities as an independent, transparent, accountable, alternative dispute resolution body skilled in the administration and adjudication of common ownership law, regulation and policy.***

<sup>1</sup> [http://www.montgomerycountymd.gov/ocp/ccoc/ccoc\\_index.html](http://www.montgomerycountymd.gov/ocp/ccoc/ccoc_index.html)

## **CRITIQUE OF COUNCIL Bill 50-15 TO REFORM THE CCOC**

### **DEFINITION**

#### **RECOMMENDATION: OPPOSE PROVISION.**

##### **Lines 15-18. (10B-2). Definitions.**

*Provision would define "Department" as meaning the Department of Housing and Community Affairs (DHCA) and "Director" as Director of DHCA.*

- This change to the Act signifies the transfer of the CCOC to DHCA jurisdiction and opens Chapter 10B to amendment.

### **COMPOSITION OF COMMISSION WOULD BE ALTERED TO ITS DETRIMENT**

#### **RECOMMENDATION: OPPOSE PROVISION.**

##### **Lines 23-38. (10B-3). Commission on Common Ownership Communities.**

*Provision would dramatically alter the composition of the Commission. Instead of having fifteen members, with eight (8) being Residents and seven (7) being Professionals, the Commission would be comprised of 15 members, with five (5) being Residents, five (5) being Professionals, and five (5) being selected "from the public at large" who would not be either Residents or Professionals.*

- This proposal risks severely undermining the integrity of the Commission and its reputation for quality decisions informed by experience, knowledge and seasoned judgment. The CCOC was designed to serve as an advocate for the needs of common ownership communities (COC's). By seating individuals with absolutely no stake in the future welfare of COC's, the bill threatens to erode the confidence of residents and boards in Commission decisions and the belief that the body is acting in their best interests. It is difficult to discern what practical benefit there is in "dumbing down" the Commission, particularly at a time when more, not less, technical expertise is needed in addressing the needs of unit owners.
- It may be unrealistic to expect that five (5) people with zero stake in common ownership communities will be found who are willing to serve as unpaid commissioners, each of whom will have to sit on one fifth of the hearings.

- The provision would fundamentally undermine the vision set forth in the 1989 Task Force study that gave rise to the CCOC.
- The present structure of the Commission is designed to ensure that principal stakeholders in common ownership communities are fairly represented. Property owners (the residents and the fiduciaries they elect to represent them on boards of directors), are assigned eight (8) seats. Professionals, those who provide services to associations through a variety of contractual relationships, are assigned seven (7) seats. Experience over the last quarter century has shown that this arrangement works well, reflecting an appropriate balance between those who bear the expense of living in an association and those charged with helping to ensure its orderly operation. Tinkering with the composition of the CCOC to enable non-stakeholders to join its ranks as commissioners makes no sense. It is sure to diminish its stature and thus, the desire of complainants to bring a case.
- The director of DHCA has stated that the proposed third category of membership is not intended to exclude members who may be eligible under one of the other two classes. Specifically, he stated that members who currently serve as commissioners as either residents or professionals could resign their membership and re-apply under the third category. This makes a mockery of the reason for the categories in the first place and opens the Commission to the possibility of being "stacked" in favor of one type of stakeholder over another.

### **CHANGE IN DESIGNATION**

#### **RECOMMENDATION: OPPOSE PROVISION.**

#### **Line 42. (10B-3). Commission on Common Ownership Communities.**

*Provision would remove the Office of Consumer Protection from the enumerated list of County agencies/departments that the County Council could designate as a designee to the Commission.*

- This change would bar any OCP representative from serving as an official member of the Commission. There is no apparent logic behind this exclusion. To a large extent, the cases that come before the Commission are quasi-contractual disputes between associations and their members. Associations are voluntary membership organizations. The governing documents that bind association members are contracts and contract law forms the basis of most of the judicial opinions rendered in cases involving associations. The same can be said of OCP whose principal responsibility it is to investigate and resolve

consumer allegations often involving breach of contract. By contrast, DHCA's work in the contract arena is focused, primarily, on landlord-tenant disputes.

- There can be no practical benefit to legislate that the expertise available in one County office should not be made available, as needed, to assist another County office. If there is value to having a representative of OCP serve as a "designee to the Commission" then this should be allowed. Surely there are areas of training, education and the administration of justice, where the cross pollination of ideas and expertise would benefit the community. The taxpayers of the County are paying for the range of County services and should not be prevented from access to any of them, individually or in combination, for no apparent reason.

### **TECHNICAL CHANGE #1**

**RECOMMENDATION: OPPOSE PROVISION.**

**Line 46 (10B-19). Enforcement.**

*Provision would replace the word "Office" (of Consumer Protection) with the word "Department."*

- This change would invest DHCA with authority over the Commission and open Chapter 10B to amendment.

### **TECHNICAL CHANGE #2**

**RECOMMENDATION: OPPOSE PROVISION.**

**Line 53 (10B-4). Administrative Support.**

*Provision would replace the word "Office" (of Consumer Protection) with the word "Department."*

- This change would invest DHCA with authority over the Commission and open Chapter 10B to amendment.

### **TECHNICAL CHANGE #3**

**RECOMMENDATION: OPPOSE PROVISION.**

**Lines 56-58 (10B-5). Duties of the Office of Consumer Protection.**

*Provision would replace the word "Office" (of Consumer Protection) with the word "Department."*

- This change would invest DHCA with authority over the Commission and open Chapter 10B to amendment.

### **TECHNICAL CHANGE #4**

**RECOMMENDATION: OPPOSE PROVISION.**

**Lines 65 and 68 (10B-7A). Notification requirements.**

*Provision would replace the word "Office" (of Consumer Protection) with the word "Department."*

- This change would invest DHCA with authority over the Commission and open Chapter 10B to amendment.

### **LIMITS PANEL TO CONSIDER "RELIEF FROM STAY" TO ONE REPRESENTATIVE OF EACH MEMBERSHIP CATEGORY**

**RECOMMENDATION: OPPOSE PROVISION.**

**Line 74 (10B-9A). Request for relief from stay.**

*Provision removes the words "at least" and would require that a special panel convened to consider a relief from stay would consist of 3 voting members of the Commission designated by the chair and, and must include one representative of each membership category.*

- This amendment is likely to increase the Commission's difficulty in scheduling suitable volunteers to serve on special panels. Rather than shortening the time until a decision is rendered, it actually may increase the time.
- This change would invest DHCA with authority over the Commission and open Chapter 10B to amendment.

## DHCA DIRECTOR MAY PRE-EMPT MEDIATION

### RECOMMENDATION: OPPOSE PROVISION.

#### **Line 78, 80, 81 (10B-11). Mediation; dismissal before hearing.**

*Provision would replace the word "Office" (of Consumer Protection) with the word "Director." DHCA Director would be given authority to "investigate facts and assemble documents relevant to a dispute filed with the Commission, and may summarize the issues in the dispute. The director may notify a party if, in the Director's opinion, a dispute was not properly filed with the Commission, and may inform each party of the possible sanctions under Section 10B-13(d)"*

- The DHCA Director would be given broad authority to pre-empt the work of the Commission, its mediator(s) and its hearing panels by making determinations as to facts in a case and the manner in which it was filed. This broad re-delegation of authority away from the Commission, and to the DHCA Director, undermines the position of the CCOC as an independent adjudicator of disputes.

## DHCA DIRECTOR AUTHORIZED TO DISMISS MEDIATION CASES

### RECOMMENDATION: OPPOSE PROVISION.

#### **Lines 84, 85, 87, 88, 89, 91 and 92 (10B-11(b)). Mediation; dismissal before hearing.**

*Provision directs that in the event that the Director of DHCA concludes that the facts alleged by a party in a dispute are true that "there are no reasonable grounds to conclude that a violation of applicable law or any association document has occurred, the Commission **must** dismiss the dispute if it, too, concludes "that there is no reasonable grounds to conclude that a violation of applicable law or any association document has occurred."*

- This change injects the DHCA Director into what is supposed to be an independent quasi-judicial process. The provision needlessly usurps the authority of the Commission and/or a hearing panel over cases and transfers that authority to the DHCA Director. The Director, not the Commission, is empowered to communicate directly with each party regarding whether a dispute is properly filed.
- The DHCA Director is authorized to make determinations about the efficacy of a case before consulting the Commission and before jurisdiction is formally taken.

- The proposed amendment would eliminate a hearing panel's discretion in how it chooses to manage a case, particularly with respect to making a determination whether one or both of the parties to a case acted in bad faith.

### **MEDIATION MADE MANDATORY**

#### **RECOMMENDATION: OPPOSE PROVISION.**

#### **Lines 100-118 (10B-11(c). Mediation; dismissal before hearing.**

*Provision directs that mediation is to be mandatory for cases brought to the Commission where the Director finds that there is "reasonable grounds to conclude that a violation of applicable law or an association document has occurred."*

- For at least the last decade, the Commission has considered the question of whether mediation should be made mandatory. After much deliberation it has concluded that while the idea appears to have merit on its face, in fact, it would prove difficult to implement and likely would discourage parties from bringing their disputes to the Commission for review.
- The Commission is strongly committed to voluntary mediation and has vigorously and successfully pursued this form of alternative dispute resolution throughout its 25 year existence. Its procedures are flexible and effective and have led, over the years, to an annual success rate of over 80 percent. Under existing CCOC procedures, informal mediation conferences can be arranged. Deadlines can be moved if necessary. Once the Commission has taken jurisdiction over a case, the panel chair has discretion to tailor a path to reconciliation that suits the needs of both parties. Therefore, it is perplexing, that the current proposal would seek to "fix" a system that is in no way broken.
- The Commission's experience with mediation is clear: If mediation is to be successful, the process must begin with two receptive parties willing, if not eager, to find a solution to their disagreement. Mediation cannot be compelled or coerced. Doing so often has the opposite effect of what is intended, breeding heightened animus, increasing cost, and driving both parties even farther apart.
- The Commission notes that under Council Bill 50-15, there is a contradiction between the mandatory mediation requirement and the subsequent requirement that the CCOC review all cases not resolved within 90 days unless the Director finds that mediation would be futile. Further, the CCOC believes that mandatory mediation will not be productive because parties cannot be compelled to cooperate in good faith in a mediation or settlement.

- Consistent with the original purposes of the CCOC, the Commission prefers to encourage mediation through the intervention of a skilled professional rather than apply a heavy hand that, all too often, fails to achieve the desired goal.
- Whether or not mediation is made mandatory, it should be noted that the Commission does not have a mediator on staff. A part-time volunteer currently provides mediation assistance. If mediation is made mandatory, the Commission will definitely require the addition of a paid staff person to undertake the mediation, in order to address a foreseeably large workload. This could result in dramatically increased costs, as presently dispute resolution is either mediated with a volunteer or ordered by a hearing panel.

### **DHCA DIRECTOR GIVEN MEDIATOR ROLE**

#### **RECOMMENDATION: OPPOSE PROVISION.**

#### **Lines 119-126 (10B-11(c). Mediation; dismissal before hearing.**

*Provision would grant the "Director" the right to determine, "at any time that mediation would be fruitless."*

- This provision is a cause for concern on several grounds: 1) The Director is given no standards by which to judge when, and under what circumstances, a mediation is deemed "fruitless;" 2) The consequences of the Director's decision are severe, since they could result in a dismissal of a complaint or in the entry of judgment against a party without a hearing; 3) the Director would be making such decisions before any authority has even decided if the Director (CCOC) has any jurisdiction over the complaint at all. For example, the owner could file a dispute stating he did not owe any money. The HOA might refuse to mediate that issue if it has a lien or at least gave the contract lien notice. That would be a reasonable response in such a case, but the Director could overrule it and send the dispute to be resolved by default judgment at which the HOA would not be allowed to present any evidence justifying the debt or making any legal argument in its defense. And yet, the CCOC would have had no jurisdiction over that complaint at all.
- The provision provides no procedural mechanism for the parties to provide countervailing information and/or evidence to the Director.
- In short, this provision undermines the integrity of the mediation process by effectively turning it into an arbitration proceeding. The Director of DHCA should have no role in the mediation process. The proposed provision is likely to discourage parties from entering into a mediation process that could be

interrupted at any time and by a Director with no intimate knowledge of the facts of a dispute, or the evidence and argumentation brought to bear by both sides. The success of mediations is highly dependent upon the skill and experience of the mediator. If the Director lacks these core competencies, yet involves himself/herself in a case, then the parties to a dispute are not being well served.

- The Commission is committed to addressing real or potential conflicts of interest before they emerge. The oversight provided by volunteer commissioners is central to this process, particularly when making determinations about when and how disputes are resolved. By removing volunteer commissioners from the process, there is no effective check on a Director who might chose to dismiss a case for purely political reasons.

### **ATTORNEYS REMOVED FROM HEARING PROCESS**

#### **RECOMMENDATION: OPPOSE PROVISION.**

#### **Line 135 (10B-12). Hearing Panel**

*Provision would alter the number of Commissioners selected to serve on a hearing Panel from the current 2, to 3. No licensed attorney would be required to serve as a Panel Chair.*

- The Commission already makes a strenuous effort to protect the integrity of its quasi-judicial process by actively addressing real or alleged potential conflicts of interest. In communication with the County Ethics Commission, the CCOC has proposed additional filters to further shield parties by: 1) expanding the disclosure requirements placed on Panel Chairs, and 2) granting each party to a dispute the right to reject a panel member whom they feel holds an inherent bias against them. Over the course of its 25 year history, there never has been a single proven instance of an attorney panel chair who practices before the Commission of having been influenced by a seeming conflict of interest.
- This provision is fundamentally flawed because it fails to recognize that the cases handled by the CCOC fall along a broad spectrum, everything from those requiring a simple factual determination to others that demand the skillful parsing of legal nuance. For complicated cases, skilled attorneys play a critical role in ensuring that appropriate legal procedure and judicial precedent are respected. The fact that CCOC decisions are upheld well in excess of 95 percent on appeal is a testament to the rigor of their construction and the experience gathered by attorneys during years of practice in the field of property and contract law.

- For disputes involving issues of fact or the interpretation of governing documents, the Commission has benefited greatly from Panel Chairs bearing the Community Associations Institute (CAI) credential of Professional Community Association Manager (PCAM®), the highest certification in the field. PCAMs are required to comply with strict ethical and educational standards. They also must demonstrate familiarity with the laws governing associations. PCAMS bring their own special set of skills and knowledge base to the table that make ideal for CCOC hearings. Their decisions are reviewed by an attorney to ensure they comport with applicable judicial standards.
- The bottom line is that the CCOC makes wide use of attorneys in its work. Removing them from the process would only diminish the exactitude of CCOC decisions and harm the cause of justice as well. It seems counter-intuitive for the County to be aggressively pursuing the training of association directors yet at the same time, be satisfied with the lowering of the bar for CCOC panel chairs. The County should be seeking ways to strengthen the skills of panel chairs, not diminish them.
- Attorneys are an integral part of the CCOC adjudication process. Any diminution of their role weakens the process by denying the parties to a dispute access to licensed legal authorities, who are formally trained and experienced in parsing complex and often nuanced legal text and argument.
- It is likely that the net effect of this provision will be to drive cases to the Circuit Court, increasing not only the cost to the parties, but the wait time for decisions as well. In part, the CCOC was created precisely to counter the problem of an overburdened judiciary and to provide a more “user friendly” environment for homeowners and associations wishing to resolve their disputes in a less costly and procedurally complex environment.

**WORD “UNREASONABLY” REMOVED AS A STANDARD FOR  
EVALUATING THE APPROPRIATENESS OF REFUSING  
MEDIATION**

**Lines 153-154 (10B-13). Administrative hearing.**

**RECOMMENDATION: OPPOSE PROVISION.**

*Provision would remove the word “unreasonably” from the standard used for determining the appropriateness of a party to refuse to participate in, or withdraw from, ongoing mediation.*

- Striking the word “unreasonable” from existing law as well as and the phrase, “or unreasonably withdrew from ongoing mediation,” deprives a hearing panel of an essential tool for assessing the appropriateness of a party’s action with respect to mediation. It imposes a hard standard that runs contrary to the mandate of the CCOC which is to be flexible and probative in understanding the needs and perspectives of disputants.

**TECHNICAL CHANGE #5**

**RECOMMENDATION: OPPOSE PROVISION.**

**Lines 159, 165 (10B-13). Administrative hearing**

*Provision would make a grammatical change of “the” to “The” and “Office” to “Department”*

- This change would invest DHCA with authority over the Commission and open Chapter 10B to amendment.

**TECHNICAL CHANGE #6**

**RECOMMENDATION: OPPOSE PROVISION.**

**Line 171 (10B-14). Settlement of disputes; assistance to parties.**

*Provision would make a grammatical change of “Office” to “Department”*

- This change would invest DHCA with authority over the Commission and open Chapter 10B to amendment.

**TECHNICAL CHANGE #7**

**RECOMMENDATION: OPPOSE PROVISION.**

**Line 176, 178 (10B-19). Enforcement**

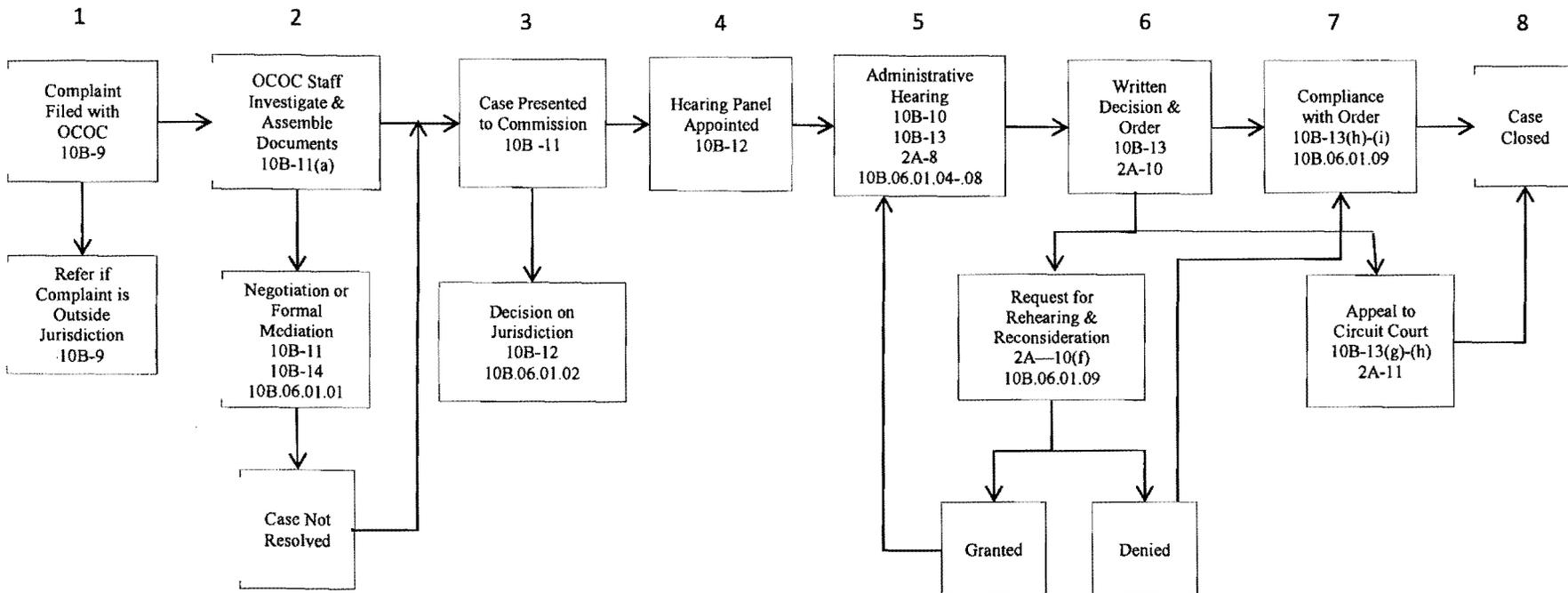
*Provision would change the word “Commission” to “Department” thereby transferring responsibility for the enforcement of this Article from the Commission to DHCA.*

- This provision would remove Commission enforcement authority over its own decisions and transfer that authority to DHCA. The ability of the Commission to enforce its decision is central to its effectiveness. Parties who go to the trouble and expense of bringing their dispute to the Commission do so, in large part,

because they trust that the Commission will use its power to issue civil citations or recommend court act should the losing party not comply with a Panel Decision.

- This change would invest DHCA with authority over the Commission and open Chapter 10B to amendment.

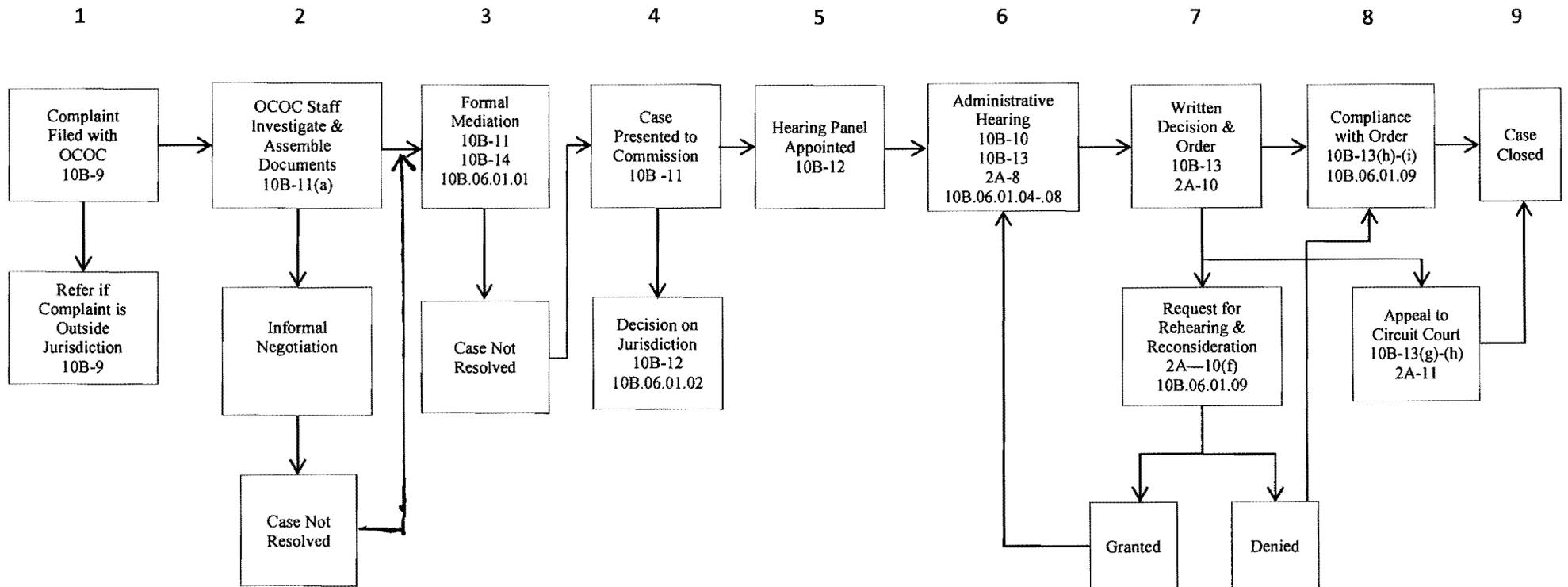
Commission on Common Ownership Communities Dispute Resolution Process



159

# Commission on Common Ownership Communities Dispute Resolution Process

if mediation is a required step prior to administrative hearing





# Commission on Common Ownership Communities

Rm. 330, 100 Maryland Avenue, Rockville, Maryland 20850

February 12, 2016

The Hon. Isiah Leggett, County Executive  
Office of County Executive  
Executive Office Building, 2nd floor  
101 Monroe St., Rockville, MD 20850

The Honorable Nancy Floreen, Council President  
Council Office Building  
100 Maryland Avenue, 6th Floor  
Rockville, MD 20850

Dear County Executive Leggett & Council President Floreen:

Of the many critical issues affecting the future of the Commission on Common Ownership Communities (CCOC), perhaps none is more urgent than the need to ensure that a full complement of fifteen (15) volunteer commissioners is available at all times to serve the needs of residents living in community associations. Today, the Commission finds itself stretched to the breaking point as the number of serving commissioners has fallen from its authorized level of fifteen (15) to just eight (8) due to natural attrition and several early resignations for personal reasons.<sup>1</sup>

***The Commission is in need of urgent relief and calls upon the County's political leadership to act with all deliberate speed to ensure the swift nomination and confirmation of qualified candidates to fill all vacant CCOC positions. In addition, immediate action is needed on the reappointment of two (2) commissioners seeking a second three year term and one (1) seeking an upgrade of his temporary status to a regular first term appointee.***

The Commission's situation became acute in January when it found itself unable to muster a quorum for its monthly meeting. Without a quorum, the Commission could not vote to take jurisdiction of new cases, hold an election for officers or formalize reformed policies and procedures along the lines recommended by the Office of Legislative Oversight (OLO) in its 2015 review of CCOC operations.

At the present time, the CCOC needs eighty (80) percent of current members to attend a meeting rather than the fifty-three (53) percent necessary under normal conditions. This imposes an

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<sup>1</sup> Chapter 10B-3 of the County Code states that the "County Executive must appoint, subject to confirmation by the Council," eight (8) residents and seven (7) professionals to serve as voting members of the Commission. Each commissioner serves a three (3) year term, renewable upon request.

enormous burden on our remaining volunteer commissioners who must now do double, even triple duty, on committees, hearing panels, and educational programs. The hardship is compounded by the fact that many commissioners now are volunteering their time to assist our single overworked staff member in fielding a constant stream of public inquiries and whittling down a backlog of open cases.

Today, it is not uncommon for it to take 150 days or more to fill open seats on the Commission. In the case of the former Vice-Chair whose term expired in January, 2015, it has now been thirteen months – over 390 days – and still there is no candidate available to fill this seat. This time lapse is far in excess of the sixty (60) day requirement set forth in the Montgomery County Code for the confirmation of new candidates to a board, committee and commission. Section 2-75(b) reads:

*(b) Confirmation of executive appointments. When any vacancy exists on any board, committee, commission, or similar body whose members are appointed by the county executive, the county executive should appoint a successor within 60 days. The county council should act within 60 days, by resolution, to confirm or disapprove the appointment. The affirmative vote of a majority of council members in office is required for confirmation. If the appointment is not confirmed, the county executive should promptly appoint another person to that vacancy and submit the person to the council for confirmation.*

As of today, there is only one (1) volunteer Professional member in service on the Commission instead of the seven (7) required. Since the law mandates that a Professional must occupy one of the three seats on a hearing panel, this means that we are completely dependent on this single individual to participate in every hearing we hold. By any measure, this is an unreasonable demand to make on any volunteer, particularly when the situation is so clearly avoidable and could be quickly ameliorated through the accession of additional commissioners. In fact, we understand that at least three applications from Professionals (i.e. association managers) seeking appointments to the Commission have been pending in the Executive's Office since the July, 2015, recruitment period.

Moreover, in recent weeks the Commission has confirmed that the Executive has decided not to appoint, or reappoint, any new Resident members of the Commission so as not to send a conflicting message to the Council with respect to his intentions regarding Bill 50-15 and its proposed change to the composition of the CCOC. What is the Commission to do during the six months while its fate is being decided? Are we expected to turn away new cases from associations that have paid for this service?

As the Commission has so often pointed out, it is unfair for the County to establish high expectations for the delivery of services if it is not prepared to provide the resources and personnel necessary to meet those expectations. At a bare minimum, we believe it is the responsibility of the County to ensure that candidates for the CCOC are solicited, vetted and approved in a timely manner. Given the enormous value provided to the County by such a dedicated corps of volunteers, this should be a goal well worth striving for.

Lastly, we believe it is unreasonable to hold-up the reappointment of commissioners in good-standing. Most of our commissioners have rigorous day jobs, family responsibilities and busy

calendars that often are filled months in advance. Keeping them in limbo about their future on the Commission imposes an unnecessary hardship that the County should want to mitigate.

We, the commissioners of the CCOC, trust you will take our comments in the positive and constructive spirit in which they are intended. We are honored to serve the County and take great pride in our work. Our compensation is measured in the feeling of satisfaction each of us receives from a job well done and in the belief that we are providing a valuable service to a deserving, and often under-appreciated, part of our community. As volunteers, we ask for nothing more than to be provided with the tools, the resources and the freedom to carry out our mission and the mutual respect that our service should engender.

Thank you for letting us share our concerns. We hope you will give them every consideration.

Respectfully,

*Rand H. Fishbein*

Rand H. Fishbein, Ph.D.  
Chair, CCOC  
(Reappointment Request Pending)

*Aimee Winegar*

Aimee Winegar, CMCA, LSM, PCAM  
Vice-Chair, CCOC  
(Reappointment Request Pending)

*Richard Brandes*

Richard Brandes, CMCA, AMS  
Commissioner, CCOC  
(Term Expired)

*Terry Cromwell*

Terry Cromwell, CMCA, AMS  
Commissioner, CCOC  
(Term Expired)

*Jim Coyle*

Hon. Jim Coyle, Mayor, Rockville (Ret.)  
Commissioner, CCOC

*Marietta Ethier*

Marietta Ethier, Esq.  
Commissioner, CCOC

*Mark Fine*

Mark Fine  
Commissioner, CCOC  
(Reappointment Request Pending)

*Bruce Fonoroff*

Bruce Fonoroff  
Commissioner, CCOC

*Donald Weinstein*

Donald Weinstein

*Kenneth Zajic*

Kenneth Zajic



# Commission on Common Ownership Communities

Rm. 330, 100 Maryland Avenue, Rockville, Maryland 20850

September 10, 2015

Ms. Constantia Latham, Special Assistant  
Ms. Fariba Kassiri, Assistant CAO  
Marc Hansen, Esq., County Attorney  
Executive Office Building (EOB)  
101 Monroe Street, 2nd Floor  
Rockville, MD 20850

Dear Ms. Latham, Ms. Kassiri and Mr. Hansen:

Thank you for taking the time to meet with our delegation on September 2<sup>nd</sup> to discuss the fiscal and manpower crisis now facing the Commission on Common Ownership Communities (CCOC), and our urgent need for immediate County relief. We also welcome the opportunity to defend the Commission's record.

## The CCOC's Record:

We trust we were able to put to rest any concerns the Executive might have had regarding CCOC operations. As we explained, the issues brought to his attention were not informed by actual case statistics or the statutory mandate under which the Commission operates. By way of summary:

- **CCOC Is Too Litigious?** Untrue. On the average, eighty (80) percent of the cases brought to the Commission annually are resolved through staff intervention. Only about twenty-five (25) cases per year are assigned to hearing panels, and many of these are settled without the need for a hearing. Of the ones that go to hearings, less than two (2) percent, or 1-2 cases per year, extend beyond one (1) hearing. Indeed, those claims made by critics that the Commission has become too litigious are contradicted by the statistics placed on the County's website by the Office of Consumer Protection itself.

The few protracted cases handled by the Commission in the last several years were outliers. They involved complicated legal and factual questions, but even in several of those cases, the homeowners were able to prevail without attorneys. These lengthy cases in no way are reflective of either the Commission's usual processes or its desire to resolve as many disputes as possible and with a minimum of delay and complication.

Nor do we wish to foreclose the option for parties to bring complicated cases to the Commission. Section 10B-5(i) expressly grants to the CCOC the authority to conduct quasi-judicial hearing panels: "The office, in consultation with the Commission, must operate a dispute resolution process to furnish mediation and administrative hearings." For many citizens unschooled in the judicial process, this remains a far superior option than bringing their cases to the Circuit Court. Most important to remember is the fact that all of the hearings are conducted by volunteer Commissioners and attorneys at virtually no cost to the County.

- **Advising the County Council / Keeping the Executive Informed:** Yes. Section 10B-6(b) expressly states that: "The Commission must cooperate with the County Executive and all government agencies concerned with matters within the jurisdiction of the Commission." Section 10B-6(e) states: "The Commission must advise the citizens of the County, the County Council, and the County Executive, and County, state, and federal agencies on matters involving common ownership communities and recommend such programs, procedures, or legislation as it finds necessary." The Commission takes these responsibilities very seriously and has striven, to the best of its ability, to be as transparent and responsive as possible to all those with an interest in its activities.

We have kept the Director of OCP informed of our contacts with other government entities. Indeed, on numerous occasions he has encouraged us to speak directly with the Council to better assist them in their deliberative process. As requested, we have cooperated fully with OLO in its study of CCOC operations. We also have provided detailed information to Susan J. Farag, Legislative Analyst for the Council, and to the Office of Management and Budget (OMB) and the Office of the Executive. At the request of the full Council and its committee heads, our Chair has testified on the work of the Commission. The Commission would welcome the opportunity to communicate directly with the Office of the County Executive on a more regular basis.

- **CCOC Complaint Process is Unwieldy:** Untrue. The CCOC is bound by the Administrative Procedures Act and so must hew closely to its statutory requirements. That said, all organizations can benefit from a periodic adjustment of their policies and procedures. The CCOC is no exception. Where change is possible, the CCOC is committed to improving how it does business and to implementing evolving "best practices" wherever it can.

Beginning in January, 2015, the CCOC stood up a permanent *Committee on Process and Procedures*. The Committee is charged with reviewing and, where necessary, revamping the manner in which the CCOC addresses complaints. Its goals are: 1) to create programs to educate our constituents so they learn and avoid disputes, 2) to significantly boost the Commission's education and training efforts in communities across the County, 3) to simplify the case intake process, 4) to provide greater guidance to complainants on how to use the CCOC's services, 5) to streamline the hearing panel evidentiary process so that it is more focused and relevant to the original complaint, and 6) to address complaints at early stages in the dispute cycle.

Bottom line: there can be no reform without the staff essential to proper implementation and sustainment.

### Urgent Staff Requirement:

Simply put, the CCOC is at the breaking point. The Commission needs immediate emergency staffing relief over the next few months to ensure the smooth introduction of the Commission's new online directors' training program and to begin to fulfill those aspects of its Mission that have been ignored for years because of lack of staffing. Education is a prime example.

With only one (1) full time paid professional staff member assigned to the Commission and little or no clerical support, it is utterly unreasonable to require the Commission to take on significant new responsibilities and still expect its staff to cope with other essential office duties. The Commission has not had a staff increase for over *ten* years. To reiterate, the CCOC only has one (1) paid professional staff member assigned to the Commission and no clerical support. We have identified the following urgent staffing requirements for FY 2016 and respectfully ask for the Executive's expedited consideration.<sup>1</sup>

### Emergency Proposed Staff Enhancements to the CCOC in FY 2016

Staff Position	FTE	Responsibilities	Class Code	Grade	Projected Salary <sup>1</sup> Amount <sup>2</sup> (\$\$)
Management Level II	1.0	Manages the CCOC staff; responsible for planning, development and implementation of mission of CCOC.	000111	M2	148,004
Program Manager II (Education Specialist)	1.0	Develops whole range of educational and training programs including implementation of recent mandate to train COC board members.	000832	25	100,326
Senior Information Technology Specialist (IT Specialist)	1.0	Provides IT support; assists in communication with COC's and tracking of data.	000551	28	115,471
Management Level III	1.0	Functions as Assistant to the Manager II including supervision of complaints and management of process and procedures to resolve same.	000112	M3	127,711
Office Services Coordinator	1.0	Provides advanced office support.	009273	16	65,934
<b>TOTAL</b>					<b>\$557,446</b>

<sup>1</sup> Salaries are the mid-point between the minimum and maximum levels on the Management Leadership Service Salary Schedule for FY 2015.

<sup>2</sup> Salaries are the mid-point between the minimum and maximum levels on the Management Leadership Service Salary Schedule for FY 2015.

<sup>1</sup> The position currently occupied by the Commission's single staff member (Peter Drymalski, Esq.), is identified in the chart as "Management Level II." Presently, he is classified as a Consumer Protection Investigator. His salary is close to the amount for the "Management Level II" position due to his seniority, training and skill level. It is County practice not to classify any of its employees as "attorneys" unless they work in the County Attorney's Office.

We believe this emergency infusion of resources to the CCOC needs to be followed by a serious multi-year commitment by the County, beginning in the FY 2017 budget cycle, to match the Commission's broad mandate with the resources necessary to carry it out.

Statistics demonstrate the inadequacy of our present staffing position. The CCOC has had no staff increase for over 10 years, and during this time has lost the assistance of several part-time supporting staff. By contrast, DHCA currently has at least 5 investigators while the CCOC has none. The Office of Human Relations has a similar number to DHCA. The Office of Consumer Protection has no plan in place to train a successor to its only CCOC staff member or to preserve the corporate knowledge he possesses. Should the incumbent staff member retire or become incapacitated, the CCOC will be unable to function.

The CCOC believes that its need for additional funding is made all the more acute by the fact that a sizeable portion of the revenue that is supposed to support its programs apparently never reaches the Commission as demonstrated in the chart below.

### Disposition of Fees Collected on Behalf of CCOC (Est.)

Collection / Disbursement Activity	Fee Allocation (FY 2014)	Amt. Retained
CCOC Fees collected by DHCA in FY 2014	\$408,000	---
Fees retained by DHCA	\$ 67,000	16.42%
Estimated OCP allocated costs	\$181,000	44.36%
Net direct amt. used by CCOC – Primarily salary of single staff employee	\$160,000	39.22%

*If the CCOC were a charity, we believe, it would receive a negative rating from Charity Navigator given the disproportionate amount of money spent on administration - a whopping 60.78%.*

In this respect, we must remind you that the County Code mandates that all funds from the CCOC registrations may be spent only as allocated. Since all the registration fees are allocated to the CCOC, it has a right to be consulted on how those funds are used and to receive credible information to verify the proper use of the funds.

We appreciate that the County is experiencing financial difficulties. However, this does not relieve leadership at all levels of the responsibility of ensuring that the fees collected from common ownership communities are used for the purposes for which they were collected. Associations across the County, likewise also are suffering financial hardship. They are trusting that their hard-earned funds are going solely for the benefit of the CCOC and that the Office of Consumer Protection is working to make sure they are put to the best and highest use.

Indeed, it appears to us that a substantial portion of CCOC revenue is not being used for the direct benefit of associations. This is a cause of great concern. Fairness demands that the CCOC be treated like other County agencies and be provided with the funding, staffing and appropriate IT tools commensurate with its duties. We believe we can show that by nearly every measure, the return on investment would more than outpace the cost.

### **Future Home for the CCOC?**

This gets us to the question of whether the Office of Consumer Protection is the appropriate home for the CCOC and whether it should be repositioned within the County Government. The leadership of both OCP and DHCA has expressed publically its opinion that the CCOC does not fit within their respective mission areas.

We would like to offer up the suggestion that the Executive, among his other options, consider three additional possible futures for the CCOC:

1. Place the Commission under the jurisdiction of the County Council where it can join the six other offices presently overseen by the Legislative Branch, three of which have an investigatory/ quasi-judicial function like the CCOC. They are:
  - Office of the Inspector General (OIG)
  - Board of Appeals (BofA)
  - Office of Legislative Oversight (OLO)
  - Office of Zoning & Administrative Hearings (OZAH)
  - Merit System Protection Board (MSPB)
  - Charter Review Commission (CRC)
2. Stand-up the CCOC as an independent agency.
3. Bring together all of the County's quasi-judicial offices into one agency where economies of scale could be achieved through shared office and hearing room space and an individually tailored case management system.

It is the view of both staff and the Commissioners who have examined this issue, that moving to the Council, if only for a trial period of five (5) years, would provide the Commission with the opportunity to restructure its operations.

### **Conclusion**

Commissioners are working hard to propose solutions to improve the CCOC's dispute resolution process, solutions that we believe are responsive to the County Executive's concerns and which he will be able to support. We expect to complete our proposals no later than the end of October, and we welcome the opportunity to meet again with you and the County Executive to discuss them.

We are aware of the severe difficulties that the County faces in its fiscal affairs, and of Mr. Leggett's intention to hold the line on spending. Nonetheless, it is our duty to inform the Executive of our needs, and to plan for a gradual increase in staff that will allow us to meet the demands placed on the CCOC now, as well as to assist it in meeting its duties in the years to come.

We hope the Executive will accept the frank opinions expressed in this letter in the constructive spirit in which they are intended. The volunteer Commissioners, volunteer attorney panel chairs and volunteer mediator are involved with the CCOC because each cares deeply for the County and its 1,034 common ownership communities, believes in the power of government to be a

positive force for change, and holds in high esteem the accomplishments of the CCOC over the last quarter century.

It is in this hopeful spirit that we reach out to the Executive for his help in recapitalizing the CCOC.

At your earliest convenience, we would like to schedule a follow-up meeting to discuss, in greater detail, the path forward for the CCOC.

Respectfully,

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Rand H. Fishbein, Ph.D., Chair

And on behalf of:

Aimee Winegar, CMCA, LSM, PCAM, Vice-Chair

Marietta Ethier, Esq., Commissioner

Hon. Jim Coyle, Mayor (Ret.), Commissioner

Below please find a Zero-Baseline Assessment of Full CCOC Staff Needs. We ask that the Executive give this request every consideration in the FY 2017 budget cycle.

## ZERO-BASELINE ASSESSMENT OF FULL CCOC STAFF NEEDS

STAFF POSITION	FTE	Responsibilities	Class Code	Grade	Budgeted Amount* (\$\$)
Management Level II	1.0	Manages the CCOC Staff, responsible for planning, development and implementation of mission of CCOC.	000111	M2	148,004.
Management Level III	1.0	Functions as Assistant to the Manager II including supervision of complaints and management of process and procedures to resolve same.	000112	M3	127,711.
Investigator III (Mediator)	0.5	Provides Mediation Services in second step in dispute resolution techniques.	000643	25	50,163.
Program Manager II (Education Specialist)	1.0	Develops whole range of educational and training programs including implementation of recent mandate to train COC board members.	000832	25	100,326.
Investigator III (Ombudsman)	1.0	Develops and conducts informal dispute resolution programs as first step in program of dispute resolution techniques. Includes site visits as necessary.	000643	25	100,326.
Program Manager II (Support Specialist / and Ethics Compliance Officer)	1.0	Develops programs to assist COCs with cost savings; provides basic services such as assistance with governance issues, oversight of elections, development of forms, procedures, etc.	000832	25	100,326.
Legislative Analyst II (Legislation & Advocacy Specialist)	1.0	Legislative resource to COCs, Advise County Council in developing legislation; Serves as Advocate for COCs	000832	26	105,179.
Accountant Auditor II	0.5	Provides Financial Support	000212	21	41,571.
Office Services Coordinator	1.0	Provides advanced office support	009273	16	65,934.
Administrative Aide	1.0	Provides entry level office support	009275	12	55,209.
Senior Information Technology Specialist (IT Specialist)	1.0	Provides IT support	000551	28	115,471.
Planning Specialist I (Internship Program Coordinator)	0.5	Coordinates the hiring and oversight of law school / public policy internship program	004404	18	36,141.
<b>TOTAL</b>					<b>1,046,361</b>

\* Salaries are the mid-point between the minimum and maximum levels on the Management Leadership Service Salary Schedule for FY2015.

\*\* Salaries are the Mid-point on the General Salary Schedule for FY2015 for the Montgomery County Government plus 25% for benefits.



## Commission on Common Ownership Communities

Rm. 330, 100 Maryland Avenue, Rockville, Maryland 20850

February 4, 2016

Eric Friedman, Director  
Office of Consumer Protection  
Council Office Building  
100 Maryland Avenue, 6th Floor  
Rockville, MD 20850

Dear Eric:

At its regular meeting held on Wednesday, February 3, 2016, the Commission on Common Ownership Communities (CCOC), expressed concern about the information survey recently mailed by the Department of Housing and Community Affairs (DHCA), to common ownership communities across Montgomery County.

As you know, representatives of the Commission met with officials of DHCA several times over the past year and requested additional information about the survey. They also made a number of suggestions to improve the efficacy of the exercise. Among the suggestions we made was that the survey be performed in June, and sent with the billing statements, rather than in January, so that associations would need to interact with the Commission only one time per year.

We also recommended some additional questions be added to the survey, so that the Commission could benefit from data about the financial health and leadership status of associations and any difficulties they are experiencing. In December, a representative of DHCA submitted to the Chair and Vice-Chair of the Commission, and possibly others, a link for a draft *SurveyMonkey* survey to be sent out to associations.

Vice-Chair Winegar reviewed the data-oriented questions and responded that she found the questions acceptable and suitable for generating data that would help the CCOC. The Commission was not told, nor was it made aware, that the survey would be sent out in January. Moreover, the Commission was not made aware of the fact that a transmittal letter was to accompany the survey and so had no opportunity to provide its input. As partners in this endeavor, we assumed we would be consulted on all activities regarding the survey since it was developed by the Commission, is intended to benefit the Commission and is paid for by association fees charged to the Commission.

Further, the Commission was not notified nor asked about the recipients of the survey information. Had DHCA done so, we would have recommended that the survey be sent

directly to the management companies employed by the associations, instead of only to board members who would have little or no knowledge of the information being requested. Even more to the point, DHCA has acknowledged that its association database is outdated so many of the board members they have on record may not even be serving in that capacity today. In instances where a board member left no forwarding address, this would all but ensure that any association falling into this category would not be surveyed. To make matters worse, associations not responding to the survey, through no fault of their own, would be automatically subject to penalties.

In any event, the surveys were apparently mailed out in mid-January, and a February deadline was provided for completion. The Commission voted unanimously at its February 3 meeting to request that DHCA take the following actions as soon as possible:

1. Notify all recipients of the survey request that the deadline has been extended to April 30. This information should also be publicized through every available media outlet.
2. Change question 85 to read: "This form must be completed by a Board officer, contracted community manager, or Resident Agent." Further, the requirement that any changes be reported within 10 days of occurrence, now that the information requires information on budgets, delinquencies, and board membership is not sustainable. This information changes constantly throughout the year and we doubt that DHCA is prepared to capture all of these changes from 1,000 associations. Further, associations are not prepared to notify DHCA on an on-going basis without significant additional administrative costs. We recommend that the requirement for changes to be reported within 10 days be removed from the affirmation.
3. Permanently retain all original/raw data, survey forms, etc. collected from members of the public following tabulation and make that they are available to the Commission upon request. We are asking that this action be taken so that the Commission might capture any comments from the public returned with the survey as well as to confirm the accuracy of data entry.
4. Provide monthly reports to the CCOC on the progress of the survey, the associations that have, and have not, responded, and the follow-up steps taken to ensure compliance. The reports also should include updates on the progress made by DTS in providing CCOC staff with full real-time digital connectivity to the DHCA association/survey database.

Please note our concern that the survey cover letter does not better explain the value to associations that will result from completing this survey. The goal of the additional questions is to provide information about the challenges associations face so that the CCOC can better serve as advocates. If the DHCA would like assistance in crafting this language, Commissioners are willing to assist.

Additionally, the Commission needs to work with DHCA to assure that management companies are brought into this process. Board members serve as volunteers and are

inherently transient. By sending the survey to individuals who may not even be on the board any longer, rather than management companies when that information is available, makes it less likely that the information they are being asked to provide will be returned correctly and in a timely manner. At least in the past, the recipient of the paper survey could send it on to the manager, who could fill it out and return it to the officer for a signature. With the electronic survey, this is not possible.

All stakeholders in this process must do a better job of communicating with each other and with association leaders and professionals. The Commission is quite concerned that it will continue to receive inadequate information because of the cumbersome nature of the process and the unrealistic expectations of the entities involved.

We respectfully and urgently ask that the aforementioned CCOC requests as soon as possible. The Commission has received numerous angry complaints. This situation needs to be remedied immediately before damage is done to both the reputation of the CCOC, OCP, DHCA and, more generally, the County.

Going forward, it would be helpful if the cover information and recipient list could be provided to the Commission or Commission staff for review or comment prior to being sent out. Please notify us of your thoughts as soon as possible.

Lastly, Eric, please always feel free to create any drafts that you believe are necessary to accomplishing the goals of the CCOC. The first line you highlighted in your comments last evening during the Commission meeting was an almost direct copy of the first line of the DHCA survey. If there is an error in the first line of the proposed registration form, it may be echoed in the DHCA survey form. You may want to follow up on that.

Thank you for your time and attention to this matter.

With appreciation,

*Rand H. Fishbein*

Rand H. Fishbein, Ph.D.  
Chair, CCOC

*Aimee Winegar*

Aimee Winegar, CMCA, LSM, PCAM  
Vice-Chair, CCOC

**Fiscal Impact Statement**  
**Council Bill 50-15**  
**Common Ownership Communities-Commission on Common Ownership Communities**  
**Composition Dispute Resolution**

1. Legislative Summary

The purpose of this legislation is 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 (OCP) to the Department of Housing and Community Affairs (DHCA), (5) provide for certain transition provisions, and (6) generally amend County law concerning common ownership communities.

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

This legislation impacts DHCA and OCP operating budgets shifting all Common Ownership Community programmatic functions from OCP to DHCA. Currently expenses are split between OCP and DHCA in the general fund. Revenue is reported in OCP's budget. Expenses include personnel costs for 2.5 full time equivalent (FTE's) in addition to operating expenses. Below is the current budget for Common Ownership:

Revenue			Expenses		
Budget	Description	FTEs	Budget	Description	
405,000	CoC Fee (\$3/unit)	1.00	167,915	OCP - Investigator III	
5,000	User Fees / Misc. Rev	0.90	100,000	OCP - Admin	
<b>410,000</b>	<b>Total Revenue</b>	0.60	71,632	DHCA Lic and Reg.	
		<b>2.50</b>	<b>339,547</b>	<b>Total Personnel Costs</b>	
			87,025	CoC Operating	
			6,680	DHCA Operating	
			<b>93,705</b>	<b>Total Operating Costs</b>	
		<b>2.50</b>	<b>433,252</b>	<b>Total FY16 Budget</b>	

Bill 50-15 enhances Common Ownership Community mediation efforts and is expected to increase demand on the program; therefore, resources in the range of \$339,547 to \$590,000 (\$250,453 increase) for personnel assumes one additional Investigator, legal assistance and administrative support for increased workload demand, and a range of \$93,705 to \$250,000 (\$156,295 increase) for operating expenses to include information

technology improvements (one-time) and community outreach and education for an estimated increase of \$406,748 in expenditures with a total cost range of \$433,252 to \$840,000.

Revenues are based on the number of residential units built in developments governed by Common Ownership Communities (homeownership associations, condos and cooperative housing). There are approximately 135,000 common ownership units charged at a fee of \$3.00 per unit. The total estimated revenue is \$410,000 which is inclusive of \$5,000 in user fees.

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

Revenue is based on the number of residential units built in developments governed by Common Ownership Communities (homeownership associations, condos and cooperative housing). There are approximately 135,000 common ownership units. The fee is \$3.00 per unit. The program generates approximately \$410,000 in revenue per year which includes \$5,000 in user fee revenue. Below is an illustration of the estimated revenue and expenditures for six years that assume the current rate of \$3 per unit for revenues, and a range of expenditures as noted above in #2:

CCOC	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Total Incremental Change	Total 6 Year Cost Range/Revenues
Expenditures *	406,748	336,748	336,748	336,748	336,748	336,748	2,090,488	\$2,523,740 to \$2,930,488
Revenue**	410,000	410,000	410,000	410,000	410,000	410,000	2,460,000	2,460,000

\*Calculated increase from the FY16 base amount of \$433,252 to the estimated amount indicated in #2. Year 1 includes an assumption for one-time expenditures that are not assumed in years 2-5 (assumes personnel cost at the FY16 rate).

\*\* Revenues are assumed at the current rate of \$3 per unit.

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

Not applicable

5. An estimate of expenditures related to County's information technology (IT) systems, including Enterprise Resource Planning (ERP) systems.

Information technology system improvements, including enhancements to the COC Licensing and Registration and a new case management system are estimated at \$75,000. This cost estimate is based on the cost of a senior IT developer (contractor) working 40 hours per week at \$90/hour. Enhancements to the COC Licensing and Registration is

~~2~~

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estimated to take 3 to 4 months, with development of a case management system to take approximately 1.5 to 2 months.

System Type	Months	Weeks	Hr/wk	Rate	Cost
Case Management System	1.5-2.0	7.33	40	\$90/hr	\$26,400
Database Enhancements	3.0-4.0	13.50	40	\$90/hr	\$48,600
<b>Total</b>					<b>\$75,000</b>

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

Bill 50-15 does not authorize future spending.

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

Current Common Ownership Communities Program staffing consists of 2.5 FTEs. Bill 50-15 enhances the Common Ownership Community Program mediation efforts and is expected to increase the business demands on the program. Additional staff resources will be needed to implement the legislation. It is estimated that an additional 2.5 FTEs (less OCP administration of .9 FTEs) are needed to support the program goals including an additional investigator, administrative staff and legal assistance.

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

This legislation promulgates a reorganization and service enhancements. It is not anticipated that current DHCA staff is sufficient to support the CCOC's hearing process, process complaint cases in a timely manner, provide customer service that address issues before a formal complaint is needed and plan and coordinate training and education forums. It is estimated that additional resources will be needed to ensure successful implementation of Bill 50-15.

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

DHCA would require \$433,000 to \$840,000 for staffing and associated operating costs listed above in #2 in the fiscal year the bill is enacted for implementation.

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

The number of new units constructed in developments governed by Common Ownership Communities is variable that may impact revenues.

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

Not applicable

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

Not applicable

13. Other fiscal impacts or comments.

Not applicable

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

Clarence Snuggs, DHCA

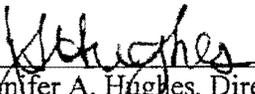
Tim Goetzinger, DHCA

Eric Friedman, OCP

Marsha Carter, OCP

Jennifer Bryant, OMB

Helen Vallone, OMB

  
\_\_\_\_\_  
Jennifer A. Hughes, Director  
Office of Management and Budget

3/9/16  
Date

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**Economic Impact Statement**  
**Bill 50-15, Common Ownership Communities – Commission on Common**  
**Ownership Communities – Composition – Dispute Resolution**

**Background:**

This legislation would:

- make mediation of certain disputes regarding common ownership communities mandatory;
- alter the composition of the three member hearing panel;
- alter the composition of the Commission on Common Ownership Communities (CCOC) to include members of the public;
- transfer duties assigned to the Office of Consumer Protection (OCP) to the Department of Housing and Community Affairs (DHCA); and
- provide for certain transition provisions.

Bill 50-15 would improve the efficiency and effectiveness of the CCOC by making mediation a mandatory component of dispute resolution when complaints are filed with the CCOC and encourage informal resolution of disputes. The legislation would change the composition of the Commission by requiring that one-third of the Commissioners are selected from the general public. Bill 50-15 would also enable CCOC to have adequate staff and resource support by transferring such support from OCP to DHCA.

Because Bill 50-15 addresses the efficiency and effectiveness of the CCOC by amending Section 10B-11(c) – Mediation; dismissal before hearing – of the County Code and by transferring support to DHCA, the legislation would have no direct impact on employment, spending, savings, investment, incomes, and property values in the County. Therefore, Bill 50-15 would have no economic impact.

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

Not applicable

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

Not applicable

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

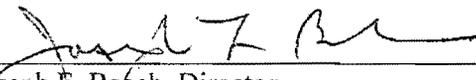
Please see last paragraph in the Background section stating why Bill 50-15 would have no positive or negative effect on the County's economy.

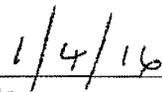
**Economic Impact Statement**  
**Bill 50-15, Common Ownership Communities – Commission on Common**  
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**4. If a Bill is likely to have no economic impact, why is that the case?**

Please see last paragraph in the Background stating why Bill 50-15 would have no positive or negative effect on the County's economy.

**5. The following contributed to or concurred with this analysis:** David Platt, Mary Casciotti, and Rob Hagedoorn, Department of Finance.

  
\_\_\_\_\_  
Joseph F. Beach, Director  
Department of Finance

  
\_\_\_\_\_  
Date

## CCOC Complaints – 4 Month Summary

October 1, 2015 to January 31, 2016

- #54-15      **RE: Parking.** The townhouse unit owner wants the condominium to assign parking spaces and enforce parking restrictions.
- Status:** Mediation session was conducted. Settlement Agreement was signed. Condominium agreed to post certain signs. Case resolved in 34 days.
- #55-15      **RE: Communication.** The condominium unit owner is concerned that the condominium is not providing enough technical information regarding the condominium's transfer of internet & cable service to a new provider.
- Status:** A mediation session was conducted on 1/12/2016. The parties reached a general understanding as to how to resolve the matter. The complainant elected to wait and see how things progressed before agreeing to sign anything formally settling the case.
- The dispute appears to have been resolved in 60 days.
- #56- 15      **RE: Damage / Insurance.** The condominium unit owner claims that the condominium is not entitled to an assessment seeking reimbursement for any master insurance deductible regarding a water leak.
- Status:** The condominium did not agree to participate in a mediation session. An administrative hearing was scheduled for 2/10/2016 and has been postponed at the request of the parties. A new hearing date is being scheduled.
- #57-15      **RE: Services.** The condominium unit owner states there is not sufficient hot water in the unit.
- Status:** Staff contacted DHCA Code Enforcement and the hot water issue was resolved. The \$50 filing fee was returned to Complainant. Case resolved in 5 days.
- #58-15      **RE: Dues / Billing.** The condominium unit owner states that the condominium improperly imposed a late fee with respect to payment of condo dues.

**Status:** Staff contacted the management company and the payment dispute was resolved. The \$50. filing fee was returned to Complainant. Case resolved in 8 days.

#59-15 **RE: Architectural Guidelines.** The HOA states that the townhouse unit owner improperly installed synthetic grass in his front yard because his professional landscaper was unable to get grass to grow.

**Status:** Mediation session was conducted. Settlement Agreement was signed. The parties agreed to consider replacing the existing artificial turf in the owner's yard with a natural non-grass alternative such as a rock garden, ivy, shade tolerant plantings, or mulch. Case resolved in 28 days.

#60-15 **RE: Damages / Repairs.** The condominium unit owner states that failure to maintain or repair the common area caused damage to the condo owner's unit.

**Status:** The original mediation session date was cancelled due to a funeral. A mediation session was subsequently conducted at which time the parties agreed to specific arrangements for conducting and inspection of the common area attic and unit. The parties also agreed to participate in a second mediation session scheduled for April 14, 2016.

#61-15 **RE: Damages / Repairs.** The condominium unit owner states that the failure to maintain or repair the common area and equipment caused damage to her unit.

**Status:** Mediation session was conducted. Settlement Agreement was signed. The condominium agreed to make certain repairs and the unit owner agreed to certain provisions regarding renting the unit. Dispute resolved in 24 days.

#62-15 **RE: Election / Master Board.** The homeowner states that the master HOA has not been properly notifying the homeowners regarding elections, and that the common areas have not been properly maintained.

**Status:** Mediation session was conducted. Settlement Agreement was signed. The parties acknowledged and agreed to the methods of notification used to convene meetings, and the procedures for nominating members for election to the Board. Case resolved in 44 days.

- #63-15      **RE: Architectural Guidelines.** The HOA states that the homeowner constructed a walkway without first obtaining the required approval from the HOA.
- Status:** Mediation session was scheduled. The parties subsequently exchanged correspondence and anticipate that the mediation session may be cancelled if the matter has been resolved prior to the mediation date.
- #64-15      **RE: Election.** The homeowner states that the HOA failed to properly conduct a special meeting and election, and illegally withheld proxy ballots.
- Status:** Mediation session was conducted. Settlement Agreement was signed. The parties agreed to certain action regarding seeking nominations to fill new board positions. The case was resolved in 35 days.
- #65-15      **RE: Architectural Guidelines.** The HOA claims that the townhouse owner has a basketball hoop in the driveway in violation of the rules regarding recreational equipment.
- Status:** A mediation session was scheduled, but cancelled due to snow. A new date for a mediation session has been scheduled.
- #66-15      **RE: Towing.** The homeowner claims that 2 vehicles were improperly towed by the HOA.
- Status:** A mediation session was conducted. A Settlement Agreement was signed. The HOA agreed to reimburse \$218 to the owner and agreed to send out a notice regarding the hours during which towing will occur. The case was resolved in 47 days.
- #67-15      **RE: Architectural Guidelines.** The HOA states that the homeowner constructed a fence 4 years ago without first obtaining approval from the HOA and that the fence may be on common property.
- Status:** A mediation session was scheduled, but cancelled due to snow. A new date for a mediation session has been scheduled.
- #68-15      **RE: Damages / Repairs.** The unit owner states that the condominium hired an unlicensed tree service and damaged the Japanese cherry tree in the front of the unit, and failed to make certain documents available for review.

**Status:** Mediation session was conducted. Settlement Agreement was signed. The parties agreed that all future pruning work will be undertaken by a licensed tree expert, and that a licensed tree expert will evaluate the condition of all trees that were trimmed since 2013 and determine what further action is needed. In addition, the condominium will reimburse \$224 to the complainant for time and expense with regard the document review. Case resolved in 38 days.

#69-15      **RE: Election / Master HOA.** The homeowner states that the developer's master HOA board acted improperly regarding board composition, payments, and towing vehicles.

**Status:** Mediation session was tentatively scheduled. The parties subsequently exchanged correspondence including a 7 page letter from the Master HOA's attorney which detailed the timeframe regarding the transfer of control from the developer to the homeowners. The Complainant is communicating directly with the developer and the parties anticipate cancelling mediation if the matter is resolved prior to the tentative mediation session date. The dispute may be resolved within approximately 60 days.

#01-16      **RE: Architectural Guidelines.** HOA states several shutters have fallen off the homeowner's house and have not been replaced despite several notifications and the assessment of a fine.

**Status:** Staff has facilitated communication and an exchange of information between the parties. The name of the shutter manufacturer has been identified and the homeowner states a contractor has been retained to obtain and install the correct color shutters within 4 weeks. It is anticipated that the dispute may be resolved within 60 days.

#02-16      **RE: Architectural Guidelines.** HOA states several shutters have fallen off the homeowner's house and have not been replaced despite several notifications and the assessment of a fine.

**Status:** Staff has facilitated communication and an exchange of information between the parties. The name of the shutter manufacturer has been identified and the homeowner states that a contractor has been retained to obtain and install the correct color shutters within 4 weeks. It is anticipated that the dispute may be resolved within 60 days.

#03-16      **RE: Damages / Repairs.** The Complainant states she experienced medical conditions related to mold in her unit. The condominium unit owner seeks compensation for medical expenses allegedly caused by the condominium's delay in making the necessary water damage repairs.

**Status:** Staff visited with Complainant and discussed options for seeking consequential medical compensation. Mediation session will be scheduled if the condominium is willing to seek a conclusion to this dispute.

#04-16      **RE: Governing Board Action.** Several condominium unit owners state that the condominium acted improperly in selecting the color of the carpet for the common area.

**Status:** Attempts to schedule a mediation session were terminated after the unit owners filed a legal motion with the CCOC, and the condominium's attorney required certain pre-conditions before agreeing to participate in a mediation session. A Motion for a Stay is currently pending before the CCOC.

### Summary

20	Total Complaints filed (5 complaints filed per month)
14	Complaints filed by owners
6	Complaints filed by governing bodies
10	Complaints resolved by mediation or staff action
9	Complaints currently scheduled for mediation
1	Scheduled for administrative hearing



## Commission on Common Ownership Communities

Rm. 330, 100 Maryland Avenue, Rockville, Maryland 20850

To: Hon. Councilmembers  
Montgomery County Council

From: Rand H. Fishbein, Ph.D.,  
Chair, CCOC

Date: April 5, 2016

Re: **CCOC Strongly Recommends the Following Changes to Joint PHED/PS  
Committee Mark-up of Bill 50-15**

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The Commission on Common Ownership Communities has reviewed Bill 50-15 as reported out of the Joint (PHED-PS) Committee Work Session on March 10, 2016, and **strongly urges**, that the Full Council amend the bill as follows:

1. **STRIKE Lines 55-57**: (Mandatory legal training by County Attorney) because:
  - What will it cost and who will pay for it? If the CCOC must pay, it should receive additional funding;
  - The requirement is unfair because it is applied to the CCOC only and not to other BCCs;
  - The requirement is unnecessary for managers and lawyers who already have been trained in the law; and,
  - The requirement is unnecessary if the CCOC is going to retain its volunteer panels chairs to do the legal work on its decisions and if the proposed decisions are reviewed by the County Attorney.
  
2. **STRIKE**: requirement for Mandatory Mediation.
  - Mandatory mediation is unnecessary if the CCOC already resolves 75-80% or more of its cases without hearings. Making mediation mandatory will not significantly improve those statistics. In all likelihood, it will lengthen the adjudicatory process. The Commission's experience has shown that parties unwilling to come to the mediation table voluntarily, cannot be compelled to do so. Forcing mediation on unwilling parties only makes a satisfactory resolution of a dispute more difficult to achieve.

3. **STRIKE Lines 128-141:**

- This provision would allow the County to decide if mediation should be required or not, and thereby give the agency unfettered discretion over whether to dismiss the complaint entirely, or to resolve it in what is basically a default judgment proceeding. Staff believes that this provision does not comply with the Administrative Procedures Act and will lead to arbitrary decisions. The staff of adjudicative tribunals should not be deciding cases.
- Such powers also penalize a party even though the CCOC might not have jurisdiction over the complaint anyway, in which case the agency would be acting outside of its authority by proceeding to a default judgment.
- Lastly, the impartiality of the Commission could be compromised if political appointees were to insinuate themselves into cases that rightfully should be independently decided.

4. **STRIKE:** at 10B-3(d) Lines 51-58: Language requiring Commission members to complete certain training.

- Oppose any training requirement for current or new commissioners that is selective only for the CCOC and is in excess of what is required of **ALL** others Boards, Committees and Commissions (BCC's) in the County. The Commission notes that there are a number of other County administrative bodies that provide quasi-judicial services to the public. The Commission believes that it is fundamental to good governance that All BCC's should be subject to the same requirement to provide equivalent training to their volunteer members – not just the CCOC.

### **CCOC Requests New Amendments to Bill 50-15**

5. **All Commission Funding to Benefit Commission**

10B-7(b)(4) All funds appropriated to the Commission, including fees prescribed under this Act, shall be obligated and expended only on behalf of the Commission and only in support of its statutory mandates, and only after consultation with, and the approval of, the Commission.

6. **Authority Over Budget and Annual Budget Preparation**

10B-7(c) Only after consultation with, and the approval of, the Commission, the Director shall prepare and submit to the Executive and Council on behalf of the Commission an annual budget, and an annual budget justification document, to include a summary of the Commission's accomplishments during the prior year. The Commission may appear before the appropriate Council budget committee(s) to comment on the budget submitted on its behalf.

7. Hosted Administrative Body; Separate DHCA Division

( ) The Commission shall operate as an independent hosted administrative body within the Department, reporting directly to the Director. The Commission shall be organized as a separate Division, comprised of sub-divisions and headed by a Division Chief approved jointly by the director and the Commission. The Commission shall exercise oversight of its budget, develop programs and set policies commensurate with its responsibilities under Chapter 10B.

8. Office Modernization

( ) The Director must provide the Commission with fully integrated office support and maintenance services to include, among other management tools, a modern digital database platform capable of supporting a case management system, budget tracking, education initiatives, compliance monitoring and enforcement, surveys, outreach communications, scheduling, archiving, performance metrics and other functionality as may be identified by the Commission as necessary to support its mission.

9. Carryover Authority

10B-3(l) Notwithstanding any other provision of law, any funds appropriated or otherwise made available to the Commission in a given fiscal year and not expended in that fiscal year shall be designated "no year funds" and remain available to the Commission until expended.

10. Assistance Provided By the Director

10B-5(k) The Director must:

- (A) Consult with the Commission when assigning staff and other support to the Commission,
- (B) Provide the Commission, not later than the first day of each month, with a detailed report on the Commission's budget, to include, but not limited to, the status of its annual revenue collection, current revenue balance, and both an accounting and descriptive summary of all fiscal year obligations and expenditures to date,
- (C) Provide support, as requested by the Commission, in the preparation of its annual budget proposal to the Executive, and
- (D) Serve as an advocate before the Executive and Council for the specific needs of common ownership communities and the Commission.

### 11. Commission on Common Ownership Communities

Section 10B-3(i). (i) The Department must provide the Commission with the staff, offices and supplies as are appropriated for it. Funds available to the Commission may not be used for any purpose other than for the direct support of the Commission.

### 12. CCOC Judicial Independence

( ) The Director is prohibited from exercising any authority or influence over the Commission's legal proceedings to include, but not limited to, negotiations, arbitrations, mediations, quasi-judicial hearings and any other activities relating to the management of cases over which the Commission has accepted jurisdiction. Only staff assigned to the Commission and handling cases at the direction of the Commission shall be authorized to address issues arising from said cases, in accordance with policies and procedures established by the Commission.

### 13. Training Standards and Certification

*10B-6(f) Duties of the Commission on Common Ownership Communities.*

*The Commission must:*

*(f) establish and enforce common standards and certification requirements for the provision of training for board members of governing bodies. The Commission may, at its sole discretion, authorize (1) training through any public or private provider and by any means it deems appropriate, and (2) fees to be charged by a third party provider only to cover the reasonable costs of delivering the course(s).*

**Proposal for A New DHCA Division for the Commission on Common Ownership Communities**

