BEFORE THE
COMMISSION ON COMMON OWNERSHIP COMMUNITIES
FOR MONTGOMERY COUNTY, MARYLAND

JOSEPH J. BISHOW, *et ux.*	)	
	)	
Complainants	)	
	)	
v.	)	Case No. 42-15
	)	
KING FARM VILLAGE CENTER CONDOMINIUM II	)	
	)	
	)	
Respondent	)	

DECISION AND ORDER

The above-captioned case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland ("CCOC") on January 13, 2016 for an evidentiary hearing pursuant to Mont. Cnty. Code Ch. 10B. Based on the parties' evidence and argument, the Panel finds, concludes and orders as follows.

I. BACKGROUND

On August 14, 2015, Complainant Joseph J. Bishow ("Mr. Bishow") filed a complaint with the CCOC against Respondent King Farm Village Center Condominium II ("King Farm II"). CCOC Ex. 1 at 4. [1] He raised a number of claims in his complaint, which the Panel restates as follows:

- King Farm II failed to reasonably accommodate his disability by failing to provide a handicap parking space with an access lane;

[1] "CCOC Ex. __" refers to portions of the CCOC's administrative record in this case, all of which was placed in evidence at the hearing without objection. The Bishows' exhibits are referred to as "Cmplt. Ex. __" and King Farm II's exhibits as "Rspt. Ex. ___."

- King Farm II violated federal and state law by removing the handicap designation for an existing handicap parking space in the common area.

- King Farm II violated state law and its own governing documents by allocating parking spaces in the common area to some, but not all, unit owners;

- King Farm II has not adequately maintained certain common elements; and

- King Farm II has failed to register with the Office of Consumer Protection, as required by County law.

This last issue was withdrawn at the hearing after King Farm II presented evidence that it is now registered.

By letter dated October 17, 2015 to the CCOC, Mr. Bishow's wife, Marlene Bishow ("Mrs. Bishow"), joined as a Complainant. CCOC Ex. 1 at 14. Mrs. Bishow's letter contains no allegations concerning her own disability and the original complaint was never amended to add any claims in her own right. However, the CCOC accepted jurisdiction over disability accommodation claims by both Mr. and Mrs. Bishow and the case proceeded as if each of them had asserted individual claims. The Panel proceeded on that basis as well.

Prior to the hearing, the Bishows filed a motion to compel discovery. At the hearing, King Farm II's counsel represented that King Farm II had responded to discovery as fully as possible. Without necessarily accepting that representation, the Bishows declined to request a continuance and they elected to proceed. Accordingly, the motion to compel is denied as moot.

Also prior to the hearing, King Farm II moved to dismiss the Bishows' disability accommodation claims to the extent they are grounded on the federal Fair Housing Act or the Maryland Human Relations Act, on the basis that such claims are barred by those statutes' two-year limitations period. See 42 U.S.C. § 3613(a)(1)(A); Md. Code Ann., State Govt. § 20-1035(b)(1). The Panel deferred ruling on the motion, invited the parties to submit supplemental briefing on the limitations issue, and kept the record open until February 4, 2016 for that purpose. See Order dated January 14, 2016.

II. FINDINGS OF FACT

[King Farm II]

1. King Farm II is a condominium association, as defined in the Maryland Condominium Act, Md. Code Ann., Real Prop. § 11-101, *et seq.*, and it is a common ownership community as defined in Mont. Cnty. Code § 10B-2(b).

2. King Farm II is a gated community, meaning that vehicular access is restricted to those possessing remote gate-opening devices.

3. King Farm II consists of 51 residential condominium units and 36 parking units in three multi-story buildings known as 303 Redland Boulevard, 305 Redland Boulevard and 800 Grand Champion Drive, Rockville, Maryland. Each of the three buildings contains 17 residential units and 12 parking units. See CCOC Ex. 1 at 44.

4. King Farm II also includes surface parking as part of the common elements.

5. Each of the 36 garage units has an appurtenant parking pad as a limited common element for the exclusive use of the garage unit owner.

6. Each parking pad can accommodate one vehicle. Thus, each of the 36 residential unit owners who also owns a garage unit can park two cars – one in the garage and one on the parking pad. The other 15 unit owners, who do not also own garages, must park on surface parking in the common area, or they must park off site.

7. Three of the 36 garages (one in each building) are considered "handicap garages," only in the sense that they are larger than the other garages. The so-called handicap garages are not marked as handicapped or otherwise reserved for drivers with disabilities. These handicap garages are available for purchase by any residential unit owner whether or not the unit owner is disabled.

8. When King Farm II was initially developed, there were 48 surface parking spaces in the common area. None of those spaces was assigned to a specific unit owner and all were available to any of the 51 unit owners, including those who owned garages, on a first-come, first-served basis.

[Mr. and Mrs. Bishow]

9. Mr. and Mrs. Bishow purchased their condominium unit at 303 Redland Boulevard in 2002. Their building has a front entrance on Redland Boulevard and a rear entrance on a drive lane that is part of the common elements. The drive lane provides access to surface parking, parking pads and garages.

10. At the same time they purchased their residential unit, the Bishows also purchased a garage unit, with an appurtenant parking pad. As a result, they have exclusive use of two parking spaces. However, the garage unit they bought is not one of the larger, handicap garages because the handicap garage unit in their building had already been purchased by someone else.

11. Mr. Bishow suffers from a progressive disease that, among other things, substantially affects his mobility. He was in a wheel chair throughout the hearing and was assisted by an aide when arriving and leaving the hearing room. Mrs. Bishow testified that Mr. Bishow needs either a walker or a wheel chair for ambulation and he needs extra space alongside the Bishows' automobile when he is transferring to or from the automobile.

12. Since the Bishows' garage is not one of the handicap garages, it is not large enough to accommodate Mr. Bishow when transferring to or from an automobile. The Bishows' parking pad is also not adequate in width to accommodate Mr. Bishow when transferring to or from an automobile. See Report of Thomas Downey, CCOC Ex. 1 at 36.

13. Although there is open space on either side of the Bishows' parking pad, that space is sloped, somewhat deteriorated, and slippery in inclement weather. Thus the open space on either side of the Bishows' parking pad does not provide the accommodation Mr. Bishow needs when transferring to or from an automobile.

14. The drive lane passing the rear entrance to the Bishows' building is wide enough to accommodate Mr. Bishow's transfers and is currently used for that purpose. See CCOC Ex. 1 at 52. Since this is a gated community and the drive lane only serves the King Farm community, use of the drive lane for transfers does not impede traffic or present a significant danger to Mr. Bishow or his aide.

15. Mrs. Bishow presented evidence that she, too, has limited mobility due to a serious injury in 1997, osteoarthritis in her feet and ankles, and degenerative changes in her spine. Cmplt. Ex. 1. Although these conditions may be progressive, she, personally,

does not currently need extra space when entering and exiting an automobile. See Rspt. Ex. 2 and attachments.

[Changes to Surface Parking]

16. When King Farm II was originally completed, there were no handicap parking spaces in the common area. However, sometime after the project was completed, King Farm II set aside two spaces (now known as spaces 7 and 8) to accommodate a unit owner who used a wheel chair and drove a van with a wheel chair lift. Specifically, King Farm II designated one space as handicap and it striped the adjoining space as an access lane. See CCOC Ex. 1 at 32; Rspt. Ex. 2. [2]

17. Until about 2008, the Bishows used the parking space in the common area on the other side of the access lane, when that space was available, thus giving them the room Mr. Bishow needed when transferring to and from their automobile.

18. In about 2008 the common area parking lot was restriped. Since the unit owner who used the wheel chair van no longer needed that accommodation, King Farm II eliminated the handicap parking space and access lane designations and converted those spaces to normal parking.

19. In 2009, 18 of the 48 surface parking spaces in the common area were set aside by the Montgomery County Housing Opportunity Commission for use by an adjoining housing project pursuant to a recorded easement. That left only 30 spaces in the common area for exclusive use by King Farm II residents.

20. Following the loss of 18 common area parking spaces, the King Farm II Board of Directors ("Board") decided to assign all 30 remaining spaces to the 15 unit owners who did not own garages. Minutes of June 8, 2009 Board meeting (Rspt. Ex. 5). Each of those 15 unit owners was subsequently assigned two specific parking spaces in the common area. None of those spaces was assigned to any of the 36 unit owners who also own garages.

21. Several unit owners testified at the hearing that, even though they own garages and were therefore excluded from having any assigned parking spaces in the

---

[2] According to the cover sheet (part of CCOC Ex. 1) for the King Farm Village Center development project, 391 parking spaces were to be provided for the entire project, of which 9 would be accessible spaces. Those 9 accessible spaces are the handicap garages, one of which is located in each of the 9 buildings in the development project.

common area, they felt that the Board's action was fair. They further testified that, in their view, reversing the Board's action would be disruptive to the community. See Rspt. Ex. 10, 11. On the other hand, the record contains a petition signed by a number of unit owners, including Mr. Bishow, to have the Board rescind its action assigning the surface parking to 15 unit owners. See CCOC Ex. 1 at 101. The Panel makes no finding as to who is in the majority on this issue.

[The Bishows' Complaints]

22. Beginning in 2003, the Bishows submitted a number of written requests to the Board for accommodation on account of their disabilities. Although the substance of the requests varied, they generally sought to have the surface space on the opposite side of the striped, access lane reserved for them. See, for example, correspondence dated May 2, 2003, October 31, 2005 and November 18, 2005 included within Cmplt. Ex. 1.

23. Sometime prior to July 2005, Mr. Bishow filed a complaint with the Montgomery County Human Rights Commission, presumably alleging disability discrimination by King Farm II. See Rspt. Ex. 1 at 4. The record does not contain a copy of his County complaint.

24. In July 2005, Mrs. Bishow filed a disability discrimination complaint against King Farm II with the U.S. Department of Housing and Urban Development ("HUD"). Rspt. Ex. 1 at 3. In the HUD complaint, Mrs. Bishow identified herself as the complainant and Mr. Bishow as an "Other Aggrieved Person[]." The HUD complaint was referred for processing to the Maryland Commission on Civil Rights ("MCCR") (then known as the Maryland Commission on Human Rights). Rspt. Ex. 1 at 1.

25. In December 2005, after investigation, MCCR "determined that there is no probable cause to believe that discrimination has occurred in this matter" and it dismissed the HUD complaint. CCOC Ex. 1 at 15.

26. In June 2014 the Montgomery County Human Rights Commission administratively closed the proceeding involving Mrs. Bishow's earlier complaint, on the basis that its proceeding was duplicative of the HUD complaint proceeding. CCOC Ex. 1 at 177.

27. By letter dated September 14, 2010 to the Board (CCOC Ex. 1 at 58), Mr. Bishow requested what amounted to an alternate accommodation: swapping his garage unit (Garage Unit D) with the handicap garage unit in his building (Garage Unit F). Garage Unit F was owned by another unit owner in the building.

28. King Farm II responded to Mr. Bishow's September 14 letter by requesting the owner of Garage Unit F to voluntarily make the swap. The owner of Garage Unit F was unwilling to do so and King Farm II declined to compel the swap. CCOC Ex. 1 at 60, 66.

29. At a prehearing conference in this matter held on December 10, 2015, King Farm II represented that it had obtained the written offers by unit owners Otero and Flood (who are assigned parking spaces 7 and 8, respectively), to allow the Bishows use of those two spaces, subject to termination under conditions specified in the offers. The offers were admitted in evidence at the hearing as Rspt. Ex. 7 and 8.

30. The conditions listed in the offers under which use of spaces 7 and 8 would terminate are: sale of the Bishows' condominium unit; cessation of Mr. Bishow's need for accommodation; and sale of the unit owned by the resident to whom the space was assigned. As to space 7, need of the space by the unit owner's tenant was an additional condition triggering termination.

31. The offers by their terms would accommodate only Mr. Bishow's disability, not Mrs. Bishow's, presumably because she does not have a current need for that specific accommodation.

32. Parking spaces 7 and 8 are directly across the drive lane from the rear entrance to the Bishows' building.

33. The Bishows rejected the offers because the offers were not permanent accommodations for the benefit of both Bishows.

[Maintenance Issues]

34. The Bishows presented undisputed evidence that the pavers and concrete in the spaces on either side of their parking pad are in disrepair, and that the interior of the rear door to their building is scuffed and unsightly. CCOC Ex. 1 at 33, 34. See Rspt. Ex. 4.

35. King Farm II presented undisputed evidence that the Board had already contracted to have the pavers repaired. Rspt. Ex. 9.

36. King Farm II also presented undisputed evidence that concrete repairs could not be done until warmer weather in the spring, at which time the Board would address that issue.

[Governing Documents]

37. Section 3.2 of King Farm II's Bylaws (CCOC Ex. 1 at 314) imposes on the Board the following powers and duties, among others: "Operation, care, upkeep and maintenance of the Common Elements and those portions of the Units for which the Association has exclusive control."

38. Article 10 of the Bylaws provides:

> Any parking spaces that are not designated as a part of a Unit or as a Limited Common Element appurtenant to any Unit by the Declaration, these Bylaws or on the Condominium Plat * * * are part of the General Common Elements of the Condominium and are hereby unassigned and designated for general use, to be used on a "first come, first served" basis. *Subject to applicable law, the Board of Directors may assign all or any portion of these parking spaces as "reserved" for the exclusive use of designated Unit Owners.* * * * [Emphasis added]
>
> Each Unit Owner shall comply in all respects with such supplementary Rules which are not inconsistent with the provisions of the Declaration or these Bylaws which the Board of Directors may from time to time adopt and promulgate with respect to parking and traffic control within the Condominium, and the Board of Directors is hereby, and elsewhere in these Bylaws, authorized to adopt such Rules. The location of any parking space assigned to any Unit Owner in accordance with this Article may be changed by the Board of Directors, at any time and from time to time, upon reasonable notice thereof in writing. *The Board of Directors reserves the right to assign and reassign parking spaces (including the reassignment of Limited Common Element spaces) if necessary to fulfill federal, state or local laws, including, without limitation, the Fair Housing Amendments Act of 1988*, as amended, and any Unit Owner requested by the Board of Directors to relinquish or convey his or her Garage Unit and/or appurtenant Limited Common Element parking space or reserved parking space, shall promptly comply with such request; provided, however, if another Garage Unit and/or appurtenant Limited Common Element parking space or reserved parking space is not made available to such Unit Owner, the Board of Directors shall reimburse such

> Unit Owner for any monies previously paid to acquire such Garage Unit and/or appurtenant Limited Common Element parking space or reserved parking space. [Emphasis added]

III. CONCLUSIONS OF LAW

A. Discrimination-in-Housing Statutory Framework

The Bishows necessarily base their discrimination claims on one or more of the following laws: the federal Fair Housing Act as amended, 42 U.S.C. § 3601, *et seq.*; the Maryland Human Relations Act, Md. Code Ann., State Gov. § 20-101, *et seq.*; and Montgomery County's Human Rights and Civil Liberties Law, Mont. Cnty. Code, Art. 27. Each of these laws requires reasonable accommodation in housing to persons with disabilities/handicaps; they create administrative processes to hear and adjudicate discrimination complaints; and they allow complainants to bypass the administrative processes and take their complaints to court.

Significantly, none of these laws explicitly requires that handicap parking be provided in conjunction with housing. While the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, does require handicap parking in places of public accommodation, the ADA is not applicable to private, residential developments such as King Farm II.

Regulations under the Fair Housing Act, at 24 C.F.R. § 100.204, state:

> It shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas.

The Regulations give the following example:

> Progress Gardens is a 300 unit apartment complex with 450 parking spaces which are available to tenants and guests of Progress Gardens on a first come first served basis. John applies for housing in Progress Gardens. John is mobility impaired and is unable to walk more than a short distance and therefore requests that a parking space near his unit be reserved for him so he will not have to walk very far to get to his apartment. It is a violation of §100.204 for the owner or manager of Progress Gardens to refuse to make this accommodation. Without a reserved space, John might be unable to

> live in Progress Gardens at all or, when he has to park in a space far from his unit, might have great difficulty getting from his car to his apartment unit. The accommodation therefore is necessary to afford John an equal opportunity to use and enjoy a dwelling. The accommodation is reasonable because it is feasible and practical under the circumstances.

Given the substantial similarity in language between the Fair Housing Act, Maryland law and the County Code, the Panel concludes that the above example provides authority for interpreting state and county law as well.

Pursuant to the Maryland Condominium Act, Md. Code, Real Prop. § 11-109(d)(22), King Farm II has full authority to accommodate the Bishows. That section grants to condominium associations the power to "designate parking for individuals with disabilities, notwithstanding any provision in the declaration, bylaws, or rules and regulations." Similar authority is contained in King Farm II's governing documents.

Thus, if the Bishows require accommodation because of their disabilities, King Farm II is required by law, and empowered by law and its governing documents, to reasonably accommodate them – subject, however, to the issues discussed below.

B. Is Exclusive Jurisdiction Over Housing Discrimination Claims Vested in Agencies Other Than the CCOC?

The CCOC clearly has jurisdiction over disputes involving the assignment of common element surface parking and over maintenance of common elements. Mont. Cnty. Code § 10B-8(4)(A)(i) & (iv) ("dispute" defined to include the authority of a governing body to require a person to take action or not to take action involving a common element and the authority of a governing body to alter a common element); § 10B-8(4)(B)(vii) ("dispute" includes failure of a governing body to "maintain or repair a common element if the failure results in significant personal injury or property damage;" *Tyler v. Brookfield at Milestone Condominium*, CCOC No. 564-O (2003), *aff'd by unreported opinions,* Mont. Cnty. Circuit No. 247842-V (May 10, 2004), Md. Ct. of Sp. Appeals No. 733-04 (Feb. 16, 2005) (hearing panel invalidated condominium association rule assigning common element parking spaces to some but not all unit owners).

Jurisdiction over housing discrimination claims is a more complicated question. Each of the three housing discrimination laws applicable here – federal, state and county – provides for administrative remedies by, respectively, HUD, MCCR and the Montgomery County Commission on Human Rights. In contrast, the CCOC's organic statute – Chapter 10B of the Montgomery County Code – does not explicitly grant

jurisdiction over housing discrimination issues. For the reasons set forth below, however, the Panel concludes that the CCOC may decide a housing discrimination issue if that issue arises within or as part of a dispute over which the CCOC otherwise has jurisdiction.

First, none of the three housing discrimination laws on which this case rests purports to grant *exclusive* jurisdiction to the respective commissions. To the contrary, each of these laws allows a claimant the alternative of filing suit in court without first exhausting administrative remedies. This suggests that the specialized knowledge and expertise of HUD, MCCR, and the Montgomery County Commission on Human Rights is not a critical factor in addressing housing discrimination.

Second, if the CCOC could not address a housing discrimination issue in the context of a dispute over which it otherwise has jurisdiction, then the CCOC would be divested of jurisdiction whenever a dispute involved a claim or defense grounded on the housing discrimination laws. At the same time, it is unclear whether HUD, MCCR, or the Montgomery County Commission on Human Rights, having resolved a discrimination issue, could then grant the type of relief authorized to the CCOC. This could result in the inefficiency of having multiple administrative agencies addressing distinct issues within the same case.

Finally, a previous panel addressed a housing discrimination issue on the merits within the context of a parking dispute. *Voloshen v. Sligo Station Condo. Ass'n*, CCOC No. 30-11 (2012).

In arguing against the CCOC's jurisdiction, King Farm II cites *Martinez v. New Mexico State Engineer Office*, 129 N.M. 413, 9 P.3d 657 (2000). That case involved the decision of the New Mexico State Personnel Board upholding the firing of a state employee for disruptive behavior in the workplace. The employee, who was bipolar, contended that the Board should have considered the Americans With Disabilities Act and parallel state disabilities law when determining whether there was just cause for the firing. The New Mexico Court of Appeals (New Mexico's highest court), held that the Board did not have authority to determine ADA issues in an administrative appeal under the Personnel Act, because authority to decide such issues rests exclusively with the U.S. Equal Employment Opportunity Commission and the New Mexico Human Rights Commission.

Martinez is not, of course, binding in Maryland. And it stands as the only case cited by either party on the jurisdictional issue. Whatever persuasiveness *Martinez* might otherwise have is undercut by the New Mexico court's recognition that an employee's

disability could, in certain cases, be raised in a personnel proceeding. For example, according to the Court the employee could raise his or her disability to show that the agency's proffered reason for its personnel action are pretextual and that the real reason for its action was the disability. Thus even in New Mexico the State Personnel Board could consider a disability issue in the context of a personnel proceeding.

The statutes involved in *Martinez* are also different from the statutes involved here. Under the ADA's employment discrimination provisions, and under the parallel New Mexico statute (NMSA § 29-1-13, *et seq.*), claims of employment discrimination must first be brought to the U.S. Equal Employment Opportunity Commission or the New Mexico Human Rights Commission, as a prerequisite to going to court. Only after the administrative process has terminated may an employee file suit. In contrast, under each of the three housing discrimination laws involved here, the employee has a choice of pursuing either an administrative or a judicial remedy.

For these reasons, the Panel does not find *Martinez* persuasive.

C. Are the Housing Discrimination Claims Barred by Res Judicata?

Res judicata, also known as claim preclusion, "bars a party from relitigating a claim that was denied or could have been decided in an original suit. *Lauren Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 161 (4th Cir. 2008). "Under Maryland law, the elements of res judicata are: (1) that the parties in the present litigation are the same or in privity with the parties in the earlier dispute; (2) that the claim presented in the current action is identical to the one determined in the prior adjudication; and (3) that there has been a final judgment on the merits." *Id.* (citing *Anne Arundel Cnty. Bd. of Educ. v. Norville*, 390 Md. 93, 106, 887 A.2d 1029, 1037 (2005).

Res judicata also arises from an administrative decision in which the "agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *Batson v. Shiflett*, 325 Md. 684, 704, 602 A.2d 1191, 1201 (1992). See *Bradley v. Artery Custom Homes, LLC*, 2009 WL 6560200 (D.Md. No. 08-539, decided Jan. 29, 2009) (Messitte, J.), *aff'd*, 328 Fed. Appx. 873 (4th Cir. 2009) (administrative decision by the Maryland Department of Labor, Licensing and Regulation on an unemployment insurance claim precludes the claimant from re-litigating her employment status in a subsequent federal court suit).

There is some question here who, if anyone, might be bound by the state and county commissions. While King Farm II was the respondent in both cases, Mrs. Bishow

was the sole named complainant in the HUD/MCCR complaint and Mr. Bishow was the sole named complainant before the County Commission. Rspt. Ex. 1 at 3; CCOC Ex. 1 at 177. It is not necessary to sort out the parties, however, because neither case was resolved by final judgment after litigation on the merits: the MCCR dismissed the complaint after investigation without an evidentiary hearing, and the County Commission dismissed the complaint administratively as duplicative.

In addition, circumstances have changed since those two complaints were filed: parking has become more limited; an access lane and handicap parking space have been eliminated; and Mr. Bishow's disability has progressed.

For these reasons, the Panel concludes that neither of the Bishows is barred under the doctrine of res judicata from litigating the reasonable accommodation issue before the CCOC.

D. Are the Housing Discrimination Claims Barred by the Statute of Limitations or Laches?

Maryland's general statute of limitations, Md. Code Ann., Cts. & Jud. Proc. § 5-101, states:

> A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.

Equitable actions – *i.e.*, actions that are not "at law" – are not directly governed by statutes of limitations. Instead, they are subject to a timeliness defense known as "laches." For a defendant in an equitable action to successfully invoke laches, the defendant must show both inexcusable delay and that the defendant was prejudiced by the delay. *Rettaliata v. Sullivan*, 208 Md. 617, 622, 119 A.2d 420, 423 (1956); *Schaeffer v. Anne Arundel Cnty.*, 338 Md. 75, 83, 656 A.2d 751, 755 (1995).

In determining whether an equitable action was timely filed, the courts "refer to the limitations period for the cause of action at law most analogous to the one in equity." *Rettaliata*, 208 Md. at 81, 656 A.2d at 754. And "if there is no action at law directly analogous to the action in equity, the three-year statute of limitations found in . . . § 5-101 . . . will be used as a guideline. *Id.*, 208 Md. at 82, 656 A.2d at 754. However, "There is no inflexible rule as to what constitutes, or what does not constitute, laches; hence its existence must be determined by the facts and circumstances of each case." *Greenfield v.*

Hechenbach, 144 Md. App. 108, 141, 797 A.2d 63, 83, n.11 (2002) (internal quotation marks and citation omitted).

The Maryland general statute of limitations, by its terms, applies to a "civil action" filed in court, not (at least expressly) to a complaint filed with the CCOC. A prior panel in another CCOC case ruled that there was no statute of limitations applicable to a covenant enforcement action involved in that case. *DuFief Homes Ass'n, Inc. v. Sacchi*, CCOC No. 589 (2006). Based on that decision, the Staff's Guide to Procedures & Decisions of the Montgomery County Commission on Common Ownership Communities (2014) states at 22: "The Statutes of Limitations apply only to legal actions filed in court, they do not apply to complaints filed with the CCOC."

Without necessarily ruling that no statute of limitations can ever apply to a CCOC case, the Panel concludes that, in light of the equitable nature of the Bishows' claims, laches, not limitations, governs here. See *Sacchi*, where the panel considered the merits of the respondent's laches defense. Thus the Panel must decide whether the Bishows delayed inexcusably in filing their CCOC complaint (measured by an analogous statute of limitations, if any); and, if so, whether King Farm II has been prejudiced by that delay.

All three housing discrimination laws impose limits on the time for bringing complaints. 42 U.S.C. § 3613(a)(1)(A) says:

> An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

Md. Code Ann., State Gov. § 20-1035 says in part:

> (a) In accordance with this section, an aggrieved person may commence a civil action in an appropriate State court to obtain appropriate relief for an alleged discriminatory housing practice or the breach of a conciliation agreement entered into under this part.
>
> (b)(1) The action shall be filed within 2 years after the later of the occurrence or termination of the alleged discriminatory housing practice or the breach of the conciliation agreement.

And Mont. Cnty. Code § 27-7(d) says in part:

> Any complaint must be filed with the director of the [Montgomery County] Commission [on Human Rights] within one year after the alleged discriminatory act or practice. If those acts or practices are continuing in nature, the complaint must be filed within one year after the most recent act or practice.

The federal and state limitations periods apply to civil actions in court, not the CCOC. Similarly, the county law applies only to the County Commission on Human Rights, not the CCOC. Nevertheless, the deadlines stated in those laws may provide guidance in evaluating a laches defense.

King Farm II argues that it rejected Mr. Bishow's accommodation request by letter dated July 27, 2011and it rejected Ms. Bishow's accommodation request by letter dated February 12, 2009. Moreover, the history of the Bishows' accommodation requests and discrimination complaints begins in 2003, some 12 years prior to their filing with the CCOC and well beyond the one- and two-year limitations periods specified in the housing discrimination laws. To the extent the one- and two-year limitations periods of county, state and federal law provide guidance, the Bishows substantially delayed in complaining to the CCOC.

The Bishows might argue that their delay is excusable, in that during some of the relevant period they had complaints pending before HUD/MCCR and the County Human Rights Commission.

They might also argue that King Farm II's failure to accommodate is a continuing violation, such that laches has not even begun running. See 42 U.S.C. § 3613(a)(1)(A) (requiring a complaint to be filed within two years "after the occurrence *or the termination* of the alleged discriminatory practice) (emphasis added); Md. Code Ann., State Gov. § 20-1035 (complaint to be filed two years after "the occurrence *or termination* of the alleged discriminatory housing practice" (emphasis added); and Mont. Cnty. Code § 27-7(d) (complaint to be filed "within one year *after the most recent act or practice*" (emphasis added). But see King Farm II's counter-argument, supported by a number of case citations,[3] that the continuing violation doctrine does not apply to failures

[3] *E.g., Tobin v. Liberty Mut. Ins. Co.*, 553 F.3d 121 (1st Cir. 2009); *Mayers v. Laborers' Health & Safety Fund*, 478 F.3d 364 (D.C. Cir. 2007); *Johansson v. Prince George's Cnty. Public Schools*, 2014 WL 3345054 (U.S. Dist. Ct. D. Md. No. 13-2171, decided July 7, 2014);

to accommodate disabilities, at least in the context of the Americans With Disabilities Act.

Finally, Mr. Bishow might argue that his disability has worsened and his accommodation needs have changed accordingly.

The Panel need not resolve these arguments because, insofar as the record discloses, King Farm II has not suffered any prejudice from the delay. The loss of 18 surface parking spaces in the common area, and the decision to assign the remaining 30 spaces exclusively to the non-garage unit owners, occurred independently of the Bishows' delay. In the absence of any prejudice, laches does not bar the Bishows' complaint.

E. Do the Bishows Require Accommodation?

Clearly, Mr. Bishow has a disability that substantially affects his mobility and his ability to transfer to and from an automobile. The Panel concludes, however, that Mr. Bishow is able to transfer when the Bishows' automobile is stopped in the drive lane behind the rear entrance to the Bishows' building without presenting a significant safety hazard to Mr. Bishow or his aide. Therefore, no further accommodation is required.

The accommodation the Bishows seek – exclusive use of parking spaces 7 and 8 – might be more convenient to the Bishows, since they would not have to move their automobile to and from the drive lane after a transfer, but it would not offer significantly greater accommodation than is already available to Mr. Bishow.

The evidence is also clear that Mrs. Bishow has a disability that substantially affects her mobility. But she is able to enter and exit her automobile when it is parked on their parking pad and no further accommodation for her is required at this time. The Panel cannot, of course, foresee whether she may require greater accommodation in the future.

The record contains Mr. Bishow's alternative request to swap the Bishows' garage with the handicap garage in their building. The Panel therefore addresses it briefly.

---

and *Raiford v. Maryland Dept. of Juvenile Svcs.*, 2014 WL 4269076 (U.S. Dist. Ct. D. Md. No. 12-3795, decided Aug. 28, 2014).

King Farm II's governing documents give the Board power to compel such a swap. Bylaws, Art. 10. See Md. Code, Real Prop. § 11-109(d)(22) (empowering a condominium council of unit owners to "designate parking for individuals with disabilities, notwithstanding any provision in the declaration, bylaws, or rules and regulations"). This power is a necessary adjunct to the opportunity afforded any unit owner, disabled or not, to purchase a handicap garage. The Board decided, however, not to exercise that power and, instead, it sought only a voluntary agreement from the owner of the handicap garage. When such an agreement was not forthcoming, the Board dropped the matter. While the swap issue could have been pursued, the Bishows waived that issue by not actively litigating it before the Panel. In addition, as stated above, the Bishows' disabilities are adequately accommodated under King Farm II's facilities as currently configured.

F. Was the Board Permitted to Redesignate the Handicap Space and Access Lane as Normal Parking Spaces?

In about 2008, the Board redesignated spaces 7 and 8 – which had been a handicap space and an access lane – as normal parking spaces. That action did not violate any applicable housing discrimination laws, since those laws do not explicitly require handicap parking in private residential developments.

Nor was that action inconsistent with the developer's site plan. The developer represented to the County that it would include accessible spaces within the larger King Farm development project. See n.2, above. It did so by providing the 9 handicap garages. Those garages continue to exist and, then as now, they are available for purchase by unit owners without regard to the unit owners' disability.

G. Was the Board Authorized to Assign Common Element Parking Spaces Only to Some Unit Owners?

In *Tyler v. Brookfield at Milestone Condo.*, the condominium association, relying on a bylaws provision identical in relevant respects to Article 10 of King Farm II's Bylaws, purported to assign all general common element parking spaces only to unit owners who did not also own garage units. The panel in that case invalidated the assignment as beyond the board's authority, since it deprived garage unit owners of any right to use common element parking. Although the panel stated in its decision that "[a]ny assignment of spaces in the general common elements must include an assignment of some spaces, which means at least one space, to each garage unit owner," the panel's order only invalidated the existing assignments; it did not direct the condominium association to assign at least one space to each unit owner.

The Panel agrees with *Tyler* that the complete exclusion of garage unit owners from enjoyment of common element parking is inconsistent with the right of all unit owners to enjoy common elements. The Panel does not necessarily agree, however, that the only options open to King Farm II are (1) assigning at least one space to each unit owner, or (2) eliminating all assignments entirely and allowing all unit owners to park in common areas on a first-come, first-served basis. For example, it might be permissible to assign 15 spaces to the 15 non-garage unit owners and leave the remaining 15 spaces unassigned and available to all unit owners. (Such an arrangement is not now before the Panel and the Panel is not ruling on its permissibility.)

The Panel will invalidate the current parking regime for the reasons stated, but will not otherwise restrict King Farm II in addressing parking issues in the future.

H. Has the Board Failed to Maintain the Common Areas?

While the Board is obligated to maintain the common elements, when and how it does so is generally a matter of business judgment not subject to CCOC review. Mont. Cnty. Code § 10B-8(5) ("dispute" excludes "the exercise of a governing body's judgment or discretion in taking or deciding not to take any legally authorized action); *Black v. Fox Hills North Community Ass'n, Inc.*, 90 Md. App. 75, 599 A.2d 1228, 1231 (1992) (the business judgment rule "precludes judicial review of a legitimate business decision of an organization, absent fraud or bad faith"); *Boland v. Boland*, 423 Md. 296, 328, 31 A.3d 529, 548 (2011) ("It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption") (citation and internal quotation marks omitted).

A maintenance failure may be brought before the CCOC, but only if "the failure results in significant personal injury or property damage." Mont. Cnty. Code § 10B-8(4). In other words, common ownership communities should not be haled before the CCOC for maintenance issues that involve aesthetics but not a clear risk of significant injury or damage.

In this case, there is evidence that the deteriorating pavers and concrete on either side of the Bishows' parking pad create a safety hazard to the Bishows. The Board offered testimony that a contract has been signed to repair the pavers and that concrete

repairs will be addressed as soon as weather permits. The Panel will order the Board to proceed in that fashion.

There is no evidence that the scuffed and unsightly rear door presents a risk of injury or damage, so no relief will be granted on that issue.

IV. ORDER

Accordingly, it is by the Panel, this 18th day of March, 2016, ORDERED as follows:

1. The motion to dismiss the complaint on statute of limitations grounds is DENIED.

2. The Bishows' motion to compel discovery and their demand to compel King Farm II to register with the CCOC are each DENIED as moot.

3. The action of the King Farm II Board assigning 30 common element parking spaces to some but not all residential unit owners is hereby DECLARED INVALID, with the result that each of those 30 parking spaces is now available to all residential unit owners on a first-come, first-served basis; *provided, however*, that nothing in this Decision and Order prevents the Board from adopting different parking rules so long as those rules preserve the right of all residential unit owners to enjoy the common elements.

4. King Farm II must repair the deteriorated pavers and concrete near the Bishows' parking pad within 45 days after the date of this Decision and Order.

5. Except as otherwise stated in this Decision and Order, the complaint and all claims therein are hereby DISMISSED WITH PREJUDICE.

6. Within 30 days after the date of this Decision and Order, the Board must distribute copies of this Decision and Order, via hand delivery, email or regular mail, to all unit owners within King Farm II.

Panel members Aimee Winegar and Marietta Ethier concur in this Decision and Order.

This is a final order intended to dispose of all claims in this case. Any party aggrieved by the action of the CCOC may file an administrative appeal to the Circuit

Court for Montgomery County, Maryland within thirty days after this Decision and Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.

Charles Fleischer

Charles H. Fleischer, Panel Chair