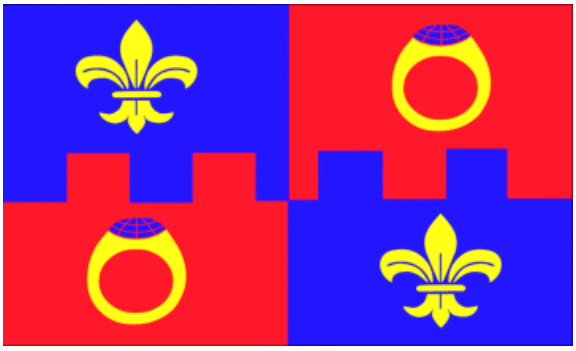
The
STAFF'S GUIDE
to the
PROCEDURES AND DECISIONS
of the
MONTGOMERY COUNTY COMMISSION ON COMMON OWNERSHIP COMMUNITIES



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FOREWORD and DEDICATION

Montgomery County's Commission on Common Ownership Communities (CCOC) has three important missions: (1) to act as an advocate for the County's community associations ("associations"), (2) to educate the associations and their members regarding their rights and duties and in the proper management of the associations, and (3) to resolve disputes between members and their associations. Although the CCOC has been active in all three areas, most attention focuses on its dispute resolution efforts, and that is also the function on which most Commissioners and staff have spent their efforts.

This Guide is not intended to be a comprehensive review of all aspects of community association law. Rather, its purpose is to explain the CCOC's procedures and to make available the formal decisions of its hearing panels in a useful manner. 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 issues facing them as members or directors of the County's community associations. This is especially true when there are few, if any, other sources of information freely available on community association issues, a problem compounded by the fact that there are very few attorneys who consider studying this area of the law and making it their specialty.

Almost all CCOC decisions are unanimous, and all the members of a panel participate in the making of their panel's decision; but in general, the main burden of writing the decision and explaining the reasoning behind them falls upon the panel chairs. Under the CCOC's procedures, most of the panel chairs are local attorneys who volunteer their time to lead the panel, study the record, supervise the conduct of the hearing, draft and circulate the decision for comment by the other panel members and the County Attorney, and then issue the final Decision and Order. This involves a considerable investment of valuable legal time and thought -- the Staff estimates one decision involving a single hearing can require anywhere from 15 to 40 hours of the panel chair's time. The CCOC's panel chairs donate this time and effort as a public service to the citizens of Montgomery County. It is a service that has generally gone both unnoticed and unrewarded.

Without the knowledge and assistance of our expert panel chairs, however, the CCOC would not be able to decide as many cases as it now does, and the CCOC's rulings would lack the credibility they now have. A simple ruling for or against a complaint might be considered purely arbitrary if not accompanied by an explanation of the relevant law and how it applies to a particular dispute; and, without such an explanation, a court is more likely to overturn a CCOC decision on appeal. As it is, the courts rarely reverse CCOC decisions.

This Guide organizes the combined efforts of the many attorneys who have volunteered countless numbers of hours of their time and expertise on behalf of the CCOC and of the citizens of Montgomery County. In alphabetical order, these are the panel chairs whose decisions constitute the heart of this Guide and to whom it is dedicated:

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On behalf of the CCOC, we express our profound appreciation.

Several people lent invaluable assistance in the preparation of this Guide: Sara Behanna-Moseley, Ellen Pollack, Pandora Prather, Lorena Bailey and Rae Cooper. Without their help, it would have taken many more years for the Guide to appear. The Staff is also deeply grateful for the review and comments on the drafts of this Guide by Walter Wilson, Associate County Attorney.

Michelle L. LaRue, Attorney at Law
&
Mark Fine, CCOC Chairman
Editor, 2020 Edition

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August 2019

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NOTICE

The contents of this Guide are the personal opinions of the Commission's staff. They do not necessarily reflect the opinions of, nor are they in any way binding upon, the Commission, the Office of the County Attorney, or the Montgomery County Government.

This Guide is not intended to provide legal advice. Readers who wish to know how the law applies to their specific circumstances should consult an attorney.

This Guide is intended only to assist the public in understanding how the Commission operates and how it has applied the law in the cases that have come before it.
Any errors in this Guide are the staff's alone.

Regarding Case Numbers

The CCOC decisions referred to in this Guide are listed by their case numbers in brackets. Thus, the decision and order in Case Number 829, for example, is listed here as "[829]." The CCOC has used two numbering systems. The older one was a purely sequential system which began with Case Number 100, and ended in 2005 with Case Number 829. In 2006, the CCOC adopted a different system, in which the cases were numbered sequentially by the year in which they were filed. The first decision under the new system is Case Number 04-06, which in this Guide is listed as "[04-06]", and later decisions follow this system. In 2019, the CCOC adopted the Montgomery County Fiscal year which starts in July. At that point our case numbers will start with the fiscal year (2020) then the case number (001, etc)

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PART ONE: THE CCOC'S PROCEDURES

The CCOC is created by Chapter 10B of the Montgomery County Code, which was amended in 2016. The CCOC is composed of fifteen (15) voting members who are appointed by the County Executive for 3-year terms. Eight (8) members must be residents of common ownership communities, Seven (7) members must be professionals who are associated with common ownership communities, such as lawyers, real estate agents, developers, etc., At least one (1) person must be a professional community association manager. Commissioners are volunteers who serve without pay.

The CCOC is assisted by attorneys who volunteer to chair its hearing panels; these "volunteer panel chairs" are not members of the CCOC itself but are appointed by it, and they are not compensated for their services.

The CCOC is not funded by property taxes. Its entire budget comes from the annual registration fees that each community association must pay. Currently, the fee is $5.00 per unit, which became effective July 1, 2016.

One of the CCOC's duties is to resolve disputes between community associations and their members and residents. The process begins when one party files a written complaint against the other with the CCOC. The staff notifies the other party of the complaint and requests its written answer, and then attempts to assist the parties in settling the dispute between themselves. This is the "conciliation" stage. If the parties cannot reach a settlement, the staff then forwards the dispute to the CCOC for a hearing and a binding decision. This is the "hearing" stage.

I. THE CONCILIATION STAGE

<u>The CCOC staff</u> are members of the Montgomery County Department of Housing and Community Affairs. . Most of the Investigators assigned to the CCOC are attorneys, but the law does not require this. Unlike other Investigators who are assigned to consumer disputes, the CCOC staff are not advocates of either party nor do they investigate and attempt to establish the claims of either party. Instead, the staff serves and advises the commissioners and panel chairs. The Code of Montgomery County Regulations (COMCOR) Section 10B.06.01(a)(3) authorizes the staff to investigate complaints as the staff thinks proper, and the staff can use this authority to request one party or the other to back up its claims or defenses with supporting evidence. However, during the conciliation stage, the staff does not have the power to issue subpoenas.

<u>Parties and lawyers:</u> The CCOC's rules allow both parties to proceed without lawyers. Members or residents can represent themselves (but cannot represent anyone else); associations can be represented by an officer or member of their boards of directors. Property managers cannot

represent their associations. However, the CCOC cannot prevent a party from having an attorney, and both parties should keep in mind that they can benefit from legal advice, especially in complicated disputes involving many issues. The CCOC does not accept "class action" complaints, that is, complaints filed by one member on behalf of other members. Each complainant must file his or her own complaint and pay his or her own filing fee.

Complaints: A party who wishes to make a complaint to the CCOC must use and complete the CCOC's Complaint Form, pay the $50.00 filing fee, and attach a copy of the entire set of governing documents (declaration of covenants, bylaws, rules & regulations) and of all the documents relevant to the particular complaint (such as architectural change applications, violation notices, photographs, etc.). The staff can refuse to open a complaint file until the missing documents are provided.

If the complaining party is an association, and the association is not properly registered with the County, the staff will usually refuse to open a complaint file until the association complies with registration. (Registration is handled by the Licensing Office of the Department of Housing and Community Affairs).

https://montgomerycountymd.gov/DHCA/housing/commonownership/Registration.html

Prerequisites to filing complaints: Section 10B-9 and the CCOC's own *Policy on Exhaustion of Remedies* require the complaining party first to follow whatever procedures the association might have for making and resolving disputes before filing a complaint with the CCOC. The staff will review the complaint form to determine if the party certified it has done so and provided evidence that it has done so. The staff can reject a complaint if a party has not followed the association's procedures before filing with the CCOC.

https://montgomerycountymd.gov/DHCA/housing/commonownership/policyonexhaustionofremedies.html

***Associations* must usually show that they have given written notice to the member of an alleged violation and the right to a hearing, and that they have also provided written notice of their final decision together with notice of the right to appeal to the CCOC.**

***Members and residents* must, at the minimum, show that they have given written notice to their boards of directors of the dispute and given the board a reasonable amount of time to resolve it.**

The defending party can also, as part of its answer, object to a complaint and ask that it be suspended or dismissed until the complaining party follows the relevant association procedures.

Who can be parties: CCOC complaints can only involve the following parties: the governing body of the common ownership community, a member of the community, or a resident of the community. Therefore, complaints cannot be filed by or against property managers or employees of the association. Complaints also must involve the authority of the governing body to take, or to refuse to take, some action. Therefore, complaints cannot be made by one member against another member (since such complaints do not involve the authority of the governing body). The Commission does not issue advisory opinions, and therefore will not accept complaints about a decision that the board of directors might make, but has not yet made.

If a member objects to something another member is doing, the proper procedure is to notify the board, in writing, that the other member is violating a specific rule of the community. If the board does not respond to the complaint within a reasonable time, the member can then file a complaint against the board for its failure to enforce the rules.

If the complaint is clearly outside the CCOC's jurisdiction (for example, it involves an association inside the City of Poolesville, or it is a complaint against another member or against an employee of the association), the staff can refuse to accept the complaint. The complaint will be returned, together with the filing fee.

In certain circumstances, someone who qualifies as a proper party under Chapter 10B may be granted permission to intervene in a pending case involving other parties. Foo v. Dellabrooke HOA [58-09]

The Complaint must be one that the CCOC can accept. Section 10B-8 lists the kinds of complaints that the CCOC *can* and *cannot* accept. This list is also included in the complaint forms. If a complaint does not involve one of the issues allowed by law, it will be dismissed.

All complaints must involve the legal authority of the association to do something, or to refuse to do something.

The CCOC does not give advisory opinions. It will not comment on a rule or decision that the association or its board of directors is considering, but which the association has not yet formally adopted. For example, the CCOC will not accept complaints regarding a violation notice that a member has received, since a violation notice is not a final decision by the association; it will, however, accept a complaint about the decision of the board of directors that the member is in violation and will be penalized. Similarly, the CCOC will not accept complaints about a proposed rule or bylaw amendment, but it will accept complaints regarding a rule or bylaw amendment after it has been adopted by the board of directors or the association.

Answering the Complaint: Once the staff receives a proper complaint, it will send a copy of the complaint form and of the relevant documents (but not of the governing documents) to the other party by mail, along with an explanatory cover letter. The other party then has thirty (30) calendar days to send a written response to the staff, along with any supporting documents. This response must also be forwarded to the other party.

Most responding parties will file answers within the thirty (30) days required by law, and when they do, the staff sends a copy of the answer to the complaining party, who may file written comments on it for the record.

If a party needs additional time to respond, he or she should request, in writing, an extension of time, and send a copy of the request to the complaining party. The staff does not have the authority to approve such extensions, but it will forward the request to the complaining party. If the complaining party objects to such a request, he or she may file a motion for entry of an order of default once the 30-day deadline has passed and no answer has been filed. The staff will refer the dispute to the full CCOC for consideration at its next monthly meeting. If the responding party has made a reasonable request for an extension of time to reply, the staff will almost always recommend, and the CCOC will almost always agree, to deny the motion for an order of default provided the party answers when promised. This is especially the case when the staff has received the answer on or before the time in

which the CCOC meets. The CCOC's default procedures are not intended to be used as a penalty for mere delay. They are to be utilized against parties who refuse to respond at all.

If a party does not answer and does not request an extension of time to answer, the staff will then notify the complaining party of its right to file a request for entry of an order of default. The staff sends a copy of this notice to the defaulting party as well so it is aware of what will happen. The procedures are detailed in the CCOC's *Default Judgment Procedures,* which is posted online at the CCOC's website.
https://montgomerycountymd.gov/DHCA/Resources/Files/housing/commonownership/ccoc/defaultjudgmentprocedures.pdf

<u>The automatic stay:</u> Section 10B-9(e) states that when a complaint has been filed, the responding party cannot take any action to enforce its decision except by filing a civil action. This means that if an association has held a member in violation of a rule, it cannot add fines to the member's account or revoke the member's privileges until the complaint has been resolved or settled. Likewise, if a member disputes the validity of an assessment, the association cannot add late fees or interest to the complaining party's account for nonpayment of the disputed assessment and cannot obtain a lien.

The CCOC does not interpret this law to extend to association actions that do not involve enforcement action against the individual person filing the complaint. For example, a complaint by one member about an allegedly invalid assessment affects, at the most, the association's right to collect that assessment from the complaining member and does not affect the association's right to collect the disputed assessment from any other member who has not filed his or her own complaint. Likewise, a complaint challenging the validity of an election does not prevent the new board of directors from proceeding to hold meetings and make decisions. The automatic stay is intended to be a shield that protects the rights of the person filing the complaint by *preventing* the association from taking action against that person; it is not intended to be used as a sword to shut down the operations of the association or to *force* the association to take any action. When the responding party has doubts about the reach of the automatic stay, it can file a motion to lift the stay pursuant to Section 10B-9A.

<u>Motion to lift the automatic stay:</u> The responding party, at any stage of the case, can make a written motion to lift or limit the automatic stay. Section 10B-9A states that this motion will be heard on an expedited basis by a special hearing panel of three (3) voting members, and not by the full CCOC. The CCOC has adopted a policy statement and forms for motions to lift the stay.

<u>Motion to Dismiss:</u> In addition to, or in place of, filing an answer, the responding party can file a motion to dismiss the complaint. Such motions are usually based on a claims that the subject of the complaint is outside the CCOC's jurisdiction, that the complaining party has not exhausted the association's internal dispute resolution procedures, or that the complaint does not state any specific facts to support its allegations. Many motions to dismiss made by associations are based on the defense that the association's decision is protected by the "business judgment rule," which is described in Section II of this Guide. The complaining party can file its opposition to such a motion.

The staff cannot decide such motions, and it will refer them to the full CCOC for consideration at its next monthly meeting, along with its recommendation. The CCOC seldom grants motions to dismiss unless it is clear that the CCOC has no jurisdiction even if the facts alleged by the complaining party are true. If the CCOC has any doubt regarding the facts or the law, it will normally give the complaining party the benefit of a doubt at this stage, and allow the case to go forward to mediation or a hearing. The CCOC believes that its hearing panels are better able to decide such motions

because the hearing panel will have the benefit of additional time to review and consider the facts. The CCOC might also accept the dispute and refer the motion to dismiss to a hearing panel for its consideration.

Mediation: In most cases, the responding party does file its answer, and the next step is for the staff to contact both parties to arrange for a voluntary settlement conference or "mediation." The CCOC may require mediation if it determines that it is likely a violation has occurred. The CCOC retains the services of qualified volunteer mediators to conduct the mediation. During this informal, neutral meeting, each party will present his or her side of the story and the mediator will assist in exploring ways to resolve the dispute informally.

If the parties do resolve the dispute, the CCOC closes the case on the grounds that there is no longer any "dispute" under Section 10B-8. If for some reason the parties do not want the case closed—for example, because the agreement is not a final one, or the agreement calls for one party to do something in the future before the dispute can be considered fully resolved—then the agreement should state in writing that the dispute is not resolved until all actions have been properly performed and that if the actions are not performed then either party can ask that the case be sent back to the CCOC for a hearing.

The content of the mediations is confidential, and the information disclosed during mediations cannot be used against a party at any hearing. The purpose of this rule is to encourage the parties to discuss their positions honestly and without fear of retaliation. However, the result (or lack of result) of a mediation becomes part of the record. The mediation agreement itself is not confidential unless the agreement is clearly written to state that it is confidential.

The CCOC strongly encourages both parties to attempt to resolve their dispute either through mediation or through direct negotiation. The CCOC has the authority to penalize a party who unreasonable rejects or disrupts mediation. If the party that files the complaint refuses or fails to appear at mediation, the CCOC must dismiss the case. If the party that is subject to the dispute refuses or fails to participate in mediation, the case is referred to the Commission and the party may not appear at the hearing.

For additional information regarding mediation, please refer to COMCOR Section 10B.06.01.01.

II. THE HEARING STAGE

CCOC's vote on jurisdiction: The hearing stage begins when the staff refers an unresolved dispute to the full CCOC for a vote on whether to accept or reject jurisdiction of the complaint.

The staff starts the process by writing a "Case Summary." The Summary gives a brief history of the complaint, its allegations and the answer; and it states whether or not there was a mediation. The staff analyzes the complaint to determine whether or not the claims in the complaint fall within the requirements of Section 10B-8 of the County Code. The staff then recommends that the CCOC either accept the complaint (or parts of it) or dismiss the complaint (or those parts which do not fall under Section 10B-8).

Staff sends a copy of the Case Summary to both parties in order to give them the opportunity to comment on the staff's recommendations before the CCOC meets to discuss the case. If either party

sends comments, the staff gives them to the CCOC along with the Summary. For the CCOC's benefit, the staff attaches a copy of the complaint form and the most relevant of the documents sent with it, and often a copy of the answer. The Summary is usually two pages long, but in a complicated case can be 4 or 5 pages long so that each individual claim can be analyzed separately. Any and all communications from a party to the CCOC must include a copy to the other party.

(Some parties object to the Summary on the grounds that does not properly advocate their position or fully detail their complaints. When the staff prepares a Summary, it is not acting on behalf of either party, but instead is acting as the CCOC's advisor and attempting to provide the CCOC members an objective overview of a pending dispute. The preparation and discussion of the Case Summary is essentially an open dialogue between the CCOC and its staff. The law does not require that the CCOC give the parties a copy of the Case Summary or the right to comment on it. However, in the interests of fairness and transparency, the parties do receive the Summary and the opportunity to comment on it. The CCOC will always have a copy of the original complaint form, so it can make up its own mind as to what the complaint involves. The CCOC is not obligated to follow the staff's recommendations.)

The CCOC takes up Case Summaries at its monthly meetings, which are usually held on the 1st Wednesday of each month. Because the Case Summaries are only part of the many items of business on the monthly meeting agenda, the CCOC has a limited amount of time to discuss each case. The staff will provide a short oral summary of its position on the case and then the County Attorney's representative, who attends every meeting, will also give his or her opinion on whether the CCOC has the authority under Section 10B-8 to accept the case.

As when dealing with motions to dismiss, the CCOC will generally give the complaining party the benefit of the doubt and accept the facts alleged in the complaint as true. The issue before the CCOC at this time is not who is right or wrong, but whether the facts claimed, *if true*, establish a case that falls within the CCOC's jurisdiction to decide. Although the CCOC votes to accept most of the cases that the staff brings to it, it can reject a case if the claim does not meet one of the requirements of Section 10B-8, if the claim falls under that Section but there are insufficient facts alleged to support the claim, if the claim is not against a proper party, or if the dispute does not involve the authority of the association to do or refuse to do something. The CCOC is not obligated to accept the recommendations of its staff or of the County Attorney, and, in fact, the law (Section 10B-11(b)) provides the Commission the sole discretion to accept or reject complaints.

The CCOC's decision to *reject* a complaint, since it is made without a hearing at which the parties can present their views or offer evidence, is not a ruling on their legal rights, but only a ruling on whether the complaint falls under Section 10B-8. It is unlikely a court would reverse such a decision on appeal and force the CCOC to accept a complaint.

A CCOC decision to *accept* a dispute is not a final and binding ruling that the CCOC has jurisdiction over the complaint under Section 10B-8. Since neither party has had the opportunity to propound discovery, or to present facts at a formal hearing, the CCOC is merely finding that there are sufficient facts alleged to raise a dispute and that the matter should proceed to a hearing panel for further development of the facts and the law. Once the CCOC accepts a dispute, the parties have the right of "discovery," which is the right to ask each other written questions and to ask for documents, and even to request witness subpoenas. These are rights that the parties do not have in the mediation stage. The CCOC expects that its hearing panels will decide for themselves, after having conducted a hearing and seen all the evidence that the parties wish to present, whether the complaint still falls under Section 10B-8, and whether the complaining party has proven its case by the greater weight of the evidence.

Decision of jurisdiction: **If the CCOC rejects a complaint the staff will send written notice of this to the parties and it will close the case. Under Section 2A-8(e) of the County's Administrative-– Procedures Act, a party has the right to file a Motion for Reconsideration of the CCOC's decision. There are strict deadlines that apply to such motions. If the motion is filed within 10 days, the party can ask the CCOC to reconsider the entire dispute. If the motion is filed after 10 days but before 30 days after the decision is rendered, the party can only request the CCOC to reconsider its decision if the party can demonstrate that the CCOC misunderstood the facts, that new facts have since appeared which could not be known earlier, or that the law has changed, or some other important reason of which the CCOC could not have been aware at the time it voted on the case. Motions to reconsider should not be made if they only re-argue the same issues the CCOC was already aware of when it voted. Very few motions to reconsider are granted. Reconsideration motions filed after the 30-day deadline will not be considered.**

While the staff publicizes the decisions of the CCOC's hearing panels, it does not publicize its votes on whether to accept or reject jurisdiction. However, the staff reports those votes in the monthly minutes. When the CCOC votes to accept jurisdiction, it does so knowing that it does not have the benefit of all the facts that a hearing panel will have, and the panel is free to make its own determination of whether the complaint falls under the purview of Chapter 10B. Therefore, a decision by the full CCOC to accept jurisdiction is not a final ruling on that issue. A decision to reject jurisdiction is difficult to rely upon as an interpretation of the law, because members may express differing ideas on why the complaint should be rejected, and some members may vote against accepting jurisdiction without stating any reason at all; consequently, it is often unclear whether a majority of the CCOC was in favor of any specific justification for rejecting the complaint.

Reconsideration: Under Section 10B-11(b), if the full CCOC dismisses a dispute without a hearing because it believes that, even assuming all the claims are true, there are no reasonable grounds to conclude that any violation of law or association document has taken place, then the complaining party has the right to file, within thirty (30) days, a written motion requesting reconsideration of the dismissal. In order to prevail, the party must show that the CCOC misinterpreted the law or the association documents, or that there are indeed important disputes of fact that must be resolved. This right of reconsideration is distinct from that granted under Section 2A-10(f), which imposes a 10-day deadline on the filing of most motions for reconsideration of a final decision made by a hearing panel.

Acceptance of jurisdiction and prehearing procedures: If the CCOC votes to accept a complaint, it will name the hearing panel, and then, in most cases the staff will then mail a "Summons and Satement of Charges" to both parties. The Summons will identify the issues that the CCOC voted to accept, state the date and time of the hearing, and identify the members of the hearing panel. The copy of the Summons that is sent by certified mail includes the detailed brochure on *How to Prepare for Your Hearing.*

https://montgomerycountymd.gov/DHCA/Resources/Files/housing/commonownership/ccoc/hearing.pdf

Most of the Summons is then devoted to informing the parties of their legal rights prior to the hearing itself. The most important of these rights are the right to send ten (10) written questions to the other party to be answered in writing and under oath, and to request twenty (20) documents. The party also has the right to request subpoenas for witnesses or documents. These discovery requests must be filed with the staff and sent to the other party within 15 days after the summons is issued. The chairperson of the hearing panel will rule on the written questions (called "interrogatories") and on the subpoena

requests; but no approval is necessary for the document requests. However, either party can file written objections to the other party's discovery requests, and the panel chairperson will decide those disputes.

For additional information regarding discovery, please refer to COMCOR Section 10B.06.01.04.

Unfortunately, most parties tend to ignore the educational information contained in the summons, and as a result, often waive their rights to conduct discovery and to put on the best case possible.

There are three members on a CCOC hearing panel, which must include two Commissioners: one resident representative and one professional representative. The third member is the panel chair, who is sometimes also a Commissioner who is an attorney; however, most of the time, the panel chair is a volunteer from the Commission's list of Volunteer Panel Chairs. Volunteer Panel Chairs are local arbitrators, most of whom specialize in community association law, and all of whom serve at no charge on behalf of the Commission. They decide evidentiary disputes, conduct the hearing, and write the final Decision and Order in the case. Panel chairs are usually not also Commissioners and do not attend or participate in the Commission's monthly meetings. Panel chairs do not vote or advise on whether the CCOC should accept or reject a dispute.

No Commissioner and no panel chair will participate in a dispute in which that person might have a conflict of interest or otherwise not be able to be impartial; and no Commissioner will represent his own association in a proceeding before the CCOC. (They can be called as witnesses in such a proceeding, however.) Either party can challenge a member of the panel for good cause. Good cause does <u>not</u> mean that the party thinks a panel member might be biased simply because that person is a resident or manager or that the panel member knows the other party or its witnesses.

Good cause means that the party has persuasive and supportable reason to believe that the panel member is biased against that party personally, or has such a close relationship to the other party as to make the panelist incapable of acting fairly. The CCOC chairperson, in consultation with the County Attorney, will decide on any such challenges, and they become part of the official record of the case.

Parties should also be aware that in addition to the procedures of Chapter 10B and Chapter 10B.06 of the Code of Montgomery County Regulations (COMCOR), the County's Administrative Procedures Act, Chapter 2A of the County Code, also applies to CCOC hearings. Among other things, Chapter 2A specifically states that the "hearsay rule" does not apply in administrative hearings such as the CCOC's.

During this process, the parties should not attempt to communicate with the staff without sending the same communication to the other party. The staff will not provide legal advice, although it may attempt to explain the pre-hearing and hearing procedures.

Neither party should ever attempt to communicate directly with any commissioner or panel member. **All communications, motions, and requests should be sent to the staff with a copy to the other party. Any discussions between staff and a party on the merits of a dispute will become part of the official record of the case.**

Although a hearing has now been scheduled, the parties are still encouraged to settle their dispute informally.

If the case appears to be a complicated one, the hearing panel may call a prehearing conference on its own initiative, or at the request of either party. A prehearing conference can be used to clarify and limit the issues to be raised at the hearing, and to identify in advance the evidence that will be used, as well as to resolve other issues before the hearing. The panel also has the right to issue subpoenas on its own initiative if it wants additional documents or information.

For additional information regarding the prehearing conference, please refer to COMCOR Section 10B.06.01.06.

Referrals to OZAH: The CCOC might refer a dispute to the Office of Zoning and Administrative Hearings (OZAH) instead of hearing the dispute itself. OZAH has professional hearing officers and it will appoint one of them to handle the case. OZAH will apply all the same rules and laws that CCOC hearing panels will follow. The OZAH hearing officer will conduct the hearing and write a recommended decision. That recommendation will be reviewed by a CCOC hearing panel, which can elect to accept, reject, or modify it. The panel will then issue a final decision. In such cases, the CCOC hearing panels do not hold their own hearings, but only review the record and the recommendations from OZAH.

The CCOC might refer disputes to OZAH if the dispute involves a CCOC commissioner personally, or if the CCOC's case load does not allow it to schedule the hearing promptly.

Commission Exhibit 1: A very important part of the prehearing process is the compilation and posting of "Commission Exhibit 1" (CE1). CE1 is prepared by the staff, and includes a copy of all the documents of the case up to the time that the summons is issued. It contains the complaint and supporting evidence, the answer and its supporting documents, and most other relevant information submitted by the parties, the staff's Case Summary, etc. Documents concerning the mediation are usually not included. CE1 is posted online (but protected by a password) and the panel members and the parties are sent a link to it with the password. The staff will supplement CE1 with other documents showing the official history of the case from the time the summons is sent to the date of the hearing. However, the staff does not usually add to CE1 any evidence submitted by the parties after CE1 has been prepared. If the parties wish to add evidence to the record, they must offer it at the hearing or as instructed by the panel chair (see below).

The advantage of CE1 is that both parties can use it (or the documents in it) as part of their own cases without having to bring the same evidence into the hearing along with copies for the panel and the other party. A party can use any document in CE1 at the hearing simply by referring to its page number. The panel chair will offer CE1 into evidence at the start of the hearing.

Either party can then object to any part of CE1 for good cause, and the panel chair will decide on such objections. In addition, either party can, as part of his or her own case, offer into evidence any new documents not already a part of CE1. CE1 simplifies the presentation of evidence at CCOC hearings.

Hearings: CCOC hearings are open to the public and usually scheduled for weekday evenings beginning at 6:30 pm. Hearings are held before a panel of 3 members appointed by the CCOC Chairman. Although the public is welcome to attend, only the parties and their chosen witnesses are permitted to testify or present their cases. CCOC proceedings are much like trials in the Small Claims Court in that they are relatively informal. Most hearings last from 2 to 4 hours; if they are going to take longer, the panel usually continues the proceedings to another evening. *The CCOC strongly*

encourages each party to plan to present its case in one hour.

A party may request a continuance for good cause to the Commission Chair and must do so in writing or by email with a copy to the other party. Any party who requests a continuance less than twenty four (24) hours before the hearing must pay the CCOC's court reporter's cancellation fee, which is approximately $100.

If, for some reason, a panel member cannot attend a hearing, the parties are offered two choices. They can either waive the presence of the third member and have the hearing conducted by the two members present, with the absent member participating in the decision by reading the transcript and all new exhibits; *or* they can have the hearing postponed and rescheduled so that all three panel members will attend.

Once a hearing is over, the panel has up to forty five (45) days to issue a written decision; but it can extend the time if necessary. After the panel drafts the decision, it sends it to the Office of the County Attorney for review before issuing it.

Post-hearing proceedings: A party who disagrees with a final Commission Decision and Order has two options: (1) The party may file a motion for reconsideration under Section 2A-10(f) of the County Code. A motion for reconsideration must be filed within 10 or 30 days after the Decision and Order is issued (depending on the reason for the request), and the motion suspends the running of the time in which an appeal must be filed. Motions for reconsideration that merely make the same arguments that were raised at the hearing are unlikely to be successful. (2) The party can also file an appeal to the Circuit Court to review the Commission's ruling. Appeals must be filed within 30 days after the decision. The party filing an appeal must pay the cost of having a printed transcript of the hearing prepared, which costs approximately $500 to $750.00.

Appeals to the Circuit Court must comply with the Rules of Court for Appeals from Administrative Agencies. The Circuit Court does not hold a new trial on the dispute, but only reviews the official record from the CCOC to determine whether there are facts in the official record to support the panel's findings of fact, and whether the panel correctly interpreted the relevant laws.

Default Judgments: The process for defaults against parties who have not answered complaints filed against them differs from the hearing process chiefly in that there is no hearing and no discovery. Instead, the hearing panel relies entirely on the information submitted with the complaint.

The CCOC will not consider association motions for defaults which are not signed by a president or vice-president of the association, or by its attorney.

If there is a default (in other words, if the responding party does not answer the complaint within thirty (30 days) and has not requested any extension of time for answering the complaint) the staff will send the complaint to the CCOC for consideration at its monthly meeting. The staff will prepare a Case Summary with its recommendations and send a copy to both parties. Unless a party files its answer to the complaint before the monthly meeting, or unless it has requested an extension of time, the CCOC will usually grant the request for a default and assign the dispute to a 3-member hearing panel.

The CCOC will also authorize the issuing of an order of default. This order includes a "show cause" order for the party who has not answered the complaint to: 1. explain why it has not answered the

complaint on time; and, 2. state what its defense to the complaint is. The party has thirty (30) days to comply with this order. If the party does not respond, the hearing panel will then review the CE1 for the case and issue a final Decision and Order based on the complaint. The non-responding party is not permitted to present any evidence or to request a hearing if it has not complied with the show cause order.

The CCOC's rules for default judgments are stated in its *Default Judgment Procedures*, which are posted online and which follow the rules used by the Circuit Courts.

https://montgomerycountymd.gov/DHCA/Resources/Files/housing/commonownership/ccoc/defaultjudgmentprocedures.pdf

The losing party can file a motion for reconsideration of the default judgment, and it can also appeal the judgment. (See, "Post-hearing Proceedings" above.)

Default judgments are not automatic. **The party requesting a default judgment must prove to the panel's satisfaction that certain conduct took place, that a specific rule prohibits the conduct, that the party seeking the judgment followed the relevant association procedures and gave all proper notices, and that the violation still exists at the time the party requests a final judgment.**

<u>Enforcement of panel orders:</u> Once a hearing panel issues a final Decision and Order, either in a contested case or a default case, and there is no appeal, the CCOC staff will monitor the case until the losing party has obeyed any order issued against it. If the losing party does not obey in the time permitted, the staff may file a civil citation against the party in the County District Court, and ask for a court order of abatement and fines of up to $500 per day. The District Court will not consider any arguments that the CCOC Decision was incorrect—that can only be done in an appeal to the Circuit Court. The only issues before the District Court are whether the party was informed of the CCOC Decision, and whether the party obeyed that decision.

PART TWO: THE DECISIONS OF THE CCOC'S HEARING PANELS

. THE COMMISSION, ITS POWERS AND PROCEDURES

A. Governing Laws

1. Chapter 10B

(No cases.)

. Executive Regulation 10B.06 (No cases.)

. Default Judgment Procedures (No cases.)

4. Policy on Exhaustion of Remedies

Complainants were not required to comply with an HOA's detailed policy on member complaints before filing with the CCOC, since the HOA had failed to file that policy in the HOA Depository until after the CCOC case was filed, [Huynh, al., v. Falls Farm Homes Corp. 48-14 to 51-14]

Although the HOA did not properly follow its own procedures for holding the member in violation, and although it also failed to comply with County law requiring it to notify the member of his right of appeal to the CCOC, the CCOC would hear the merits of the dispute anyway, since there was no reason to believe that the HOA would change its mind on the matter if it had to start over again. [Schott v. Summer Village Condominium Two, Inc. #250]

Even if a party does not answer the complaint, the record must show that the association properly followed its own procedures when trying to enforce its rules against that person. If the record does not show those facts, then a request for a default judgment will be denied. [Greencastle Lakes Community Association v. Copeland 50-07], [Stonebridge HOA v. Deck 60-07]

When a condominium unit owner shows only that he received a warning or violation notice, but does not show that that the association took any action beyond that, he has not exhausted his remedies as required by Chapter 10B of the County Code, and the hearing panel will not make any rulings on the dispute. [Glenn v. Park Bradford Condominium 29-11]

Section 11-113 of the Condominium Act requires the association to follow a set of procedures before it can hold a member in violation of its rules. If the association has only issued a warning letter but has not taken any other action against the member pursuant to Section 11-113, the hearing panel will not intervene in the dispute. [Glenn v. Park Bradford Condominium 29-11]

B. The Commission's Jurisdiction over Complaints

1. Statute of Limitations

The statute of limitations apply only to legal actions filed in court; they do not apply to complaints filed with the CCOC. [Sacchi & Karowiec v. DuFief Homes Association #589]

2. Subjects of Disputes

Claims alleging the intentional infliction of emotional distress do not fall under the CCOC's jurisdiction. [Glenn v. Park Bradford Condominium 29-11]

Claims for damage to a lot caused by the HOA do not fall under the CCOC's jurisdiction. [McBeth v. Fountain Hills Community Association #52-12] [Muse v. Fountain Hills Community Association 67-12]

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. [Bishow v. King Farm Village Center Condominium II #42-15]

3. Who May Be Parties

Section 10B-8 (8) requires that the only persons who can be "parties" to a CCOC dispute are the council of unit owners, a member of the association, and a resident of the association.

A tenant, who subsequently becomes a member of the condominium association, may file a complain with the CCOC about elections that took place while he was a tenant and before he became a member, because as a member he is affected by a board that is not properly elected and because the violations might be continuing ones. [48-13 & 51-14]

Lawyers, managers, employees and agents cannot be parties to CCOC disputes. [Saunders v. Greencastle Manor Condominium #03-12, [Glenn v. Park Bradford Condominium #29-11]

The decision of a board president is a decision of the board when the board has delegated the right to make that decision to the president and the board does not reverse the decision; however, the association, and not the president, is the proper party to a CCOC dispute. [Decoverly I HOA, Tanouye v. - #19-12]

In order for an individual to be a party to a CCOC complaint, he/she must be a current owner or current occupant. [Kaplan v. Stonebridge HOA - #549]

A member of a sub-association cannot file a complaint against the master association, because that person is not a member of the master association; according to the covenants, the master association had only 3 members, and they were the individual condominium associations. [Goosh-Mosches v. Grosvenor Park Homeowners Association, Inc. and Grosvenor Park II Condominium Association #231]

A member of an association cannot file a complaint against an association of which he is not a member or occupant. [Goosh-Mosches v. Grosvenor Park Homeowners Association, Inc. and Grosvenor Park II Condominium Association #231]

A sub-association may file a complaint against the master association of which it is a member. [32-06]

A person who would qualify as a party under Section 10B-8 may apply for and be granted permission to intervene in a pending dispute involving other parties if he or she has a special interest that might not otherwise be protected. [Foo v. Dellabrooke HOA#58-09]

Parties must represent themselves, or be represented by a licensed attorney. The proceedings are invalid if a party is represented by someone who is not a licensed attorney. [Prue v. Old Georgetown Village Condominium - #24-14]

A Commissioner may bring a case before the Commission. By analogy to the Canons of Judicial Ethics, the panel notes that under Canon 3(d) of the Maryland Code of Judicial Conduct: "a judge shall recuse ... herself from a proceeding in which the judge's impartiality might reasonably be questioned, including an instance when the judge has a personal bias or prejudice concerning a party or a party's lawyer or extra judicial knowledge of a disputed evidentiary fact concerning the proceeding....." In this case, the panel members had no prior knowledge of the facts except what they learned at the meeting when the Commission accepted jurisdiction. At that time, the Complainant recused herself from voting and did not participate in the discussion. Moreover, each of the panel members specifically stated on the record that they had not spoken to the Complainant about the case and did not have any prior knowledge of the facts in this case. Under these circumstances, the panel members were each satisfied that they could fairly and impartially rule on the facts and evidence presented in this case. *See* In re Erich S .• 416 Md. 15 (2010). The Panel finds that the Complainant does not relinquish the rights accrued to her by virtue of citizenship in Montgomery County as a consequence of her membership on the Commission. The Panel also finds that the individual Commissioners appointed to hear this case did have the ability to view this case objectively and to make fair and reasoned decisions despite their interaction with the Complainant as a fellow Commissioner. [Viney v. Mutual 14 Condominium of Rossmoor - #18-17]

4. The Automatic Stay

[Staff comment: Section 10B-9(d) of the County Code states that once the board of directors has found a member or resident to be in violation of its rules, it may not take action to enforce its decision for fourteen (14) days. The law further states that once a member or resident files an appeal of a board decision to the CCOC, the association may not take any action to enforce its decision until the CCOC disposes of the case. Section 10B-9(e). The only exceptions are (1) when the association requests and receives permission to lift the automatic stay, or (2) when the association files an action in court to enforce its decision.]

When a member files a CCOC complaint challenging the validity of an increase in the assessments, the association may not attempt to collect the disputed portion of the assessment, nor penalize the member for not paying the assessment in full. [Shomette v. Greencastle Lakes Community Association - #140]

It is a violation of the automatic stay to file a lien against a member for not paying a bill that he is currently disputing before the CCOC. In such a case, the CCOC can order the association to remove the lien at its own costs and to take whatever steps are necessary to restore the member's credit rating. [Wear v. Kenwood House Condominium, Inc. - #260]

Sending a collection letter to a homeowner during the pendency of a dispute before the CCOC violated the automatic stay imposed by § 10B-9(e). *See* Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, Faville v. Brookstone Condominium, Inc. - #560 & n.3 (1990) (Bankruptcy Code's automatic stay provision "automatically stays a wide array of collection and enforcement proceedings against the debtor and his property [and] protects a debtor from various collection efforts"). Such a violation warrants sanctions against the association. [Thai v. Potomac Glen Community Association - #20-17]

5. Exclusions from Jurisdiction

a) Non-parties: managers, employees, outsiders

The CCOC does not have jurisdiction over claims against lawyers, managers, employees, agents, etc. [03-13, [Glenn v. Park Bradford Condominium #29-11]

b) Title and Ownership

The CCOC has no authority to determine title or ownership to property. [Section 10B-8(5)(A)]

When the governing documents allocated specific parking spaces to specific individual units, and an owner of a different unit claimed to have purchased title to one of those assigned parking spaces from its former owner, the CCOC had no jurisdiction to resolve that dispute. [Shelby v. Riviera of Chevy Chase Condominium - #749]

c) Evictions

[Staff comment: The CCOC cannot order the eviction of a member or tenant from a common ownership community. Only the District Court of Maryland may do so. *See,* Title 8, Landlord and Tenant, Real Property Article of the Annotated Code of Maryland.]

d) Decisions Not Final

[Staff comment: The Code gives the CCOC authority over certain "disputes."

The Code does not define "dispute," but the CCOC treats it as similar to the requirement in Federal courts that there be a "live" or ongoing "case or controversy." This means that the CCOC will not take a case involving, for example, a decision the board is considering but has not yet voted on. Similarly, the CCOC will not become involved in an architectural application that the architectural committee has denied, but on which the board has not yet ruled. If a case is settled, there is no longer any "dispute" and it will be closed or dismissed (unless there is a provision in the settlement agreement stating that the complaint is not settled until performance is complete). Furthermore, in order to establish the existence of a "dispute" the complaining party must allege specific facts or events, and show that the conduct violated specific provisions of the governing documents. The CCOC will reject jurisdiction of complaints that are overly vague or too general, or fail to provide basic facts in support of them.]

The CCOC will not interfere in disputes in which the board has only issued a warning. [Glenn v. Park Bradford Condominium #29-11], Barrett v. Normandy Hills HOA - #544, Cameron v. Westlake Terrace Condominium - #135]

e) Advisory Opinions

[Staff comment: The Code does not give the CCOC authority to issue "advisory opinions." In practice, this means that the CCOC will not accept complaints which allege that the board ought to adopt a specific rule, or that the board should be prevented from adopting a specific rule, or that the association's rules are antiquated and should be revised, etc. This practice is based on the CCOC's

interpretation of the word "dispute," which requires that there be a specific decision of the board or of the council of unit owners for the CCOC to review, or else a failure to make a decision when a decision is required.]

f) Neighbor v. Neighbor

The board of directors has the right to refuse to enforce a rule against a neighbor of the complaining party. [*Black v. Fox Hills North HOA*, Appendix B]

The board of directors does not have the right to ignore a member's complaints about conditions on a neighbor's property when those conditions might violate the association's rules. The board must consider the complaints and make a decision on how to proceed or not proceed, and it should be able to document that it did so. [Bodmer v. Potomac Meadows HOA - #69-10]

When the facts demonstrate that a board has ignored a member's complaints regarding conditions on a lot belonging to another member, the CCOC can order the board to investigate the complaints, make a written report of its findings, and make a decision about what action it will take. When the association's rules so state, the board must hold a hearing on the complaints at which the complaining member can testify. [Bodmer v. Potomac Meadows HOA - #69-10]

When the CCOC is reviewing a board's decisions on whether or not to take action against a neighbor of the complaining party, and that neighbor is not a party to the CCOC case, the CCOC cannot make a decision about whether that neighbor is in fact violating any rule or law, nor can it issue any orders against that neighbor. To do so would be a violation of that person's Constitutional right to due process and a fair hearing. [Killea v. Cabin John Gardens, Inc. – #88-10/ McNulty v. Cabin John Gardens, Inc. - #24-11, Bodmer v. Potomac Meadows HOA - #69-10]

When a member complains that his association is not enforcing its rules against his neighbors, and the association shows that it has issued violation notices against the neighbors listed in the complaint and either obtained voluntary compliance from them or has taken enforcement action, that response renders the complaint moot. [Ehrlich v. Sweepstakes HOA - #08-12]

g) The "Business Judgment" Rule

[<u>Staff comment:</u> The business judgment rule is discussed in more detail in Appendix A.]

The business judgment rule does not protect an association's failure to enforce its rules against a member when the association cannot prove that it ever considered the complaints against that member or made a decision on them. The business judgment rule only protects decisions, not failures to make decisions. [Bodmer v. Potomac Meadows HOA - #69-10]

When the undisputed facts show that the board investigated the complainant's claim that the neighbor's bushes exceeded the HOA's rules on the allowable height of bushes, that the board met with the complainant in mediation to try to settle the dispute, the board then asked the neighbor to prune the bushes, and then, when the neighbor refused to do so, the board made a decision not to pursue the issue further, the dispute is outside the CCOC's jurisdiction because it does not involve "the authority of the board to compel a party to take action or not to take action" concerning a unit. Also, the board's decision is protected by the "business judgment" rule. [Henry v. Bel Pre Recreational Association - #40-09]

Staff comment: **this decision was made under the pre-2010 amendments to Section 10B-8(4), and the 2010 amendments now allow complaints about the board's failure to take action to enforce a rule in certain situations; however, the "business judgment" exemption still applies to board decisions if made in good faith, *see,* Section 10B-8(5)(E).]**

h) mootness

If a complaint has been resolved, if the complainant has already obtained the relief he has requested, or if there is no practical remedy the CCOC can grant, the complaint is moot and will not be accepted, or if accepted, will be dismissed as moot. [Ehrlich v. Sweepstakes HOA - #08-12, Zanoff v. Rock Creek Commons Condominium - #169, Meldrum & Kastner v. Americana Finnmark Condominium Ass. - #690]

If an HOA acts favorably on the complainant's application before the CCOC panel can hold a hearing on the dispute, the matter becomes moot and the hearing panel will not rule on it. [Weiss v. Woodstock HOA - #702]

If a party removes the violation before the hearing, the matter is moot and the panel will not hold a hearing on the merits of the dispute. [McDonald v. Briars Acres Community Association - #64-10]

If a member files a complaint alleging that he has been refused access to certain documents, but does receive the documents while the case is pending, that dispute is moot and the hearing panel will dismiss it. [Glenn v. Park Bradford Condominium 29-11]

If a member comes into compliance with the association's rules, and no fines have been assessed against him, and he is no longer subject to any violation notices, the issues becomes moot. *Simms v. State*, 232 Md. App. 62, 68 (2017) ("A question is moot if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide") (quoting *Attorney Gen. v. Anne Arundel Cnty. Sch. Bus Contractors Ass 'n*., 286 Md. 324, 327 (1979)). [Yourshaw v. Waring Station HOA - #60-17]

i) harassment, emotional distress

The CCOC has no jurisdiction over claims of "harassment" by board members, especially when there is no proof that the director's conduct was authorized or ratified by the board. [Huynh, al., v. Falls Farm Homes Corp. 48-14 to 51-14]

The CCOC has no jurisdiction over claims of the intentional infliction of emotional distress, or claims of "harassment." All claims must come under one or more of the categories listed in Section 10B-8. [Glenn v. Park Bradford Condominium 29-11]

j) equipment contracts

The CCOC has no jurisdiction to review the terms of an association's lease of laundry room equipment so long as the association had the authority to enter into the lease agreement. Although the laundry room is a common area, the equipment is not common property belonging to the association. The equipment inside the laundry room is only rented. [Davis v. Chevy Chase Crest Condominium

Ass'n. - #06-12]

k) Property Damage

The CCOC has no jurisdiction over claims of damage to private property caused by an HOA in the course of maintaining the HOA's common property. 52/67- 12]

C. Commission Hearings and Decisions

1. Evidence

Formal rules of evidence do not apply in CCOC hearings, nor does the rule prohibiting hearsay evidence. [Section 2A-8(e) of the Montgomery County Code states: The hearing authority may admit and give appropriate weight to evidence which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs, including hearsay evidence which appears to be reliable in nature. It shall give effect to the rules of privilege recognized by law. It may exclude incompetent, unreliable, irrelevant or unduly repetitious evidence, or produce evidence at its own request.]

Either party may use expert testimony at a hearing to substantiate its claims. [Susman v. Sussex House Condominium Association - #779]

2. Discovery

COMCOR Sec. 10B.06.01.04 outlines the procedures for propounding discovery to a party, including Requests for Production of Documents, Interrogatories and Depositions.

A timely motion for discovery should include specific interrogatory requests, specific requests to produce documents, specific requests for admission, and/or subpoenas with specification. Otherwise, the request for more time to provide discovery requests does not constitute a proper and timely motion for discovery. Good cause is not present to grant reconsideration and to warrant a different result. [Hypolite v. Longmead Crossing HOA - #2018-37]

3. Binding Effect

CCOC panels not only adjudicate disputes, but can instruct the parties on the procedures they must follow to bring themselves into compliance. [Flickinger v. Parker Farms Condominium Owners Assn. - #598]

4. Enforcement

The Commission does not oversee implementation of its Orders unless there is a violation sufficiently serious to merit a complaint for enforcement which will then be considered. The Commission's Decisions and Orders should be implemented in reasonable fashion. [Tavens v. The Willoughby Condominium of Chevy Chase - #2018-72]

5. Costs and Attorney Fees

Section 10B-13(d) allows the CCOC to require the losing party to pay the winning party's filing fee, if there is a hearing and if the hearing panel decides the award is justified.

Effective February 4, 2014, the County Council repealed that part of Section 10B-13(d) of the County Code that allowed the CCOC to require a party to pay the other party's attorney's fees if the association's own rules required it. Currently, the CCOC can only award legal fees if the party being charged the fees is guilty of some type of misconduct while the case is pending before the CCOC. "Misconduct" in this sense includes unreasonable delay, unreasonable action such as pursuing a frivolous complaint or frivolous defense, or an unreasonable refusal to participate in mediation. [Prue v. Old Georgetown Village Condominium - #24-14, [Glenn v. Park Bradford Condominium #29- 11], McDonald v. Briars Acres Community Association - #64-10, Greencastle Lakes Community Association v. Baker - #88-06, Brandermill Association v. Wells - #42-06, Cunningham & Fisher v. Decoverly I HOA - #31-06, Greencastle Lakes Community Association v. Davis - #11-06, Greencastle Lakes Community Association v. Muller - #829, Lapkoff v. Camelback Village Condominium Assn. - #794, Greencastle Lakes Community Association v. Abeje - #776, East v. Bel Pre Square HOA - #745, Fishbein v. Avenel Community Association - #744, Vartan v. Oak Springs Townhouse Association - #733, Potowmack Preserve, Inc. v. Ball #720, Weiss v. Woodstock HOA - #702, Halaby & Abboud v. Glen Waye Gardens Condo. - #679, McPherson v. Morningside HOA - #614, Flickinger v. Parker Farms Condominium Owners Assn. - #598, [Sacchi & Karowiec v. DuFief Homes Association #589], Evnin v. Decoverly IV Condominium, Inc. - #586, Saling v. Cabin John Gardens, Inc. - #572, Faville v. Brookstone Condominium, Inc. - #560, Ngo v. Churchill East Village Community Association et al. - # 503, Walker v. Germantown Station HOA - #487, Harary v. The Willoughby of Chevy Chase - #373, MacArthur Park HOA v. Steinhardt - #362, Turner v. Cherrywood HOA - #111, MacArthur Park Condominium Inc. v. Austin - #110]

A party who is represented at a hearing by a relative who is not an attorney licensed to practice law in Maryland is liable for the other party's legal fees due to misconduct. The hearing at which this occurred is invalid and must be conducted again before a different hearing panel, resulting in a waste of time and money to the other party. [Prue v. Old Georgetown Village Condominium - #24-14]

CCOC hearing panels will not award witness costs to a person who is not the prevailing party in an action and who does not show misconduct by the other party. [Potowmack Preserve, Inc. v. Ball - #73-12, Order Re: Shed]

A party who insists on pursuing claims and theories after having been warned that those claims or theories are outside the panel's jurisdiction will be ordered to pay the attorney's fees incurred by the other party to defend against such claims. [Glenn v. Park Bradford Condominium 29-11]

In evaluating whether a homeowner filed and pursued a frivolous claim or acted in bad faith the panel will consider whether the party had legal counsel, whether it tried to follow the rules and CCOC policies or delayed them, whether there was any hearing on the merits of the claim so that evidence and intentions were thoroughly tested, the CCOC's policy in favor of simple and inexpensive dispute resolution, and whether the complaint appeared to be a reasonable one on the surface. It can also be taken into account that the losing party has proven some violation of the law or association rules by the other party, and whether the relevant laws or rules were clearly worded. [Gold v. Fallstone HOA Inc. - #66-12, Saunders v. Greencastle Manor Condominium - #03-12, Lichtman v. Grand Bel Manor Condominium - #50-11]

Negative inferences do not justify a finding of bad faith if inferences of good faith can be drawn from the same facts, especially if there was no hearing because the dispute became moot. [McDonald v. Briars Acres Community Association - #64-10]

The failure to answer a complaint is not misconduct that is automatically sanctioned by the imposition of attorney's fees. The complaining party must prove its case whether the other party answers or not. [Brandermill Association v. Wells - #42-06]

The CCOC will not award attorney fees to the defending party simply because the complaining party fails to appear for a hearing. The defending party was required to appear regardless, or risk losing its case if the complainant did show up. [Davis v. Chevy Chase Crest Condominium Ass'n. - #06-12]

Maryland has adopted the American Rule which prohibits the prevailing party in a lawsuit from recovering attorney's fees. There are statutory exceptions to the American Rule. One exception is codified in Montgomery County Code, Section 10B-13(d):

(d) The hearing panel may award costs, including a reasonable attorney's fee, to any party if another party: (1) filed or maintained a frivolous dispute, or filed or maintained a dispute in other than good faith; (2) unreasonably refused to accept 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. In this case, the Panel took cognizance of the following: the complaint was filed in good faith and in furtherance of the Association's responsibility to enforce the Association's Standards and Guideline which were promulgated for the benefit of all owners of Lots and Dwellings; that the Respondent has not responded to the Complainant's allegations although given numerous opportunities to do so; that the Respondent has filed no answer to the complaint although having received several notices from the Commission; that if the Respondent had legitimate objections to the Complainant's case and any defense to the allegations, Respondent should have made them known at some point in the process; that this lack of response and failure to address the allegations has substantially delayed the resolution of this dispute and resulted in the Complainant having to spend money to hire an attorney to pursue this case and that other owners, through the Association, are entitled to be reimbursed for these expenditures. [2017-041] [2017-049]

A homeowner who files a complaint challenging an HOA's new bylaw amendment that prohibits day care businesses, without alleging a reasonable argument in support of her complaint, can be ordered to pay the HOA's reasonable legal fees for defending the case, even if the homeowner sincerely believed in the justice of her claim; the hearing panel could and did find the complaint frivolous since there was no reasonable basis for it. [Livingstone v. Parkside Community Association - #23-08]

Attorney's fees for the association's costs of attending a hearing (but not for the costs of the entire case) will be assessed against a unit owner who, two weeks before the hearing, was given and rejected a settlement offer that exceeded the amount the unit owner could have reasonably expected to win at a hearing even if her documents were accepted at face value. [Soliman v. Madison Park Condominium - #12-09]

Until February 4, 2014, if there was no "misconduct' the CCOC could only award attorney's fees when the association's own documents clearly required them in the type of case before the CCOC. [15-11, Greencastle Lakes Community Association v. Baker - #88-06, Greencastle Lakes Community Association Kelley - #87-06, Brandermill Association v. Wells - #42-06, Cunningham & Fisher v.

Decoverly I HOA #31-06, Inverness Forest Association v. Notter - #453, Hamilton v. 7611 Maple Avenue Cooperative, Inc. #314] For example, if the association documents referred only to "costs" and not to "attorney's fees" or "legal fees", then the rules did not clearly require the reimbursement of attorney's fees and the CCOC will not award them. However, effective February 4, 2014, the County Council revoked this **authority to award fees when the association's documents required them. [Section 10B- 13(d) (last paragraph), Greencastle Lakes Community Association v. Kelley - #87-06.]**

When the association's rule only required reimbursement for attorneys fees awarded by a court and the association had sued the member in court and entered into a consent judgment that did not require the payment of attorneys fees, the CCOC cannot award them because they are not "required" under the terms of the rule. [Hamilton v. 7611 Maple Avenue Cooperative, Inc. - #314]

The CCOC can only award reimbursement of attorney fees incurred in the CCOC proceeding, and not for fees incurred in the courts. [Potowmack Preserve, Inc. v. Ball - #73- 12]

The CCOC must and will decide what is a reasonable attorney's fee, considering the type of case before it and the difficulty of the case and the work involved. [15-11, Greencastle Lakes Community Association v. Baker - #88-06, Cunningham & Fisher v. Decoverly I HOA - #31-06, Greencastle Lakes Community Association v. Davis - #11-06, Greencastle Lakes Community Association v. Muller - #829, Vartan v. Oak Springs Townhouse Association - #733, Flickinger v. Parker Farms Condominium Owners Assn. - #598, Inverness Forest Association v. Notter - #453]

[Staff Note: The Maryland Court of Appeals has ruled that in association legal actions to collect assessments from members in default, the courts must award reasonable attorneys fees using the guidelines of the code of ethics. Courts may not use rules that set flat rates, such as 15%, but must consider a variety of factors, including the value of the work performed, the amount of time spent on the case by the lawyer, etc. *Monmouth Meadows HOA v. Hamilton,* 416 Md. 325 (2010). Although this is a debt collection case, the principle was based on the law of contract and, therefore, might apply to other types of cases as well, including HOA actions to enforce architectural rules. The CCOC applied the *Monmouth Meadows* decision in an architectural dispute in #15-11.]

A party is not ordinarily entitled to an award of attorney's fees by the CCOC unless that party prevails at a hearing. [Schott v. Summer Village Condominium Two, Inc. #250] When a dispute has been resolved before there has been a hearing, the matter is moot, and there is no "prevailing party;" therefore the panel cannot order an award of attorneys fees. [Meldrum & Kastner v. Americana Finnmark Condominium Ass. - #690]

When a homeowner disagrees with an HOA decision requiring him to replace shutters he removed without approval, and the HOA's answer not only defends the HOA's decision but asks for an order from the CCOC that the homeowner replace the shutters, and the HOA then prevails at the hearing, the hearing panel can require the homeowner to reimburse the HOA for its attorneys fees because the rules of the association state that if the HOA must sue to enforce its rules, the homeowner must pay its legal fees for doing so. In this situation, the HOA's defense was essentially a claim to enforce its rules. [Decker v. Kingsview Village HOA – #19-11]

After the conclusion of an unsuccessful, mandated mediation process, the Panel determined that the Complainant's case was frivolous and or demonstrative of bad faith, as she had been repeatedly informed that the CCOC does not have the authority to substitute its judgment for that of the board of directors of the Association. Accordingly, pursuant to Section 10B-13(d)(l) of the Montgomery

County Code, the Panel could award the association its reasonable attorney's fees expended for the preparation for the hearing, after mediation. [Bian v. Arora Hills HOA– #34-17]

By failing to accept a reasonable offer of settlement that actually exceeded damages which could be verified by stipulation or evidence, or which are within the Commission's authority to grant, Complainant unreasonably delayed or hindered the dispute resolution process without good cause. By declining the offer of compensation made by the Respondent, the Complainant maintained a frivolous dispute ... or substantially delayed or hindered the dispute resolution process without good cause (*see* Section 10B-13(d) Montgomery County, Maryland Code). This finding permits the award of certain attorney's fees. *See* Soliman v. Madison Park Condominium, CCOC #12-09 (2010), affirmed, Civ. No. #329202V (Circuit Court of Montgomery County (2010), holding that by refusing an offer of settlement which was significantly greater than that which the evidence was likely to support, the Complainant substantially delayed the dispute resolution process and pursued a frivolous complaint. [Ozkanian v. Walnut Grove Condominium Association,
- #22-15]

When the homeowner failed to appear at the hearing before the panel, the Association proceeded to put forth evidence of its case. Complainant's President testified under oath that counsel 's proffer was factually accurate, that the maintenance deficiencies she identified continued to exist, and that those deficiencies violated Complainant' s governing documents. Complainant also submitted an attorneys' fee affidavit. The Panel unanimously entered a default against the owner. When the homeowner appeared after the decision was rendered, he was advised of the ruling and referred to the CCOC for further instruction. [Greencastle Lakes Community Association v. Nwadike & Nwagu - #73-14]

Motions for Summary Judgment

The Panel has authority to rule on motions for summary judgment. Mont. Cnty. Code § 2A-7(c). Borrowing from judicial rules and precedent, the Panel will grant a motion for summary judgment "if the motion and response show that there is no genuine dispute as to any material fact and the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-50l(f). The factual record is reviewed in the light most favorable to the non-moving party and any reasonable inferences are drawn in favor of the non-moving party. Rowhouses, Inc. v. Smith, 446 Md. 611,631, 133 A.3d 1054, 1066 (2016). Summary judgment is not a substitute for trial, because it does not provide the proper opportunity for the fact finder to give credence to certain facts and to refuse to credit others. Hines v. French, 157 Md. App. 536, 565, 852 A.2d 1047, 1063 (2004). [2018-60]

6. Reconsideration and Appeal

Commission decisions are final and binding unless reversed on appeal to the Circuit Court. The appeal must be filed, at the cost of the person filing it, within thirty (30) days after the date of the decision. [Section 2A-11; Rules for Appeals from Administrative Agencies Rules 7- 201 to 7-211.]

A party who wishes the CCOC to reconsider its rejection of jurisdiction must file its motion for reconsideration within thirty (30) days. A party that wishes the CCOC hearing panel to reconsider its decision on the merits, must file that motion within ten (10) days; thereafter, the motion for reconsideration must prove fraud or a change in circumstances or law. A motion for reconsideration under this section suspends the running of the thirty (30) days to appeal until the CCOC can rule on

the motion. [Section 2A-11(f)]

A party that would like the CCOC to reconsider a decision of the entire CCOC dismissing a case must file its motion within thirty (30) days. [Section 10B-11(b)]

There is no authority under the law that allows a party to file a motion for reconsideration of a decision denying a previous motion for reconsideration. The panel will dismiss such a motion without consideration of its contents. [35-11 Reconsideration Dismissal]

The grant or denial of a motion for reconsideration is a matter within the Panel's discretion. *See* Morton v. Schlotzhauer, 449 Md. 217, Goosh-Mosches v. Grosvenor Park Homeowners Association, Inc. and Grosvenor Park II Condominium Association #231 (2016). [Youssef v. Cloverleaf Center Condominium - #05-17]

In the absence of any new factual or legal assertions (*see* Causion v. State, 209 Md.App. 391, 402 (2013)), such a motion will be denied. [Youssef v. Cloverleaf Center Condominium - #05-17]

7. Dismissals

The CCOC may dismiss a unit owner's complaint concerning a condominium association's liability for repairs to the unit if the owner refuses or fails to allow the association access to the unit for the purpose of verifying the damages. [Boone v. Seneca Knolls Condominium Assn. - #81-06]

The CCOC may dismiss unit owners' complaints for their refusal or failure to obey the hearing panel's order to answer the association's discovery requests. [Section 2A-8(j]

The CCOC may dismiss a complaint if the complaining party fails to follow the CCOC's rules. [Wu v. Morningside HOA - #559]

The complaining party's failure to prosecute its case may result in the case being dismissed. [Wu v. Morningside HOA - #559]

8. Default Orders and Default Judgments

[Staff comment: The CCOC can issue judgments by default against a party who fails to answer a complaint; it can enter such a judgment on the basis of the evidence filed with the complaint, and need not hold a hearing. Such judgments will be final and binding if not appealed. The procedures are described in the CCOC's *Default Judgment Procedures.* Although a party is free to request an order of default simply because the other party has not filed its answer within the thirty (30) days required by law, the CCOC will typically not grant the request if the answer is filed by the time the CCOC can consider and rule upon the request. The rationale for this is that under the *Procedures,* an order of default includes an order to the other party to show cause why it did not file its answer on time, and to show also that it has a defense to the complaint. Therefore, if the other party has already filed its answer, albeit late, by the time the CCOC can review the matter, it has already done what the default order would require it to do. Giving the other party an additional thirty (30) days to produce its defense, when it has already done so, would only cause more delay.

If, however, the other party has not answered the complaint, the CCOC will usually agree to issue the order of default, provided it is convinced that it has jurisdiction over the complaint. If it does so, it will also appoint a hearing panel to supervise any further proceedings. If the other party fails to show cause and produce its defense, the hearing panel will review the complaint and its supporting documentation, and will issue a judgment and an order against the defaulting party. If the party does not comply with the panel's order, the CCOC staff can then enforce the order in the District Court and seek fines and an order of abatement. In an enforcement action is brought in the District Court, the only issues before the judge will be: 1) did the defaulting party get a copy of the CCOC judgment, and 2) has that party satisfied the judgment? The defaulting party does not have the right to attempt to re-litigate the case or argue with the CCOC's decision.]

The CCOC will not issue an order of default simply because a party files its answer late. Defaults are not to be utilized as punishments for technical violations of the rules. [Henry v. Bel Pre Recreational Association - #40-09]

The CCOC will not issue a default judgment when the facts show that the violations listed in the complaint have been removed, even if other violations exist which were not identified in the complaint. For the panel to consider those other violations, the record must show that the HOA provided notice of those violations, an opportunity for a hearing, and that it notified the homeowner of its decision and of the right to appeal to the CCOC. [Stonebridge HOA v. Deck 60-07]

The CCOC will not issue a default judgment if the panel finds that the conduct complained of did not violate the terms of the rule being cited. In this case, the rule prohibited the accumulation of trash on the lot. The evidence showed that the items in question were household items and play equipment in good condition, and they therefore could not be considered trash. [Churchill East Village Community Association v. Tobias Awasum - #691]

The CCOC will not issue a default judgment if the panel finds that the association failed to follow its own rules in the process of taking action against the homeowner. Here, the association delegated too much authority to its property manager and imposed penalties in excess of the time limits allowed by its governing documents. In such a case, the panel will deny the default judgment and order the association to comply with its own rules. [Greencastle Lakes Community Association v. Copeland 50-07]

The CCOC will not issue a default judgment requiring a lot owner to remove a shed, when the facts show that the HOA never sent a violation notice to the owner regarding the shed, and the notice of the board's decision also did not identify the shed as a violation. This constitutes a lack of due process and a failure to follow the HOA's own rules. The CCOC will only grant judgment as to the 3 items about which the HOA properly gave notice. [Cloverleaf Townhome Condominium Assn. v. Patel - #68-10]

If a party is ordered to show cause why a final judgment should not be issued against it for failure to answer the complaint in time, the party must demonstrate why it did not answer the complaint in a timely manner and must also show that it has a defense to the complaint. It is not enough to raise counterclaims against the complainant. The respondent must show a defense on the merits. [Plymouth Woods Condominium Association v. Sayer - #01-11]

When the respondent is accused of accumulating trash and debris in her unit and is ordered to show cause why a final judgment should not be entered against her, it is not enough for her to make

counter-claims against the complainant. She must defend herself against the allegations that her unit is full of trash and debris. In this case, she failed to do so. Therefore, the panel entered judgment against her, and ordered her to clean the unit to the satisfaction of the housing code inspector. [Plymouth Woods Condominium Association v. Sayer - #01-11]

9. Mootness

A dispute over the reasonableness of an association's fees for inspection of records is moot when the association provides the requested records at no charge. [Huynh, al., v. Falls Farm Homes Corp. 48-14 to 51-14]

When the evidence showed that two years earlier the Condominium had failed to provide the required thirty (30) days' advance notice of its proposed budget, but had given proper notice of its current budget, there was no remedy the CCOC could order to correct the error, since the association had complied with its own rule. The matter was moot. [Pereira v. Park Terrace Condominium - #335]

When the association provided the records it had been withholding after the complainant filed her complaint for access to the records, the complaint is moot and will be dismissed. [Glenn v. Park Bradford Condominium 29-11] , Zanoff v. Rock Creek Commons Condominium - #169]

When, before a hearing is held, an association grants the complaining party the relief he has requested, the dispute is moot, and the panel cannot order a refund of the filing fees. [Lakomiec v. Greenfields at Brandermill Condominium - #361, Meldrum & Kastner v. Americana Finnmark Condominium Ass. - #690]

When a member complains about the association's failure to enforce its rules and the association shows it has issued violation notices, and obtained either voluntary compliance or took enforcement action, the complaint is moot and will be dismissed. [Ehrlich v. Sweepstakes HOA - #08-12]

When the homeowner removes the play equipment that is the subject of the dispute, the dispute becomes moot and there is no need to hold a hearing on whether the play equipment constitutes a violation of the governing documents. [McDonald v. Briars Acres Community Association - #64-10]

10. Exhaustion of Remedies

Both Chapter 10B and the CCOC in a policy statement require that the complainant follow whatever procedures the association might have for dealing with complaints and violations before filing a complaint with the CCOC.

Complainants are not required to follow an HOA's specific complaint procedures when the HOA had not filed those procedures in the HOA Depository until after the complaints were filed. [Huynh, al., v. Falls Farm Homes Corp. 48-14 to 51-14]

When a party fails to show that the association took any other action against him beyond issuing a violation notice or warning, and that he failed to request a hearing with the Board of the association on the notice, then he failed to exhaust his association remedies and the hearing panel will not intervene in the dispute. [Glenn v. Park Bradford Condominium 29-11]

III. THE STANDARDS OF REVIEW USED BY THE COMMISSION

[Staff comment: CCOC hearing panels seldom substitute their own opinions on how an association should be run or what it should look like. Instead, CCOC panels generally (1) review the decision of the association, or of its board of directors, to verify that the decision was within the authority given to the association, or its board, by the governing documents, (2) that the association and its board complied with the governing documents in making the decision in question, and (3) that the decision was not an arbitrary or unjustified one, but rather based upon some sort of factual or reasonable basis.

The CCOC applies different standards to this review depending upon the issue to be considered.

A. The "Reasonableness" Test

When the governing body makes a decision that restricts a member's right to use his own property, or when the governing body decides to take some action that penalizes the member, the CCOC will apply the "reasonableness" rule, as identified in *Kirkley v. Seipelt* (see Appendix B, below).

Under this standard, the governing body's decision will be upheld if the governing body can produce a good reason for it and the decision is otherwise made in compliance with applicable laws and governing documents. Under this standard, the governing body has the burden of proving the existence of good cause. If it can do so, the CCOC will generally uphold it, even though there might be other reasonable arguments in favor of different decisions.

When, however, the issue is one of the correctness of the board's decision on a matter affecting the association as a whole, rather than an action directed at a specific member only, the standard is the "business judgment rule." Under this rule, the association's decision is *presumed to be valid.* Therefore, the person challenging the decision must allege, and support with evidence, that the board or the association acted fraudulently or in bad faith, or that the association failed to comply with its own rules in the process of making the decision. This is a very high standard for a challenger to meet.

Some disputes can involve the application of *both* the "reasonableness" rule and the "business judgment" rule, depending on the specific issues to be resolved. For example, a case involving the denial of an architectural application will be governed overall by the "reasonableness" rule, but a dispute in that case over the adoption or the meaning and interpretation of specific architectural regulations may be governed by the "business judgment" rule.

(For more information on these rules, see Appendix A.)

[Staff comment: The business judgment rule is also written into Chapter 10B. Section 10B-8(5)(E) states that the Commission does not have jurisdiction over claims that "only" involve the exercise of the board's discretion in taking or refusing to take any legally-authorized action. Therefore, any person raising a claim about the board's decisions in general association management must allege and document that the board acted in violation of the rules or law, or fraudulently or in bad faith. However, the Commission believes that this section applies only to "business judgments" and it has not interpreted this section to apply to disputes involving association action to enforce rules against members or residents. The Commission believes that such disputes are governed by the "reasonableness rule." The Commission's reasoning rests on the use of the word "only." In a situation

in which the "reasonableness rule" applies, the board must not only have the right of discretion, but it must have a reasonable foundation for how it decides.

In addition, a form of the business judgment rule is incorporated into Section 10B-8(4)(B)(viii), which states that the Commission has authority over an association's failure to "exercise its judgment in good faith concerning the enforcement of the association documents against any person who is subject to those documents." Thus, when a member wants his association to take action against another member or resident, he or she must demonstrate that the association's refusal to take action was made in bad faith. It is not enough to show that the other member or resident violated some association rule, or that the board was wrong in deciding whether there was a violation. However, if a member complains about a board's failure to make a decision—for example, its failure to respond in any way to the member's complaint to the board about another member's rule violation—then this section does give the Commission jurisdiction to accept the case.]

Decisions:

The panel will not order a homeowner to remove the imitation cedar shake roof that he installed without permission from the HOA, when there was no evidence to support that the new roof was more of a fire hazard or more dangerous in any way than the roofs made of natural cedar shakes, and especially when there was no visible difference between the installed synthetic roof, and the brand of synthetic roof that the HOA had formally approved. The board's decision to require the homeowner to remove the synthetic roof and replace it with another synthetic roof, visually indistinguishable but having a higher fire-resistant rating, was unreasonable. [Inverness Forest Association v. Salamanca - #17-08 II]

A board's decision to refuse to allow a member to install her air conditioning unit in the common elements of the condominium is reasonable when the evidence demonstrates that (1) the member can purchase a new unit that will fit into the same utility closet that her old air conditioning unit fit, (2) when the board also considered that allowing air conditioning units in the common elements would create more noise for the ground floor units that they would be next to, and (3) the effect that running Freon lines up the exterior walls of the building would have on the appearance of the community. [Verchinski v. Plymouth Woods Condominium Assn. - #57-10]

An HOA can require a member to remove roll-down shutters that he installed on his new, approved deck in order to screen the patio below the deck. He had no approval for the installation shutters from the HOA, and the shutters negatively affected the appearance of the community. The board's decision was a reasonable one. The fact that he had County approval for the work did not mean he did not also have to comply with the HOA's own rules. [Rose Hill Falls Community Assn. v. Phillips - #76-10]

A board's decision to fine a member for damaging the association's trees cannot be upheld if at the CCOC hearing the board cannot produce any evidence to support its decision. Board decisions penalizing members are governed by the "reasonableness" rule and the burden is on the board to prove the reasonableness of its decision, including the facts on which it relied, and this is true even if the member did not attend the board hearing to defend himself. [Simons v. Fair Hill Farm HOA - #66-09]

Restrictions or decisions by associations that are proven to be whimsical, capricious or unreasonable will not be upheld. [Fishbein v. Avenel Community Association - #744, Potomac Mill Farm HOA v.

Dinh - #633, Chan v. Hadley Farms Community Association - #446, Berger v. Fox Hills North Community Association - #359]

It is for the board, not the CCOC, to evaluate claims that a proposed architectural change should be granted because it may be safer than other alternatives. [Blackburn Village HOA v. Saunders - #06-06, Inverness Forest Association v. Notter - #453]

B. The "Business Judgment" Rule

[Staff comments: The "business judgment" rule is a doctrine developed by the courts which has since been made part of many relevant statutes, including Chapter 10B. Under this rule, courts and the CCOC must give greater deference to board decisions than is required by the "reasonableness" rule (see above). The CCOC has no jurisdiction over a board decision if it finds that the decision is protected by the business judgment rule. [Section 10B-8(5)(E)]

The "business judgment" rule has two *different* meanings. The first meaning is that board members cannot be held individually or personally liable for the decisions they make as board members, so long as they act in good faith. This is true even if the board members make mistakes or are found to have violated some rule of the association. In fact, Maryland law states that board members are not individually liable when they act as members of the board. [Courts & Judicial Proceedings Article, Section 5-417; Corporations & Associations Article, Section 2-405.1] In a nutshell, under this meaning of the "business judgment' rule, members of the board have "the right to be wrong." The rule may be essential, because the board members of associations are volunteers, and if they are subject to being personally liable for every action they take and to defend themselves at their own cost, it may become impossible to get anyone to volunteer to take the risk of serving on a board.

The second meaning of the rule is that a court will generally uphold the business and operational decisions of a board if those decisions are made in good faith *and in compliance with the community association's governing documents and the law,* provided that the board has a *factual* basis for its decision. This doctrine applies to such board decisions as: the interpretation of the association's own governing documents and rules; the adoption of rules within its authority; the hiring and firing of employees and managers; the timing and details of repairs; the determination of how to enforce, or not to enforce, a rule against a member; the decision not to take an action; increasing assessments; and the spending of association funds.

The difference between the two types of business judgment rules is the following: board *members* are protected from individual liability for their errors so long as they act in good faith, even if they violated some law or association rule; whereas, in contrast, *board decisions* can be reversed if they are made in violation of some rule or law, or don't have a factual basis, *even if* they are made in good faith.

Under the "reasonableness" rule, the burden is on the board to prove a reasonable basis for its decision. In contrast, under the "business judgment" rule, the burden is on the challenging party to show that the board acted in bad faith, did not have a factual basis for its decision, or that it violated some association document or law. As defined by the courts, "bad faith" includes a conflict of interest or fraud.

***See* CCOC *Baroni v. Avenel Community Association*, #55-11 (now on appeal) and *Prue v. Manor Spring HOA* #39-09] for the best recent overall discussion and application of the "business judgment."**

Decisions:

An HOA decision on permitted roof shingle types is not protected by the business judgment rule when the board does not have the legal right to make such a decision. For example, the hoard cannot violate County law, nor can it adopt requirements that are in conflict with its own governing documents, or which are not authorized by its governing documents. [Baroni v. Avenel Community Association - #55-11] [Editor's note: this decision is on appeal.]

The board has the discretion to reimburse a director for money he spent on behalf of the association that the board did not authorize in advance, however, it is bad practice for directors to attempt to spend association funds without prior approval from the board. [Huynh, al., v. Falls Farm Homes Corp. 48-14 to 51-14]

The board cannot adopt penalties for nonpayment of assessments when the right to impose those penalties has not been granted to it by the governing documents. [Stalbaum v. Ashley Place at Tanglewood HOA - #26-14]

The board has the discretion to hire an attorney to draft revisions of its bylaws. [Huynh, al., v. Falls Farm Homes Corp. 48-14 to 51-14]

The board of directors has the discretion to decide what should be included in the minutes of its meetings, which must include a record of its decisions, but it need not include all comments, debates, or discussions relevant to those decisions. [McBeth v. Fountain Hills Community Association #52-12] [Muse v. Fountain Hills Community Association 67-12]

The board of an association, acting through its president, has no authority to adjourn an annual election meeting because this requires a motion and a vote of the association members present. [Decoverly I HOA, Tanouye v. - #19-12]

The board of directors of an association does not have the legal authority to adopt an unwritten policy that effectively prohibits the rentals of part of a home or of separate apartments in the homes when the declaration of covenants allows such rentals. [Syed v. Llewellyn Fields HOA - #24-12]

The board of directors of an association cannot prohibit a townhome owner from installing a split rail fence behind his home when the declaration of covenants declared without limitation that any styles used by the developer were permitted fence styles, and the developer installed split rail fences elsewhere in the community. [Bejo v. Olde Potomac Park CA - #41-11]

The board's conduct is not entitled to the protection of the business judgment rule when the board cannot show it ever considered the issue at one of its meetings and made a decision on that issue. The business judgment rule only protects associations that make judgments, instead of avoiding them. [Bodmer v. Potomac Meadows HOA - #69-10]

A board's decision not to enforce a covenant or bylaw against a member of the association is protected by the business judgment rule. [Bodmer v. Potomac Meadows HOA - #69-10, Killea v. Cabin John Gardens, Inc. – #88-10/ McNulty v. Cabin John Gardens, Inc. - #24-11, Prue v. Manor Spring HOA - #39-09]

A condominium board's decision to spend over $25,000 on a study to evaluate the feasibility of adding a central heating and air conditioning system to a building which does not currently have such a system was improper because it was authorized in violation of a rule which stated that any expenditure of $25,000 on additions and improvements to the common elements must be approved by a majority vote of all the members. [Glenn v. Park Bradford Condominium 29-11]

Although the Complainants agree that the fire alarm system replacement (except for the pilasters) qualifies as maintenance, repair or replacement under the Association's governing documents, in addition to the pilaster design feature, which fulfills a necessary functional purpose, the new fire alarm system is of a different design than the current one and is upgraded to meet code requirements that have changed over the 50 years since the installation of the current system. Thus, it is appropriate to consider the new system an "addition, alteration or improvement" and it will cost more than $10,000.00. The association's bylaws require a majority vote of unit owners to approve such a project. [Dillin v. The Willoughby of Chevy Chase Condominium - #2018- 040/2018-061]

The board's decision to spend money to improve neighboring land which it does not own is outside its authority and not protected by the business judgment rule. The governing documents allow the board to spend association funds only on the property belonging to the association and do not give it authority to spend funds for maintenance or improvements to property it does not own. The association must refund the funds improperly spent to its members. [Voorhees v. Decoverly I HOA - #05-11]

Before the CCOC can evaluate whether a board's decision setting different assessment levels for different types of housing in the HOA is covered by the "business judgment" rule the CCOC must first determine whether the board has the right to set different assessments under its governing documents. [O'Connell v. Greencastle Lakes Community Assn. - #55-09, Pomykala v. The Willoughby of Chevy Chase - #279]

The board does not have the right to adopt rules which conflict with its Declaration of Covenants or Bylaws. [Syed v. Llewellyn Fields HOA - #24-12, O'Connell v. Greencastle Lakes Community Assn. - #55-09, Pomykala v. The Willoughby of Chevy Chase - #279]

The Act contains detailed procedures that a condominium association must follow to adopt rules for the condominium. Section 11-111 of the Act requires the association to hold a public meeting to consider the rule, at which each unit owner must be allowed to comment. Further, at least 15 days prior to the meeting, the association must mail or deliver to each unit owner a copy of the rule along with a notice that unit owners are permitted to submit written comments and a notice of the proposed rule's effective date. The rule itself must state that it is being adopted under provisions of § 11-111 and the rule cannot be inconsistent with the association's declaration or bylaws. [Creitz v. Meadow Ridge Villas Condominium Association, Inc. - #73-16]

Decisions by the board which are outside the scope of its authority under the governing documents are null and void. [Perkins v. Rose Hill Falls HOA - #70-12, Syed v. Llewellyn Fields HOA - #24- 12, Bodmer v. Potomac Meadows HOA - #69-10, Willard v. Glenbrook Village HOA - #569]

When the Covenants grant equal access to the general common elements by both residential and commercial occupants, the board cannot deny or limit access for the commercial occupants. [Miller v. Manchester Farms Community Association, Inc. - #379]

A condominium board lacks the authority to require all of its members to install ground fault interrupter (GFI) outlets in their units even though their existing outlets are in good condition. Under the condominium documents the board can only regulate the interiors of the units for health or safety reasons, and the board failed to show any factual basis for its new rule. [Lieberman v. The Whitehall Condominium - #25-06]

A case can involve the application of both the "reasonableness" rule and the "business judgment" rule. The overall standard used to review the board's rejection of a member's application to construct a white deck with white trim is the "reasonableness" test, but the board's interpretation of its own rules was governed by the "business judgment" test. The panel must apply the interpretation chosen by the board, provided that it is a reasonable one, to help resolve the overall issue of the reasonableness of the board's final decision on the application. [Syed v. Gatestone HOA - #46-09]

Although the rule used by the board to reject an application to install white railings and white trellises on a deck could be interpreted either to require that the trim match the deck or that it match the house, so long as the interpretation applied by the board was a reasonable one, it should be upheld under the 'business judgment" rule. [Syed v. Gatestone HOA - #46-09]

A person who challenges a board decision as not being made in good faith, because of a conflict of interest by one of the board members who voted on it, must convincingly prove the existence of the conflict. Although the homeowner claimed that two board members had made a deal exchanging favorable votes for each other's architectural applications, no such deal was proven, and the board members involved had previously campaigned for office on the grounds that the board should not enforce the rules as strictly as it had been doing. Therefore, the votes could have been a matter of principle, not the result of a deal made in bad faith. [Zich v. Decoverly I HOA - #73-07]

The board's decision to modify or remove its own play equipment, or to close a play area located in the common areas, is protected by the "business judgment" rule. [Johnson v. Hallowell HOA - #46-06, Kaplan v. Stonebridge HOA - #549, Ramsay v. Bel Pre Recreational Association - #547]

When a member of the association complained to the CCOC about the association's decision to take no action against a fence and stairway that violated the association's rules, the evidence showed that the board had investigated her complaint and ordered the fence owner to change the fence, but had finally determined to take no further action. Although the CCOC found that the board had made mistakes in the process of ruling on the fence application, it upheld the board's final decision under the "business judgment" rule. [Kessel v. Kenwood Forest I Condominium - #506]

The board's selection of a manager is a "business judgment" which the CCOC cannot review unless it violates some law or governing document. [East v. Bel Pre Square HOA - #745]

A Board's decision to hire or terminate a property manager is protected by the business judgment rule. Mont. Cnty. Code § lOB-8(5) (excluding from the definition of "dispute" "the exercise of a governing body's judgment or discretion in taking or deciding not to take any legally authorized action"); *Reiner v. Ehrlich*, 212 Md. App. 142, 153 (2013) ("There is a presumption that directors of a corporation acted in good faith and in the best interest of the corporation"); *Black v. Fox Hills Community Ass'n, Inc*., 90 Md. App. 75, 81 (1992) (once a corporate body's decision ostensibly falls within the protection of this business judgment rule, a party attacking the decision must

show that the decision was not made in good faith, or that it was the product of fraud or arbitrariness). The rule is fully applicable to community associations such as the Association. Black v. Fox Hills; Reiner v. Ehrlich. Since the homeowner has not shown that the Board was acting in bad faith, fraudulently, or arbitrarily in maintaining its current property manager, the Panel is not in a position to second-guess the Board in this respect. [Yourshaw v. Waring Station HOA - #60-17]

The Panel is concerned that the decision of the Board to retain the services of the President's personal real estate attorney, even on an interim basis, could give rise to the perception of a conflict of interest or, worse, an actual conflict. It is difficult to imagine how the attorney would be able to convey independent and impartial advice (advice that might run contrary to the desires of the President), when both men are bound by a longstanding financial and personal relationship. It would be reasonable for the members of the Association to ask whether their interests are being fully and appropriately served by the potential that in rendering opinions, a thumb might weigh heavily on the scale in favor of a judgement that supports the President and, thus, would not be independent or impartial. [2018-60]

The board's adoption of a contract for the rental of certain equipment to install in its laundry room is a business judgment. [Davis v. Chevy Chase Crest Condominium Ass'n. - #06-12]

When trash rooms are limited common elements under the governing documents, the Condominium may not close them without the approval of a vote of the membership because, to do so, is to deny the members the right of access to a portion of the common elements, which, in turn, amounted to a change in their percentage of ownership of the total common elements. [Thogerson v. Grand Bel Manor Condominium, Inc. - #306]

The board has the right to install dumpsters in the parking lots, even though this reduces the number of parking spaces available; it is not inconsistent with the purpose of the common elements. [Thogerson v. Grand Bel Manor Condominium, Inc. - #306]

The board's decisions on trash collection policy are generally protected by the "business judgment" rule. [Parris v. Middle Village Homes Corporation - #147]

II. C. "No Deference" Rule

[Staff comment: Although the hearing panels have never said so explicitly, their decisions make clear that, although the panels will carefully consider the legal arguments of both parties, the panels will make their own interpretations regarding the law. In other words, the deference that the CCOC gives to a board's interpretation of its own *governing documents* will not be given to the board's interpretation of the *law*.]

IV. THE RIGHTS AND DUTIES OF ASSOCIATIONS AND THEIR MEMBERS

III. A. What Associations Are Regulated?

1. Chapter 10B

Chapter 10B applies to homeowner associations, condominium associations, and cooperative housing corporations, as those terms are defined by State law. [Section 10B-2(b)]

2. Maryland Condominium Act

If there is a conflict between an association document and the Condominium Act, the Act will govern, not the document. [Kessler v. Cloverleaf Center I Condominium - #68-08, Neufville v. Greenfield Commons Condominium - #497]

When the Condominium Act requires that all association documents be available for inspection by the members, but the association's bylaws state that voting is to be done by secret ballot, a member has the right to inspect all the ballots even if that means that some ballots, such as proxy ballots, might contain the names of the voters. There is no exception in the "open records" law for ballots, and the law takes priority over the documents, pursuant to Section 11-124. [Kessler v. Cloverleaf Center I Condominium - #68-08]

3. Maryland Homeowners Association Act (including HOA Depository) (No cases.)

4. Maryland Housing Cooperatives Act (No cases.)

5. Maryland Corporations and Associations Article (No cases.)

B. The Regulation of Architecture, Landscaping and Property Maintenance

1. General Issues of Regulation

(a) the authority of the Board

Homeowners are subject to the terms of the Declaration of Covenants as filed in the land records, regardless of whether or not they are provided a copy of these documents at the time they purchase the home. [Milne and Gammon v. Crawford Farms Townhouse Association, Inc. #151]

When there is a question regarding the meaning of a covenant running with the land, it ought to be interpreted as narrowly as possible, and in favor of freedom of use of private property. The CCOC will only enforce restrictions clearly stated in the existing governing documents and will not imply additional restrictions on the members. [Timberlawn South/Tuckerman Walk HOA v Szu-Tu & Bean #669]

The words "single family" have no clear meaning in the law and they are not limited to those related by blood or marriage but have been interpreted to include those unrelated people who live as a single housekeeping unit. If the declaration of covenants does not define those words more precisely, a board cannot interpret them to prevent a homeowner from renting his house to a group of college students. [*South Kaywood v. Long*, Appendix B]

Restrictions on the use of private property are not favored, and if the restriction is vague or ambiguous, it will be interpreted against the party attempting to enforce it. [Chan v. Hadley Farms Community Association - #446] [Staff comment: this ruling may now be in conflict with more recent rulings applying the "business judgment" rule that uphold the board's right to make reasonable interpretations of vague rules, such as Syed v. Gatestone HOA - #46-09.]

The CCOC will not penalize a board for harmless error. [Lapkoff v. Camelback Village Condominium Assn. - #794]

The CCOC will not allow a board member to take advantage of a mistake that he knowingly and intentionally allowed his association to commit. [Kessler v. Leaman Farm HOA - #02-12]

Parties who complain about improperly-conducted meetings must prove their claims with details and evidence. [Johnson v. Hallowell HOA - #46-06, Turner v. Cherrywood HOA - #111]

Parties claiming that the board improperly denied requests or petitions for special meetings must prove that they followed the relevant rules for requesting or petitioning for such meetings. [Conradt v. Rock Creek Apt. Condominium II- #707]

The CCOC will not uphold board decisions made in meetings that were not properly closed. [Haddonfield HOA v. Tyra - #263]

As part of its duty to enforce the covenants concerning the appearance of homes and lots in the community, the board may take photographs of them, and this does not constitute an invasion of privacy. [Nazemi v. Bethesda Overlook Townhouse Condominium et al. -#501]

(b) architectural procedures: application, approval and denial, appeal

It is very common, if not universal, for associations to require their members to apply in advance for authorization to make a change to the appearance of their unit or home, and the CCOC routinely upholds such rules. [Potowmack Preserve, Inc. v. Ball - #73-12, Abdelkarim v. College Square Condominium - #73-13, Oak Grove HOA v. Ford - #72-06, Greencastle Lakes Community Association v. Muller - #829, Laytonia HOA v. Nejad - #323, Hamlet Station HOA, Inc. v. Barron - #303]

Association rules requiring written approval in advance to install temporary structures, to modify the exteriors of the homes, and to construct anything in the yards of the homes (including fences and pool enclosures) will normally be upheld and enforced by the CCOC. [2017-49, Greencastle Lakes Community Association v. Copeland - #01-15, Greencastle Lakes Community Association v. Awol - #36-14, Resnik v. Montgomery Village Foundation - #63-07, Greencastle Lakes Community Association v. Chan & Yau - #64-06, Castlegate Townhouse Association v Greenfield - #35-06, Masters v. Norbeck Grove Community Association - #30-06, Greencastle Lakes Community Association v. Muller - #829, McDowell v. Cloverleaf Center II Condominium - #763, Potowmack Preserve, Inc. v. Ball #720/33-06, Doral HOA v. Georgakopoulos - #505, Neelsville Estates Community Association v. Miller - #482, Inverness Forest Association v. Notter - #453, Longmead Crossing Community Services Association v. Bright - #430, Kensington Crossing HOA v. Case - #426, Laytonia HOA v. Malone - #341, Meyers v. Montgomery Village Foundation - #325, River's Edge HOA, Inc. v. Harding - #293, Cloisters HOA v. Solomon - #280, [Schott v. Summer Village Condominium Two, Inc. #250], Seneca Forest Community Association v. Meiselman - #249, Patel v. Hampton Estates HOA - #205]

The CCOC will uphold properly adopted architectural guidelines if they are enforced consistently and fairly. [Syed v. Gatestone HOA - #46-09, Beebe v. The Oranges HOA - #41-09, Greencastle Lakes Community Association v. Chan & Yau - #64-06, Masters v. Norbeck Grove Community Association - #30-06, Potowmack Preserve, Inc. v. Ball #720, Evnin v. Decoverly IV Condominium, Inc. - #586, Park Overlook HOA v. Barrick - #554]

The CCOC will not uphold a board's decision denying an architectural change if the board acted unreasonably or arbitrarily. [Potomac Mill Farm HOA v. Dinh - #633]

The CCOC will reverse a board's decision on a rule violation dispute if the board did not properly interpret the rule in question. [Perkins v. Rose Hill Falls HOA - #70-12]

However, the failure of the board to state a reason for its denial of an application does not mean the application is automatically approved. [Kessler v. Leaman Farm HOA - #02-12]

Failure to record architectural rules in the HOA Depository renders the rules unenforceable until they are properly filed. [Potomac Mill Farm HOA v. Dinh - #633] However, an HOA may enforce architectural rules written into its Declaration of Covenants, because the Covenants are filed in the land records and need not also be filed in the HOA Depository in order to be enforceable. [Doral HOA v. Akhigbe - #36-07, Crabill v. Manchester Farm Community Association - #78-07]

Unless the governing documents clearly provide otherwise, an HOA has no authority to regulate the interior appearance of a house. [Fizyta v. Quince Haven HOA - #473]

When the HOA's rules state that architectural applications are deemed approved if the HOA fails to act on them within some fixed time limit (*e.g.*, 60 days after they are received), then the CCOC will dismiss HOA complaints seeking to reject an architectural change if the HOA failed to act on the application within the time allowed. [Potomac Grove HOA v. Finizio - #342] However, when the board denies an application within that 60-day deadline but fails to state a reason for its denial, that does not mean the application is automatically approved. The penalty on the association, if any, will depend on the facts of the case. [Kessler v. Leaman Farm HOA - #02-12]

Approval for changes given by a developer under one set of rules may become invalid if the developer transfers control of the association to the membership, and the membership changes the architectural rules, before the homeowner begins construction. [Milne and Gammon v. Crawford Farms Townhouse Association, Inc. #151]

Where the governing documents call for an architectural review committee, but there is no such committee, the board of directors may act as the committee. [Castlegate Townhouse Association v Greenfield - #35-06]

Boards must provide due process when imposing a penalty on a member, the member must be given a chance to speak in his defense, and if the board imposes penalties without offering a hearing, the CCOC will not uphold the board. [Lee v. Green Hills Farm HOA - #624]

The CCOC cannot uphold a board's decision to find a member in violation of the rules if the board does not present evidence to support its decision. [66-06]

Condominium associations must provide the dispute resolution procedure outlined in Section 11-113 of the Condominium Act.

Associations may not file complaints against their members without first using the dispute resolution procedures contained in their own documents; if no such procedure is specified, CCOC rules require they first provide notice of the violation and the opportunity for a hearing with the board. [CCOC

Policy on Exhaustion of Remedies]

https://montgomerycountymd.gov/DHCA/housing/commonownership/policyonexhaustionofremedies.html

Homeowners must follow the procedures outlined in their association documents, such as requesting and attending a hearing by their board of directors on their architectural applications, before filing a complaint with the CCOC challenging the denial of their application. [Section 10B-9, Willard v. Glenbrook Village HOA - #569, Laytonia HOA v. Nejad - #323]

If a homeowner builds something different from what he applied and obtained approval for, and if the changes do not meet the community's architectural standards, the CCOC will uphold the standards and require the homeowner to comply with them and make the necessary alterations. [Lake Hallowell HOA v. McLister - #166]

A homeowner who obtains approval for an application, but then makes changes and does not build according to the approved application, he or she may be compelled to submit a new application for the structure as finally built and to comply with the association's ruling on the revised application. [Greencastle Lakes Community Association v. Chan & Yau - #64-06]

When a homeowner replaced an existing picket fence with a similar picket fence in the same location, she was not required under the association's rules to file an application for approval because she was not making any changes to the lot or its appearance. [1st Aquarius Homes v. Rossiter - #13-09]

The board does not need to comply with the architectural rules when making changes to the common areas; board decisions concerning the use and appearance of the common areas are protected by the "business judgment" rule. [44-06]

Approval of an architectural application given by a person who does not have the authority under the rules to approve a change by himself, does not constitute proper approval and the homeowner has no right to rely on it. [Decoverly I HOA v. Kidd and Jens - #69-06]

When the homeowner proves he had approval for a fence, the HOA waived its rights to take action against the fence once it was constructed, even though the fence violated the architectural rules. The homeowner relied to his detriment on the approval by spending money to build the fence and landscape it. However, the waiver applied only to that owner and lot, and the HOA did not waive its rights regarding other lots. [Milne and Gammon v. Crawford Farms Townhouse Association, Inc. #151]

When the homeowner submits an application that is unclear or capable of more than one interpretation, any ambiguity will be interpreted against the person who wrote it - in this particular case, the homeowner. [Black v. Dumont Oaks Community Assn. - #74-09]

When the homeowner's application requested permission to replace the "green siding/shutters," the HOA reasonably interpreted this to mean he would replace the green siding on all 4 sides of the house. Based on this understanding, the HOA approved the application. The homeowner's argument that he intended to replace only the siding on the front and sides of the house, since only the front of the house had been damaged in a storm, was rejected on the grounds that he knew what his intentions were and was in the best position to make them clear in his application.

The HOA's interpretation of his application was a reasonable one. [Black v. Dumont Oaks Community Assn. - #74-09]

A request by the HOA for additional information concerning an architectural application will not be treated as the equivalent of a formal request by the homeowner to make a change and, therefore, the rules setting deadlines by which the HOA must act on an application are irrelevant. [Lake Hallowell HOA v. McLister - #166]

When the governing documents declare that "landscaping modifications" may be performed without HOA approval, that includes the planting of trees along the owner's property line. Foo v. Dellabrooke HOA [58-09]

An association's governing documents cannot address every conceivable architectural issue. An association must be free to fill in the gaps, so long as it acts reasonably in doing so. *See* Kirkley v. Seipelt, 128 A.2d 430 (Md. 1957) (homeowner enjoined from installing heavy metal awnings, although restrictive covenants did not expressly address awnings). [Greencastle Lakes Community Association v. Awol - #36-14]

(c) oral approval

A member who claims oral approval for a change must prove the existence of the approval. Foo v. Dellabrooke HOA [58-09], Meyers v. Montgomery Village Foundation - #325, Greenfield Station HOA, Inc. v. Mehta - #203, Hunting Woods HOA v. Marhamati - #154]

When a homeowner submits a written application listing two alternative plans for construction, received written permission for one plan, then applies for permission to implement the alternative plan and receives oral approval for it, the later attempt by the board to find the member in violation will not be upheld, especially when the evidence not only showed oral approval in this case but the additional fact that the board did not consistently comply with its own rules requiring written approval in other applications. [Potomac Mill Farm HOA v. Dinh - #633]

(d) interiors

Unless otherwise permitted by the governing documents, an HOA cannot regulate the interior of a home. [Baroni v. Avenel Community Association - #55-11, Fizyta v. Quince Haven HOA - #473]

(e) application of County Housing Code

[<u>Staff comment:</u> defects in the common areas that affect health or safety can often be remedied quickly by filing a complaint with the County's (or with the City of Rockville's) Housing Code Enforcement Office. The Housing Code applies to all residential housing. Similarly, homeowners or tenants who create unsafe or unsanitary conditions on their lots or units are also subject to investigation and enforcement actions by that Office.]

<u>https://www.montgomerycountymd.gov/DHCA/community/code/index.html</u>

https://www.rockvillemd.gov/FormCenter/Code-Enforcement-10/Code-Violation-Report- 92

(f) disability and medical necessity

HOAs must make reasonable accommodations for residents with disabilities, but this does not mean that such residents are entitled to make any change they wish; the HOA can investigate and permit alternatives that are responsive to the needs of the resident but which preserve the overall architectural harmony and appearance of the neighborhood as much as possible. [Voloshen v. Sligo Station Condominium - #30-11, Grinkrug v. Inverness Forest Association, Inc. - #561, Flores v. Highlands of Olney Condominium - #553]

The board has the right to decide what constitutes a reasonable accommodation for a handicapped resident who requires a special parking space. The board is not required to give the resident the specific location and features she desires if it has good reason for its alternative. [Voloshen v. Sligo Station Condominium - #30-11]

The board is not required to make reasonable accommodations for a member who claims she is extremely sensitive to mosquito bites. Such a condition does not amount to an impairment of a life function under Federal laws. [Decoverly I HOA v. Kim-#56-11]

An HOA may enforce its rules prohibiting window air conditioners even against a member who claims he needs one for medical reasons (to relieve allergies); other alternatives are readily available, such as indoor air conditioning units, that would not be as obvious a change in the exterior appearance of the home. [Olde Potomac Park Community Association v. Oppenheim - #518]

Unit owners cannot claim the right to keep washing machines prohibited by the association's rules on the grounds that it is too difficult for them to carry their laundry up and down the stairs when the association has offered to provide someone to carry the laundry for them. [Halaby & Abboud v. Glen Waye Gardens Condo. - #679/685]

(g) failure to enforce rules

The board of directors has a fiduciary duty to enforce the association's rules, but that does not mean it must strictly enforce every rule in every case. The association documents give the board discretion on how to enforce the rules. However, the continued failure or refusal to enforce rules can eventually lead to a finding that the association has abandoned or waived its covenants. [Ramsey v. Bel Pre Recreational Association, Inc. - #369]

When an association approved a member's plans for a new deck, and he built the deck following the approved plans, the association cannot thereafter force him to change the deck, nor can it alter the deck without his approval, until such time as he sells the house. [Koppel v. College Square Condominium Assn. - #53-13]

When a member cannot show that he ever applied for, and received, approval for a deck, the association can require him to alter it, or can enter on the property to alter it at the owner's cost. [Abdelkarim v. College Square Condominium - #73-13]

(h) fines and other penalties

An HOA that fails to follow its own rules on how it can charge fines cannot properly impose a fine. [23-13]

Fines are arbitrary and unreasonable when the HOA failed to report in its minutes why they were imposed, how it determined the amount to charge, and why it stopped charging them. Furthermore, the fines were unnecessary because, at all times, the member was trying in good faith to comply with the board's orders, and the board failed to provide evidence that justified imposing the fines during the time the member had requested permission for additional time to complete the repairs. [23-13]

The right to impose a fine does not, by itself, justify the fines actually imposed. [Parkside Condominium v. Lopez-Cayzedo - #12-13]

A condominium has the right to impose fines under the Condominium Act and because its bylaws grant the power. [Parkside Condominium v. Lopez-Cayzedo - #12-13]

Although the condominium had the right to impose fines, and followed its own rules in doing so, the full amount of the fines it was seeking ($3,737.00, or $5.00 per day for 747 days) was arbitrary and unreasonable. It was clear after six months of fines that the member would still not comply but the association simply began a new round of violation notices, hearings, and fines. The purpose of fines is to encourage compliance with the rules, and once it is clear that the fines are not accomplishing this purpose, it is unreasonable to continue them and the association to take other, more effective, legal measures to obtain compliance. The panel granted 6 months of fines ($900.00) and declared the rest invalid. [Parkside Condominium v. Lopez-Cayzedo - #12-13]

Condominium fines of $500.00were upheld when the association had adopted a schedule of fines based on the severity of the alleged violation, the maximum amount of fines was limited to $500.00, and thereafter the association filed a legal action with the CCOC to compel compliance. [Plymouth Woods Condominium Association v. Slyavash Nejadi and Alicia Torres # 10-12]

2. Defenses to claims of architectural violation

(a) lack of authority

A homeowner is subject to Covenants recorded in the land records, whether or not he is provided a copy of them when he buys the home. [Milne and Gammon v. Crawford Farms Townhouse Association, Inc. #151]

(b) Lack of filing in Depository

An HOA may not enforce architectural rules until it files them in the HOA Depository. [Potomac Mill Farm HOA v. Dinh - #633, Lee v. Green Hills Farm HOA - #624, Logan v. Montgomery Knolls Community Association - #502, Village of James Creek HOA v. Barry – #432, Haddonfield HOA v. Tyra - #263, Avenel Community Association v. Nayar - #220] However, an HOA may enforce architectural rules, even if they are not filed in the Depository, if they have been included in the HOA's Declaration of Covenants, because the Covenants are filed in the land records and need not also be filed in the Depository.

If a rule was not properly filed in the HOA Depository at the time the complaint was filed with the CCOC, but is filed in the Depository while the CCOC case is pending, it becomes enforceable by the CCOC once filed. [East v. Bel Pre Square HOA - #745]

Homeowners need not follow the complaint procedures adopted by the HOA before filing their complaints with the CCOC, when the HOA did not file those procedures with the HOA Depository until after the CCOC complaints were filed. [Huynh, al., v. Falls Farm Homes Corp. 48-14 to 51-14]

(c) improper procedures

If the association's own rules state that the decision of the architectural review committee is final, the board of directors may not overturn that decision. [Willard v. Glenbrook Village HOA - #569]

When the HOA's rules called for architectural matters to be decided by a 3- person committee, and there was only one person on the committee and that person was making all the decisions by himself, the committee's decision to hold the homeowner in violation was a violation of its own procedures. [Blackburn Village HOA v. Saunders - #06-06]

Although the governing documents call for an architectural committee to rule upon architectural change applications, the board of directors may act as the architectural committee unless prohibited by the governing documents. [Castlegate Townhouse Association v Greenfield - #35-06]

When an association amended its rules on privacy enclosures after having allowed several such enclosures to be built, and the amended rule permitted the existing enclosures to remain as long as they were maintained in good condition, the association could not prevent the owner of such an enclosure from rebuilding it at his own cost after the association destroyed it during a renovation project. [Schott v. Summer Village Condominium Two, Inc. #250]

Although the HOA failed to follow its own rules and to comply with County law on notifying a member of his right to appeal an adverse decision to the CCOC, the CCOC would hear the case anyway, because

there was no reason to believe that the HOA would change its decision if it had to start over again. [Schott v. Summer Village Condominium Two, Inc. #250]

Association efforts to enforce rules regulating doors and windows will not be upheld if the association failed to follow its own procedures and the rule was not enforceable because it had not yet been filed in the HOA Depository. [Haddonfield HOA v. Tyra - #263]

When an association fails to notify an applicant within the 60 days required by its own rules that it was rejecting her application, and she went ahead and made the changes after the 60 day period expired but before the HOA sent the notice of rejection, the HOA had no authority to reject her application and to hold her in violation, and the CCOC dismissed its claim. [Potomac Grove HOA v. Finizio - #342]

(d) abandonment and waiver

Although picket fences were prohibited by the rules, the HOA failed to notify the buyer of the home in its resale package that the lot contained a picket fence that violated the rules. The HOA took no action on the nonconforming fence for 10 years after the member bought the home, when the homeowner applied for permission to replace part of the fence due to the removal of a tree that was growing through it. The HOA approved the application without any warning that the picket fence was a violation. It was only after the member replaced the entire picket fence with a new picket fence in the same location that the HOA notified her of the violation. The CCOC held that the HOA had abandoned the picket fence rule as to that lot (but not as to other lots). [1st Aquarius Homes v. Rossiter - #13-09]

Even when there has been some inconsistent enforcement in the past, an association may be able to prevail in an enforcement action under any "no waiver" clause in its governing documents. Such a clause states that the failure to enforce a rule cannot be deemed a waiver of the rule. [Rapport v. North Lake Woods HOA - #268]

An HOA's delay of six (6) years in enforcement of a rule concerning trees does not render the rule waived or unenforceable. Foo v. Dellabrooke HOA [58-09]

A persistent non-enforcement of the covenants can result in the covenants being found to have been abandoned or waived. [Ramsey v. Bel Pre Recreational Association, Inc. - #369]

(e) laches and estoppel

"Laches" is an ancient legal doctrine which means that if one party's failure to assert its legal rights causes, or induces, a second party to do something under the mistaken impression that he has the right to do it, then the first party can be found to have waived its rights as to the second party. But for laches to apply, the second party must have relied on a pre-existing failure or inaction of the first party before the second party acts; laches does not apply if the second party complains about the first party's inaction *after* the second party has already acted. [Sacchi & Karowiec v. DuFief Homes Association #589]

When the rules of the HOA provide that decisions of the architectural committee are final unless appealed, the homeowner applies to the committee for approval to build a structure which clearly shows it will violate the community rules but the committee approves the application anyway, the homeowner then proceeds to spend money to build the structure, and then, after the structure is completed the committee reverses itself and orders the homeowner to remove or to alter the structure, the homeowner has proven that he relied to his detriment on the committee's un-appealed decision and thus proven a defense of estoppel. If the HOA wants to enforce the rules it must pay the homeowner his reasonable costs to build and then to remove or alter the offending structure. [Koppel v. College Square Condominium Assn. - #53-13, Potomac Crossing HOA v. Meddings - #77-10]

Although the homeowners had parked their commercial vehicle on their lot for many years before the HOA took action against it, they cannot prevent the enforcement action under the doctrines of estoppel or laches because they did not rely to their prejudice on the HOA's inaction. Their violation of the rule preceded the inaction, it was not the result of the inaction. If anything, the homeowners benefited from the inaction rather than having been harmed by it. [South Village Homes Corporation v. Toossi - #50- 10, Sweepstakes HOA v. Webb - #55-10]

The doctrine of laches did not apply when a homeowner painted her house in the wrong colors sometime before 1996 and the HOA did not take action on the violation until 2001. The HOA did not give up its right to take action on the violation because its inaction did not induce the homeowner to use the wrong color paint. [Sacchi & Karowiec v. DuFief Homes Association #589]

Estoppel applies when there is a showing of prejudice by the party claiming estoppel. In this case, when the homeowner bought his lot, the rear fence was located on the common areas, and it remained there for 11 years following his purchase. There was no evidence that this fence had ever been approved by the HOA. In 1995, he decided to replace it, but did so without applying for and obtaining permission from the HOA. After the HOA discovered the new fence, it ordered the owner to remove it from the common areas.

The CCOC found that the HOA had not waived its rights because the HOA documents contained a "no waiver" clause, stating that the HOA's failure to enforce a rule in the past did not prevent it from enforcing the rule in the future; in addition, requiring the owner to move the fence did not prejudice him or deprive him of any right, because he did not own the land on which the fence was built and therefore was not giving up anything. [Schott v. Summer Village Condominium Two, Inc. #250] An HOA was estopped to enforce a rule on fence locations against a homeowner who applied for, and received formal permission to construct, a fence in a specific location on his own lot, and then, relying on the approval, went ahead and spent money to construct and landscape the fence. However, the HOA could still enforce the rule against other lots. [Milne and Gammon v. Crawford Farms Townhouse Association, Inc. #151]

A party that wishes to defend against an enforcement action on the basis of estoppel must prove that he relied on, and was prejudiced (or harmed) by, the association's action or failure to act. [Laytonia HOA v. Nejad - #323, [Milne and Gammon v. Crawford Farms Townhouse Association, Inc. #151]

For the doctrine of laches to apply, the HOA's inactivity must have led the homeowner to do something that he erroneously thought was allowed; it does not apply when the homeowner does something that is not permitted and then tries to complain about the HOA's delay in taking action against him. [Abdelkarim v. College Square Condominium - #73-13, Greenfield Station HOA, Inc. v.

Mehta - #203]

(f) delay

An association that wants a member to remove improvements that he installed on the common area at the rear of his lot must pay the costs of the removal, when the encroachments were already existing at the time the member bought the lot, when the association failed to comply with its own rules for several years to inspect all lots annually, and when it limited its inspections to the front yards of the lots only. If the association had complied with its own rules it would likely have noticed the encroachments much earlier and could have prevented the member from expanding them. [Hernandez v. Hadley Farms Community Association – #37-11]

Mere delay in taking action on an architectural violation does not prevent the association from enforcing its rules. [DuFief Homes Association v. Sacchi & Karowiec - #589, Greenfield Station HOA, Inc. v. Mehta - #203, South Village Homes Corporation v. Toossi - #50-10, Sweepstakes HOA v. Webb - #55-10]

When a condominium's rules provided that the association must act on an architectural application within sixty (60) days or it was deemed approved, the unit owner had twice applied for permission to construct a stairway, the association twice failed to act on her applications within the sixty (60) days permitted, and she then constructed the stairway, the association could not order her to remove it and could not fine her for refusing to move it. However, since the rules provided that approval expired after six (6) months, the unit owner had not begun work for seven (7) months, the CCOC ordered her submit a new application for the stairs as built and to comply with any reasonable limitations set by the association. [Hecker v. Kenwood Forest Condominium - #448]

An association bylaw or covenant stating that the failure to enforce a rule shall not be deemed a waiver of the rules is valid and binding. Foo v. Dellabrooke HOA [58-09] , Rapport v. North Lake Woods HOA - #268]

Although the unit owners had used washing machines in their units for 20 years in violation of the rules, they could not use the association's delay in taking action against them as a defense, because they were not hurt by the delay. [Halaby & Abboud v. Glen Waye Gardens Condo. - #679/685]

A 10-year delay between the time the HOA gave a violation notice to the member that his ornamental statues were a violation, and the time that the HOA finally tried to force him to remove the statues, is excessive; the HOA's claim was stale and would not be enforced. [Lee v. Green Hills Farm HOA - #624]

(g) inconsistent enforcement, arbitrariness, bias, conflict of interest

If an association's rejection of an application is arbitrary, capricious or without a reasonable basis, the CCOC will not uphold it. [Fishbein v. Avenel Community Association - #744, 599]

A homeowner's claim of inconsistent enforcement fails when the evidence submitted by the homeowner shows a failure or refusal to enforce the rule in question at all, rather than inconsistent enforcement. [40-10]

If a board or committee will consider an architectural application at its next meeting, it should give reasonable notice to the applicants of that fact. [Weiss v. Woodstock HOA - #702]

The HOA reasonably distinguished between the complainant's proposed awnings, which would cover the windows on the front of her house and therefore be readily visible and make her house stand out from the neighboring houses, from the one other house in the community with an awning, which was on the back of the ground floor of the house, over the rear door and adjacent patio, and not easily seen from the street. [Beebe v. The Oranges HOA - #41-09]

An HOA's decision to hold a member in violation for installing a security door on her unit was unreasonable and arbitrary because there was another home in the community with a security door. The property manager testified that, in her opinion, the second door was a violation, but the one person still serving on the architectural committee testified that, in his opinion, the second door was not a violation. The rule regulating storm doors was held to be valid but the association was not enforcing it properly or consistently. [Blackburn Village HOA v. Saunders - #06-06]

When a defense of inconsistent enforcement is raised, the board can introduce evidence showing why it granted an exemption to one owner but not to the other, and if the decision is made upon a reasonable basis, it will be upheld. [McPherson v. Morningside HOA - #614]

The member's defense of inconsistent enforcement failed when the HOA was able to prove it was not previously aware of the violations cited by the member, and that once it learned of them, it proceeded to take action on them. [Sacchi & Karowiec v. DuFief Homes Association #589]

The homeowner did not provide any specific addresses or examples of homes within the Association that had been permitted to use the same type of wire and stake configuration that she was using nor did she question the Association about enforcement action or lack thereof begin taken against other homeowners in violation. The Association stated that any configuration of wires and stakes similar to that used by the Complainant within the community would be found in violation of the guidelines. [Bian v. Arora Hills HOA– #34-17]

If the evidence showed that the homeowner is being singled out for alleged violations and that he is likely to be the subject of future, selective enforcement, then it might be appropriate for the Panel to address the merits of the issue. *See* Suter v. Stuckey, 402 Md. 211, 220 (2007) ("If a case implicates a matter of important public policy and is likely to recur but evade review, this court may consider the merits of a moot case") (citations and internal quotation marks omitted). That is not the situation here. The Association convincingly demonstrated that, with rare exceptions, it pursues enforcement procedures against all apparent rule violators.[Yourshaw v. Waring Station HOA - #60-17]

When a unit owner showed that the condominium association twice failed to act on her applications to build a stairway within the sixty (60) days required by the association's rules, and also showed that there were at least three (3) other stairways similar to hers in her own row of townhomes, the association's decision to order her to remove her stairway was unreasonable. [Hecker v. Kenwood Forest Condominium - #448]

Due process requires that the CCOC not consider negative information regarding past conduct of the homeowner when that is irrelevant to the issues in the case before the CCOC. When the evidence shows that the HOA relied on irrelevant derogatory information concerning the homeowner, its

decision can be overturned for bias. In this case, however, although there was bias, it was harmless because the HOA approved almost all of the application and the one feature it did reject, it had a reasonable basis to reject. [Winans v. Montgomery Village Foundation - #353]

A homeowner wishing to assert the defense of inconsistent enforcement must show that the association is taking action against him when it did not take action against similar violations on other lots in the same community. For example, evidence of nonconforming fences may not be relevant to a case involving a nonconforming shed. [15-06, Vartan v. Oak Springs Townhouse Association - #733, Crabill v. Manchester Farm Community Association - #78-07]

An HOA may overcome a defense of inconsistent enforcement by proving that it was not aware of, and did not approve, the other violations cited by the homeowner. [Sacchi & Karowiec v. DuFief Homes Association #589]

Those who wish to raise the defense of inconsistent enforcement must prove the defense by showing a well-defined pattern or practice by the association. Without such proof, the defense fails. [Whetstone Homes Corp. v. Hight-Walker & Groff - #21-06, Supik v. Milestone II Townhouse Condominium Association - #813, Potomac Mill Farm HOA v. Dinh - #633, Rapport v. North Lake Woods HOA - #268, Wurtz and Heavey v. Kenwood Forest II Condominium - #158]

The mere fact that some inconsistent variations exist does not necessarily prove a pattern or practice of inconsistent enforcement. [Rapport v. North Lake Woods HOA - #268, Wurtz and Heavey v. Kenwood Forest II Condominium - #158]

The HOA may reject a fence application and require the fence to be moved if it is built in the wrong location, even though two other homes in the community violated the same rule. Those two other homes had fences which the developer had approved, and the developer was not required to obey the rules; since that time, the community has consistently interpreted and enforced the rules on fence location. [Doral HOA v. Georgakopoulos - #505]

Even if there has been some inconsistency in the past, an association may be able to overcome the defense by referral to any "no waiver" clause in its governing documents. Such a clause states that the failure to enforce a rule cannot be deemed a waiver of the rule. "No waiver" clauses are valid and binding. [Rapport v. North Lake Woods HOA - #268]

When a party proves (1) the existence of several violations of a rule, (2) that the HOA has taken action against only one of the violations and (3) that the rule was unclear and not consistently applied, the enforcement in that one case is unreasonable and arbitrary, and will not be upheld. [Berger v. Fox Hills North Community Association - #359]

(h) Approval

A member cannot rely on oral approval for an architectural or landscaping change which is given by only one member of an architectural committee or a board of directors, when the governing documents and rules clearly require approval from the entire committee or board. [Foo v. Dellabrooke HOA - #58-09, Meyers v. Montgomery Village Foundation - #325, Greenfield Station HOA, Inc. v. Mehta - #203, Hunting Woods HOA v. Marhamati - #154]

When the architectural committee approves an application to build a structure, and the rules of the HOA provide that the committee's decision are final and binding unless appealed to the board of directors, the homeowner may rely on the committee's approval to commence work on the structure; If, after the approved work is completed, the committee decides to reverse itself, the HOA is liable to the homeowner for his costs to build and remove the structure. [Potomac Crossing HOA v. Meddings - #77-10]

(i) What are <u>not</u> defenses (approval from county agency, public policy, etc.)

County law requiring shelters for pets left outdoors do not override association rules regulating or prohibiting structures. An HOA can prohibit construction of a structure that is an animal shelter. Members of associations must comply with both County law *and* the rules of their association, unless the law states that it overrides such rules. [Potowmack Preserve, Inc. v. Ball - #73-12, Flores v. Highlands of Olney Condominium - #553, Evnin v. Decoverly IV Condominium, Inc. - #586; and *see generally* the decisions of the Maryland appellate courts summarized in Appendix B.]

The fact that the County permits a structure, or does not regulate a structure, does not relieve a member from his duty also to comply with the association's rules. The member must obey both sets of requirements, the County's and the association's. [Potowmack Preserve, Inc. v. Ball - #73-12]

The statute of limitations do not apply to CCOC proceedings. [Bodmer v. Potomac Meadows HOA - #69-10, [Sacchi & Karowiec v. DuFief Homes Association #589]

[<u>Staff comments:</u> a small number of laws do state that they override inconsistent association regulations. For example, the Federal rules on TV reception devices such as satellite dishes, and State and County laws on renewable energy devices, solar panels, clotheslines, flags, and election signs, specifically state that association rules to the contrary cannot be enforced.]

[<u>Staff comment:</u> Under a rule of law created by the courts, called the "doctrine of independent covenants," the member's duty to pay the assessments is separate from the association's duty to maintain the property in good condition.

Therefore, a member of an association accused of nonpayment of assessments cannot use the association's violation of some other rule (such as the failure to repair a defect in the common areas or a failure to enforce its rules against other members) as an excuse not to pay.

A board member cannot take advantage for his own benefit of his association's failure to follow one of its rules when he intentionally allowed the association to violate the rule instead of calling its attention to the rule. A board member's duty is to the best interests of his association, and that duty is higher than his own personal interests. [Kessler v. Leaman Farm HOA - #02-12]

3. Appeals from and enforcement of the board's decisión

(a) Board hearings and decisions

Due process applies to board hearings, and penalties imposed without a hearing will not be upheld. [Lee v. Green Hills Farm HOA - #624]

Board decisions penalizing a member are governed by the reasonableness rule; the burden is on the board to show that its decision was reasonable, and the CCOC cannot uphold the decision of a board to penalize a member or to restrict his property rights if the board cannot produce facts to support its decision. [Simons v. Fair Hill Farm HOA - #66-09]

Under the Condominium Act, a condominium association cannot hold a member in in violation unless it first gives a notice of the violation and the right to a hearing. [Section 11-113]

(b) Board's right of entry

The Condominium Act, Section 11-125(f), gives the association the right to enter private units and an easement to make repairs in them when reasonably necessary to preserve public safety or to prevent damage to other parts of the Condominium. [Haight v. Horizon Run Condominium Association, Montgomery Village Association, and Washington Suburban Sanitary Commission - #215]

A condominium can enter and make repairs to a unit, and bill the cost of those repairs to the unit owner, when there is a leak that damages the unit. The insurance section of the Condominium Act, Section 11-114(g), overrides condominium bylaws that require the board of directors to give notice to the unit owner of the need to make repairs and to allow the unit owner the first opportunity to make the repairs. [Ortega v. Key West Condominium - #07-12]

If the board confiscates a member's private property—in this case, sports equipment placed on the common areas without approval and in defiance of an association request to remove it—which it may do under certain conditions, it is responsible under the rules of "constructive bailment" to return the property to its owner in good condition, or else pay the fair market value of the property. [Graninger v. Overbrook at Flower Mill HOA - #540]

The board has the right of access into private units provided it is for the purposes specified in the governing documents and the board follows the procedures for exercising that right. [Scenery Pointe Condominium v. Glennie - #780]

The board has the right to take photographs of homes and lots in order to assist it in its duty to enforce the covenants, and this does not constitute an invasion of a member's right of privacy. [Nazemi v. Bethesda Overlook Townhouse Condominium et al. -#501]

(c) Appeal to the CCOC (No cases.)

(d) Board's complaint to CCOC to enforce decision (No cases.)

(e) Automatic stays

CCOC will not lift the automatic stay in a condominium's complaint to remove a pit bull alleged to be dangerous when the evidence to date shows only one incident involving the dog and no evidence that

the dog has not been under control since that incident. [Parkside Condominium v. Lopez-Cayzedo - #12-13]

CCOC will lift the automatic stay when enforcing the stay may result in undue harm to the community (Kreitner v. Grosvenor Park IV Condominium Association - #04-16, Dillin v. The Willoughby of Chevy Chase Condominium - #2018-040)

(f) Exhaustion of Remedies

A person cannot file a complaint with the CCOC about a mere violation notice or warning if the association has not taken any other action against him. He must first exhaust his remedies with the association by requesting a hearing with the board of directors to dispute the notice. [Glenn v. Park Bradford Condominium 29-11]

4. Disputing a Board's decision regarding a neighboring unit or lot

A board decision to allow an architectural change, and a board's decision not to enforce an architectural rule against a member even if the member is in violation of an association regulation, are governed by the "business judgment" rule, and will be upheld by a court unless the decision is made fraudulently or in bad faith. [*Black v. Fox Hills North Community Association, above;* Prue v. Manor Spring HOA - #39- 09, Kessel v. Kenwood Forest I Condominium - #506] Therefore, a member who complains about the board's decision to approve a change in the neighbor's lot, or the decision of the board not to take action against a neighbor, must show that the board did not have a factual basis for its decision, did not interpret its rules in a reasonable manner, or acted in bad faith. [Henry v. Bel Pre Recreational Association - #40-09, Prue v. Manor Spring HOA - #39-09]

5. Specific matters regulated

(a) antennas, satellite dishes, TV reception devices

TV satellite dishes are regulated by the Federal Communications Commission and an association may only regulate or restrict their installation on private property for very limited reasons. Disputes over the validity of such restrictions must be resolved only by the FCC. However, the FCC regulation does not allow private satellite dishes on the common elements without the association's permission, and the FCC will not take complaints about such installations. The CCOC has the right to decide whether a disputed installation is on private property or on the common elements, and if it is on the common elements, the CCOC may hear the case and order appropriate relief, including ordering the removal of the dish. [Over-the-Air Reception Devices Rule, 47. C.F.R. 1.4000]

A radio antenna is not protected by the FCC rule on Over-the-Air TV reception devices. Although a radio antenna may receive tv signals, it is not designed for that purpose, and an association may regulate or prohibit it. [Old Georgetown Village HOA v. William Bevan - #584]

(b) awnings

The fact that there is another awning in the community does not mean that the HOA's decision to deny approval to the complainant's awnings is inconsistent enforcement. The other awning is on the rear of the house, over the rear door and adjacent patio, and not easily seen from the street. The awning applied for here would be above several windows on the front of the house and have a much

greater effect on the overall appearance of the house and the immediate neighborhood. The HOA's decision reasonably distinguished between the two homes and would be upheld. [Beebe v. The Oranges HOA - #41-09]

HOA rules requiring written approval for the installation of awnings are legitimate exercises of authority and will be upheld and enforced by the CCOC. [Meyers v. Montgomery Village Foundation - #325]

(c) balconies

Community rules, properly adopted, regulating balconies are a proper exercise of the community's authority, and an owner may not make changes to a balcony without advance permission from the association. [Pooks Hill Condominium Inc. v. Lockwood - #138]

(d) chimneys and fireplaces

A condominium association has the right to require that all chimneys be inspected and cleaned, and it can require that the unit owner allow the association to enter the unit for this purpose. [Scenery Pointe Condominium v. Glennie - #780]

(e) clotheslines

State law allows owners to install clotheslines on their property; an association may reasonably regulate the clotheslines but cannot prohibit them. [Section 14- 130 of the Real Property Article]

(f) colors

As with other architectural changes, associations may regulate the colors used on the exteriors of homes and other structures in the community as part of their overall right and duty to preserve architectural harmony. The CCOC will uphold such rules. [2017- 49, 2017-41, Black v. Dumont Oaks Community Assn. - #74-09, Syed v. Gatestone HOA - #46-09, Resnik v. Montgomery Village Foundation - #63-07, Castlegate Townhouse Association v Greenfield - #35-06, Cunningham & Fisher v. Decoverly I HOA - #31-06, Greencastle Lakes Community Association v. Abeje #776, Greencastle Lakes Community Association v. Dung and Tran - #607, [Sacchi & Karowiec v. DuFief Homes Association #589]

Although the shade of white paint used by the homeowner, without permission from the HOA, was close in appearance to the shade of white paint required by the HOA, it is not for the CCOC to set architectural standards for the HOA, and it will uphold the valid rules on paint colors set by the HOA. [Sacchi & Karowiec v. DuFief Homes Association #589]

(g) debris—see Trash

(h) decks

A homeowner who receives approval to construct a deck must comply with the terms of that approval and cannot alter the approved design without approval for the change. [Potowmack Preserve, Inc. v. Ball - #73-12]

Even if the County approves a change in the design of a deck, the homeowner must still obtain the association's approval for the change. [Potowmack Preserve, Inc. v. Ball - #73-12]

The board has the right to order a member to remove a screened gazebo or tent from her deck even though she claims the structure is required because she is extremely sensitive to mosquito bites. Such a condition does not amount to the impairment of a "life function" under the Federal Housing Act. In addition, such a structure, placed on a deck, falls within the meaning of the word "superstructure," and under the governing documents, "superstructures" cannot be installed without permission from the board. [Decoverly I HOA v. Kim-#56-11]

The existence in the community of 4 other white vinyl decks did not render invalid the board's refusal to approve a new application for a white vinyl deck. The other decks dated back to the beginning of the HOA and had either been approved by the developer, or by a board president acting on his own initiative and without the board's authorization. Since then the association had consistently refused to allow white vinyl decks as not compatible with the overall rustic appearance of the community. Although the rule under which the board refused to approve white vinyl railings and trellises was not perfectly clear, under the business judgment rule the board's interpretation of the rule had to be upheld so long as it was a reasonable one. Therefore, the board's refusal to allow a white vinyl deck and white vinyl trim was a reasonable one and upheld. [Syed v. Gatestone HOA - #46-09]

The CCOC will uphold rules requiring homeowners to maintain their decks in good condition. [Middlebrook Commons Townhouse Association v. Medlin - #302]

If an HOA mistakenly gives permission for certain changes to a deck, and then, once they are installed, attempts to rescind its approval and require the deck to be altered so that it complies, the CCOC will order the HOA to pay the costs of the changes. [Lake Hallowell HOA v. Marthinuss - #364]

For landscaping purposes, a deck is part of a "rear yard." [Bluefield v. Fallstone HOA, Inc. - #424]

A board decision requiring a homeowner to prevent "light leakage" from his deck is arbitrary and capricious, and not enforceable. [Chan v. Hadley Farms Community Association - #446]

(i) doors and windows

Although a rule banning security doors may be valid, the decision to enforce the rule against a specific homeowner may be invalid if it is found to be arbitrary and unreasonable. [Prentice v. Sierra Landing Condominium - #15-08]

The CCOC will uphold rules requiring advance approval for changes to doors and windows. [2017-49, Greencastle Lakes Community Association v. Abeje - #776, Haddonfield HOA v. Tyra - #263]

Association efforts to enforce rules regulating doors and windows will not be upheld if the association failed to follow its own procedures and the rule was not enforceable because it had not yet been filed in the HOA Depository. [Haddonfield HOA v. Tyra - #263]

When an association fails to notify an applicant within the sixty (60) days required by its own rules

that it was rejecting her application, and she went ahead and made the changes after the sixty 60-day period expired but before the HOA sent the notice of rejection, the HOA had no authority to reject her application and to hold her in violation. Therefore, the CCOC dismissed its claim. [Potomac Grove HOA v. Finizio - #342]

The regulation of screens covering doors and windows is a matter within the association's authority. [Damascus Manor Townhouse Assn., Inc. v. Amoruso - #45-06]

(j) drainage

When the cause of flooding into a member's unit or lot is not clear, the CCOC can order the association to hire an expert to investigate the issue. [Romaine Chase v. Georgian Colonies Condominium - #726, Smart v. Pooks Hill Condominium, Inc. - #673]

The CCOC is authorized to require an association to pay for damages resulting from a necessary change in grading. [Smart v. Pooks Hill Condominium, Inc. - #673]

(k) driveways

Driveways are subject to an association's architectural rules, and those rules will be upheld so long as they are properly enforced. [Lee v. Green Hills Farm HOA - #624]If an HOA contains both shared driveways and driveways serving a single lot, and if the shared driveways are part of the common areas, the HOA is responsible for maintaining the shared driveways. However, but it can charge the owners of the lots that share the driveways the costs of maintaining them, because the shared driveways do not benefit all the owners in the association, but only those whose houses are served by them. [Sauri v. Estate at Pope Farms -#715]

(l) electrical

A condominium board does not have the authority to require its members to install ground fault interrupter (GFI) outlets in their units. The governing documents only allow the board to regulate the interiors of the units for health or safety reasons. Although the board claimed that recent fires could have been prevented by the use of GFIs, in fact the fires were due to faulty wiring and would not have been prevented by GFIs. There was no factual support for the board's claims that GFIs would prevent fires or other damage to neighboring units. [Lieberman v. The Whitehall Condominium - #25-06]

(m) fences

The CCOC will uphold properly adopted, reasonable rules regulating fences and requiring advance approval for the construction or alteration of fences if consistently enforced. [2017-49, Prue v. Manor Spring HOA - #39-09, Greencastle Lakes Community Association v. Kelley - #87-06, Oak Grove HOA v. Ford - #72-06, Greencastle Lakes Community Association v. Muller - #829, McPherson v. Morningside HOA - #614, Flores v. Highlands of Olney Condominium - #553, Doral HOA v. Georgakopoulos - #505, Walker v. Germantown Station HOA - #487, Neelsville Estates Community Association v. Miller - #482, Decoverly I HOA v. Ghasabehi - #468, Walker v. Germantown Station HOA - #450, Longmead Crossing Community Services Association v. Bright - #430, Laytonia HOA v. Malone - #341, Hamlet Station HOA, Inc. v. Barron - #303, River's Edge HOA, Inc. v. Harding - #293, Quince Orchard HOA v. Teymourtash - #160, Pooks Hill Condominium Inc. v. Lockwood - #138,

D'Costa v. Cinnamon Woods Homes Association - #136, Warshaw v. Derwood Station South HOA - #114]

Although normally the board of directors has the right to decide what is the proper appearance of the community, and in particular what fence styles may be used in particular parts of the community, it cannot contradict the declaration of covenants. Where the covenants stated that any style of fence installed by the developer was the proper style anywhere in the community, and the developer installed split rail fences in certain parts of the community, the board could not deny permission to a townhome owner to install a split rail fence behind his house. [Bejo v. Olde Potomac Park CA - #41-11]

When an HOA fails to act on a fence application within the time allowed by its own rules, and the rules provide that an application is deemed approved if not acted on within sixty (60) days, the HOA cannot require the homeowner to remove the fence. [Potomac Grove HOA v. Finizio - #342]

Even if there is no written rule on point, the HOA can refuse to allow a fence to be built in a specific location if it has a reasonable basis for its decision. [Tattersall Woods HOA, Inc. v. Perera - #458]

The HOA's interpretation of a rule on the location of fences will be overturned when that interpretation appears to have been biased and resulted in an absurd placement of the fence. In this situation, the HOA's interpretation would have only allowed the owner to build a fence through the middle of his backyard. There was no evidence to show that the HOA had previously interpreted the rule to such effect, trees would cover the fence if built as applied for, and the neighboring lot was owned by the HOA president. The decision was overturned as whimsical and capricious. [Berger v. Fox Hills North Community Association - #359]

A similar rule will be upheld, however, even though 2 other homes had fences that violated it, because those nonconforming fences were approved by the developer, which was exempt from the rules. Since then, the HOA had been consistent in the way it interpreted and enforced the rule. [Doral HOA v. Georgakopoulos - #505]

When a fence has been approved by an HOA and then built as approved, even though the approval violates the Declaration of Covenants, the HOA is estopped from enforcing the covenants against the owner of the fence and cannot force him to remove it thereafter. However, that estoppel does not apply to any other member who builds, or requests permission to build, a fence. [Milne and Gammon v.
Crawford Farms Townhouse Association, Inc. #151]

An association may not rescind approval of a gate installation once it had already been approved. However, it may prevent an owner from hiding trash cans behind the fence when the application didn't specifically state its purpose was to hide trash cans. This is true even though the owner testified this was the purpose of the fence. It did not state so in the application. [Oak Grove HOA v. Tobb - #19-17].

When a member of the association complained to the CCOC about the association's decision to take no action against a fence and stairway that violated the association's rules, the evidence showed that the board had investigated her complaint and ordered the fence owner to change the fence, but had

finally determined to take no further action. Although the CCOC found that the board had made mistakes in the process of ruling on the fence application, it upheld the board's final decision under the "business judgment" rule. [Kessel v. Kenwood Forest I Condominium - #506]

If a private fence is erroneously built on the common areas, and the fence owner cannot prove that he had permission to build it there, he must remove it because the governing documents prohibit the use of the common areas for the private benefit of one member. [Laytonia HOA v. Nejad - #323]

(n) gardens

(o) gutters

If the governing documents and other rules governing the appearance of the exteriors of home apply to gutters, then homeowners must obtain association approval in order to install or modify them. [Inverness Forest Association Inc. v. Avissar - #163]

(p) HVAC (Heating, Ventilations and Air Conditioning)

If a unit owner can still obtain a new air conditioning unit that will fit into her units utility closet, where the old air conditioner had been placed, than the board's decision to refuse to allow her to install her air conditioning unit in the common elements next to the building is a reasonable one, especially in view of the board's concerns over the extra noise that would be created for the owners of the ground floor units by the extra air conditioners placed on the ground next to them. [Verchinski v. Plymouth Woods Condominium Assn. - #57-10]

Properly adopted rules regulating or prohibiting window air conditioner units are enforceable. [756, Olde Potomac Park Community Association v. Oppenheim - #518]

(q) hot tubs

A person who wishes to install a hot tub on his deck for medical reasons bears the burden of proving his case with competent evidence, especially if he could install the hot tub inside his house instead of outside. [Flores v. Highlands of Olney Condominium - #553]

(r) landscaping

The CCOC will uphold properly adopted regulations requiring members to maintain their yards in good condition. [2017-41, Greencastle Lakes Community Association v. Copeland - #01-15, Damascus Manor Townhouse Assn., Inc. v. Amoruso - #45-06]

The CCOC can decide what constitutes "landscaping" and "structures." [Collingwood HOA v. Kriese - #565]

The installation of timbers to frame a garden is a "structure" subject to the HOA's authority to regulate structures, and so is an arbor, even if the owner considered it part of his fence. [Collingwood HOA v. Kriese - #565]

Unless specifically so stated in the governing documents, an HOA's authority to regulate "structures" does not include the right to regulate landscaping. [Chan v. Hadley Farms Community Association - #446]

When an association's rules required approval for any changes to the exterior of the home, and the association had previously not required applications to replace existing shrubbery that was dead or dying, it could not hold the unit owner in violation of the rules for replacing his dead plants without permission. [Goosh-Mosches v. Grosvenor Park Homeowners Association, Inc. and Greenfield at Brandermill Condominium v. Lakomiec - #370]

Potted plants are not "landscaping" which is subject to regulation under the HOA's rules. [Bluefield v. Fallstone HOA, Inc. - #424]

When an HOA's rules permit vegetable gardens in "rear yard of the lot," but are silent on whether any plants can be placed on the decks, its decision to deny the homeowner the right to place potted fruit trees on the deck was unreasonable. The deck was a part of the rear yard, and the restriction on the location of plants only applied to vegetable gardening. Moreover, planting containers were not "structures" because they were not permanently attached to the land or a building, therefore the HOA could not regulate them under its authority over "structures." Nor could the HOA show that the planters affected or had any relationship to the overall plan of the community. [Bluefield v. Fallstone HOA, Inc. - #424]

Rules prohibiting the installation of sports equipment in the front yard of a lot are valid and enforceable. [Campbell v. Lake Hallowell HOA - #541]

(s) laundry machines

Condominium rules prohibiting the installation of washers and dryers in a unit are valid and enforceable if they have a reasonable basis. In this case, the association showed that the building's plumbing was not designed to handle washing machines, and that their use caused sudden sharp changes in the water temperatures for other residents. The CCOC upheld the association's order that the owner remove the machines from the unit. [Quakyi v. Parkside Condominium Inc. - #206]

Although the unit owners had installed and used washing machines in their units for 20 years, the rule prohibiting them could still be enforced, because there was a good reason for it. The plumbing was not designed for such usage, and any leaks from the washing machines could damage other units. [Halaby & Abboud v. Glen Waye Gardens Condo. - #679/685]

When a unit owner fails to follow the proper written procedures for repair to his dryer and dryer vent, and incurs higher charges as a result, the association is not liable to reimburse him for the higher fee to the extent it is reasonable. [Minni v. Leisure World Mutual 14 - #423]

(t) mailboxes

(u) maintenance and repair by owner

Owners who make exterior changes to their homes using unapproved materials can be required to remove and replace them with proper materials. [Greencastle Lakes Community Association v. Davis - #11-06]

(v) paint

As with other architectural matters generally, the CCOC will uphold properly adopted and enforced rules regarding paint colors. [2017-49, 2017-41, Greencastle Lakes Community Association v. Dung and Tran - #607, Potomac Grove HOA v. Finizio - #342]

Although the HOA never previously had a rule that explicitly prohibited the color of paint used by the member, it had never previously permitted that color to be used, nor had the member asked for permission to use it before she painted it on her home. The HOA's rule prohibiting that color of paint, although it was adopted after the member repainted her home, had a reasonable basis, being consistent with past HOA practice, and was enforceable. The homeowner can be required to repaint her home in the approved colors. [Sacchi & Karowiec v. DuFief Homes Association #589]

The existence of other nonconforming paint colors in the community does not prove the defense of inconsistent enforcement when the HOA can prove that it was not aware of the other violations, and was proceeding to take action against them. [Sacchi & Karowiec v. DuFief Homes Association #589]

(w) patios

An association has the right to require removal of a concrete patio installed without permission due to its concerns that the paving could affect rain water drainage in the community. [Correa v. Homeland Village Community Association - #31-11]

The CCOC will uphold properly adopted rules requiring permission in advance to construct patios. [Village of James Creek HOA v. Barry – #432, MacArthur Park HOA v. Steinhardt - #362]

The CCOC will uphold properly adopted rules prohibiting storage of certain items on patios. [Nazemi v. Bethesda Overlook Townhouse Condominium et al. -#501, 519]

(x) planters

A planting container is not a "structure" because it is not permanently affixed to the land or to any building. Therefore, it does not fall under association rules regulating structures. [Bluefield v. Fallstone HOA, Inc. - #424]

(y) pools and fountains

Association rules prohibiting the construction of any structures on a lot without advance permission apply to fences and to pool enclosures. [River's Edge HOA, Inc. v. Harding - #293]

(z) railings

The CCOC will uphold and enforce properly adopted rules requiring approval for adding or replacing railings on the exterior of a home. [Decoverly I HOA v. Kidd and Jens - #69-06, Greencastle Lakes Community Association v. Chan & Yau - #64- 06, Cloisters HOA v. Solomon - #280]

The CCOC will uphold properly adopted rules requiring owners to maintain the exterior railings on their homes in good condition. [2017-49, Middlebrook Commons Townhouse Association v. Medlin - #302]

(aa) renewable energy devices (including solar panels)

A homeowner's association in Maryland cannot prohibit the installation of a solar power system. But under Maryland law, an association can restrict such a system so long as the restriction does not impose unreasonable limitations. Md. Code Ann., Real Prop. § 2- l l 9(b). [Greencastle Lakes Community Association v. Patricio/Ziegler - #93-14)

According to the Association's documents, the installation of a solar power system on the roof and wall is an "exterior addition to or change ... or other alteration" of Respondents' home requiring prior AERC approval. A requirement for such approval is not, of itself, an unreasonable limitation or restriction. Respondents thus violated the Declaration when they failed to apply for approval. [Greencastle Lakes Community Association v. Patricio/Ziegler - #93-14]

Had approval been sought, the parties would then presumably have considered various installation options and the aesthetics, cost and efficiency of each. During that process, Respondents would have had the opportunity to show that an option aesthetically acceptable to the Association would significantly increase the cost or significantly decrease the efficiency of the system over a cheaper or more efficient option. Respondents aborted that process by installing an aesthetically objectionable (but presumably cheaper) option without seeking approval. [Greencastle Lakes Community Association v. Patricio/Ziegler - #93-14]

[Staff comment: Both County law (Section 40-3A) and State law (Real Property Article, Section 2-119) express public policies in favor of the use of renewable energy devices, and override association regulations that prohibit them or make them less efficient.]

(bb) roofs

The membership of an HOA has the right to vote to change the declaration of covenants so that asphalt roofs are permitted in addition to natural cedar shake roofs even if this changes the original appearance of the community as designed by its developer. [Kalin v. Normandy Hills HOA - #24-13]

Although the developer may have intended the community's architectural appearance to include natural cedar shake roofs, the membership can change that design by amending the document involved. The final arbiter of a community's appearance is its general membership. [Kalin v.

Normandy Hills HOA - #24-13]

Association rules requiring approval in advance for changes to roofs or decks will be upheld. [Inverness Forest Association v. Salamanca - #17-08 II, Fairland Park HOA v. Gebreyese - #474, Oak Springs Townhouse Association v. Butler - #288]

An HOA "must not make or enforce any deed restriction, covenant, rule, or regulation, or take any other action that would require the owner of any building to install any roof material that does not have a class A rating, or an equivalent rating that indicates the highest level of fire protection issued by a nationally-recognized independent testing organization . . . " [Montgomery County Code Section 22-98] This law controls in any dispute in which an association attempts to prevent a member from installing a Class A fire-rated roof material on his home. [Baroni v. Avenel Community Association - #55-11, Kalin v. Normandy Hills HOA - #24-13, Inverness Forest Association v. Salamanca - #17-08, Fishbein v. Avenel Community Association - #744] [Editor's note: 55-11 is on appeal at this time.]

For the purpose of complying with Section 22-98 of the County Code, there is a difference between roof "materials" and roof "systems." The plain language of Section 22-98 deals with "materials" only, and not with roof "systems." An example of a roof "system" is one that would include the installation of a fireproof or fire-resistant underlayment or barrier between the roof frame and the roof materials or shingles in order to raise the overall fire rating of the roof to Class A. [Baroni v. Avenel Community Association - #55-11, Fishbein v. Avenel Community Association - #744] [Editor's note: 55-11 is on appeal at this time.]

If a homeowner wishes to use a Class A fire-rated roofing material, an association cannot force the homeowner to use a specific brand or type of Class A fire-rated material if the association's approved material would require the homeowner to alter the structure of his house or the structural framing of his roof. [Baroni v. Avenel Community Association - #55-11, Fishbein v. Avenel Community Association - #744] {Editor's note: 55-11 is on appeal.]

An HOA cannot limit a member's choices of Class A roofs to roof materials which do not meet the HOA's own weight standards for roof shingles. [Baroni v. Avenel Community Association - #55-11] [Editor's note: 55-11 is on appeal.]

A homeowner's association does not have the legal authority to compel a member to use a certain kind of Class A roofing material (in this case, natural slate), when that would require substantial changes to the interior of the house, because the HOA does not have the legal right to regulate the interior of houses. Therefore, the board's decision is not protected by the business judgment rule, and the panel can reverse it if the decision is unreasonable. [Baroni v. Avenel Community Association - #55-11] [Editor's note: 55-11 is on appeal.]

Cedar shakes by themselves can never be Class A fire-rated roofing material. [Baroni v. Avenel Community Association - #55-11, Fishbein v. Avenel Community Association - #744, Inverness Forest Association v. Salamanca - #17-08, Kalin v. Normandy Hills HOA - #24-13]

A community's regulations on roofing material will be held to be arbitrary and unreasonable when:

- **there are other homes in the master association with roofs similar to the one that the homeowner**

wishes to install;

- **the association's own governing documents give homes on certain**
- **lot sizes greater leeway in architectural matters than it does to other homes within the association;**
- **the developer and/or the association itself had permitted similar roofs elsewhere in the community and stated that homes on their own lots should have more leeway in making changes; and**
- **the use of the material permitted by the HOA would have required structural changes to the home. [Fishbein v. Avenel Community Association - #744]**

An association's refusal to allow a synthetic Class C fire-rated roof that has already been installed on a home and its order to remove it are unreasonable when:

- **there are other homes in the community with synthetic roofs;**
- **retaining the roof as installed will not cause any harm to the community because it has a higher fire rating than the unrated natural**
- **cedar shake roofs allowed by and already in use throughout the community;**
- **and there is no visible difference between the Class C roof installed and a different manufacturer's Class A roof that is permitted by the community. [Inverness Forest Association v. Salamanca - #17-08 II]**

An association's decision to reject a Class C fire-rated synthetic roof on the basis that only natural cedar shake or cedar shingle roofs are allowed is a violation of County Code Section 22-98 allowing homeowners to install Class A fire resistant roofs. The HOA must revise its architectural rules to conform to the County Code, and then reconsider this application for a Class C fire-rated roof. [Inverness Forest Association v. Salamanca - #17-08]

(cc) screens

An association usually has the right, under its authority over architectural matters, to regulate screens and to require they be kept in good condition. [Damascus Manor Townhouse Assn., Inc. v. Amoruso - #45-06]

(dd) shutters

Even though "shutters" are not specifically referred to as such in the governing documents or architectural rules, they are included within the general clause of the Declaration of Covenants that no changes can be made to a home without the approval of the association. Consequently, a member cannot remove the shutters from his home without permission. [Decker v. Kingsview Village HOA – #19-11]

The board has the right to compel a member to replace the shutters he removed without permission even though they are purely ornamental and were an option offered by the builder and not required. The board acted reasonably when it determined to preserve the neighborhood in its original condition and appearance. [Decker v. Kingsview Village HOA – #19-11]

(ee) siding

The CCOC will uphold reasonable architectural rules regulating siding. [Greencastle Lakes Community Association v. Copeland - #01-15, Potomac Mill Farm HOA v. Dinh - #633]

(ff) skylights

The CCOC upholds association rules regulating the appearance of homes in the community and such rules usually apply to regulate skylights as well. [Fairland Park HOA v. Gebreyese - #474]

(gg) solar panels—see renewable energy devices

(hh) sports and exercise equipment

The CCOC upholds properly adopted rules and regulations that require prior approval for the installation of sports and play equipment, or that prohibit the storage of exercise equipment on decks or balconies. [590, Campbell v. Lake Hallowell HOA - #541, Barnes v. Montgomery Village Foundation - #504, MacArthur Park HOA v. Steinhardt - #362, Middlebridge Village HOA v. Feinberg - #236, Patel v. Hampton Estates HOA - #205, Quince Orchard HOA v. Teymourtash - #160]

If an association confiscates a piece of sports equipment that a member has placed in the common areas without permission and refuses to remove, it becomes a custodian of the property, and the rules of "constructive bailment" apply. The association must return the property in good condition to its owner, and if it cannot do so, it must pay the owner the fair market value of the property if it's damaged while in the association's custody. [Graninger v. Overbrook at Flower Mill HOA - #540]

An association's decision to modify or remove its own recreational equipment, or to close a play area, is protected by the "business judgment" rule, and in the absence of proof of bad faith or lack of a factual basis, the CCOC must uphold the decision. [Johnson v. Hallowell HOA - #46-06, Kaplan v. Stonebridge HOA - #549, Ramsay v. Bel Pre Recreational Association - #547]

(ii) structures, generally

Although its owner may call the building a playhouse or animal shelter, it is still a "structure" within the meaning of the definitions of the governing documents and subject to approval and regulation by the HOA. [Doral HOA v. Akhigbe - #36-07]

Potting containers for plants are not "structures" because they are not permanently attached to the land or to a building. [Bluefield v. Fallstone HOA, Inc. - #424]A screened gazebo or tent placed on a deck falls within the meaning of the word "superstructure," and the governing documents prohibit the construction of superstructures without permission from the association. [Decoverly I HOA v. Kim-#56-11]

(jj) trash

A trash can that is concealed by a custom-made cover is not "visible" from the street under the terms of the association document and is, therefore, not a violation of a rule that states that trash cans must be stored where they are not visible from the street or from other homes. Once the can is under the cover, it is not clear what it is defined as. [Perkins v. Rose Hill Falls HOA - #70-12]

If a member is accused of having an unsanitary unit, filled with trash and debris, and fails to answer

the complaint on time, then she must, as part of her response to the CCOC's "show cause" order, show that she has a
defense to that complaint, and will not be granted a hearing simply because she raises other issues but fails to show a defense to the complaint. [Plymouth Woods Condominium Association v. Sayer - #01-11]

The CCOC will deny a default judgment to an HOA if the evidence does not support the HOA's complaint. In this case, the HOA complained that the homeowner was storing trash under the deck, but the evidence showed the items were household goods and equipment in good condition, which were not covered by the terms of the rule the HOA was attempting to enforce. [Churchill East Village Community Association v. Tobias Awasum - #691]

An association may prohibit the accumulation of trash in a lot and order it removed. [Quince Orchard HOA v. Teymourtash - #160]

Trash policies must be properly adopted, and the members must be given reasonable advance notice of them before the association can begin to enforce them. [Churchill East Village Community Association v. Tobias Awasum - #691, Williams v. Oak Springs Townhouse Association, Inc. - #578]

(kk) trees and bushes

Even where there is no rule specifically addressing the planting of trees, they are regulated by a bylaw provision that covers "landscaping modifications," and, therefore, cannot be planted without advance approval from the HOA. If trees are planted without approval, the HOA may require that they be removed. Foo v. Dellabrooke HOA [58-09]

A member who wishes to compel her board to take action to order her neighbor to prune his bushes along the property line does not have a complaint within the CCOC's jurisdiction. Chapter 10B only allows her to complain about the board's action to compel her to do something regarding her own property. [Henry v. Bel Pre Recreational Association - #40-09] [Staff comment: this decision was issued under the original version of Chapter 10B. The amendments adopted in 2010 allow a member to complain about the board's failure to enforce its rules against other members under certain conditions.]

(ll) trellises

Although the rule under which the board rejected an application to install white railings and trellises on a deck could be interpreted more than one way, so long as the board's interpretation was a reasonable one, it would have to be upheld against other possible interpretations. [Syed v. Gatestone HOA - #46-09]

(mm) walls

An HOA can regulate, and require approval for, a retaining wall even though the County does not regulate a retaining wall of the height involved. [Potowmack Preserve, Inc. v. Ball - #73-12]

IV. C. Regulation of Parking and Vehicles

1. **The power of the Board to set rules**

An association can limit the rights of members to park in the common areas, but cannot deny them all right to do so. [Tyler v. Brookfield at Milestone Condominium - #564]

When some members of an association have driveways and garages in which to store their vehicles, and other members do not, the association can limit the garage owners to one space each in the common parking lot, while allowing the non-garage owners two spaces each. But it cannot refuse to give the garage owners no spaces in the common parking lots. The covenants grant all members the right of access to the common areas. [Tyler v. Brookfield at Milestone Condominium - #564]

The board cannot adopt a rule denying parking privileges to a member, and towing the vehicles involved, because the member is in default on his assessment payments, when such a rule conflicts with the higher authority of the Declaration of Covenants. The covenants state only that if a member is in default on his assessments, he can be denied the right to use the recreational facilities of the HOA. [Stalbaum v. Ashley Place at Tanglewood HOA - #26-14]

There is no decision of the association for the CCOC to review when the Fire Marshal determines that an association street does not qualify as a "no parking—fire lane" area and the association then removes the "no parking—fire lane" notices. CCOC has no authority to review the actions of other government agencies. [Gold v. Fallstone HOA Inc. - #66-12]

A resident who is handicapped has the right to reasonable parking accommodations for her disability under the Federal Housing Act. [Bishow v. King Farm Village Center Condominium II #42-15] , Voloshen v. Sligo Station Condominium - #30-11]

A board cannot allocate scarce parking spaces to members and occupants on the basis of family membership. Such a rule is arbitrary and unreasonable. [Palacios v. Oxford Crossing HOA - #75-08]

A condominium's board cannot bill the users of reserved parking spaces in its garage for services and repairs performed on the general common elements. It can only bill for services and repairs performed to the limited common elements. In this case, an examination of the documents and plats showed that only the surface of the reserved parking space was a limited common element; and the walls, ceilings, and other floors were general common elements. Moreover, the board failed to show what expenses it incurred to the reserved parking spaces, and therefore could not justify the proposed fee. [Jenkins v. Waterford Condominium Inc. - #112]

Assessing a fee on users of reserved parking spaces in the condominium's garage did not comply with the condominium's rules requiring that it give notice to the users of the specific repairs and maintenance it intended to perform to justify the fee. The proposed budget did not contain this information either. [Jenkins v. Waterford Condominium Inc. - #112]

"House rules," including parking regulations, must be upheld if they are reasonable, consistent with the governing documents, and properly adopted. [Meisnere v. Whitley Park Condominium - #376]

The association cannot deny one class of owners of all right to park in the common areas, because that deprives that class of equal access to the common areas. [Tyler v. Brookfield at Milestone

Condominium - #564]

The Association acted reasonably in restricting unit owner parking in the common area for the benefit of visitors and emergency vehicle access. Several CCOC cases have voided parking rules that prohibit some, but not all, unit owners from using common parking areas. In *Bishow v. King Farm Village Center Condo. II*, CCOC No. 42-15 (Mar. 18, 2016), the association assigned all 30 common area parking spaces to the 15-unit owners who did not have garages and it prohibited unit owners with garages from parking in the common area. The Panel concluded that the association could not completely exclude some (but not other) unit owners from enjoyment of common areas. A similar rule was invalidated in *Tylerv. Boolifzeld at Milestone Condo*., CCOC No. 564-0 (Oct. 29, 2003). *Bishow* and *Tyler* are distinguishable from this case because the parking rules in those cases treated some unit owners differently from other unit owners. Here, all unit owners are subject to the same restrictions. [Creitz v. Meadow Ridge Villas Condominium Association, Inc. - #73-16]

2. Commercial vehicles, pickup trucks and motorcycles

Rules prohibiting the parking of commercial vehicles and trucks, including pickup trucks, are valid and enforceable if the members have had notice of them. [Whetstone Homes Corp. v. Hight-Walker & Groff - #21-06, Winans v. Stedwick Homes Corp. & Montgomery Village Foundation - #556, Hunting Woods HOA v. Muravchik – #534, Oshinsky v. Timberlawn South/Tuckerman Walk HOA - #494, Meisnere v. Whitley Park Condominium - #376, Suschinski, Rivera and Stansfield v. Inverness North HOA - #371, Seneca Forest Community Association v. Ramsey - #248]

Changes to existing parking rules will be upheld if the owners are given notice of them, they are properly adopted, and are not arbitrary or capricious. [Oshinsky v. Timberlawn South/Tuckerman Walk HOA - #494]

3. Right to regulate parking on public roads

Restrictive covenants running with the land are both property interests and contracts. Thus, it is possible to imply an agreement not to park on a public road in the community to the purchaser/owner of a lot bound by a covenant prohibiting parking on the public road. The language in this case reaches only parking on the association's streets and, therefore, does not apply to the public streets. [Hunting Woods HOA v. Muravchik – #534]

4. Right to tow

County law (Chapter 30C) and State law regulate the right to tow vehicles from private property.

An association cannot adopt a rule authorizing member vehicles to be towed away if the member is in default on his assessments, when the covenants state only that the delinquent member can be denied access to the HOA's recreational facilities. [Stalbaum v. Ashley Place at Tanglewood HOA - #26-14]

IX. D. Other Subjects of Association Regulation

1. Rulemaking, generally

A condominium cannot impose a fee of $100 for moving into or out of the condominium when there is no factual basis for it. The general rule is that ordinary wear and tear is a common expense to be paid for out of the common assessments. In this case, the board conceded it had no financial or other data to show why a special fee was needed, nor could it show what costs were specifically incurred because of a move. [Zanoff v. Rock Creek Commons Condominium - #168] Move-in fees will be upheld when properly supported by facts. [Salzman v. The Whitehall - #21-08]

The "business judgment" rule requires that board decisions be supported by facts. A rule requiring ten (10) days' advance notice of a move cannot be upheld if the board cannot show facts to support it. In this case, the association had no elevators, no on-site manager who was required to be present for a move, no reports of conflicts due to competing moves, and the board admitted that moves were infrequent. [Zanoff v. Rock Creek Commons Condominium - #168]

A rule prohibiting moves between 8pm and 8am will be overturned under the business judgment rule if there are no facts to support it. In this case the board produced no such facts and conceded that it had not received any complaints about moves taking place between 8pm and 8am. [18]

When the governing documents establish late fee policies, the association cannot modify those policies without a proper amendment of the document involved. In the absence of a properly-adopted change, the new policies are invalid. The old policies remain in effect. [Kearns v. Snowdens Mill Townhouse Association #2, Inc. - #255]

2. Nuisances (noise, smoking, etc.)

Second-hand cigarette smoke in a multi-unit building is not, by itself, a public nuisance in violation of the association documents, nor is it a violation of a resident's right of "quiet enjoyment." For the smoke to amount to the level of a public nuisance, an objective standard must be met: the smoke must be excessive to ordinary, reasonable people. If a resident brings a complaint about second-hand cigarette smoke against a neighbor to the attention of the board of directors, the board's decision that the smoke is not a nuisance is protected by the business judgment rule. [*Schuman v. Greenbelt Homes, Inc.*, Appendix B]

Maryland courts have defined a "public nuisance" as conduct which creates "actual physical discomfort" to ordinary people and which "materially diminishes the value of the property" and "seriously interferes with the ordinary comfort and enjoyment" of the property. Without evidence that tends to prove the above conditions, the CCOC will not find that an "inconvenience" rises to the level of a "nuisance." [Taylor v. Heritage Green Condominium - #16-12, Johnson v. Hallowell HOA - #46-06]

When people live in close quarters, especially in a multi-unit building, some noise is Inevitable, and therefore must be accepted. [Faville v. Brookstone Condominium, Inc. - #560, Malespin v. Sierra Landing Condominium Association - #551]

A complaint that noise is excessive should be verified by an objective party. [Taylor v. Heritage Green Condominium - #16-12, Faville v. Brookstone Condominium, Inc. - #560, Malespin v. Sierra Landing Condominium Association - #551]

Proof of noise is not necessarily proof that the noise is excessive. [Taylor v. Heritage Green Condominium - #16-12, Kaplan v. Wintergate at Longmead Condominium - #410]

Properly adopted written rules and regulations limiting noise will be upheld by the CCOC. [Harary v. The Willoughby of Chevy Chase - #373, Yeilding v. Parkside Condominium - #265, MacArthur Park Condominium Inc. v. Austin - #110]

A board's decision to reject an expensive upgrade to the building in order to reduce noise levels is protected by the "business judgment" rule. [Spears v. Kenwood House, Inc. - #368]

A party claiming that excessive noise in his unit is the result of a construction defect must prove the defense with solid evidence. [Kaplan v. Wintergate at Longmead Condominium - #410]

The CCOC will not intervene in noise disputes when the board has only issued a warning. [Barrett v. Normandy Hills HOA - #544]

A board's refusal to allow the installation of air conditioning units in the common elements is reasonable when one of the factors considered by the board is the unnecessary noise that such units will cause for the owners of the ground floor units adjacent to the new air conditioning units. [Verchinski v. Plymouth Woods Condominium Assn. - #57-10]

3. **Animals and pets**

Associations can be held liable for injuries caused by dogs when they know that a member or resident is housing a dog which has previously bitten someone or has otherwise acted dangerously. [Courts & Judicial Proceedings Article, Section 3-1901]

Dog owners are liable for any injuries caused by an unleashed dog unless they can prove they were not aware, nor should have been aware, that the dog was dangerous. [Courts & Judicial Proceedings Article Section 3-1901]

An association may regulate the keeping of animals as pets so long as the regulations are properly adopted, notice of them is given to the residents, and they are consistently enforced. [Wurtz and Heavey v. Kenwood Forest II Condominium - #158, Scornavacchi v. Normandie on the Lake - #137, Cameron v. Westlake Terrace Condominium - #135, *Dulaney Towers v. O'Brey* (see Appendix B, below)]

An association may restrict its members' rights to feed wildlife—in this case, birds—when there are complaints from neighbors that the feeding draws excessive numbers of birds and creates a nuisance affecting the neighbors. The association may properly restrict a member to one birdfeeder. [Ngo v. Churchill East Village Community Association et al. - #525, Ngo v. Churchill East Village Community Association et al. - #503]

An association may properly prohibit construction of a dog shelter, even if the County requires such a building. A person who lives in an association must comply both with the County's regulations and with the regulations of his association. [Flores v. Highlands of Olney Condominium - #553] If an animal shelter violates an association's regulations, the CCOC can uphold the association's right to

have it removed. [Evnin v. Decoverly IV Condominium, Inc. - #586]

A combination animal shelter/playhouse, regardless of what its owner may call it, is still a "structure" governed by the association's architectural rules, and must be removed if it violates those rules. [Doral HOA v. Akhigbe - #36-07]

4. Landlord and tenant, leases, rentals

Although Section 11-109(d) of the Condominium Act give the condominium the right to adopt reasonable rules and regulations, it does not give the condominium the right to require tenants to pay their rent to the association instead of to the landlord, or the right to evict tenants. If the association wants to force tenants to pay rent to the asso- ciation because the landlord is in default on his assessments, it should first sue the landlord, and then obtain a court order garnishing the rent payments. [Zanoff v. Rock Creek Commons Condominium - #168]

Associations have the right to prevent homes and units from being used by more than one family. [Doral HOA v. Montalib - #592]

[Staff comment: County law requires that all landlords who do not live with their tenants must be licensed, and there is a daily fine for lack of a license. In addition, all separate living units held for rent and attached to a larger home ("accessory apartments") must be inspected and licensed by the County. Homeowners who do not live in their homes and rent them out instead, may lose the homestead exemption on their property taxes, and can be subject to penalties if they do not promptly notify the County that the house or unit is not their "principal residence." County staff may report such violations to the appropriate law enforcement agency.]

https://montgomerycountymd.gov/DHCA/housing/licensing/forms.html

5. Home businesses and day care

Section 11B-111.1 of the HOA Act, Section 11-111.1 of the Condo Act, and Section 5-6B-18.1 of the Cooperative Housing Act, state that associations cannot prohibit day care businesses and "no-impact, home-based businesses under a general authority to regulate home businesses. In order to regulate or prohibit day care and no-impact businesses, the association must have a bylaw that specifically applies to day care and child care operations and to no-impact home-based businesses. An association can amend its bylaws to adopt such a regulation by a simple majority vote.

[NOTE: The Montgomery County Department of Permitting Services defines a "no- impact" home-based business as one that has no non-resident employees coming to the site for any reason during the day, no more than 5 customer/client vehicle visits to the property each week. No retail sales. This type of business can be operated as a matter of right, with no registration.]

A mass mailing business is not a "no-impact home-based business." [Highland Manor HOA v. McClure - #87-10]

A homeowner is not guaranteed the right to set up a day care business even if no rules on the subject exist at the time she applies for permission. The HOA can, while the homeowner's application is

pending, amend its bylaws to prohibit day care businesses, and if it does so properly and according to the law, it can deny the application once the new bylaw has passed. [Livingstone v. Parkside Community Association - #23-08]

A mass mail operation does not fall under an association rule permitting "professional offices." Such an operation does not involve one of the learned professions or a profession regulated by the State. In this case, the operation also required the use of employees and created significant heavy traffic, in violation of the rule. [Highland Manor HOA v. McClure - #87-10]

HOA members who operate businesses out of their homes in violation of HOA rules will be ordered to cease their operations by the CCOC. [Hunting Woods HOA v. Marhamati - #154]

An association cannot be held liable for the failure to enforce rules against the commercial use of its lots when it has no such rules, and when it has long tolerated the commercial uses of other lots. [Killea v. Cabin John Gardens, Inc. – #88-10/ McNulty v. Cabin John Gardens, Inc. - #24-11, 2nd Order]

6. Pest control

A board's decision regarding the proper manner of pest control is protected by the "business judgment" rule, and will be upheld in the absence of proof of bad faith, fraud, or lack of authority. [Smart v. Pooks Hill Condominium, Inc. - #673]

7. Neighbor v. neighbor

[Staff comment: The CCOC does not have the authority to decide complaints by one resident or member against another resident or member, even if the complaining party claims the other party is in violation of the rules of the association. The complaining party must make his complaint to the board of directors. If the board fails to respond to the complaint, the member may then file a complaint with the CCOC against the association, but not against the member, and must show that the board's failure to respond is a violation of a rule.

If the board does respond to the complaint, but refuses to take the action the complaining party wants it to take, the complaining party may then file a dispute with the CCOC against the association, but in that case the complaining party must then prove why the board's refusal to take certain action is not protected by the "business judgment" rule. See Staff Comments at beginning of this Chapter.]

The board's decision to allow a fence on a neighbor's property is protected by the "business judgment" rule and not within the CCOC's jurisdiction. [Prue v. Manor Spring HOA - #39-09]

When a unit owner in a condominium complains about excessive noise by the tenants in the unit above her, and the board holds a hearing on the matter with testimony from the unit owner and the tenants, the board's decision that there was no excessive noise is protected by the business judgment rule and will not be overturned by the CCOC. [Taylor v. Heritage Green Condominium - #16-12]

The board's decision to ask a neighbor to prune his shrubs to the height mandated by the association rules, and its decision to take no further action if he refused to prune his shrubs in response to its request, is exempt from the CCOC's jurisdiction under the "business judgment" rule. [Henry v. Bel

Pre Recreational Association - #40- 09]

8. Managers and employees

The selection of a manager is a matter left to the "business judgment" of the board of directors. [2018-60, East v. Bel Pre Square HOA - #745]

[Staff comment: The staff believes that there is a limited exception to the general rule that board decisions on the selection and supervision of employees is covered by the "business judgment" rule. The exception is when the hiring of a particular person or firm would result in a violation of a State or local law. For example, the association does not have the right to hire someone who must be licensed to perform the work, if that person is not properly licensed for that work. If a law requires that property managers must be licensed, then the board cannot hire an unlicensed property manager. The reason for this exception is that the board does not have the legal right, under the "business judgment" rule, to do anything which clearly violates public policy as declared by State or local laws.]

9. Access to private units

A condominium association may compel a unit owner to allow access into the unit in order to ensure it is in good condition when its governing documents clearly grant that power, and it can impose reasonable fines when the unit owner fails to grant access. [Parkside Condominium v. Lopez-Cayzedo - #12-13]

10. Conditions inside private units

A condominium association must have specific authority to regulate the interiors of the private units. One such grant of authority is when the bylaws state that nothing can be done, or allowed to exist in a unit, which would cause the master insurance rates to increase or which would cause the master insurance to be denied altogether. If the master insurance has notified the condominium that it would not renew its coverage unless all the obsolete fuse boxes inside the units were replaced with more modern circuit breaker panels, the condominium had the right to pass a rule requiring all members who still had fuse boxes to replace them with circuit breaker panels. [Parkside Condominium v. Lopez-Cayzedo - #12-13]

A condominium association does not have the authority to require all members to replace their ordinary electrical outlets with ground fault interrupter outlets, when such a change was not required by the master insurer, and the condominium could not offer any evidence to show that the ordinary outlets were dangerous, or had caused any fires. [Lieberman v. The Whitehall Condominium - #25-06]

11. Rights of non-members

A Maryland corporation has the legal authority to charge fees to non-members of the corporation for the privilege of using the corporation's common property. [Ramsey v. Bel Pre Recreational Association, Inc. - #369]

Individual condominium members do not relinquish the rights accrued to them by virtue of membership in a condominium as a consequence of their membership on the Board or on multiple committees. Association members have the ability to participate in association governance and representation objectively and to make fair and reasoned decisions despite the possibility that their leadership may find outlet in various roles. There is no prohibition in the governing documents or state and local statutes limiting the participation of an association member to a single role or function. [18-17]

E. <u>Annual and Special Assessments</u>

1. Setting assessments

The board of directors has the authority to decide what is the proper amount of funds to allocate to the reserves, and it can set the assessments at a level that will allow it to meet that target. In this case, the reserve fund was considerably in excess of the amount needed for the ordinary maintenance. However, there were times in the past when the board had unusually high costs. The board's plan was conservative in allocating for the worst case scenario, but that was within its discretion. [30-12]

Section 11-109.2 of the Condominium Act, which sets a limit of 15% on assessment increases, applies only when the association has adopted its fiscal year budget and then proposes to raise the assessments during the same fiscal year. It does not apply to an increase in assessments from the old fiscal year to the new fiscal year. [Saunders v. Greencastle Manor Condominium - #03-12]

Where the governing documents create only one class of membership, and state that all members must pay their proportionate shares of the common expenses, an HOA cannot create different assessments for the different types of housing (detached homes, townhomes and duplexes) in the community; each member must pay the same amount. [O'Connell v. Greencastle Lakes Community Assn. - #55-09]

A person who claims that an association is charging a fee or assessment in violation of law or the association's governing documents must prove the claim. [Shomette v. Greencastle Lakes Community Association - #140]

An HOA's rules for the imposition and collection of assessments, and to sub-meter water bills, are valid and enforceable if the rules are filed in the land records. They need not also be filed in the HOA Depository. [East v. Bel Pre Square HOA - #745]

A board may be in violation of its fiduciary duty if it fails to charge penalties on unpaid assessments, and if it keeps its assessments too low to cover reasonably anticipated expenses. [Ramsey v. Bel Pre Recreational Association, Inc. - #369]

Even if the CCOC finds an assessment improper, it is not required to order a refund. The proper remedy may be to order the board to change its practices for the future. [O'Connell v. Greencastle Lakes Community Assn. - #55-09, DePamphilis v. Victoria Springs HOA - #511]

An association can impose special assessments on some members without imposing them on all members equally, if the purpose of the expenses is to provide a service that only those members receive. [Sauri v. Estate at Pope Farms - #715]

Condominiums and HOAs must provide their members at least thirty (30) days' advance notice of a proposed budget or of a proposed budget amendment, and at least ten (10) days' notice of any meeting to discuss a budget amendment. [Section 10B-18 of the County Code.]

The failure to comply with the notice provisions of the County Code can result in the reversal of a budget amendment or special assessment. [Balderson v. Kenwood Place Condominium - #133, Williams v. Kenwood Place Condominium- #101]

2. Application of Business Judgment Rule

Before the CCOC can reach the issue of whether the board's decision to set an annual assessment is protected by the "business judgment" rule, the CCOC must first address the issue of whether the board has the right, under its governing documents, to apportion the assessments in the manner it did. If the board's action is in conflict with the governing documents, it is not protected by the "business judgment" rule. [O'Connell v. Greencastle Lakes Community Assn. - #55-09]

The board has the right to impose special assessments without member approval if the purpose of the special assessment is to make emergency repairs. The board's decision to make the repairs in the near future, rather than to wait, is protected under the "business judgment" rule. [Susman v. Sussex House Condominium Association - #779]

The CCOC will generally uphold a board's decisions to impose special assessments under the 'business judgment" rule, provided the board acts in good faith and without fraud. [Parris v. Middle Village Homes Corporation - #147, Balderson v. Kenwood Place Condominium - #133, McCandish v. Waters Landing Association, Inc. - #131]

A condominium association may impose a special assessment for the purpose of making up a shortfall in its reserve funds if it has a factual basis for doing so. [Kauffman v. The Kenwood Condominium - #04-07]

3. Improvements vs. repairs

Even though the Complainants in this case agree that the fire alarm system replacement except for the pilasters qualifies as maintenance, repair or replacement under Article V, §9, in addition to the pilaster design feature, which fulfills a necessary functional purpose, the new fire alarm system is of a different design than the current one and is upgraded to meet code requirements that have changed over the fifty (50) years since the installation of the current system. Thus, it is appropriate to consider the new system an "addition, alteration or improvement" and it will cost more that $10,000.00. The association's bylaws require a majority vote of unit owners to approve such a project, and because the association failed to do so, it violated its governing documents. [Dillin v. The Willoughby of Chevy Chase Condominium - #2018-040/2018-061]

A study ordered by the board to evaluate the feasibility of installing central heating and air conditioning in a building that did not have any, and which cost over $25,000, violated the association's governing documents that stated that all contracts over $25,000 for the purpose of additions or improvements must be approved by the general membership. The study was for the addition of something new, not for repairs to something that already existed. [Voloshen v. Sligo Station Condominium - #30-11]

When a condominium bylaw stated that the board could not raise assessments in order to fund an improvement costing more than $25,000 without the vote of the general membership, the board did not violate this bylaw by adopting a special assessment of over $1 million in order to repair the copper pipes in the building to prevent pinhole leaks. The plumbing repair was not an "improvement" or "addition," because it did not add anything new to the common elements. Instead, it was a repair of an existing element, and not covered by the bylaw. Although the total project did include the installation of new shut-off valves in each unit, this was an insignificant part of the whole cost. [Lee v. University Towers Condominium - #52-08]

The board did not exceed the spending limits for "additions, alterations or improvements" because it was using the money for the repair and replacement of the common elements, not for new construction. [Pereira v. Park Terrace Condominium - #335]

The CCOC will uphold a board's decision to impose a special assessment without member approval if the assessment was for the purpose of making emergency repairs. [Susman v. Sussex House Condominium Association - #779]

The board's decision to raise assessments to replace the HVAC system was within the board's authority even though there was no imminent danger from the existing system, because the board's engineering consultants had recommended replacement. Since the purpose of the budget amendment was repairs, it was not governed by the bylaw that required membership approval for budget increases over 15%. [Balderson v. Kenwood Place Condominium - #133]

4. Collection of assessments (interest, late charges, liens and costs)

A board might be in violation of its fiduciary duties by failing to charge interest on unpaid assessments. [Ramsey v. Bel Pre Recreational Association, Inc. - #369]

Rules imposing fines and penalties should be properly adopted and the association should give notice of the new rules to all the members before attempting to enforce the new rules. [Scenery Pointe Condominium v. Glennie - #780, Williams v. Oak Springs Townhouse Association, Inc. - #578] Properly adopted and executed rules creating penalties for violations after due notice to the offending member will be upheld by the CCOC. [590]

When the late payment policies are created by the covenants or bylaws, the association cannot change them except by properly adopting amendments to those documents. In the absence of a properly-adopted amendment, the new rules are invalid and the old rule remain in effect. [Kearns v. Snowdens Mill Townhouse Association #2, Inc. - #255]

Inconsistent enforcement of assessments, and inconsistent application of interest on unpaid assessments, may result in a violation on the board of its fiduciary duties. [Ramsey v. Bel Pre Recreational Association, Inc. - #369]

The failure of an HOA to file all of its documents in the HOA Depository did not affect the right of the HOA to impose and collect assessments, because that right was contained in the Declaration of Covenants, which was properly filed in the land records. Since the Declaration of Covenants was filed in the land records, the document was not also required to be filed in the Depository. [East v. Bel Pre Square HOA - #745]

5. Utility charges as assessments

An HOA has the right to sub-meter its water service charges provided that its rules provide for such a charge, and that the relevant documents are properly filed either in the land records or in the HOA Depository. [East v. Bel Pre Square HOA - #745]

6. Purpose of assessments

The board of a master association can charge the individual members of a sub- association for the costs of maintaining the local facilities that serve only their community, but it cannot charge those members an additional fee for the costs of providing administrative services. This is because the costs of operating an association must be paid for out of the general assessments that all members share equally. [Esprit, A Condominium and Klingaman v. Waters Landing Association, Inc. - #149]

The board has the discretion to impose a special assessment for the purpose of bringing the reserve fund up to the level recommended in the last reserve study. [Kauffman v. The Kenwood Condominium - #04-07]

Section 11-110 of the Condominium Act allows a condominium to assess charges for utility services on the basis of individual usage rather than on the basis of percentage of ownership. Charges for utility services may be enforced in the same manner as assessments for common expenses.

7. Doctrine of Independent Covenants

[<u>Staff comment:</u> Under a rule created by the courts, the covenant duty of the member to pay assessments is separate from the covenant duty of the association to maintain the property in good condition or to enforce other rules. Therefore, a member cannot use the association's failure to maintain the property as an excuse not to pay the assessments. Even placing the assessments into escrow is a violation of the duty to pay, unless the association has agreed to this procedure, or it has been ordered by a court or the CCOC.]

F. <u>Meetings and Elections</u>

1. The "open meeting" laws

For the purposes of the "open meetings" laws, a "meeting" is a gathering of the board of directors, whether in person, or by email, or in some other manner, for the purpose of making decisions concerning the business of the association. Mere discussions by board members, without decisions, are not "meetings." [McBeth v. Fountain Hills Community Association #52-12] [Muse v. Fountain Hills Community Association 67-12]

When the undisputed evidence shows that the board improperly conducted a closed meeting, the panel will order the board to participate in training regarding the open meetings law from its attorney, even though the complaining party has asked to have his case dismissed prior to a hearing. [Lebowitz v. Arora Hills Condominium - #60-14]

A "meeting" conducted by email is a "closed meeting" under the law, and the board is therefore allowed to conduct such a meeting only for the purposes authorized by the laws and only if it complies with the reporting requirements of the laws. [McBeth v. Fountain Hills Community Association #52-12] [Muse v. Fountain Hills Community Association 67-12]

A board of directors can close a meeting and require a director to leave the meeting when the purpose of the closed meeting is to discuss a legal action filed against the association by that director. [McBeth v. Fountain Hills Community Association #52- 12] [Muse v. Fountain Hills Community Association 67-12]

The board can hold a closed meeting without giving one director notice of that meeting when the purpose of the meeting is to discuss complaints filed by that director with the CCOC. [Huber v. Thayer Towers Condominium - ##49-13 & 04-14]

The board can hold closed meetings for the purpose of discussing replacing its community manager and attorney. [2018-60]

In the absence of an express prohibition in the Act or the Association's governing documents, the Board is free, using the broad powers granted to it, to hold informal gatherings to discuss matters important to the community. Should those matters later come before the Board or the unit owners for formal action, the fact that informal discussions had previously taken place does not preclude whatever additional discussion may be desired and appropriate. [2018-60]

"Meetings" conducted by committees of the board of directors fall under the "open meetings laws, and if they involve the making of decisions, as opposed to mere recommendations, they must be held as open meetings, unless there is authority to close them under the open meetings laws. [McBeth v. Fountain Hills Community Association #52-12] [Muse v. Fountain Hills Community Association 67-12]

The board must provide advance notice of its meetings, and this notice should include a statement of the time, place, and agenda of the meeting. [McBeth v. Fountain Hills Community Association #52-12] [Muse v. Fountain Hills Community Association 67-12]

The hearing panel held invalid a disputed election because the election notice sent out by the board was improper. As a result, all decisions made by the newly-elected board at its meeting immediately following the election were also invalid. [Jones v. Georgian Colonies Condominium Association - #40-17]

The statutory provision on condominium members and board meetings is confusing but one of the most important purposes it is intended to serve is to assure meaningful open meetings of both bodies. The requirement for not less than ten (10) days' notice delivered to each unit owner must be read to apply to both sets of meetings. Assuring that Board meetings are open to unit owners in a meaningful way requires reasonable notice of board meetings be provided to unit owners. The language of Section 11-109(c)(1) that includes the board of directors in the "not less than" provision cannot be ignored. [Dillin v. The Willoughby of Chevy Chase Condominium - #2018-040/2018-061]

Notice to all unit owners of all board meetings must be given at least ten (10) days but not more than ninety (90) days in advance of the meeting. It must include the date, time, place and agenda for the meeting and it must be delivered in accordance with the statute. The reason for the distinction between regular and special meetings is that boards may establish a published schedule of dates, time and place of a regular schedule of meetings and then have only to announce the agenda. But notice in accordance with the statutory requirements must be provided for meetings that are not on a published schedule of meetings. [Dillin v. The Willoughby of Chevy Chase Condominium - #2018-040/2018-061]

The meeting of part of the board with its auditor or manager is not a meeting of the board and is not covered by the open meetings act. [Kelly v. The Willoughby of Chevy Chase Condo. - #677]

The CCOC will not uphold decisions made by the board in closed meetings that were not properly closed. [Haddonfield HOA v. Tyra - #263]

Unlike condominiums and HOAs, cooperatives are not governed by any law requiring open meetings. [Hamilton v. 7611 Maple Avenue Cooperative, Inc. - #314] [Editor's note: the law was amended in 2014 and now cooperatives must also comply with an open meetings statute.]

Meetings that do not include the board of directors or its committees are not covered by the Condominium Act's "open meetings" law. [Kelly v. The Willoughby of Chevy Chase Condo. - #677]

Parties challenging a meeting as not properly conducted must prove their cases with details and evidence. [Johnson v. Hallowell HOA - #46-06, Turner v. Cherrywood HOA - #111]

Parties challenging the board's refusal to call a special meeting must prove that they followed the relevant rules for requesting such a meeting. [Conradt v. Rock Creek Apt. Condominium II- #707]

Although the "open meetings" provision of the HOA Act does not require that boards provide advance notice of their meetings, the lack of notice means that the members cannot attend, and that could result in what amounts to an improperly closed meeting, in violation of the law. [Prue v. Manor Spring HOA - #39-09]

When an association is found to lack a procedure to notify all its members of its board meetings, the

CCOC can order it to publish the meeting schedule and distribute it to all members. [Benziger v. Westbard Mews Condominium - #557]

When the CCOC finds an association to be violating the open meetings law, it can order it to change its procedures, and can require progress reports to ensure that the association is complying. [Chlebowski v. Rolling Acres HOA - #631]

Minutes of properly-closed meetings do not have to be made available to the members. [Benziger v. Westbard Mews Condominium - #557, Williams v. Kenwood Place Condominium - #175]

An HOA board cannot close its meetings to discuss an architectural violation when no litigation over that violation is pending. [Zich v. Decoverly I HOA - #47-07] [Staff note: This holding does not apply to condominium boards, as the Condominium Act requires that board hearings on member violations are confidential. Section 11-113.]

Section 11-109.2 of the Condominium Act requires boards to give members at least ten (10) days' advance notice of any meeting to amend the budget.

2 Meeting Notices and waiver of notice

An election will not be invalidated because the condominium gave a thirty (30)-day call for nominations instead of the required forty-five (45)-day notice, if there is no evidence that any harm to the community or to any candidate resulted from the violation. [Huber v. Thayer Towers Condominium - ##49-13 & 04-14]

Although the Bylaws require the Board's secretary to send the notices of election, and the management company sent them instead, this does not invalidate the election in the absence of any evidence of harm. It is common for managers to send these notices, and the informal delegation of that duty by the board to the manager is not prohibited. [Huber v. Thayer Towers Condominium - ##49-13 & 04-14]

Although the board gave notice that three (3) positions were available on the board at the next election, the members of the association could properly reduce the size of the board by a simple majority vote taken at the start of the election, thereby reducing the number of vacancies on the board to one (1). The bylaws did not specify a fixed size of the board but only that it be no smaller than three (3) directors and no larger than nine (9). The bylaws did not specify how the number could be changed within that range. It was a reasonable interpretation of the bylaws to allow the members to change the size of the board from seven (7) to five (5) members by a simple majority vote, because they were not amending the bylaws. [Brown v. Americana Finmark Condominium Association - #42-09]

When the bylaws only specify a range for the size of the board of directors (not less than three (3) and not more than nine (9)), and do not explain how the size is to be set within that range, but do indicate that the board of directors is allowed to make all decisions not specifically given to the general membership, then the board has the right to make that decision. [35-11, Corporations & Associations Article Section 2-402(c)(2) of the Maryland Code.]

An HOA member who attends an election waives any defect in the notice of the election even if the HOA failed to give the proper amount of notice. [Chidel v. Dellabrooke HOA - #76-09]

When the Condominium had failed to give proper advance notice of its proposed budget two years earlier, but had since provided proper notice of the proposed budget for the following year, the matter was moot because there was no effective remedy the CCOC could order. [Pereira v. Park Terrace Condominium - #335]

When a board adopted a special assessment for repairs but failed to give proper notices of the budget amendment and of the meeting at which the budget amendment and new assessment would be voted upon by the board, the board was ordered to stop collecting the special assessment until it provided the proper notices and voted on the assessment again. [Balderson v. Kenwood Place Condominium - #133]

Associations should have their election rules and regulations in writing and available to the members. [Conradt v. Rock Creek Apt. Condominium II- #707]

There were too many errors and irregularities in the election regarding the election process, tabulation of ballots and third-party contractor. Even though there was no finding of bad faith on behalf of the Board, the Panel concluded that the original election process was not conducted in accordance with generally accepted standards and must be set aside. A new election was ordered. [Tavens v. The Willoughby Condominium of Chevy Chase - #2018-72]

Bylaw amendments affecting elections which were not adopted at meetings at which there was a proper majority vote of the members, will be invalidated. [Susman v. Sussex House Condominium Association - #779, Haight v. Horizon Run Condominium Association, Montgomery Village Association, and Washington Suburban Sanitary Commission - #215]

Bylaw amendments affecting elections become effective on the date they are recorded. They cannot be retroactive and affect an election held before they are recorded. [Susman v. Sussex House Condominium Association - #779]

Associations must give proper advance notice of new assessments before the members can be required to pay them. [Balderson v. Kenwood Place Condominium - #133, Jenkins v. Waterford Condominium Inc. - #112, Turner v. Cherrywood HOA - #111, Williams v. Kenwood Place Condominium- #101]

An HOA that fails to provide its members notice of its meetings on architectural applications pursuant to Section 11B-111 of the HOA Act violates their right of due process. This applies not only to the homeowners whose applications are to be considered at the meeting, but to all members, because they might be affected by the board's architectural decisions. [Weiss v. Woodstock HOA - #702, Haddonfield HOA v. Tyra - #263]

If a board fails to give the proper advance notice of proposed budgets and budget hearings, the budget amendment or special assessment involved could be reversed. [Balderson v. Kenwood Place Condominium - #133, Williams v. Kenwood Place Condominium- #101]

3. **Ballots, proxies and powers of attorney**

The use of faxed ballots does not violate Chapter 10B's prohibition on counting ballots before the voting is complete. Receiving ballots is not the same as counting them. [Huber v. Thayer Towers Condominium - ##49-13 & 04-14]

County law requires that all proxy ballots, and all powers of attorney created only for use in an association election, must be directed ballots, that is, they must identify the candidates for whom they are to be voting. [Section 10B-17(b)] The Condominium Act also requires this. [Section 11-109(c)] [291] If they are not directed, they can only be used to establish a quorum and to vote on other business. Proxy ballots created only for use in association elections must also be "directed" ballots. [Section 10B-17(d)]

The board of directors can reject a member's proxy ballots for good cause under Section 10B-17(d). In this case, the proposed proxy ballots listed only one candidate out of several candidates for several positions on the board, and the proposed ballots failed to protect the identity of the proxy giver to the same extent that the board's approved proxy ballots did. [41-08]

The panel will not declare an election invalid simply because the board president went around the community soliciting proxy ballots from the members before all the candidates knew when the election would be held or that proxy ballot forms were available. The error or unfairness of the early proxy solicitation, if there was any, was mitigated by the subsequent announcement by the board secretary that the members must use the proxy forms she prepared and submit them to her instead. Any member who had given proxy ballots to the board president had the chance to reconsider his decision and change his vote before the election when he submitted the revised proxy. [Johnson v. Highland Manor HOA – #42-10]

The failure of the association to hold its annual meetings on the date appointed in its Bylaws will not invalidate the results of the election in the absence of any evidence showing that the failure harmed the community or any candidate, but the association must henceforth comply with the Bylaw. [Huber v. Thayer Towers Condominium - ##49-13 & 04-14]

The process used by the condominium association in distributing the proxy/ballot form, a two-sided single sheet, does not allow calculation of the ownership value of the submitted proxies without looking at the proxy itself. One side of the sheet of paper is the proxy and the other is the ballot. This is a violation of Montgomery County Code § lOB-17 (f), which requires that an association not open election ballots until the time for voting closes. The proxy/ballot forms that were submitted in envelopes were opened prior to the annual meeting in order to assess the status of the quorum count. [Tavens v. The Willoughby Condominium of Chevy Chase - #2018-72]

Even though there were explanations that were perfectly reasonable for the changes in ballot count and tabulated results, it was no longer possible to establish what the correct result of the election was. Therefore, the panel may order a new election. [Tavens v. The Willoughby Condominium of Chevy Chase - #2018-72]

4. **Quorums**

Section 11-109(c) of the Condominium Act states that if a condominium association calls an election but fails to muster the necessary quorum in order to proceed, it may call a second meeting at which the members present will constitute a quorum, even if that number is less than the number required by the rules, but it must have provided proper notice of this procedure in its initial notice of election; otherwise, the second meeting cannot proceed. [811] [Staff comment: A similar law applies to HOAs and cooperatives: Section 5-206 of the Maryland Corporations & Associations Article.]

Section 11-109(c)(8) of the Condominium Act requires the fifteen (15) days' notice of the subsequent meeting be given *after* the initial meeting fails for lack of a quorum. This puts all unit owners on notice that a quorum was not initially achieved and that they should attend the subsequent meeting if they wish to prevent a small group of unit owners from conducting business at the additional meeting.

5. Participation by absent members

In the absence of any association document to the contrary, the board has the right to allow the nomination from the floor at an election of a person who is not present at the election. [McBeth v. Fountain Hills Community Association #52-12] [Muse v. Fountain Hills Community Association 67-12]

6. Terms of office and staggered terms

Section 10B-17(g) of the County Code requires that unless the association's rules state otherwise, the terms of the directors should be staggered so that they are not all up for election at the same time.

Although the board's conduct of past elections effectively ignored the requirement of staggered terms, this does not necessarily invalidate the board's decisions. When a board is recently elected without staggering the terms, the hearing panel can decide the terms based upon the vote tallies for each director. [Huynh, al., v. Falls Farm Homes Corp. 48-14 to 51-14]

Defects in past elections can be mooted by a recent election properly conducted. [Huynh, al., v. Falls Farm Homes Corp. 48-14 to 51-14]

7. Minutes

The board must comply with the open meetings act. This means that when it decides to hold a closed meeting, its minutes must state why the meeting is closed and the vote to close it. The board must report this information in the minutes of its next open meeting. [Huber v. Thayer Towers Condominium - ##49-13 & 04-14]

The board of directors has the authority to decide what should be in the official Minutes. It is not required to include everything said or every argument made at the meeting, but the board should include a record of all decisions made. [McBeth v. Fountain Hills Community Association #52-12] [Muse v. Fountain Hills Community Association 67-12]

Minutes of properly-closed meetings are confidential. [Williams v. Kenwood Place Condominium -

#175, Section 11-116 of the Condominium Act, Section 11B-112 of the HOA Act]

If an association is found to have failed to comply with statutes on open meetings and record keeping, the CCOC can order it to comply, and can order the association to submit status reports from time to time to establish that it is bringing itself into compliance. [Chlebowski v. Rolling Acres HOA - #631]

The association cannot keep secret the fact that it closed a meeting. When a meeting is closed, the publicly-available minutes must indicate the reason for closing the meeting, the vote of each board member to close it, and the date, time and place it was held. [Zich v. Decoverly I HOA - #47-07]

8. **Disqualification from voting**

   Under Section 11-104(d) of the Condominium Act, a condominium can disqualify a member from voting in an election if the association has recorded a lien against the member. However, a condominium cannot disqualify a member from voting if the member is in arrears on his assessments, but it has not yet filed a lien against him. [Haight v. Horizon Run Condominium Association, Montgomery Village Association, and Washington Suburban Sanitary Commission - #215]

   A bylaw that states that no one can vote in an election if he is not in good standing does not prevent a properly-elected board member, who subsequently is not in good standing, from voting on business before the board. [Lopez v. Spring Lake Condominium - #30- 13]

9. **Voting (No cases.)**

10. **When meeting not required**

    An amendment to the declaration of covenants need not be voted upon at a meeting of the membership, when the declaration itself states that it may be amended through "an instrument" signed by two-thirds of the members. [Kalin v. Normandy Hills HOA - #24-13]

11. **Removal from a meeting**

    The board of directors has the right to exclude one of its members from a meeting which is called for the purpose of discussing litigation between the association and that board member. [McBeth v. Fountain Hills Community Association #52-12] [Muse v. Fountain Hills Community Association 67-12]

12. **Revocation of Appointment**

    Unless the governing documents provide otherwise, the board of directors has the authority to abolish a committee it created, and to revoke at will the appointment of members to a committee. [McBeth v. Fountain Hills Community Association #52-12] [Muse v. Fountain Hills Community Association 67-12]

G <u>Access to Association Records</u>

The Maryland Condominium Act [Section 11-116], the Maryland Homeowners Association Act [Section 11B-112] and the Cooperative Housing Act [5-6B-18.5] allow members of associations to inspect almost all the books and records of their associations. The exceptions are:

- ***a) personnel records (but information on salaries, wages, bonuses and other compensation paid to an employee can be inspected);***
- ***b) a person's medical records;***
- ***c) a person's personal financial records including assets, income, bank statements, etc.;***
- ***d) the written advice of legal counsel;***
- ***e) minutes of closed meetings; and records relating to business transactions that are still being negotiated (HOAs only, this section does not apply to condominiums).***

The association may charge a reasonable fee for inspection and for copying. [Campbell v. Lake Hallowell HOA - #541] The copying fee may not be more than that charged by the Circuit Court.

The charges for document review are subject to the terms and conditions of the Association's management contract, which are shielded from review by the Business Judgment Rule, and further do not violate the applicable state law mandating that such charges be reasonable. [Oak Grove HOA v. Tobb - #19-17]

Audit reports, even though labeled "confidential" by the auditor, are association documents once delivered by the auditor to the association, and they are subject to inspection by the association's members. [Kelly v. The Willoughby of Chevy Chase Condo. - #677]

Although the "accountant-client privilege" means that an accountant cannot be required to turn over documents without the client's permission, it does not apply to documents in the possession of an association which are otherwise subject to inspection under the relevant "open records" acts. An association cannot use the accountant-client privilege to refuse to allow inspection of documents. [Kelly v. The Willoughby of Chevy Chase Condo. - #677]

Members have the right to inspect the financial records of the association. [Pereira v. Park Terrace Condominium - #335]

Members have the right to inspect election records, including the ballots themselves, in spite of association rules requiring all voting to be by secret ballot. State law on "open records" takes precedence over association documents. [Kessler v. Cloverleaf Center I Condominium - #68-08]

H Budgets, Spending and Audits

1. Accounting and Budget

Associations must comply with their governing documents for the proper adoption of a budget, and provide proper advance notice of the budget and of the meeting at which the budget will be voted upon. Associations must act in good faith during the process. [26-06, Lapkoff v. Camelback Village Condominium Assn. - #794, Susman v. Sussex House Condominium Association - #779, Pereira v. Park Terrace Condominium - #335, Shomette v. Greencastle Lakes Community Association - #140]

An association that imposed a special assessment for the replacement of its HVAC system failed to give the required thirty (30) days' advance notice of the amended budget and also failed to give the required ten (10) days' notice of the meeting to vote on the amended budget. Although the board's right to impose the assessment was upheld, the CCOC ordered the board to stop collecting the new assessments until it gave proper notice of the proposed budget amendment and of the meeting to vote upon the new budget and assessment. [Balderson v. Kenwood Place Condominium - #133]

If the association miscalculates its assessments and collects more money for landscaping to one class of members than is permitted by its rules, the CCOC is not required to order it to make refunds to the members of the surplus. Rather, the proper remedy may be to require it to revise its budgeting procedures so that the problem is corrected and the assessments for that class are properly calculated going forward. This especially will be the case where neither party can convincingly show how much the overcharge was. [DePamphilis v. Victoria Springs HOA - #511]

2. **Audits and Financial Status**

A meeting to discuss an audit, between part of the board and its auditor or manager, is not an official meeting of the board itself, and need not be an open meeting. [Kelly v. The Willoughby of Chevy Chase Condo. - #677]

Members have the right to inspect the financial records of the association. [Pereira v. Park Terrace Condominium - #335]

3. **Improvements v. Repairs**

The board of a condominium may adopt a special assessment without the obligation to obtain approval of the members when the purpose of the special assessment is the repair of an existing plumbing system, rather than an "improvement", which is the addition of something new. The bylaws only required approval for expenses in excess of $25,000 when the expense was for improvements, not repairs. [Lee v. University Towers Condominium - #52-08, Pereira v. Park Terrace Condominium - #335]

4. **Right to Shift Funds and to Change the Budget**

The board has the right, pursuant to the business judgment rule, to impose a special assessment for the purpose of making up a shortfall in the reserve funds, if the board has a factual basis for doing so. [Kauffman v. The Kenwood Condominium - #04-07] The Condominium Act does not prevent the board from taking money out of the reserves and using it for current maintenance expenses, nor doesthe Act require the board to get membership approval to spend reserve funds. [Pereira v. Park Terrace Condominium - #335]

5. **Reserves**

If there is a shortfall in the amount of money that was planned to be in the reserve funds, the board has the right to impose a special assessment in order to restore the reserves to their proper level, if the board has a factual basis for doing so. [Kauffman v. The Kenwood Condominium - #04-07]

The board has the right to take funds from the reserves to use for other purposes if the board determines, in the exercise of its business judgment, that this is necessary. [Brown v. Americana Finmark Condominium Association - #42-09, Pereira v. Park Terrace Condominium - #335]

Although the Condominium Act requires the board to establish reserves for operating and for long term capital needs, it does not specify how much should be set aside for those purposes, nor does it prevent the board from using the reserves for current maintenance needs. [Pereira v. Park Terrace Condominium - #335]

6. Legal fees

The board has the legal right, under the Corporations Article and its own Articles of Incorporation, to reimburse a director for his legal fees incurred defending himself from a member's peace order lawsuit when the board had reason to believe that the lawsuit was directly related to the director's services on behalf of the board. [Huynh, al., v. Falls Farm Homes Corp. 48-14 to 51-14]

The board has the right to hire an attorney to assist it in revising its bylaws. [Huynh, al., v. Falls Farm Homes Corp. 48-14 to 51-14]

7. Authority of association to use common funds for private repairs

A condominium whose bylaws allow it to create a program for repairs inside the private units, and to bill the unit owners involved for such repairs, has the authority to decide to pay for the mandatory replacement of fuse boxes with circuit breaker panels out of the common funds, and then bill the unit owners involved for the costs of such work. This does not constitute a "loan" from the association to the unit owners. [Parkside Condominium v. Lopez-Cayzedo - #12-13]

An HOA cannot use common funds to pay for work done to improve property that it does not own. [Voorhees v. Decoverly I HOA - #05-11]

An HOA cannot pay for landscaping of the privately-owned units out of the ordinary assessments. [O'Connell v. Greencastle Lakes Community Assn. - #55-09]

An HOA that charges separate fees for maintaining driveways used by some members, but not by all, must in fact provide the maintenance, including snow removal. [Huynh, al., v. Falls Farm Homes Corp. 48-14 to 51-14]

I. <u>The Common Elements and the Limited Common Elements</u>

1. Amenities

A board has the right to decide where to place amenities in the common areas so long as the amenity in question is not immoral, offensive, prohibited by law or in conflict with the governing documents. [Konig v. Whitehall Condominium - #194]

The board has the right to expand a playground already in the common areas without the need for approval by the membership, as an exercise of its business judgment.
[Johnson v. Hallowell HOA - #46-06]

The board has the right to modify or remove play equipment located in the common areas under the "business judgment" rule. [Kaplan v. Stonebridge HOA - #549, Ramsay v. Bel Pre Recreational Association - #547]

2. Adverse Possession

In order to make a claim of adverse possession, the claimant must show open, continuous and exclusive use or possession of the property in dispute for at least 20 years. [Laytonia HOA v. Nejad - #323]

An HOA member cannot raise a claim of adverse possession of the common areas, because such a claim violates the governing documents, which prohibit the use of the common areas to benefit a single person. [Laytonia HOA v. Nejad - #323]

When an HOA approved an application to build a fence which extended into the common areas, and the HOA allowed the fence to exist for several years without complaint, and then failed to notify the new buyer of the home that the fence was a violation until after the purchase contract became final, the HOA did not surrender control of the common area involved but did, in effect, grant a "license" to the property owner for the use of that strip of common area on which the fence was located. This license lasted for the reasonable life of the fence, which was found to be ten (10) years.
After ten (10) years, the fence should be replaced, and the license would expire. The new fence would have to be built within the boundaries of the owner's lot. [Bennett v. Potomac Farms HOA - #444]

3. Boundaries

The board can change the boundaries of a playground already located in the common areas without approval by the membership. [Johnson v. Hallowell HOA - #46-06]

4. Damages

The CCOC has no jurisdiction over a claim by a lot owner that his HOA damaged his lot during work on the common elements. [McBeth v. Fountain Hills Community Association #52-12] [Muse v. Fountain Hills Community Association 67-12]

Although the developer, and not the HOA, changed the landscaping of the area in such a way that it caused erosion in the common area and more severe erosion on a private lot, the HOA had a duty to prevent the erosion in the common areas. [Siefken v. Tivoli Community Association – #75-12]

Although the rule in Maryland is that a landowner is not liable for the consequences of the natural flow of storm water from his land to the land downhill, he cannot alter his land so as to increase or concentrate that flow; and if the flow of water from his land to the land downhill causes severe hardship to the downhill land that its land owner cannot easily correct by himself, than the uphill land owner must take remedial action. [Siefken v. Tivoli Community Association – #75-12]

A unit owner complaining that the association is liable for damages due to its negligence must substantiate the claim with solid evidence. [Chase v. Georgian Colonies - #40-06, Gallagher v. Willow Cove Manor Condominium - #771, Wear v. Kenwood House Condominium, Inc. - #260]

In determining liability for damages in a condominium, the CCOC will consider all relevant evidence, including the governing documents, the plats, past practices, and expert opinions. [Collins v. Thomas Choice Condominium - #601, Ward v. Sierra Landing Condominium Association - #292, Botman & Coleman v. The Crescent J. Condominium, Inc. - #283, Eckard v. Montgomery Century Condominium - #219]

If an association's attempts to deal with a repair are inadequate, the CCOC can find the association liable for the fair market value of the damages. [Prentice v. Sierra Landing Condominium - #15-08, Eiland v. Autumn Walk Condominium Association Inc. - #257] If the evidence of liability for damages is inconclusive, the CCOC can require the Association to hire an expert witness to provide more information. [Romaine Chase v. Georgian Colonies Condominium - #726]

Awards for lost rental income, stress and aggravation cannot be awarded. The general rule for liability for consequential, or "special" damages has recently been summarized by the Court of Appeals in Burson v. Simard, 35 A.3d 1154 (Md. 2012), where the Court wrote: The general rule [regarding remedies] is enumerated in Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854): "the damages for a breach of contract should be such as may fairly and reasonably be considered, either as arising naturally, i.e. according to the usual course of things from such breach of the contract itself; or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Lloyd v. Gen. Motors Corp., 397 Md. 108, 162 n. 25, 916 A.2d 257, 288 n. 25 (2007). The panel has used the terms "general damages" and "special damages" to describe this rule. Addressograph- Multigroph Corp. v. Zink, 273 Md. 277, 286, 329 A.2d 28, 34 (1974) ("[D]amages which a plaintiff may recover for breach of contract include both those which may fairly and reasonably be considered as arising naturally from the breach (general damages) and those which may reasonably be supposed to have been in the contemplation of both parties at the time of making of the contract (special damages)."). "Special damages" are sometimes called "consequential damages," *see* Hinkle v. Rockville Motor Co., 262 Md. 502, 510-511, 278 A.2d 42, 46-47 (1971), and courts may award "incidental damages" as well, Lloyd, 397 Md. at 162, 916 A.2d at 288; Powell on Real Property§ 81.04[2][c]; Corbin on Contracts§ 60.12 (2005). This is especially applicable in this case because the Respondent could not know how much rent the Complainant was charging because Complainant failed to register a copy of his lease with the Respondent. [Ozkanian v. Walnut Grove Condominium Association, - #22-15]

5. Negligence, waiver of liability

Unit owners claiming that their units were damaged by leaks from the condominium roof must make their units available for inspection by the condominium or face dismissal of their complaints. [Boone v. Seneca Knolls Condominium Assn. - #81-06]

Although a condominium association is not ordinarily liable to repair improvements installed by an owner which have been damaged by a leak from the common elements, the CCOC can find it liable for such repairs if it is proven to be negligent. In this case, the leaks into the unit had been going on

for years and the association had failed to take effective action to stop them. [Prentice v. Sierra Landing Condominium -#15-08]

The CCOC will not enforce a provision in the governing documents that attempts to declare that the condominium association is not liable for damages caused by water leaks. The provision conflicts with the requirements of the Condominium Act and other condominium documents making the condominium responsible for maintenance of the common areas, and also conflicts with a rule adopted by the board stating that the condominium would repair damages caused by leaks from the common areas. [Prentice v. Sierra Landing Condominium - #15-08]

6. **FOUNDATION**

7. **LEAKS**

Unit owners claiming damage to their units from leaks in the common areas must make their units available for inspection by the condominium or face dismissal of their claims. [Boone v. Seneca Knolls Condominium Assn. - #81-06]

A condominium will be held liable for its negligence, and ordered to pay the cost of damages to improvements installed by the unit owner, if the evidence shows repeated leaks into the unit over several years, and the lack of effective repairs by the association. [Prentice v. Sierra Landing Condominium - #15-08]

8. Maintenance and Repair by Association

Under the rules of many condominium associations, common elements that serve more than one unit, such as exterior walls, exterior window sills and caulking, utility pipes, etc., are the responsibility of the association to maintain. [Smart v. Pooks Hill Condominium, Inc. - #673, Ward v. Sierra Landing Condominium Association - #292, Eckard v. Montgomery Century Condominium - #219]

The CCOC will uphold bylaws that exclude from the responsibility of the condominium association common elements that have been replaced or altered by a unit owner without permission. [Collins v. Thomas Choice Condominium - #601]

A unit owner wishing to hold the association liable for damage to his unit must prove his case with competent evidence. [Chase v. Georgian Colonies - #40-06, Gallagher v. Willow Cove Manor Condominium - #771]

An owner of a unit must allow the association access to the unit for the purpose of inspection and maintenance of a common element, provided the association has complied with its rules for access, including giving reasonable notice. [Scenery Pointe Condominium v. Glennie - #780]

9. Limited Common Elements

A limited common element is owned by the association but restricted to the use of one or a small

group of unit owners, such as a balcony outside a unit. The properly- drafted rule prohibiting the installation of temporary structures on a limited common element is binding and enforceable. [Evnin v. Decoverly IV Condominium, Inc. - #586]

A condominium can require a unit owner to maintain the limited common element, and if the unit owner fails to do so, the condominium can enter the limited common element, make the repairs, and bill the unit owner for them, provided that it follows its own rules. [Jacobson v. Sligo Station Condominium - #32-08]

Ceilings and pipes connected to a unit might constitute common elements of a condominium if so defined by the governing documents; and, if they are, the association will be responsible for repairing them. [Ward v. Sierra Landing Condominium Association - #292]

J. Insurance and the Association's Duty to Repair Private Property

The Condominium Act states that the association must maintain the common elements, and the owner of a unit must maintain the unit in good condition, except as provided in Section 11-114(g). [Section 11-108.1 of the Real Property Article; Smallis v. The Willoughby Condominium - #09-10]

Section 11-114(g) of the Condominium Act states that a condominium association must fix damage to private units when the damage originates from the common areas or from another unit, regardless of whether the amount of the damage is more than or less than the amount of the master insurance deductible. If the amount of the damage is less than the deductible the cost is a common expense. [Smallis v. The Willoughby Condominium - #09- 10]

The condominium association will be responsible for repairing ceilings and pipes connected to a unit if those things are defined in the governing documents as part of the common elements. [Ward v. Sierra Landing Condominium Association - #292]

Carpet is a "betterment" for which the Association is not liable under Section 11-114(g)(l) of the Maryland Condominium Act [Ozkanian v. Walnut Grove Condominium Association, - #22-15]

The CCOC will consider all relevant evidence, including not only the association's written documents, but its past practices. [Ward v. Sierra Landing Condominium Association - #292, Botman & Coleman v. The Crescent J. Condominium, Inc. - #283]

The Condominium Act states that if a private unit is damaged by a cause that originates from outside the unit, the Association is responsible to repair the damage, whether it is caused by a defect in the common elements or by a neighbor. However, the Association is not liable for damage to personal property, or for damage to improvements installed after the unit was first sold by the developer. If the cause of the damage originated in a neighboring unit, the Association can require the owner of that unit to pay the first five thousand dollars ($5,000.00) of any master insurance deductible. The balance of any deductible in excess of five thousand dollars ($5,000.00) must be paid by the Association. [Section 11-114(g)(2), Neufville v. Greenfield Commons Condominium - #497, Moore v. Churchill View Condominium, Inc. - ##374&375, Ward v. Sierra Landing Condominium Association - #292, 188] However, this law does not apply to condominiums created before 1982, if their governing

documents provide for a different outcome. [Burns v. North Creek Condominium Association - #330] The CCOC will uphold rules that pass on the cost of the deductible to the unit owner causing the damage. [Tuckson v. Seneca Knolls Condominium - #522]

Unit owners can be required to allow the Association access to their unit for inspection and maintenance if the access in necessary and the request is properly made. [Scenery Pointe Condominium v. Glennie - #780]

If a unit owner fails or refuses to allow the Association into his unit to investigate the need for repairs, the CCOC may dismiss the owner's claims. [Boone v. Seneca Knolls Condominium Assn. - #81-06, Kaplan v. Wintergate at Longmead Condominium - #410, Smart v. Pooks Hill Condominium, Inc. - #673]

If a member performs repairs for which he wants the condominium to be responsible, but fails to follow the condominium's rules for doing so, even though he has been informed of those procedures, the condominium will not be held responsible for the costs of the repairs. [Minni v. Leisure World Mutual 14 - #423]

Under the Condominium Act as it existed in 2001, a condominium's costs of repairs which were not covered by insurance was a common expense, and therefore the condominium could not require the unit owner who caused a fire and whose unit was damaged by the fire to pay the five thousand dollars ($5000.00) deductible. Although changes to the law were pending, they would not change the result because the condominium would have to amend its bylaws to take advantage of the legislative change. [Neufville v. Greenfield Commons Condominium - #497]

A condominium association's new rule stating it was not liable for the costs of repairs when the cost was less than the insurance deductible was not properly adopted and would not be upheld. Therefore, the applicable rule was the former rule. Although the governing documents were not clear, the association had, in the past, consistently interpreted them as requiring the association to pay the costs of repair to private units even if that cost was less than the deductible. In the absence of a properly-adopted rule, that interpretation still applied, and the association had to make the repairs. [Moore v. Churchill View Condominium, Inc. - ##374&375] [Staff comment: the amendments to Section 11-114 of the Condominium Act, adopted in 2009, make clear that the association cannot charge a unit owner the cost of repairs, or the deductible, when the unit is damaged by a cause from outside the unit. [08-10]

When a condominium's bylaws state that nothing can be done or maintained in a unit that would cause the master insurance to be more expensive, or denied altogether, and the master insurer had told the condominium that it would deny coverage unless all of the fuse boxes in the private units were replaced with more modern circuit breaker panels, this is sufficient authority for the condominium to require all members to replace, at their own cost, their fuse boxes with circuit breakers. [Lopez v. Spring Lake Condominium - #30-13]

The Condominium Act requires condominium associations to maintain property insurance on the common elements. Act §11-114. That section goes on to say that "[i]f the cause of any damage to or destruction of any portion of the condominium originates from a unit, the owner of the unit where the

cause of the damage or destruction originated is responsible for the council of unit owners' property insurance deductible not to exceed $5,000." Accordingly, when the Panel concludes that the damage originated from the owner's unit, it follows from that conclusion that the owner's liability from damage cause by his tenant is capped at the lesser of the deductible under the property insurance the Association is obligated to maintain, or $5,000. [Kim v. Montgomery Chase Condominium Association - #31-17]

K. Amendments to the Governing Documents

When the declaration of covenants of an HOA states that the declaration can be amended by "an instrument" signed by at least two-thirds of the members, and at least two-thirds of the members signed a petition to amend the declaration, no meeting to take a vote on the amendment is necessary. [Kalin v. Normandy Hills HOA - #24-13]

County law [Section 24B-7] allows a homeowner association to amend its bylaws by a simple majority vote of its members, regardless of any higher requirement set by its governing documents.

No changes to a HOA's documents are enforceable until they are filed in the HOA Depository at the Circuit Court. [HOA Act, Section 11B-113]

Associations may not prohibit or restrict day care or childcare businesses pursuant to a general rule that regulates in-home businesses. The association must have a bylaw that specifically prohibits or regulates day care and child care businesses. If the association does not have such a bylaw, it may amend its bylaws to create one, and can do so by a simple majority vote of the membership. [Condo Act 11-111.1, HOA Act 11B-111.1, Cooperative Housing Act 5-6B---]

Bylaw amendments affecting elections are not retroactive and only take effect on the date they are recorded; they cannot be applied to govern an election that took place before they were recorded. [Susman v. Sussex House Condominium Association - #779]

L. Snow Removal

Montgomery County law requires homeowners to remove snow from the sidewalks in front of their homes, even if the sidewalk is owned by the association. This applies to townhomes as well as single-family homes, but does not apply to multi-unit buildings where one door serves several units. County law overrides association rules on this duty. [Section 49-17]

An HOA may not pay for snow removal services to private lots. The common funds may only be used for common purposes. [O'Connell v. Greencastle Lakes Community Assn. - #55-09]

An association may be obligated by its governing documents to remove snow from the common areas, but even so, it may levy a non-uniform assessment for services which benefit some members more than others. In this case, shared driveways used only by certain members were common areas, and the HOA had to maintain them and clear them of snow, but the costs thereof could be passed on to the members whose lots used those driveways. [Sauri v. Estate at Pope Farms - #715]

V. RESOURCES

Montgomery County Code, Chapter 10B (amended in April 2016), and Montgomery County Executive Regulation Chapter 10B.06, can be found in any County Library. They are also available online through the "Services" section of the website of the Office of the County Attorney, which you can find in the "Departments" section of the County's main website: www.montgomerycountymd.gov.

The Maryland Condominium Act, the Maryland Homeowners Association Act, and the Maryland Cooperative Housing Corporation Act are all part of the Maryland Code, which is available in County library as well as online through the Code's publisher. The Condominium Act is Title 11 of the Real Property Article, the Homeowners Association Act is Title 11B of the same Article. The Cooperative Housing Corporation Act is subtitle 6B of Title 5 of the Corporations and Associations Article. All these associations may also be subject to other provisions of the Corporations and Associations Article even if they are not chartered corporations. The Code is online through links provided by its publisher at www.michie.com.

These laws are also posted online by several local law firms and can be found by browsing the law's title, such as "Maryland Condominium Act."

The Commission on Common Ownership Communities (CCOC) also publishes a "Law Library" found within its website at https://montgomerycountymd.gov/DHCA/housing/commonownership/law_library.html

The Commission's *Default Judgment Procedures*, *Policy Statement on the Exhaustion of Remedies,* and *Policy on Procedures for Motions to Lift the Automatic Stay* are online at its website, as is Chapter 10B.

The best summary of the law on community associations is *Condominium and Homeowner Association Practice: Community Association Law* (3rd edition) by Wayne Hyatt, published by the American Law Institute-American Bar Association, 4025 Chestnut Street, Philadelphia, Pennsylvania 19104. Softcover supplements to that edition are published every few years to keep it current.

General information on Maryland's laws for community associations is available in the easy-to- read *Happy Homes: A Consumer's Guide to Maryland Condo and HOA Law and Best Practices for Homeowners and Boards (*Jeanne Ketley, 2014) (available through Amazon). More general guides to association management are *The Homeowners Association Manual* (5th edition by Peter and Marc Dunbar, published by the Pineapple Press, P. O. Box 3889, Sarasota, Florida 34320); and *Questions and Answers About Community Associations* by Jan Hickenbottom, published by Miller Publishing in California. The Community Associations Institute, www.caionline.org, has an extensive library of information available.

Finally, the Commission has its own *Manual and Resource Guide*, which is online at the Commission's website, and a new, award-winning series of short videos on YouTube. The Commission's quarterly newsletters (also online) contain numerous helpful articles on a wide variety of association topics.

V. APPENDICES

Appendix A: The Business Judgment Rules

In disputes between associations and their members, the legal issue most often involved is the "business judgment" rule.

Arguably, there are at least three (3) related but distinct legal principles that can be called the "business judgment rule," and they will be described separately in this Appendix.

Defined in very general terms, the business judgment rule provides that *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.*

Or, put another way, when a dispute over the validity of a decision of the board is brought before a court, the court will not substitute its own judgment of what is best for the association in place of the judgment of the board of directors, so long as the board acted properly.

The business judgment rule is derived from the law of corporations, and it is applied to common ownership communities because most of them are also corporations. Even when common ownership communities do not have corporate charters, they are governed much like corporations. In all common ownership communities, as in corporations, the members share the ownership of the association's property, and they delegate their rights to manage the association's affairs and to control its assets to an elected board of directors.

The Commission currently registers more than one thousand common ownership communities. There are probably tens, if not hundreds, of thousands of corporations of all kinds doing business in Montgomery County alone, from multinational defense corporations to auto repair shops and nonprofit charities. It would be impossible for the courts to supervise every decision of these corporations, nor would it be appropriate to substitute the opinions of judges for those of the stockholders and managers in the day-to-day operations of these organizations. For practical reasons, and because the courts lack the expertise to run such varied and often complex entities, the courts have developed a set of rules that limit their ability to review the decisions of private enterprises to those in which the organization acted improperly, arbitrarily, or in bad faith. This means that if the only issue is the wisdom of a decision—whether to adopt a rule or raise an employee's pay or to increase the assessments—than the court will uphold the decision.

As noted at the beginning of this Appendix, there is no single business judgment rule. There are at least three (3) distinct business judgment rules recognized by Maryland law. The facts of the dispute will determine which rule applies, and it is possible that a single case can involve all three of the rules.

1. The Protection of Individual Members of the Governing Body ("the Right to be Wrong")

State law (Real Property Article, Section 14-118, Courts & Judicial Proceedings Section 5-422), provides that individual members of a board of directors cannot be held personally liable for their decisions and, in fact, cannot even be named as defendants in a lawsuit against an association, unless there is evidence to show they engaged in serious misconduct. In *Reiner v. Avenel Community Association* {see Appendix B], a trial court not only dismissed a complaint made against the individual members of a board of directors, but went on to order the homeowner to pay the association's legal fees to defend it, as a penalty for violating Real Property Article, Section 14-118.

Note that under these laws, the only instances for which board members can be sued are for acting (1) outside the scope of their duties, (2) in bad faith, or (3) in a "reckless, wanton, or grossly negligent manner." ("Gross negligence" is generally defined as the deliberate or reckless failure to exercise ordinary care.) Mistakes, negligence, and bad judgment are *not* reasons for which a board member can be held personally liable.

In other words, board members are protected from individual liability if they make a decision that is later found to be a bad one, or even if it is later held to be in violation of some association rule or law. Thus, for example, a board might adopt an assessment increase that under its rules should have been adopted by a vote of the general membership, or perhaps the board made a decision in a closed meeting that should have been made in an open meeting and which thus was made in violation of State law. Nonetheless, as long as it was acting in good faith, the individual members of the board cannot be sued merely because they made a mistake in interpreting or applying a rule or a law. For the exception to apply, it must be shown that the board members acted recklessly or with gross negligence, or that they intentionally violated their governing documents or a relevant law. Similarly, the board might place some of its funds in an investment account that later loses value. As long as the board acted in good faith and with due care, its members cannot be sued for the association's financial losses.

Because of this protection, this aspect of the business judgment rule can be called "the right to be wrong." There are good reasons for such protection. Common ownership communities rely heavily on the efforts of volunteer boards of directors, and usually the volunteers have had no previous experience in managing complex organizations and large sums of money. If board members knew they could be sued personally for every mistake they might make, it would probably be impossible for our communities to fill their boards and manage their own affairs. In this way, the business judgment rule provides a great benefit for our associations.

This legal principle is built into the County Code as well. Section 10B-8 defines a "dispute" as a disagreement over "the authority of the governing body" to do, or to fail to do, something. The Commission interprets this to mean that all disputes must involve the decisions of the board or of the council of unit owners. The decisions and conduct of the individual members of the board or of the individual members of the council of unit owners do not represent the decisions of the board or council of unit owners as a group. Consequently, the Commission has never accepted jurisdiction over complaints against individual members of the governing body of an association, but only against the governing body itself.

2. The Protection of the Board's Business Judgments

The legal protections granted to the individual *members* of the board of directors and of the governing body do not necessarily protect the *decisions* of the board or the governing body. A

board's decisions can be overturned even if the board's members can't be sued for making those decisions.

When members challenge the decisions of a governing body, they can be successful not only if they can prove bad faith or fraud, but also if they can establish that the governing body did not have the legal authority to do what it did. For example, in *Ridgely Condominium Association v. Smyrnioudis* (see Appendix B, below), the Court held that the decision of the governing body was invalid because it conflicted with the association's own Declaration of Covenants. The Commission applied a similar reasoning in *Stalbaum v. Ashley Place at Tanglewood,* #26-14, when it invalidated a rule allowing the board to revoke the parking privileges of a member who was delinquent in his assessment payments when the HOA's own covenants only stated that it had the right to deny access to recreational facilities. In *Voorhees v. Decoverly I HOA*, #05-11, the panel held that the association must refund $1000 to its members that it used to clean up a tract of land that it did not own, because the governing documents stated that the community's funds could only be used to maintain the community's property. A condominium's decision to spend money on a study to add a new common element was declared invalid when the board failed to obtain a majority vote of the membership for such a project when required by the association's bylaws in *Glenn v. Park Bradford Condominium*, #29-11.

Conversely, in a recent decision regarding a Montgomery County dispute, *Reiner v. Avenel Community Association, Inc.* [see Appendix B], the court upheld a board's decision to enforce a rule banning the use of asphalt roof materials when the homeowner could not produce any evidence that the rule violated the County Fire Code or that the rule was not properly adopted.

Consequently, a governing body's decision can be overturned, even if made in good faith and without fraud, if the decision was not made in compliance with an association's own governing documents or in compliance with a relevant law. They can also be reversed if they are "arbitrary or capricious,' meaning that they cannot be rationally justified.

The law and the Commission require the member intending to challenge a decision that is protected by the business judgment rule to allege, and provide evidence of, bad faith, fraud, arbitrariness or of a lack of legal authority. It is not sufficient simply to claim fraud, bad faith, arbitrariness or lack of authority. There must be a showing of some supporting facts or of a specific law or rule that has been violated. Without such a showing, the Commission will often simply refuse to accept a complaint for a hearing. See, for example, the Commission's extended discussion of the business judgment rule in #66-09, *Simons v. Fair Hill Farm HOA*, in which it held that a member filing a complaint challenging the board's business judgment had the burden of proof of alleging, and documenting, bad faith, fraud, or lack of authority, or else the complaint could be dismissed for lack of jurisdiction.

The business judgment rule protects the governing body's decisions, whether those decisions are decisions to do something or decisions not to do something, but the rule does not protect the board's FAILURE to make any decision at all. This is implicit in the title of the rule: it protects judgments, otherwise defined as "the exercise of discretion." Consequently, it does not apply to inaction. This point was emphasized by the leading commentator on the law when he wrote:

Consider the breadth of the enumerated powers that this example of [the typical bylaws] presents. First, the members of the board have an obligation to act. This means that the board must make a decision when confronted with a germane issue; the

board may not refuse to consider the issue and thus refuse to meet its duty. Not taking action is just as much an affirmative decision as taking action.

> **A board should have sufficient information to make an "informed' decision, and must actually make a decision. The board must deliberate and decide, not procrastinate or equivocate, allowing inaction to produce a consequence called a "decision."**
>
> **W. Hyatt, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW at 83, 99 (3d edition 2007).**

The Court of Appeals applied this exception in the recent case of *Greenstein v. Council of Unit Owners of Avalon Court Six Condominium Association* (see Appendix B, below). In that case, the board of directors was aware for several years that the new condominium had extensive water leaks. Although aware, the board failed to take any action for several years. When it finally voted to sue the condominium's builder for breach of warranty, its case was thrown out by the trial court because the statute of limitations had run before the case was filed. The members of the association then sued the association for damages and the Court of Appeals ruled that they could do so because the business judgment rule did not protect the association. Although this case is well-known because of the Court's holding that members can sue associations for negligence, it is worth noting that the negligence here was not that the board decided not to sue, but rather that the board did not make any decisions at all until it was too late. The board negligently lost its right to sue the developer and thus negligently lost the members' legal rights. If the board, knowing of the water leaks, had made a timely decision to sue, it might well have avoided liability under the business judgment rule. (Note also that this lawsuit was against the association, not against the individual members of the board of directors.)

(The Commission has also upheld a claim against an association by one of its members for negligence in *Prentice v. Sierra Landing Condominium Association*, #15-08. In that case, the Commission ruled that an association that failed to make timely and effective repairs to prevent an ongoing water leak into a unit was liable to repair all the damages to the unit, even those that were not otherwise covered by the condominium's master insurance.)

The business judgment rule is incorporated into, and defined by, Section 10B-8 of the County Code. The specific definitions are important:

(4) *Dispute* means any disagreement between 2 or more parties that involves:
(B) the failure of the governing body, <u>when required by law or an association document,</u> to:
(viii) <u>exercise its judgment in good faith</u> concerning the enforcement of the association documents against any person that is subject to those documents.

(5) *Dispute* does not include any disagreement that <u>only</u> involves:
(E) <u>the exercise of a governing body's judgment or discretion</u> in taking or deciding not to take any legally authorized action.
(Emphasis added.)

Section 10B-8 requires the governing body to "exercise its judgment." It recognizes the right of the governing body to decide to do something, or to refuse to do something. However, the board must make a decision when required to do so, and its decision must be within the scope of its legal authority and made in good faith.

The business judgment rule also extends to the board's interpretations of it governing documents. When a rule or section is vague, or can be interpreted in more than one way, the courts must uphold and apply the board's interpretation if it is a reasonable one, even if other reasonable interpretations are also possible. *See*, *Tackney v. U.S. Naval Academy Graduates Alumni Association*, Appendix B, below.

This latitude especially applies to the board's exercise of its authority to preserve the overall architectural scheme of the community. When the governing documents are vague concerning a specific architectural item or change, the board's determination of what is consistent with the overall design of the community is given great weight, and it will not be reversed by a court simply because the relevant rule is vague. The board has the right to interpret vague rules. See the case of *Markey v. Wolf* in Appendix B, below.

The Commission gave an excellent example of how the business judgment rule should be applied in *Prue v. Manor Spring HOA*, #39-09, where, among other matters, the Commission upheld the board's interpretation of the clause "the rear wall of the house" when it was not clear how that clause applied to the particular house design in question.

3. The Protection of the Board's Decisions to Enforce Its Rules

When the board of directors wishes to take an action that restricts a member's or resident's rights to use his property as he sees fit, or to penalize a member or resident, the business judgment rule requires it to meet a higher standard than that required by good faith. In addition to acting within its authority and in good faith, the board must have a reasonable basis for its decision, and that reason must be related to the overall purposes of the association.

The case usually referred to for this principle is *Kirkley v. Seipelt* (see Appendix B, below). In *Kirkley,* an HOA member had installed, without permission, a metal awning on the front of his house and the HOA board instructed him to remove it. He challenged that decision in court, arguing that the governing documents did not mention awnings at all, that two other lots had awnings on the fronts of their houses, and that other homes had awnings on the rears of the houses. The Court of Appeals rejected all of his arguments. The Court held that the HOA had not waived enforcement of its rules simply because two (2) other homes, out of hundreds, had awnings on them; and there was a big difference between installing awnings on the rear of a home and on the front of the home where they were more obvious. Most importantly, the Court held that the board had the right to interpret and decide how to apply its governing documents, so long as it did so in a way that was consistent with its overall purposes. In this case, although the documents did not specifically prohibit or regulate awnings, the community had been constructed without awnings, and the board's decision not to permit awnings was consistent with the overall architectural design of the community. The Court set the standard that is still followed today in rule enforcement cases:

We hold that any refusal to approve the external design or location by [the association] would have to be based upon a reason that bears some relation to the other buildings

or the general plan of development; and that this refusal would have to be a reasonable determination made in good faith, and not high-handed, whimsical or captious in manner.

In the important case of *Simons v. Fair Hill Farm HOA*, #66-09, the Commission discussed the meaning of *Kirkley v. Seipelt* in the overall context of rule enforcement. The *Simons* panel held that in rule enforcement cases, as well as in cases where the association imposes penalties on its members, the burden is not on the member to prove that the board acted in bad faith in order to prevail. Rather, the burden is on the association to show that it had good reason for its decision. In *Simons,* the board could not produce any evidence on which it based its decision that the member had damaged the association's trees and, therefore, the panel overturned the board's decision.

It should also be noted that, not only must the association show that it has a reasonable basis for its decision, but that the reason must be related to one of the overall purposes of the community as specified in its governing documents. Most governing documents allow the association to regulate parking, architectural changes, and how the lots may be used.

In *Reiner v. Avenel Community Association, Inc.,* the Court seems to say that a board's decision to limit a member's right to install the roof shingles of his choice is a "business judgment" that can only be reversed if the member shows fraud or bad faith by the board, and that the "reasonableness" standard is not applicable. However, that must be taken in the context of the court's statement that, even if the "reasonableness" standard did apply, the homeowner failed to produce any evidence that the decision conflicted with any law, or that the board did not have the legal authority to make the decision, or that the board's decision was unreasonable. On the contrary, the court stated that the rule and the board's decision reflected a reasonable effort to comply with the standards in the HOA's governing documents and to preserve the appearance of the community as it was.

The Commission generally takes the position that "disputes" involving the board's rule enforcement decisions are not covered by the business judgment rule of Section 2 of this Appendix. This is because Section 10B-8(5)(E) states that the word "dispute" does not include any disagreement that "only" involves the exercise of the governing body's judgment or discretion in taking or deciding not to take any legally-authorized action." In the Commission's view, a dispute over a rule enforcement action involves not only good faith and whether the board had the authority to enforce a rule, but it also involves, pursuant to *Kirkley v. Seipelt*, the factual issue of whether the board had a good reason for its decision. The Commission expects the governing body to prove, with competent evidence, that it had a proper reason.

If the association can demonstrate that its decision to enforce a rule is within its authority and that it has a reasonable basis that is related to the purposes of its governing documents, than the Commission will typically respect and uphold the association's decision. It will not substitute its own judgment for what constitutes the proper appearance of the community or how its lots can be used.

The Commission treats rule enforcement disputes much differently when the party to the case is the member or resident against whom the association is enforcing a rule, than when the party is trying to force the association to enforce a rule against someone else. In the former case, the party is directly affected by the association's action. In the latter instance, not only is the party

not directly affected, but also wants the association to directly affect someone who is not a party to the case. The Commission does apply the business judgment rule of Section 2, above, to such cases because Section 10B-8(4)(B)(viii) only grants the Commission authority over "disputes" to the extent that they involve "the failure of the governing body, when required by law or an association document, to exercise its judgment in good faith concerning the enforcement of the association's documents against any person that is subject to those documents." Thus, so long as the board makes a decision about whether another person has violated a rule or not, and has done so in good faith, the Commission has no jurisdiction over complaints that seek to make the board take action against another person who is not a party to the CCOC case. Therefore, it is the burden of the complainant to show either that the board failed to make a decision ("exercise its judgment"), or that the board did make a decision but that it was motivated by bad faith. If the board decided not to enforce a rule against another person, and complainant does not allege and document the existence of bad faith in connection with that decision, the Commission will typically refuse to accept jurisdiction of the complaint.

There are several reasons for this policy, but the simplest one to understand is the following: the governing documents almost always require the board to enforce the governing documents, but they almost never state *how or to what extent* the board must do so in particular cases. They do not provide, for example, that the board *must* issue fines, assess penalties or file suit, although they might *allow* the board to do so. The governing documents do not state that the board must find a member to be in violation simply because another member complains about him or her. In effect, the documents provide the board the discretion to decide how to deal with such issues. See the cases of *Markey v. Wolf* and *Black v. Fox Hills North Community Association* in Appendix B, below.

4. The Meaning of "Fraud" or "Bad Faith"

The protection provided by the law to individual board members and to board decisions does not apply when the members make a decision fraudulently or in bad faith.

As suggested above, the courts assume that the governing body acts in good faith. The party wishing to dispute the decision must therefore prove, with evidence, that the association acted in bad faith.

Most members equate "bad faith" with "conflict of interest," and assume that any conflict of interest renders the board's decision invalid, and the members personally liable. This is not necessarily the case.

Section 2-419 of the Corporations and Associations Article specifically permits a board member to vote on a matter in which he has a possible conflict. To do so properly, he/she must first disclose the existence of the conflict to the rest of the board, so that it has full knowledge of all the
facts. Second, the board member can vote on the issue so long as he/she does not cast the deciding ballot.

In this context, we should distinguish between actual and potential conflicts of interest. The real issue should be whether the association benefits from the decision and, if so, to what extent it benefits. For example, a board member may run a landscaping company. If the contract he

offers for his services to his own association is for a lower price than his competitors can offer, than is there a real *conflict* of interest? If both parties benefit from a transaction, are their

interests the same? Whenever there is the possibility of a conflict of interest, the parties should try to look behind the label to determine whether the decision-makers knew about the possible conflict, and the extent to which the decision was intended to assist the association as a whole.

In an important case involving claims of conflict of interest and bad faith—although not a case involving a community association—the Court of Special Appeals explained the test as follows:

If the [trial] court finds that the transaction was, on the whole, motivated by a legitimate corporate purpose, it should declare the sale to be valid; if it finds to the contrary—that the purpose of the transaction was primarily one of management's self-perpetuation and that that purpose outweighed any other legitimate business purpose—it should declare the sale to be invalid.

Thus, even a real conflict of interest will not necessarily invalidate a decision if the primary purpose of the decision is to benefit the corporation as a whole. (*Mountain Manor Realty Inc. v. Buccheri*, see Appendix B, below.)

Conflicts of interest are not the only example of bad faith, however. Maryland courts have defined "bad faith" to include much more than conflicts of interest. In recent decisions, they have stated it in various ways:

The business judgment rule insulates business decisions from judicial review absent a showing that the officers acted fraudulently or in bad faith. *(NAACP v. Golding*.)

Courts will not second-guess the actions of directors unless it appears that they are the result of fraud, dishonesty, or incompetence.

[T]he courts cannot be invoked to review [the decisions of a board of directors] coming properly before them, except in cases of fraud— which would include action unsupported by facts or otherwise arbitrary." (*Black v. Fox Hills North Community Association*.)

Thus, "fraud" or "bad faith" can include not only conflicts of interest but also "dishonesty," "incompetence," "arbitrariness," and decisions "not supported by facts."

While the business judgment rule provides great protection to the decisions of an association's governing body, it requires associations and their board members to act in good faith and with reasonable care. The law presumes they have done so. Therefore, it also requires anyone challenging the decision to demonstrate that the decision was either made for the wrong reasons (fraud, bad faith), for no good reason at all (arbitrariness, lack of any factual basis), or in violation of the association's own governing documents or of the law.

If the member is able to demonstrate that the association's decision is tainted by the violation of one of these duties, than the Court or the CCOC is able to review the merits of the board's decision and make its own judgment whether the decision serves the best interests of the community.

Appendix B: Leading Maryland Court Decisions

***Kirkley v. Seipelt*, 128 A.2d 430, 212 Md. 127 (Md. 1957):**

1. Homeowner association covenants running with the
land that regulate the appearance of the community are valid and enforceable.
2. A general clause in the Declaration of Covenants that prohibits all changes to the lots without the permission of the association is valid and enforceable even if it does not mention in any detail the specific changes to which it can be applied.
3. The decision of a board of directors to reject an application to change the appearance of a home must be upheld by the courts if "based upon a reason that bears some relation to the other buildings or the general plan of development and this refusal would have to be a reasonable determination made in good faith, and not high-handed, whimsical or captious in manner."
4. The existence of 2 other homes that have metal awnings on the fronts of the houses in a development of 1500 homes does not constitute abandonment or waiver of the covenant so as to prevent the board from rejecting an application to install metal awnings on a 3rd home in the community.
5. The fact that the covenants did not specifically refer to metal awnings did not prevent the board from denying an application for awnings, so long as the board's decision was reasonably related
to its authority to regulate the overall appearance of the community.

***Savonis v. Burke*, 216 A.2d 521 (Md. 1966).**

1. In a dispute between two landowners over the boundaries of a strip of community land, a person who examines the plat which shows the existence of the correct boundaries cannot reasonably rely on another person's oral statement of where the boundaries are.
2. A party claiming the benefit of equitable estoppel must prove that another person's statements misled him, and that they caused him to change his position in reasonable reliance on those statements.

***Lindner v. Woytowitz*, 37 Md.App.652, 378 A.2d 212 (Md. App. 1977):**

1. An above-ground swimming pool is a "structure" within the meaning of the association's covenants.
2. An association has not waived its right to enforce its rules that require permission for all changes to the lots against a member who wishes to install an above-ground swimming pool simply because other members already built above-ground swimming pools on their lots, when 2 of the 3 had done so without the association's knowledge and the 3rd pool had been permitted as an accommodation for a member with a disabled child. "An intention to abandon [a rule]is essential. The question whether there has been such an abandonment is in each case a question of fact and must be established by evidence clear and unequivocal of acts of a decisive nature."

***Dulaney Towers Maintenance Corp. v. O'Brey,* 46 Md.App. 464 (Md. App. 1980):**

1. "House rules" of a condominium—those regulating the use and occupancy by owners of their units and the common areas—will usually be upheld if the rules are "reasonable, consistent with the law, and enacted in accordance with the bylaws."
2. The courts "have adopted a hard-line approach and have upheld …rules as to dogs, even to the exclusion of dogs, as being reasonable and enforceable. The courts stress that communal living

requires that fair consideration must be given to the rights and privileges of all owners and occupants of a condominium association so as to provide a harmonious residential atmosphere."
3."Under the current [Maryland Condominium Act], a council of unit owners may delegate its powers of administration or management to a board of directors which may in turn make reasonable rules and regulations concerning conduct, not inconsistent with the Master Deed and Declaration and bylaws, including the regulation or prohibition of pets."

***Mountain Manor Realty v. Buccheri*, 55 Md.App. 185, 461A.2d 45 (Md. App. 1983):**

1. A single surviving member of a corporation's 3-member board of directors has the right to appoint directors to fill the two vacant seats on that board even though there was no quorum. Such an action is permitted by Section 2-407 of the Maryland Corporations & Associations Article.
2. "It is well established that courts generally will not interfere with the internal management of a corporation at the request of a minority stockholder or member. The conduct of the corporation's affairs is placed in the hands of the board of directors and if the majority of the board properly exercises its business judgment, the directors are not ordinarily liable. The key word, of course, is 'properly.' Although courts are generally enjoined from substituting their judgment for that of the directors as to the economic wisdom of business decisions made by the board, they can, in an appropriate case, examine whether, in making those decisions, the directors abided by the relevant ground rules."
3. The actions of a board member that are intended to increase her control over the corporation are not necessarily invalid simply because they benefit her. "If the court finds that the transaction was, on the whole, motivated by a legitimate corporate purpose, it should declare the sale to be valid; if it finds to the contrary—that the purpose of the transaction was primarily one of management's self-perpetuation and that that purpose outweighed any other legitimate business purpose—it should declare the sale to be invalid."
[Staff comment: this decision did not involve either a common ownership community or a non-profit corporation, and a court might be more strict in reviewing a decision made by such a corporation. Nonetheless, the court's ruling demonstrates that the decision of a governing body is not automatically invalid simply because it involved a conflict of interest on the part of one of the directors, and that the real issue is the extent to which the association benefits from the action in spite of the conflict.]

***Souza v. Columbia Park and Recreation Association*, 70 Md.App 655, 522 A.2d 1376 (Md. App. 1987):**

The member disputed the right of his community to prevent him from subdividing his lot into 4 smaller lots that he could build homes on and sell. The member argued that he had the right to do so because the County issued him a permit to subdivide. The court ruled:
1. A community rule on architectural applications is not unenforceable simply because it is vague and does not explicitly state all the criteria that it will apply. Rather, the board's enforcement of that rule will be upheld so long as the board's refusal to approve an application was made with a reasonable basis, in good faith, and not arbitrarily.
2. Government approval to subdivide a lot in a homeowners association does not override association covenants preventing such subdivision; homeowners who are subject to such covenants must obey those rules as well as obey the relevant laws.

***Markey v. Wolf,* 92 Md.App.137, 607 A.2de 82 (1991):**

The buyers of a home in an HOA sued the developer for putting up smaller and cheaper homes than the original homes in the community. The Court upheld the developer's decision on the grounds that it

might benefit the association by allowing the sale of more homes and lots then to prevent the failure of the development for lack of buyers.
1. The Declaration states that it is intended to promote a general plan of development and to benefit the property and the owners of the lots. Therefore, the Declaration can be enforced by the developer and by the lot owners.
2. "In 1957, the Court of Appeals adopted the reasonableness rule with respect to the *disapproval of plans*... We note, however, that public policy and the rules of construction with respect to restrictive covenants do not require that disapprovals and approvals should necessarily be treated equally... As we see it, the disapproval of a building plan might be a restraint on the free use of land and can adversely affect its alienability. The reasons for disapproval, therefore, should be very closely scrutinized. On the other hand, approval of building plans does not interfere with the unrestricted use of property nor with the 'freedom of property.'. . . . Accordingly,..... the approving authority might well be able to give a liberal interpretation of the term's meaning when approving plans and a less liberal construction in the case of the disapproval of plans." This is especially the case when the Declaration allows the developer to amend or change the terms of the Declaration.

***Black v. Fox Hills North Community Association*, 599 A.2d 1228 (Md. App. 1992):**

Black sued his HOA and his neighbors to prevent the construction of a fence by the neighbors that the HOA had approved. The HOA argued that the case was frivolous and that Black should be ordered to reimburse it for its legal fees. The Court ruled as follows:
1. Although a board's decision to enforce a rule, or to deny an architectural application, is governed by the "reasonableness" rule of *Kirkley v. Seipelt* (see above), the board's decision *not to enforce a rule* against a particular homeowner, and its decision to allow an architectural change, is governed by the "business judgment" rule, and must be upheld if it is "a legitimate business decision of an organization, absent fraud or bad faith." "Whether that decision was right or wrong, the decision fell within the legitimate range of the association's discretion. The association was under no obligation to [force the homeowner to remove the fence]. There was no allegation of fraud or bad faith. Absent fraud or bad faith, the decision to approve the fence was a business judgment with which a court will not interfere."
2. The award of attorney fees as a penalty for bringing or defending a lawsuit "without substantial justification" or in bad faith is an exceptional remedy, intended to reach only "intentional misconduct." It is not intended to penalize a party or its attorney for asserting a colorable claim or defense. The rule does not apply simply because a complaint fails to state a cause of action or because a party misconceives the legal basis upon which he seeks to prevail. (The Court reversed the decision of the trial court to award attorney fees.)

***Ridgely Condominium Association v. Smyrnioudis*, 681 A.2d 494 (Md. 1996):**

1. The members of an association lack the authority to adopt a rule that conflicts with the declaration of covenants.
2. A rule that limits the access of the owners of the business units of a condominium to the main lobby of the building violates the covenant that all members of a condominium, business as well as residential, are entitled to equal use of and equal access to the common elements.

***Mikolasko v. Schovee,* 124 Md.App 66, 720 A.2d 66 (Md. Sp.App. 1998):**
The association has the legal right to reject a member's plan to subdivide his lot even though the County issued subdivision approval and the new plats were properly recorded in the land records. "The [members] have misunderstood the principle that zoning regulations and restrictive covenants are two

concurrent but separate systems of law. . . Provided that private covenantal rights do not violate local governmental land use restrictions, the land use restrictions will not affect the private covenantal rights." The member of an association must obey both the local law and the covenants of his association.

***Colandrea v. Wilde Lake Community Association*, 761 A. 2d 899 (Md. 2000):**

1. A homeowner association can deny permission to a homeowner to turn a home into a group home for the disabled, so long as the board's decision is a reasonable exercise of its discretion on good faith, based upon legitimate concerns regarding the impact of the facility upon the surrounding neighborhood. The association can do so even though the homeowner has approval from and support of the relevant government agency.
2. Courts can enforce restrictive covenants by injunction.
3. Although a court can refuse to issue an injunction enforcing a restrictive covenant on the basis of "hardship," the judge must consider whether the party attempting to avoid the covenant had truly made an "innocent mistake," or whether he should have known about the covenants, and also the effect of the violation upon the neighboring homes.
4. Lots in homeowner associations are subject not only to governmental land use restrictions but also to community covenants, and so must comply with the more restrictive of either the regulations or covenants.

***Werbowsky v. Collomb,* 362 Md. 581, 599, 766 A.2d 123, 133 (Md. 2001) and *Danielewicz v. Arnold,* 137 Md. App. 601, 620, 769 A.2d 274, 285 (Md. App. 2001):**

The directors of a corporation have a fiduciary duty to the corporation and its stockholders as a group, but the directors are not fiduciaries or trustees for individual stockholders.

***City of Bowie v. MIE Properties Inc*., 922 A.2d 509 (Md. 2007):**

1. A zoning ordinance does not override or defeat a restrictive covenant that also governs the land. When a zoning law and a private restrictive covenant are in conflict, the more restrictive of the two will prevail.
2. In order for the doctrine of "waiver" to apply, there must be proof of some word or act by one party to the other party representing that the covenant in question would not be enforced.
3. An oral waiver cannot be relied on when the governing rules require that all waivers be in writing;
4. In order for estoppel to apply, the party seeking to benefit from the estoppel must show that the other party was actually aware of the violation and did nothing to prevent it;
5. In order for a party to be excused from a violation under the doctrine of "comparative hardship," the party must show that he committed the violation innocently or mistakenly, and the covenant would cause much greater harm to him than the other party would suffer if the covenant was not enforced.

***NAACP v. Golding,* 342 Md. 663, 679 A.2d 554 (Md. 1996):**

1. Courts have a limited role in resolving the internal disputes of both corporations and unincorporated associations. "The rule is that when the tribunals of the [association] have the power to decide a disputed question, their jurisdiction is exclusive, and the Courts cannot be invoked to review their decisions of questions coming properly before them, except in cases of fraud. In this context, we have interpreted "fraud" to include "action unsupported by facts or otherwise arbitrary . . . As in the case of

corporations, decisions of the unincorporated organization are insulated from judicial review absent fraud, irregularity, or arbitrary action. . . We note that if an organization acts inconsistently with its own rules, its action may be sufficiently arbitrary to invite judicial review."
2. "The policy of minimizing judicial involvement in private organizations does not mean that members have no guarantee of procedural fairness. We have historically taken the view that members in a private organization are entitled to at least rudimentary procedural protections such as notice and an opportunity to be heard, before they may be expelled or deprived of other important membership rights. If the organization's adjudicatory procedure does not afford the member these minimal protections, or if the organization provides no avenue for internal review or appeal, then judicial intervention may be appropriate."
3 The board's interpretation of its own documents will be upheld by the courts if the interpretation is a reasonable one.
[Staff comment: This case does not involve a common interest association but does involve a nonprofit association, and common interest associations are also nonprofits. If anything, a court is likely to apply standards at least as strict, if not more strict, to common ownership communities as it did in this case because members of such communities cannot easily leave the organization.]

***Tackney v. United States Naval Academy Alumni Association, Inc.,* 408 Md. 700, 966 A.3d. 900 (Md. 2009):**

1. In a case involving a nonprofit, voluntary corporation, "we shall apply the business judgment rule and intervene in the dispute at hand only if the Board's actions were fraudulent or arbitrary. We do not consider actions pursued in good faith, in purported compliance with the Association's Bylaws, to be fraudulent or arbitrary."
2. When interpreting the governing documents of an association, the language of the document is only ambiguous if it is susceptible to more than one meaning. A member's interpretation of the document may be plausible, but that does not prevent the existence of other reasonable interpretations. If the Board's interpretation is also reasonable, then it cannot be said that the Board acted in an arbitrary fashion.
3. The business judgment rule applies to Board decisions even if those decisions have the effect of restricting the voting rights of the membership.
4. Maryland law permits directors to participate in transactions in which they may have conflicting interests provided that such conflicts are known to other board members and the transaction is ultimately approved by a majority of disinterested directors.

***Mikolasco v. Schovee*, 720 A.2d 1214 (Md. App. 1998):**

1. A general plan of development recorded in the land records that includes the lot in question will bind and control that lot even though the deed for that lot fails to disclose the restrictions.
2. Although the owner of a lot might lawfully subdivide the lot in accordance with County law, that approval did not create a right to construct an additional home on the subdivided lot in violation of the restrictive covenants. "Zoning regulations and restrictive covenants are two concurrent but separate systems of law."

***Greenstein v. Council of Unit Owners of Avalon Court Six Condominium*, 201 Md. App. 186, 29 A.3d 604 (Md.App. 2011)**

1. The failure of a board of directors to make a decision is not protected by the business judgment rule.
2. Unit owners may sue their association for negligence when the association knows of the existence of defects but fails to take any action against the builder before the statute of limitations runs out on the association's claims.

***MRA Property Management Inc. v. Armstrong*, Md. (2011) (No. 93, September Term 2007).**

1. The members of a condominium association may sue both their association and its manager for damages under the Maryland Consumer Protection Act for their failure to disclose material facts in connection with a consumer transaction, when the association and its manager distributed resale packages which did not disclose serious defects in the common areas, and which the association and the manager knew about, even though the association and the manager were not sellers of the units.
2. The duty to disclose known defects in a resale package is not limited to defects of which the association has been formally charged by a government agency as violating health or building codes.
3. The association does not have a duty to disclose contemplated or proposed capital expenditures which are not listed in the current budget, but only those which have been approved by the association.

***Tracey v. Solesky*, 427 Md. 627 (2012):**

Pit bull dogs are inherently dangerous. Therefore, a landowner is strictly liable for any injuries caused by a pit bull which it knows is on its premises, even if it has no knowledge that the pit bull is dangerous. [Staff comment: Under this ruling a common ownership community is liable for any injuries caused by a pit bull owned by any of its members or residents. *See* discussion in the *CCOC Communicator* for Fall, 2012. However, this decision was modified by a new law, in Courts & Judicial Proceedings Section 3-1901, under which associations are not liable for dog bites unless the association was on notice that the dog had already bit someone else or otherwise acted dangerously.]

***Reiner v. Avenel Community Association Inc.,* 212 Md.App. 153 (2013)**

1. The trial court dismissed a complaint filed against the individual members of the HOA's board of directors and awarded the HOA its legal fees for the motion to dismiss as a penalty against Reiner. Suing individual board members is prohibited by the Maryland Code unless specific claims can be made against them.
2. The general rule under Maryland law is that decisions made by an HOA board of directors will not be changed by a court unless there is proof of fraud or bad faith. In this case, the member claimed that the HOA's new rule on roofing materials violated the County Fire Code, but the member failed to produce any evidence to support the claim.
3. "Even if" the court was required to apply "close scrutiny" pursuant to *Markey v. Wolf* [see above] to review an HOA's denial of an architectural application, the member's claim in this case still fails. The HOA established that its decision was related to an overall plan for the community and had a relationship to other homes in the community, and there was no evidence that the decision conflicted with the higher law of the County Fire Code, or that it was affected by fraud or bad faith.

Appendix C: Table of Laws and Regulations Applicable to Common Ownership Communities in Montgomery County

(By Charles Fleischer, Esq.)

Federal Law

1 Fair Housing Act, 42 U.S.C. § 3601

2 FCC preemption of restrictions on satellite earth stations and TV antennas, 47 C.F.R. §§ 1.4000, 25.104

3 FHA Lending Requirements, 24 C.F.R. Part 203

Maryland Code

4 Homeowners associations, RP 11B-101

5 Condominiums, RP § 11-101

6 Cooperatives, C&A § 5-6B

7 Corporations, C&A § 2-101

8 Representation by non-attorneys, BOP § 10-206

9 Immunity of officers and directors, RP § 14-118, C&JP § 5-422

10 Contract liens, RP § 14-201

11 Display of flag, RP § 14-128

12 Solar collectors, RP § 2-119

13 Condo Exemption from Sales Taxes on Energy Utilities, Taxes §11-207

14 Dog Bite Law, CJP Section 3-1901

Montgomery County Code

15 Administrative procedures, Chapter 2A-1

16 Common ownership communities, Chapter 10B

17 Homeowners associations, Chapter 24B

18 Renewable energy, § 40-3A

19 Snow removal from sidewalks in HOAs, § 49-24A

20 Human rights, Chapter 27

21 Smoking in common areas, Resolution 17-210 (July 12, 2011)

22 Right to Class-A Fire-Rated Roof, Section 22-98

23 Housing Standards, Chapter 26

24 Motor vehicle towing from private property, Chapter 30C

Executive Regulations

25 Dispute resolution procedures, COMCOR 10B.06.01

CCOC Procedures

26 Default judgment

27 Exhaustion of remedies

28 Panel Chair Guidelines

29 Witness Seating

30 Motions to Lift the Automatic Stay

31 Rules of Conduct for Panel Members

Appendix D: Alphabetical List of CCOC Decisions by Party

1st Aquarius Homes v. Rossiter - #13-09

4720 Chevy Chase Drive Condo. Assn., Levenson v. - #61-06

7611 Maple Avenue Cooperative, Inc., Hamilton v. - #314

Abeje, Greencastle Lakes Community Association v. - #776

Abdelkarim v. College Square Condominium - #73-13

Abrigo, Esprit, a Condominium v. - #06-07

Akhigbe, Doral HOA v. - #36-07

Amber Ridge at Milestone Community Association, Faye v. - #548

Americana Finnmark Condominium Association, Brown v. - #42-09

Americana Finnmark Condominium Association, Brown v. - #35-11

Americana Finnmark Condominium Association, Meldrum & Kastner v. - #690

Amoruso, Damascus Manor Townhouse Assn., Inc. v. - #45-06

Arora Hills HOA, Bian v. – #34-17

Arora Hills Condominium, Lebowitz v. - #60-14

Ashley Place at Tanglewood HOA, Stalbaum v. - #26-14

Austin, MacArthur Park Condominium Inc., v. - #110

Autumn Walk Condominium Association Inc, Eiland v. - #257

Avenel Community Association, Fishbein v. - #744

Avenel Community Association v. Nayar - #220

Avenel Community Association, Baroni v. - #55-11

Avissar, Inverness Forest Association Inc. v. - #163

Awasum, Churchill East Village Community Association v. - #691

Baker, Greencastle Lakes Community Association v. - #88

Balderson v. Kenwood Place Condominium - #133

Ball, Potomack Preserve Inc. v. - #720/#33-06

Ball, Potowmack Preserve Inc. - #73-12

Barnes v. Montgomery Village Foundation - #504

Baroni v. Avenel Community Association - #55-11

Barrett v. Normandy Hills HOA - #544

Barrick, Park Overlook HOA v. - #554

Barron, Hamlet Station HOA, Inc. v. - #303

Barry, v. Montgomery Village Foundation - #35-07

Barry, Village of James Creek HOA v. – #432

Basile, East Gate II Homes Assn. v. - #32-09

Beckmeyer, Olde Potomac Park HOA v. - #17-11

Beebe v. The Oranges HOA - #41-09

Bejo v. Olde Potomac Park CA - #41-11

Bel Pre Recreational Association, Henry v. - #40-09

Bel Pre Recreational Association, Ramsay v. - #547

Bel Pre Recreational Association, Inc., Ramsey v. - #369

Bel Pre Square HOA, East v. - #745

Benziger v. Westbard Mews Condominium - #557

Bennett v. Potomac Farms HOA - #444

Berger v. Fox Hills North Community Association - #359

Berlack v. Edson Park Condominium - #11-10

Bethesda Overlook Townhouse Condominium et al., Nazemi v.-#501, 519-G

Berrones, Waters Landing Association v. - #668

Bevan, Old Georgetown Village HOA v. - #584

Bishow v. King Farm Village Center Condominium II - #42-15

Black v. Dumont Oaks Community Assn. - #74-09

Blackburn Village HOA v. Saunders - #06-06

Bluefield v. Fallstone HOA, Inc. - #424

Bodmer v. Potomac Meadows HOA - #69-10

Boland Farm HOA, Opiyo v. - #22-08

Boone v. Seneca Knolls Condominium Assn. - #81-06

Botman & Coleman v. The Crescent J. Condominium, Inc. - #283

Brandermill Association v. Wells - #42-06

Briars Acres Community Association, McDonald v. - #64-10

Bright, Longmead Crossing Community Services Association v. -#430

Brookfield at Milestone Condominium, Tyler v. - #564

Brookstone Condominium, Inc., Faville v. - #560

Brown v. Americana Finmark Condominium Association - #42-09

Brown v. Americana Finmark Condominium Association - #35-11

Bruno v. Potowmack Preserve Inc. - #30-12

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Cabin John Gardens, Inc., Killea v. - #88-10

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Cameron v. Westlake Terrace Condominium - #135

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Chan v. Hadley Farms Community Association - #446

Chan & Yau, Greencastle lakes Community Association v. - #64-06

Chase v. Georgian Colonies - #40-06

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Chevy Chase Crest Condominium, Davis v. - #06-12

Chidel v. Dellabrooke HOA - #76-09

Chlebowski v. Rolling Acres HOA - #631

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Churchill East Village Community Association v. Tobias Awasum - #691

Churchill View Condominium, Inc., Moore v. - ##374 & 375

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Cloisters HOA v. Solomon - #280

Cloverleaf Center Condominium, Youssef v. - #05-17

Cloverleaf Center I Condominium, Kessler v. - #68-08

Cloverleaf Center II Condominium, McDowell v. - #763

Cloverleaf Townhome Condominium Assn. v. Patel - #68-10

College Square Condominium Assn., Abdelkarim v. – #73-13

College Square Condominium Assn., Koppel v. – #53-13

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Crabill v. Manchester Farm Community Association - #78-07

Crawford Farms Townhouse Association, Inc., Milne and Gammon v. - #151

Creitz v. Meadow Ridge Villas Condominium Association, Inc. - #73-16

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Davis v. Chevy Chase Crest Condominium Ass'n. - #06-12

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Decker v. Kingsview Village HOA – #19-11

Decoverly I HOA, Tanouye v. - #19-12

Decoverly I HOA, Cunningham & Fisher v. - #31-06

Decoverly I HOA v. Ghasabehi - #468

Decoverly I HOA v. Kidd and Jens - #69-06

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Decoverly I HOA, Voorhees v. - #05-11

Decoverly I HOA, Zich v. - #47-07

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Georgian Colonies, Chase v. - #40-06

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Greencastle Lakes Community Association v. Copeland - #01-15

Greencastle Lakes Community Association v. Copeland - #50-07

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Greencastle Lakes Community Association v. Dung and Tran - #607

Greencastle Lakes Community Association v. Kelley - #87-06

Greencastle Lakes Community Association v. Muller - #829

Greencastle Lakes Community Association v. Nwadike & Nwagu - #73-14

Greencastle Lakes Community Assn., O'Connell v. - #55-09

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Kenwood Place Condominium, Balderson v. - #133

Kenwood Place Condominium, Williams, v. - #101

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Key West Condominium, Ortega v. - #07-12

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