



Montgomery County Government

A DESCRIPTION AND EVALUATION OF THE DISPUTE RESOLUTION BUREAU IN THE OFFICE OF CONSUMER AFFAIRS

	<u>Page</u>
I. SUMMARY AND MAJOR CONCLUSIONS AND RECOMMENDATIONS	1
II. AUTHORITY, SCOPE, METHODOLOGY AND ACKNOWLEDGMENT	2
1. Authority	2
2. Scope	2
3. Methodology	2
4. Acknowledgment.	3
III. BACKGROUND	3
IV. DESCRIPTION OF THE DISPUTE RESOLUTION BUREAU	5
1. Legal Framework	5
2. Organization.	5
3. Operations.	6
4. Staffing and Budget	7
5. Regulations	8
6. Dispute Resolution Statistics - Mediation	8
7. Dispute Resolution Statistics - Arbitration	10
V. EVALUATION OF THE DISPUTE RESOLUTION BUREAU	11
1. Overview.	11
2. Legislative Findings and Purpose.	12
3. Bureau's Operating Procedures	13
4. Current Legislation	15
5. Government Involvement.	18
VI. OTHER MATTERS	20
VII. CONCLUSIONS	22
VIII. RECOMMENDATIONS	23
IX. AGENCY COMMENTS	24
EXHIBITS	
A - Chapter 24B, Homeowners' Associations, MCC.	A-1
B - Summary of Mediation Cases	B-1
C - Summary of Arbitration Cases.	C-1
D - Memorandum on Arbitration of Homeowners' Association Disputes	D-1
E - Comparison of State and County Laws on Community Associations	E-1

I. SUMMARY AND MAJOR CONCLUSIONS AND RECOMMENDATIONS

A. Summary

In late 1984, the County Council enacted legislation creating the Dispute Resolution Bureau in the Office of Consumer Affairs (OCA). The primary function of the Bureau is to provide an efficient and even-handed method for resolving disputes between and among residents and community associations (condominium associations, housing cooperatives and homeowners' associations).

The Bureau provides two alternate methods to resolve disputes, voluntary mediation and compulsory nonbinding arbitration. The services of the Bureau are free, with mediation provided by qualified staff of the Bureau, and arbitration by volunteer arbitrators. In the four years the Bureau has been in operation, it has received approximately 120 requests for mediation and 51 requests for arbitration.

B. Major Conclusions

The Dispute Resolution Bureau is providing alternate methods for resolving disputes between and among residents and homeowners' associations in an even-handed manner; however, a lack of dedicated resources hampers the operating efficiency of the Bureau.

Minor amendments to the current legislation are necessary to require governing boards of community associations to develop and publish internal association dispute procedures and to require that community associations develop and publish bylaws and publish procedures for the adoption of rules and regulations.

C. Major Recommendations

The County government should continue the operation of the Dispute Resolution Bureau in the Office of Consumer Affairs (OCA); however, resources should be provided to the Director, OCA, to enable the Bureau to be operated in a more efficient manner and to conduct a public information program on the Bureau's services.

The County Council should consider several amendments to Article III, Dispute Resolution, of Chapter 24B to clarify and strengthen certain provisions, streamline the dispute resolution process, and increase the flexibility of the Director, OCA. However, it is not recommended that the legislation be amended to require compulsory binding arbitration.

The County Council should introduce legislation to require community associations to develop and publish bylaws and to develop procedures for the adoption and publishing of rules and regulations.

II. AUTHORITY, SCOPE, METHODOLOGY AND ACKNOWLEDGMENT

1. Authority

Council Resolution No. 11-862, adopted June 7, 1988, subject:
Amendment to the CY 1988 Work Program of the Office of Legislative Oversight.

2. Scope

The purpose of this evaluation is to review the basic law and regulations under which the Dispute Resolution Bureau (Bureau) of the Office of Consumer Affairs was established and operates; and to evaluate the adequacy of the law and regulations and the existing operating procedures of the Bureau. Individual dispute files of the Bureau were reviewed for statistical data; however, the scope of this project does not include an evaluation of the merits of any specific dispute or the propriety of any mediation/arbitration settlement.

3. Methodology

This evaluation was conducted from June to August 1988, using a variety of fact finding techniques to include:

- Review of Chapter 24B, Montgomery County Code, Homeowners' Associations (Bill No. 62-83, Alternate Dispute Resolution Methods) and the legislative file of Bill No. 62-83.
- Review of the case files of all 51 disputes that went to arbitration and a random sampling of the case files of the approximately 120 disputes that were mediated or were pending mediation.
- Review of a random sampling of community association* documents, specifically the bylaws and declarations (covenants, conditions and restrictions).
- Distribution of a questionnaire to 100 randomly selected community associations requesting selective information relating to the Bureau and internal association mechanisms to resolve disputes.
- Interviews with a randomly selected sampling of individuals in the following categories:

* In this report, the term "community association" is used generically to refer to the three types of automatic membership owner associations in real estate developments: condominium associations, homeowners' associations, and housing cooperatives. However, the reader should note that the term "homeowners' association" is also used generically in laws, documents and common discourse to refer to these three types of associations.

- volunteer arbitrators who have conducted arbitration hearings for the Bureau;
- attorneys who have represented community associations, professional management companies, and individual owners in mediation/arbitration actions before the Bureau;
- members of boards of directors of community associations and individual unit owners who have participated in mediation sessions and/or arbitration hearings conducted by the Bureau;
- developers who have set up community associations and prepared the community association documents (covenants, conditions and restrictions);
- members of the original 1982 HOA Task Force and selected individuals who were involved in the drafting and enactment of Bill No. 62-83;
- staff of the Office of Consumer Affairs and other County agencies involved in community association matters; and
- others who have knowledge of community associations and dispute resolution programs and processes (HUD official, Director, Fairfax County Office of Consumer Affairs, Director, Community Associations Institute).

4. Acknowledgment

The Office of Legislative Oversight acknowledges the prompt and courteous support from the staff of the Office of Consumer Affairs (OCA), particularly those directly involved in the operation of the Dispute Resolution Bureau. Interviews were candid and information was forthcoming. In the course of this examination I found nothing that would cause me to question the individual sincerity or high professional qualifications of the OCA staff.

III. BACKGROUND

In November 1982, the County Council appointed a Homeowners' Association (HOA) Task Force to study a broad range of issues concerning homeowners' associations, condominium associations and housing cooperatives. Earlier, in April 1982, the Council had passed Bill No. 76-81, creating Chapter 24B, Homeowners' Associations and requiring open meetings and voting procedures within community associations.

The HOA Task Force divided itself into two groups. One of the groups reported on a variety of issues, to include: reimbursement for maintenance of association roadways; building permits in community associations; standards for private streets; reserve funds; and real property liens. The other, Group I, focused on a single issue, the establishment of alternate dispute resolution mechanisms for condominiums, housing cooperatives and homeowners' associations.

In July 1983, Group I issued a report which was essentially a recommended draft bill establishing alternative dispute resolution mechanisms. In October 1983, the Council incorporated many of the provisions of the Group I recommendations and introduced Bill No. 62-83, Alternate Dispute Resolution Methods. After a year of debate, and several draft versions, the Council enacted the bill with an effective date of October 7, 1984. Bill No. 62-83 was codified as Article III, Chapter 24B of the Montgomery County Code.

Two companion bills were also introduced during the same period, Bill No. 57-83, which dealt with reimbursement to community associations that provide required maintenance for association roadways; and Bill No. 58-83, which gave community associations a role in the building permit process. These two companion bills were eventually enacted by the Council in July 1985 and November 1986, respectively.

The dispute resolution mechanisms created in Bill No. 62-83 were mediation and arbitration, and the agency created to hear disputes was the Dispute Resolution Bureau, located within the Office of Consumer Affairs (OCA); The Council did not appropriate additional resources to the Office of Consumer Affairs to staff and operate the Bureau. However, using staff assigned to regular consumer-related functions, OCA began accepting disputes very shortly after the October 1984 effective date of the bill. Currently, the Bureau continues to function with OCA staff whose primary responsibilities are in other consumer-related areas within OCA.

In late 1987, the Council established another task force to study problems of homeowners' associations (Council Resolution No. 11-579, adopted December 8, 1987). As was the case with the previous homeowners' association task force, the Council specifically requested the 1987 HOA Task Force to research and analyze how to improve the process for responding to disputes. To address this issue, the Task Force established a Dispute Resolution and Government Agencies Subcommittee.

In May 1988, the Chairperson of the HOA Task Force requested the Council to revise the work program of the Office of Legislative Oversight (OLO) to provide for a program evaluation of the Dispute Resolution Bureau. The Council acceded to the request and amended the OLO work program (Council Resolution No. 11-862, adopted June 7, 1988), to direct a program evaluation of the Dispute Resolution Bureau. That program evaluation is the subject of this report.

IV. DESCRIPTION AND OPERATION OF THE DISPUTE RESOLUTION BUREAU

1. Legal Framework

The Dispute Resolution Bureau (Bureau) was established by the Council in Bill No. 62-83, effective October 7, 1984; and is codified in Chapter 24B, Homeowners' Associations, Article III, Dispute Resolution, Sections 24B-9 thru 24B-13.* A copy of Chapter 24B can be found at Exhibit A.

The primary function of the Bureau is to provide a forum and methods for the resolution of disputes among residents and community associations which would be an alternative to costly litigation. As specifically stated in the legislative findings, the purpose of the Dispute Resolution Bureau is to provide "...an efficient and even-handed method for resolving homeowners' disputes". As with the other provisions of Chapter 24B, there are a number of municipalities where the powers of the Bureau do not apply among them: Gaithersburg, Kensington, Chevy Chase Village, Glen Echo and Somerset.

When examining County legislation relating to community associations in general, and the Dispute Resolution Bureau in particular, the reader should keep in mind that the Maryland General Assembly has enacted two specific titles in the Real Property Article of the Annotated Code of Maryland relating to community associations: Title 11, Maryland Condominium Act, and Title 11B, Maryland Homeowners Association Act. Neither title includes provisions relating to alternate methods for resolving disputes among residents and the respective type of community association. However, Section 11-113 of the Maryland Condominium Act does require condominium associations to establish and follow a specific procedure prior to imposing a sanction on the unit owner, and to establish a dispute settlement mechanism for processing complaints.

2. Bureau Organization

When Group I of the HOA Task Force submitted its alternate dispute resolution methods draft bill, it did not recommend what agency in County government should administer the program. At the time that Bill No. 62-83 was being debated, there was some discussion of placing the program in either the Office of Consumer Affairs or the Office of Landlord Tenant Affairs. Also, a report by an individual member of the Task Force recommended the creation of a Homeowners' Association Arbitration Bureau as a separate agency under the County Executive with a staff of nine and a proposed first-year budget of \$300,000. The recommendation was offered as an amendment to Bill 62-83, but was defeated. The Council eventually approved placing the Bureau in the Office of Consumer Affairs.

* It should be noted that, although the sections relating to the Bureau are found in Chapter 24B, titled Homeowners' Associations, the authority of the Bureau is not limited to only homeowners' associations, but extends to all three types of community associations: homeowners' associations, condominium associations and housing cooperatives.

The decision to place the Dispute Resolutions Bureau in the Office of Consumer Affairs constituted a divergence in the focus of the Office. The fundamental purpose of OCA is to protect the consumer from deceptive and unconscionable trade practices. To carry out this consumer protection mission, OCA provides public education, licensing, registration, law enforcement and assistance to consumers and merchants in the resolution of complaints. In fulfilling this consumer-oriented mission, the Office serves primarily as an advocate for consumer rights. In addition, OCA has a law enforcement responsibility for those provisions of Chapter 24B relating to the open conduct of community associations. In contrast, the mission placed on OCA with the Dispute Resolution Bureau is to serve as a third party neutral in resolving disputes, either through mediation or arbitration, between and among residents and community associations.

3. Bureau Operations

The two alternate methods specified in Chapter 24B to resolve disputes are voluntary mediation and nonbinding compulsory arbitration. The Code is very explicit in defining which disputes the Bureau may accept for mediation and arbitration. Section 24B-1(4) defines a dispute as "...any disagreement between or among parties arising from the application or interpretation of association documents or the authority and power of a party to act..." The Code specifies three areas where the Bureau is not empowered to take action: any dispute regarding the title to any unit or the common elements of the community association; the percentage interests or votes allocable to a unit; or warranties.

Mediation. Mediation is a voluntary, informal and non-confrontational process where a neutral third-party assists the disputants to reach a mutually acceptable agreement. Usually conducted with all parties present in the same setting, the mediator, by law a member of the Bureau staff, facilitates discussion and the presentation of evidence and arguments to assist the parties to reach a solution to the dispute. Mediated settlements are nonbinding unless agreed to by all parties to be binding.

Mediation Process. A dispute can be filed with the Bureau by either an individual unit owner or a group of owners, or by the board of directors of the community association. At the time of filing, the complainant must specifically request mediation; however, the Bureau may recommend mediation as the appropriate method of resolving the dispute. The Bureau notifies the other party(ies) of the filing, provides a qualified mediator from within OCA's staff, and maintains an informal record of the proceedings.

While the law is silent on the issue, the Bureau's mediation process permits any party to be represented by an attorney. Should any party refuse to attend a mediation session ordered by the Bureau, the dispute goes to nonbinding compulsory arbitration.

Arbitration. Arbitration as conducted by the Bureau is a compulsory process where a neutral third-party decisionmaker hears evidence and arguments by all parties to a dispute and renders a decision. Under Chapter 24B, the decision by the arbitrator is nonbinding unless previously agreed to by the parties themselves to be binding.

Arbitration Process. Should the complainant request arbitration, the process is more involved and formal in that all parties to the dispute must go through a process of agreeing on the selection of the arbitrator from a list of five names provided by the Bureau from a pool of approximately 40 trained volunteer arbitrators. In a dispute settled by arbitration and agreed to by the parties themselves to be binding, the decision of the arbitrator has the force and effect of contracts, and can be enforced accordingly.

The Bureau arranges for the location of the arbitration hearing, schedules a time for the session, and notifies the arbitrator and all parties. Because Chapter 24B provides for compulsory arbitration, each party notified of a filing must attend the arbitration session. To ensure that all parties participate and all evidence is forthcoming, Chapter 24B empowers the Bureau (i.e., the Director, OCA), to issue summonses to compel the attendance of witnesses and parties and the production of documents, papers, books, records and other evidence. Finally, the law permits a party to be represented by an attorney provided the other party is notified of the representation not less than 15 days prior to the arbitration hearing.

Additional Bureau Operating Procedures. Chapter 24B explicitly requires that, prior to filing a dispute with the Bureau, the complainant first exhaust the dispute procedures or remedies provided for in his or her association's documents. Notwithstanding this requirement, the law further provides that 60 days after initiating the dispute with the association, the complainant may bring the dispute to the Bureau.

Should the association board of directors make a determination in the dispute, the law places two requirements on the association. First, the association must notify the other party of their right to file the dispute with the Bureau for either mediation or arbitration; and after notifying the parties of this right, the association is prohibited from taking any action to enforce or implement its decision for 14 days. Second, should the other party file the dispute with the Bureau, the association is prohibited from taking any action to enforce or implement its decision until after the Bureau's process is completed.

At any time during the process that a dispute is before the Bureau, any of the parties may initiate court proceedings. Also, in the case of a completed arbitration which was not agreed to be binding, either party may seek trial de novo in civil court of the underlying dispute. At the trial, the arbitrator's decision and the facts supporting it are admissible by either party.

Finally, the Office of Consumer Affairs may assist any party in a mediated settlement or the party who prevailed in arbitration. However, that assistance is limited to only providing the parties information concerning how the mediated agreement or arbitrator's decision may be enforced.

4. Bureau Staffing and Budget

As stated earlier, when the Bureau was created in 1984, no additional resources was given to OCA to operate the Bureau. In the years that the Bureau has been in operation, no resources have been specifically identified for its operation. During this four-year period, all functions of

the Bureau -- receiving complaints, conducting mediation sessions, arranging for arbitration hearings, maintaining case files, follow-up actions, etc., -- have all been performed as additional duties by staff assigned to the Office of Consumer Affairs.

Estimates by OCA of the total cost of operating the Dispute Resolution Bureau for the most recent two fiscal years, FY87 and FY88, are \$12,790 and \$13,640, respectively, primarily for salaries and wages of the OCA staff. OCA staff further estimates that 0.3 person-year, divided evenly between an OCA Investigator II and an OCA Investigator III, is committed annually to Bureau operations. Operating expenses (printing, communications, postage, etc.) are minimal, estimated to be approximately \$500 a year.

No fees are charged for the mediation or arbitration services. The law requires that mediation be conducted by staff of the Bureau, that is, staff of the Office of Consumer Affairs. Arbitrators, again by law, must be unpaid volunteers. The original draft of Bill No. 62-83 had given the Director, OCA, authority to contract for the delivery of mediation and arbitration services, but this provision was amended out of the Bill. The law does authorize the County Executive to establish in regulations "a reasonable fee" to be charged to the parties for the performance of the Bureau's services; however, the Executive has chosen not to set or charge any fees.

5. Bureau Regulations

The Code requires the County Executive to promulgate regulations and forms for the operation of the Bureau. The most current edition is Executive Regulation No. 30-86, effective June 3, 1987. Although the subject of this regulation is the Dispute Resolution Bureau, it only covers the arbitration process. The Bureau has not developed a regulation for conducting mediation so as to permit the mediator the greatest flexibility in reaching a settlement.

6. Dispute Resolution Statistics - Mediation

The Dispute Resolution Bureau received its first request for mediation in October, 1984, the same month Bill No. 62-83 became effective. From October 1984 until June 1985, it is estimated that the Bureau received approximately 20 complaints. An exact count is not available because all mediation cases prior to July 1985 were grouped and recorded with general retail consumer complaints. However, beginning in July 1985, separate records were established for mediation cases. In the period from July 1985 until July 1988, a total of 100 mediation cases have been filed with the Bureau.

At Exhibit B is a summary of the 100 mediation cases which have been received by the Bureau in the three-year period July 1985 to July 1988. Of these 100 cases, 84 were closed and 16 were still pending as of the writing of this report. An analysis of the 100 requests for mediation reveals the following:

- 91% of the requests for dispute mediation originated from unit owner(s).
- 57% of the cases involved a condominium association and 43% involved a homeowners' association.

- 84% of the cases involved professionally-managed associations; 16% involved self-managed associations.
- 80% reported first exhausting internal association dispute resolution remedies before filing with the Bureau.
- The nature of the disputes:
 - 39% -- the adoption and enforcement of internal covenants, conditions, or restrictions;
 - 30% -- the quality of construction, maintenance or repairs;
 - 24% -- matters relating to governance by the association board of directors; and
 - 6% -- neighbor and lifestyle problems.

A further analyses of the 84 closed mediation cases reveals the following:

- An attorney represented the association in 24% of the cases (20), and the unit owner in 5% of the cases (4);
- In 65% of the cases (55) a mediated settlement was achieved. Of the remaining 29 cases, either one or both of the parties withdrew from the process in 17 of the cases, and the other 12 cases were referred to arbitration.
- Of the 55 cases where a mediated settlement was achieved, in 55% of the cases (29) all parties complied with the mediated settlement.
- Of all the disputes mediated by the Bureau since July 1985, only one has eventually gone to litigation.*

Precise information on the time required to process each mediation case is not available. However, the following is a staff estimate of the processing time for 67 cases (55 cases where a mediated settlement was achieved plus the 17 withdrawn cases):

63% of the cases (42) took up to 60 days

30% of the cases (20) took between 60-120 days

* The files of the District Court reveal several cases concerning the collection of assessments under small claims; however, an attempt to determine the number of civil cases that have been filed in the Circuit Court involving community associations was unsuccessful. Unfortunately, unlike alcohol-related traffic cases and other high visibility offenses, the court does not maintain a separate record of such cases.

7% of the cases (5) took in excess of 120 days (with one of the cases taking in excess of 6 months).

7. Dispute Resolution Statistics - Arbitration

The first request for arbitration was received by the Bureau in November 1984. As of July 1988, a total of 51 arbitration cases have been received and closed by the Bureau. At Exhibit C is a summary of the 51 arbitration cases. An analysis of this summary reveals that:

- 71% of the requests (36) for arbitration originated from unit owner(s).
- 33% (17) involved a condominium association and 67% (34) involved a homeowners' association.
- 24% of the disputes (12) involved professionally-managed associations; 76% (39) involved self-managed associations.
- In 27% of the cases (14), the dispute was originally brought to the Bureau with a request for mediation.
- The nature of the disputes:
 - 73% (38) -- adoption and enforcement of internal covenants, conditions, or restrictions;
 - 13% (7) -- the quality of construction, maintenance or repairs; and
 - 13% (7) -- matters relating to governance by the association board of directors.
- In 53% of the cases (27), binding arbitration was requested by at least one of the parties; however, in only 22% of the cases (11) was binding arbitration agreed to.
- An attorney represented the association in 47% of the cases (24), and the unit owner in 18% of the cases (9).
- The arbitrator's decision in the 51 cases:
 - 51% (26) were in favor of the unit owner;
 - 22% (11) were in favor of the association;
 - 4% (2) had a split decision; and
 - 24% (12) were withdrawn before a decision was rendered.

- Follow-up by the Bureau of the 51 cases indicates the following:
 - 22% of the cases (11) all parties agreed to binding arbitration and complied with the arbitrator's decision.
 - 8% of the cases (4) the association did not comply;
 - 8% of the cases (4) the unit owner(s) did not comply;
 - 24% of the cases (12) were withdrawn with no follow-up attempted;
 - 2% of the cases (1) went to litigation; and
 - 37% of the cases (19) reflect no follow-up information.
- The time to process the arbitration cases is available for only 48 of the 51 cases, indicating:
 - 25% of the cases (12) took under 60 days;
 - 56% of the cases (27) took between 60 and 120 days; and
 - 19% of the cases (9) took in excess of 120 days (with one of the cases taking in excess of six months).

V. EVALUATION OF THE DISPUTE RESOLUTION BUREAU

Overview. So far this report has examined the 1984 legislation which established the Dispute Resolution Bureau, reviewed the Bureau's organization and operations in the Office of Consumer Affairs over the past four years, and analyzed the approximately 150 requests for dispute resolution received by the Bureau during that period.

In this section of the report the Dispute Resolution Bureau will be evaluated through an examination and discussion of the following four questions:

- A. How effective and efficient has been the Office of Consumer Affairs in carrying out the legislated purpose for creating the Dispute Resolution Bureau?
- B. What additional actions are necessary to improve the efficiency and effectiveness of the Dispute Resolution Bureau?
- C. What amendments, if any, should be made to Chapter 24B, MCC, relating to the Dispute Resolution Bureau to ensure that the purpose of the original legislation is being accomplished?
- D. Should the County government continue to provide alternate dispute resolution services between and among residents and community associations?

A. How effective and efficient has been the Office of Consumer Affairs in carrying out the legislated purpose for creating establishing the Dispute Resolution Bureau:

1. Evaluation

The legislative purpose for creating the Dispute Resolution Bureau, specifically, to provide an even-handed method for resolving disputes between and among residents and homeowners' associations, is being accomplished. However, an additional requirement, namely, to provide dispute resolution services in an efficient manner, is not always being accomplished.

2. Discussion

Section 24B-2, Legislative Findings and Purpose, of Chapter 24B of the Montgomery County Code found that, for many types of disputes between and among residents and homeowners' associations, "...there are no adequate resolution methods or forums, and for others, current methods of dispute resolution are costly, time consuming, complex, inefficient and often provide one or another side with an unfair advantage." This same section of the Code states that the legislative purpose for establishing the Dispute Resolution Bureau is "...to meet this need by providing an efficient and even-handed method for resolving homeowners' disputes."

An analysis of case documents and interviews with a random sampling of unit owners, association board members and attorneys who have been involved in disputes submitted to the Bureau for mediation or arbitration, reveals no evidence of partiality or favoritism by the Bureau to any of the parties to the disputes. However, the operational efficiency of the Bureau has been adversely affected by the decision, when initially creating the Bureau, not to commit resources to the Office of Consumer Affairs (OCA) to operate the Bureau.

During worksessions on Bill No. 62-83, there was little support for providing any resources to operate the Bureau. In the end, the Council decided that the Bureau would be placed in OCA with no additional staff or funding to carry out the Bureau's functions. Also, the Council removed a provision in the original draft of the Bill which would have authorized the Director, OCA, to contract for the delivery of mediation and arbitration services. The enacted legislation did authorize the County Executive to establish a reasonable fee to be charged for the services; however, to date, no fee has been established or charged.

One result of the decision not to commit resources to OCA to operate the Bureau has been that OCA staff, whose primary duties and first priorities are to consumer-related duties, have also been performing the functions of the Bureau. One of the effects of this arrangement may have been a lengthening of the time to process mediation and arbitration cases. A review of the case files indicates that 15 percent of the mediation cases and 37 percent of the arbitration cases have taken over 90 days to close. OLO was unable to find any "standard" for the time required to process a case through mediation or arbitration. However, interviews with parties which have used the services of the Bureau, especially for mediation, indicate they expected a more expeditious process.

The Bureau staff estimates that the average time spent on a mediation case is two to three hours, and on an arbitration case, five to eight hours. These times reflect actual staff work on the disputes, such as processing the request, arranging for the hearing or mediation session, proposing an arbitrator and scheduling a hearing room, conducting the mediation session or arbitration hearing, completing the case file and following-up on the mediated settlement or arbitrator's decision. However, these estimated times do not include activities which are outside the control of the Bureau staff, such as attorney preparation time, the process of selecting the arbitrator and waiting for responses from the parties.

An additional result of the decision not to commit resources to the Bureau is that there has been little public information and education concerning the Bureau since the initial public announcements at the time the Bureau was created in October 1984. At that time, OCA, using funds appropriated for consumer-related activities, disseminated information on the Bureau through newspaper articles, public service messages on local radio and TV stations and speakers to homeowners' associations. However, since that initial dissemination of information, little additional public information on the Bureau has been made; and a brochure describing the Bureau's alternate dispute resolution services has not been published.

In conclusion, the Dispute Resolution Bureau is accomplishing the legislative purpose of Bill 62-83 by providing even-handed alternate methods for resolving homeowners' disputes. However, because of the continuing decision to operate the Bureau without designated resources, the efficiency of the Bureau's operations has been adversely affected, primarily in the time required to process a dispute to closure. An additional consequence of not specifically funding the Bureau is that there has been little public information and education on the Bureau's services.

B. What additional actions are necessary to improve the efficiency and effectiveness of the Dispute Resolution Bureau?

1. Evaluation

The Office of Consumer Affairs should be provided sufficient resources dedicated to the dispute resolution process to ensure that mediation and arbitration services are provided in an expeditious manner and to enable OCA to conduct an ongoing public information and education program concerning the Bureau's services.

The following should also be accomplished:

- Develop operating procedures for the mediation process;
- Expand the biographies of the volunteer arbitrators; and
- Continue recently initiated improvements in the Bureau's operations.

2. Discussion

As discussed earlier in this report, the operating efficiency of the Bureau has been adversely affected by the lack of dedicated resources to the Office of Consumer Affairs to operate the Bureau. As a result, the Bureau has functioned for four years with staff whose primary duties and responsibilities are concerned with consumer-related matters. In addition, the lack of funding for the Bureau's operations has resulted in little public information or education about the Bureau after the initial announcements and notices in late 1984 when the Bureau was created. The Bureau should be provided sufficient resources to provide mediation and arbitration services in an expeditious manner and to adequately inform the public of the Bureau's services.

The basic legislation requires that the County Executive promulgate regulations and forms for the operation of Bureau. Executive Regulation No. 30-86 was developed and approved by the Council for the arbitration process; however, no regulation was developed for the mediation process. The reason for not developing a mediation regulation was to allow the mediator flexibility in reaching a settlement. Admittedly, mediation is a less formal process than arbitration, and the requirement for flexibility in the mediation process is important; however, some form of a regulation or an operating procedure for mediation is needed to assist the parties involved in understanding the mediation process; to clarify what disputes can be mediated by the Bureau; to establish the rules of confidentiality and the role of counsel; to define what constitutes a "qualified" mediator; and to provide guidelines and checkpoints to assure expeditious processing of the mediated dispute.

Executive Regulation No. 30-86 specifies a procedure to be followed in selecting the arbitrator. The procedure requires that each party to the dispute select a volunteer arbitrator from a list of five names, which, together with a brief biography, is furnished by the Bureau. Currently, the Bureau lists only the arbitrator's name and principal occupation, such as engineer, attorney, builder/developer, psychologist. Several persons who were either one of the parties in an arbitration hearing or an attorney representing one of the parties have suggested that the biographies be expanded to provide more information on the specific experiences and qualifications of each arbitrator.

Earlier this year, an internal reorganization within the Office of Consumer Affairs resulted in a change in responsibilities of the three middle managers, the Consumer Affairs Administrators. The Administrator who now has responsibility for the operation of the Bureau has introduced some improvements in the Bureau's operating procedures. These changes primarily affect the internal process of receiving and classifying complaints and of determining the appropriate method of resolution for the particular dispute. Future improvements should include developing procedures to reduce the time required to process each dispute, developing a public information program, standardizing case files, publishing a brochure which describes the Bureau's services, and setting-up procedures to obtain information on the eventual disposition of mediated settlements and arbitrator's decisions.

C. What amendments, if any, should be made to the Chapter 24B, MCC, relating to the Dispute Resolution Bureau to ensure that the purpose of the original legislation is accomplished?

1. Evaluation

Some amendments to the current law are needed to clarify and strengthen certain provisions, streamline the dispute resolution process, and increase the flexibility of the Director, OCA, to provide alternate dispute resolution services. However, it is not recommended that the legislation be amended to compel binding arbitration.

2. Discussion

Implementation of the following five specific amendments to Chapter 24B, Montgomery County Code, would facilitate the operational efficiency of the Bureau:

- Amend Section 24B-10 to require that association boards of directors establish a dispute settlement mechanism within the community association.

The Council should require that internal dispute settlement procedures be established in all community associations. The Maryland Condominium Act does require that condominium associations have a dispute settlement mechanism; however, the Maryland Homeowners' Association Act does not have a similar requirement. An OLO survey of 100 randomly selected community associations revealed that, of the 44 associations responding to the survey, 17 or 39 percent reported not having any written internal procedures to handle disputes. Included in the 16 were relatively large associations with as many as 288, 586 and 1,246 units. A provision in the legislation requiring internal dispute settlement procedures would be consistent with the provision in the current law that parties may not bring disputes to the Bureau without first exhausting the procedures or remedies provided for in the association documents.*

- Amend Section 24B-10(b), to remove the requirement that parties who file disputes must initially choose mediation or arbitration.

The legislation specifies that parties who file disputes must choose between mediation or arbitration. Experience has shown that the filing party, at least initially, does not know what method to select. Usually the dispute has gone through some internal processing within the association without satisfying the complainant. When a decision is made to file the dispute with the Bureau, the party is primarily interested in

* It should be noted that the largest community association in the County, the Montgomery Village Foundation, which manages 11 homeowners' associations comprising approximately 7,000 units, does have a detailed internal dispute resolution process. The process includes a series of notices, the third of which appraises the homeowner of the services of the Dispute Resolution Bureau, and lists both the address and telephone number of the Bureau.

resolving the dispute by a process other than costly litigation. Whether the nature of the particular dispute lends itself better to mediation or to arbitration is often better judged by the professional staff of the Bureau. Of course, should the filing party want only mediation or arbitration, the Bureau would continue to honor the request. However, Bureau experience over the past four years suggests that the filing party is prone to accept the alternate dispute resolution method which the Bureau recommends as having the highest probability of success.

- Amend Section 24B-10(b)(1)(iii), to remove the requirement that the qualified mediator must come from the Bureau's staff.

During the four years the Bureau has been in operation, mediators drawn from the OCA staff have provided qualified, professional, and even-handed mediation services. However, there have been instances when the highly technical or unusual nature of a particular dispute could have benefited from the services of a mediator with a particular specialty. The current legislative requirement that mediators must come from the Bureau (OCA) staff inhibits the flexibility of the Director, OCA, to use the services of a paid or volunteer mediator with a particular specialty or skill to mediate the dispute.

- Amend Section 24B-9 to add the following: "The Director of the Office of Consumer Affairs may contract for the delivery of mediation and arbitration services."

The above language was removed from draft Bill No. 62-83 during Council worksessions. At the time, the Director, OCA, did not object to taking out the language. However, in the four years the legislation has been in effect, there have been occasions when the Bureau has identified situations where the option to contract for the services of a mediator or an arbitrator with qualifications and skills unique to the particular case before the Bureau would have been appropriate.

- Amend Section 24B-10(b)(1) to permit the parties in a mediation to be represented by an attorney.

The legislation is specific in permitting parties in an arbitration to be represented by counsel. However, it is silent regarding attorney representation in mediation sessions. While the Bureau has not encouraged parties to a mediation to use counsel, neither has it discouraged attorney representation. A review of the 84 mediation cases indicates that associations were represented by an attorney in 20 cases (24%), and unit owners in 4 cases (5%). (See Exhibit B.)

3. Binding arbitration is not recommended

Several persons who were interviewed, to include OCA staff members, parties to disputes, arbitrators, and attorneys who are involved in community association matters, have suggested that Chapter 24B be amended to compel binding arbitration. In support of their position, three reasons were highlighted:

- A dispute brought to binding arbitration will be almost as certain of reaching resolution as is a dispute brought to a court of law.

- Without binding arbitration, the losing party will simply not comply with the arbitrator's decision, thereby reducing the arbitration process to a useless waste of time.

- The costs involved in hiring an attorney to represent a party in an arbitration hearing which is not binding on all parties cannot be justified.

However, OLO believes that the arguments for not legislating binding arbitration, other than when all parties freely agree to be bound by the arbitrator's decision, are more persuasive.

The first and overriding reason is that the County government probably does not possess the constitutional authority to compel binding arbitration. It is OLO's understanding that the HOA Task Force will be requesting a legal opinion from the County Attorney on whether the County has the authority to legislate binding arbitration. However, in the interim, OLO presented the question to the Council's Legislative Attorneys. A memorandum response from the attorneys concludes that, while the County can require compulsory arbitration, it cannot require binding arbitration. A copy of the memorandum response from the Legislative Attorneys is at Exhibit D.

There are additional reasons for not compelling binding arbitration:

- As stated above, the County Code already provides for binding arbitration should the parties involved agree to be bound by the arbitrator's decision.

- The current County program which provides for compulsory nonbinding arbitration at least brings the parties before an arbitrator where there is a possibility that they will agree to be bound by the arbitrator's decision. Of the 51 arbitration hearings since the Bureau was established, in 11 of the cases (22%), there was a prior agreement for binding arbitration. (See Exhibit C.)

- Compelling binding arbitration appears not to work. Several years ago the Florida legislature established a program of voluntary binding arbitration to resolve internal condominium disputes. A 1986 performance audit of that program by the Florida Office of the Auditor General concluded that binding arbitration was an ineffective way for resolving internal disputes. The performance audit found that, in over 1,450 complaints received in 1984 and 1985, only eight instances in 1984 and six in 1985 did all parties agree to an arbitration proceeding. Thus, in a two-year period, binding arbitration was used to resolve less than one percent of the disputes. The major reason cited in the Auditor General's audit for the low utilization of the arbitration process was the refusal, mainly by of the condominium associations, to participate in a processes which was binding. The report further cited that the effect of the condominium associations' refusing to participate in binding arbitration has been that unit owners drop the complaint because of the high cost of litigation.

4. The County may be able to strengthen the arbitration system

Included in the memorandum from the Council's Legislative Attorneys (Exhibit D) is a brief discussion of how the County could establish a stronger arbitration system if it wished to do so. Although this issue is outside the scope of an evaluation of the Bureau's existing services, it is included in this report for those who may find the legal analysis useful.

D. Should the County government continue to provide alternate dispute resolution services between and among residents and community associations?

1. Evaluation

The County government should continue to provide alternate methods for resolving disputes between and among residents and community associations.

2. Discussion

During the conduct of this evaluation, several persons questioned the County government's involvement in the affairs of community associations, especially in the area of dispute resolution. The major reason for this questioning was not that the County lacks the authority to provide these services or that providing alternate dispute resolution services was not a worthy effort. Rather, the major objection to the County's involvement was that it raised expectations on the part of the parties involved, especially the unit owners, which the Bureau cannot meet.

The argument is made that the Bureau is unable to act on the fundamental cause of most of the disputes, namely the unreasonable or impracticable provisions contained in the community associations' documents, especially the covenants, conditions and restrictions. Because these covenants, conditions and restrictions (CC&R) are part of the associations' legal documents which are recorded in the land records, they are extremely difficult to amend, often requiring the affirmative vote of as many 90 percent of the unit owners to change. Even in those instances where the associations' boards of directors agree with the disputant that a particular covenant or restriction is outdated or unreasonable and should be changed for economic or practical reasons, the boards must still enforce the CC&R until such time the document is formally amended by the required percentage of unit owners.

Another consideration offered by those opposing the County government's role in dispute resolution is that local government should not be involved in attempting to resolve disputes between parties who, essentially, are neighbors in a community, economic partners in a common interest holding, and equals in a political arrangement which governs the community association.

Notwithstanding the above, the overwhelming majority of those interviewed opined that it is both appropriate and necessary that the County government provide alternate methods to resolve disputes among and between residents and community associations. The highlights of their arguments are as follows:

- The State has failed to provide alternate dispute resolution methods in either the Maryland Condominium Act or the Maryland Homeowners Association Act. According, the County has a right and an obligation to step in to fill the void. (Note: The Maryland Condominium Act does require that condominium associations have a dispute settlement mechanism; however, this merely addresses a processing procedure and not resolution services.)

- The County has a legitimate role in maintaining harmony among its citizens, a high quality of neighborhood life, and a sense of community. Accordingly, it is appropriate for the County to provide a service which facilitates the expeditious resolution of disputes and preserves the quality of community life.

- The Dispute Resolution Bureau visibly demonstrates the County government's interest in helping citizens work out solutions to community problems in a process that is open and fair. In addition, the Bureau provides an independent and objective hearing process to supplement the dispute mechanisms of the community associations where the boards of directors are perceived to be both the accuser and the judge.

- The Bureau provides an informal administrative process for the resolution of disputes between parties who are essentially not disinterested strangers, but are neighbors who share a common interest in seeing that the particular dispute is resolved in a manner that will allow for the continuation of a relationship as neighbors and business partners.

- The informal administrative process for resolving disputes between neighbors offered by the Bureau is a less costly alternative to expensive and protracted litigation.

- Creation of the Bureau by the County is consistent with the responsibility of local government to take actions designed to protect consumers.

- The proliferation in the number of community associations has been encouraged by the County; and the County has benefited from the existence of community associations in a variety of ways: production of additional housing stock in higher density developments; construction of moderately priced housing units; additions to the County's infrastructure (roads and stormwater management) and amenities (swimming pools and open space); and the provision of services at no cost the County (snow removal and road maintenance).^{*} In exchange for these many benefits, it is appropriate that the County provide a service to these community associations, specifically, alternate methods for the resolution of disputes.

^{*} The County enacted legislation in July 1985 (Bill No. 57-83) which establishes a program for reimbursing homeowners' associations for the maintenance of association roadways. To qualify for the program, the association must meet a number of conditions, one of which is an agreement that disputes to which the association is a party will be submitted by the homeowners' association to the Bureau for mediation or arbitration, or to another OCA-approved resolution process. (See Exhibit A.)

● Finally, the active participation of government in mediating and arbitrating a wide range of minor disputes is a growing phenomenon. Originally concentrating on civil, domestic and small claims mediation arbitration services, some governmental agencies are initiating procedures to mediate minor criminal cases. Such a program was recently announced by the States Attorney's Office.

VI. OTHER MATTERS

1. In the course of this examination, several matters not specifically within the scope of the evaluation were revealed and were considered sufficiently important to be presented here for information and possible action by the appropriate department/agency.

2. Roster of community associations

Currently, there is no roster of community associations located within the County. The lists which are maintained by various agencies are incomplete and lack pertinent information (e.g., type association, number of units, type of management). Public agencies currently maintaining lists include the Maryland-National Capital Park and Planning Commission, the State Office of Assessments and Taxation and the Office of Landlord Tenant Affairs (OLTA). The roster maintained by OLTA is probably the most accurate, but it is limited to multi-family cooperatives and condominiums in which there are licensed rental units.

In addition to the above public agencies, the Montgomery County Board of Realtors publishes a list which the Board admits is neither accurate nor complete. Also, the local chapter of the Community Association Institute, a private research and educational organization, publishes an accurate list of community associations, but it is limited to only members of CAI.

It is my understanding that the current Homeowners' Association Task Force is making a concerted effort to develop a complete list of community associations, primarily through the distribution of a questionnaire. Even if the HOA Task Force is successful in assembling a complete list, there will still be a requirement for some department/agency to periodically up-date the list.

Another effort currently underway may produce an accurate list of homeowners' associations. A 1988 amendment to the Maryland Homeowners Association Act (Title 11B) requires that homeowners' associations identify themselves and deposit documents with the Clerk of the Circuit Court by December 31, 1988.

3. Zoning Text Amendment and Subdivision Regulation Concerning Dispute Resolution Procedures

When Bill No. 62-83, went to public hearing in November 1983, public testimony on two companion district Council matters were heard at the same time:

- Zoning Text Amendment 83024, requiring that language be included in homeowners' associations' documents indicating that the governing bodies of the associations will settle disputes by mediation or arbitration under the Dispute Resolution Bureau; and
- Subdivision Regulation 83-2, requiring that the Preliminary Subdivision Plan be accompanied by documents which would indicate that the governing body of the association will settle all disputes by mediation or arbitration under the Dispute Resolution Bureau.

Bill No. 62-83 was enacted in June 1984, but the Council took no further action on either the text amendment or the subdivision regulation. The records do not indicate an official reason for the Council not taking action; however, in an August 1984 letter to an attorney, the Council President stated that the Council deferred action on the two matters to provide time for the effectiveness of Bill No. 62-83 to be evaluated. The evaluation was not performed and the text amendment and subdivision regulation expired two years after the public hearing in November 1986.

4. Additional areas where the County should consider legislation

Article II of Chapter 24B, Homeowners' Associations, of the Montgomery County Code addresses three areas which ensure open conduct within community associations (see Exhibit A). Specifically, the article addresses open and closed meetings, voting procedures and annual budgets (this latter provision was added in February 1987 by Bill No. 28-85). The Code assigns responsibility for receiving complaints, conducting investigations and enforcing these three open conduct provisions to the Director, Office of Consumer Affairs. These three specific open conduct provisions are also contained in the Maryland Condominium Act (Title 11), but not in the Maryland Homeowners' Association Act.

A review of Maryland Code reveals two other areas relating to open conduct which the State has addressed for condominium associations, but not for homeowners' associations. (See comparison chart at Exhibit E.) The County may wish to consider taking legislative action in these two areas as it did in the case of open/closed meeting, voting procedures and annual budgets:

- Bylaws. Require that homeowners' associations develop and publish bylaws, enumerate minimum required particulars which must be included in the bylaws, and specify a method of amending the bylaws.
- Rules and regulations. Require homeowners' associations to develop procedures to be followed in adopting rules and regulations, notifying unit owners when rules and regulations are to be adopted, conducting open meetings on the contents of the rules and regulations, and explaining procedures for amending the rules and regulations.

5. Civil citation for violation of the open conduct provisions of Chapter 24B

Section 24B-7, Penalties, of Chapter 24B, Homeowners' Associations, discusses penalties for an association which is found to have violated the open conduct provisions of Chapter 24B. That section of the Code provides for "injunctive or other appropriate action . . ." to correct any violation. Some interpret "other appropriate action" as authority for the Director, Office of Consumer Affairs to issue civil citations under Section 1-20 of the Montgomery County Code to enforce the open conduct provisions. Since OCA has never initiated any enforcement proceedings for violating an open conduct provision of Chapter 24B, the interpretation has not been tested.

Notwithstanding this interpretation, it would appear to be clearer if Section 24B-7 specifically stated that civil citations (at the appropriate level specified in Section 1-19 of the Code) were authorized as an alternate sanction for violating the open conduct provisions enumerated in Article II of Chapter 24B.

VII. CONCLUSIONS

1. The Dispute Resolution Bureau is providing alternate methods for resolving disputes between and among residents and homeowners' associations in an even-handed manner; however, a lack of dedicated resources hampers the operating efficiency of the Bureau.

2. The efficiency and effectiveness of the Dispute Resolution Bureau's can be improved:

- By developing operating procedures for the conduct of mediation services.
- By expanding the biographies of the volunteer arbitrators.
- By continuing to make improvements in the Bureau's operations.

3. Amendments to Article III, Dispute Resolution, of Chapter 24B, Montgomery County Code, are necessary:

- To delete the requirement that the complainant must choose between mediation and arbitration as the method of resolution when initially filing the complaint.
- To delete the requirement that mediation can only be provided by a member of the Bureau's staff.
- To authorize parties in a mediation session to be represented by an attorney.

- To authorize the Director, OCA, under certain circumstances, to contract for the delivery of specialized mediation and arbitration services.
- To require the governing boards of each community association to develop and publish an internal association dispute settlement procedure.

4. It is not appropriate to amend Article III, Dispute Resolution, of Chapter 24B, to require compulsory binding arbitration.

5. The County lacks a complete and accurate roster of community associations and a method of maintaining the roster.

6. Legislation in two areas concerning open conduct of community associations is needed:

- To require associations to develop and publish bylaws; and
- To require associations to develop procedures for the adoption and publishing of rules and regulations.

VIII. RECOMMENDATIONS

It is recommended that:

1. The County government continue the operation of the Dispute Resolution Bureau in the Office of Consumer Affairs (OCA); however, resources should be provided to the Director, OCA, to enable the Bureau to be operated in a more efficient manner and to conduct a public information and education program on the Bureau's services.

2. The efficiency and effectiveness of the Bureau be improved by initiating some changes to the internal operating procedures of the Bureau.

3. The County Council should consider several amendments to Article III, Dispute Resolution, of Chapter 24B to clarify and strengthen certain provisions, streamline the dispute resolution process, and increase the flexibility of the Director, OCA. However, it is not recommended that the legislation be amended to require compulsory binding arbitration.

4. The County Council should introduce legislation to require community associations develop and publish bylaws and to develop procedures for the adoption and publishing of rules and regulations.

5. An agency or department should be charged with the responsibility of developing and maintaining a complete and accurate roster of community associations.

6. The County Council approve this report for public release.

IX. AGENCY COMMENTS

Before submitting this report to the County Council, a draft copy was sent to the Chief Administrative Officer, the County Attorney and the Directors of the Office of Consumer Affairs and the Office of Management and Budget. Comments of a technical nature have been included in this final report. Other comments are presented in their entirety beginning on page 25.



Montgomery County Government

ROCKVILLE, MARYLAND 20850

MEMORANDUM

September 15, 1988

TO: Andrew Mansinne, Director, Office of Legislative Oversight
FROM: Lewis T. Roberts, Chief Administrative Officer *L. T. Roberts*
SUBJECT: DRAFT OLO Report 88-5, A Description and Evaluation of the
Dispute Resolution Bureau in the Office of Consumer Affairs

Thank you for the opportunity to comment on the above-named report. The report is a well-balanced presentation and evaluation of the Dispute Resolution Bureau. Attached for your information are comments from OMB and the County Attorney's Office. It is my understanding that the Office of Consumer Affairs has provided you with oral comments.

Please note OMB's comments regarding resource allocation. I would like to add that I believe it to be important to balance our ability to address individual program needs against the overall needs of the organization and the limits of the government. An organization the size of the Office of Consumer Affairs requires the flexibility that dedicated resource allocation to this program may not provide.

The Executive Branch looks forward to a discussion of the report upon its release to the County Council. Thank you again for the opportunity to comment.

LTR:psa

MEMORANDUM

September 14, 1988

TO: Keith Kolodgie, Office of the County Executive
FROM: Barbara B. Gregg, Executive Director, Office of Consumer Affairs *BBG*
SUBJ: OLO Draft Report 88-5

The subject report is both helpful and fair. I have discussed with Mr. Mansinne some technical and other changes which he is going to make.

BBG/jls

September 13, 1988

TO: Andrew Mansinne, Jr.
Director, Office of Legislative Oversight

FROM: Clyde H. Sorrell
County Attorney *CS*

SUBJECT: Comments on Draft OLO Report No. 88-5, A
Description and Evaluation of the Dispute Resolution
Bureau in the Office of Consumer Affairs

We have reviewed the Draft and County Code Chapter 24B and provide the following comments. If you have any specific questions, please contact Daniel P. Rigterink, Assistant County Attorney, at 217-2606.

I. Comments Concerning Your Proposed Amendments

- (a) If amendment to Section 24B-10 is recommended, it should contain wording such as "unless the declaration or bylaws state otherwise, the dispute settlement procedures...." See MD. Real Prop. Code Ann. §11-113.
- (b) The proposed amendment to Section 24B-10(b) stating that the mediation/arbitration choice need not be made immediately is appropriate, as the complainant probably has no idea which to choose at the time the dispute is filed.
- (c) The proposed amendment to Section 24B-10(b)(1)(iii) regarding the source of mediators is appropriate and should expedite the process.
- (d) If Section 24B-9 is amended to permit OCA to contract for mediation and arbitration services, it may also be advisable to amend 24B-10 to require the parties to pay the fees for any mediation or arbitration services.
- (e) The proposed amendment to Section 24B-10(b)(1) regarding representation by an attorney is more appropriately placed in Section 24B-10(a), and should state something to the effect that "any party maybe represented by an attorney."
- (f) It is doubtful that the County has the authority to require binding arbitration.

II. Additional Comments

- (a) Your comments concerning covenants, conditions, and restrictions (CC&R) are well taken. Accordingly, it may be appropriate to state either in the law or initial correspondence from the Dispute Resolution Bureau that disputes concerning CC&R matters are not within the Bureau's jurisdiction.
- (b) The first comment on page 19 of the Draft is unclear, because Section 11-113 of the Maryland Condominium Act (Real Prop. Art.) requires a dispute settlement mechanism.
- (c) There are "community associations" in existence that fall without the definition used in the Draft. Such associations are strictly voluntary and do not own any property. Would your proposed repository for rosters and documents include such associations?
- (d) Section 24B-9(e)(3) should be deleted.
- (e) The second sentence of Section 24B-12 should be deleted, as evidentiary and procedural issues are controlled by State law.

September 14, 1988

TO: Andrew Mansinne, Jr., Director
Office of Legislative Oversight

FROM: Robert K. Kendal, Director
Office of Management and Budget *RK*

SUBJECT: DRAFT OLO Report No. 88-5, A Description and Evaluation of the
Dispute Resolution Bureau in the Office of Consumer Affairs

OMB has reviewed the DRAFT OLO Report referenced above, and appreciates the opportunity to comment on the report.

OMB is in general agreement with most of the analysis in the Report and its conclusion that the Dispute Resolution Bureau seems to be accomplishing the legislative purpose of Bill 62-83 by providing even-handed alternative methods for resolving disputes between homeowner's associations and residents.

On pages 15 through 18 of the report, OLO discusses five proposed amendments to Chapter 24B, Montgomery County Code. OMB has no opinion on the majority of these amendments in that they appear to clarify the existing County Code and are logical extensions of the original legislation.

The Report proposed an amendment to Section 24B-9 MCC which would add the following: "The Director of the Office of Consumer Affairs may contract for the delivery of mediation and arbitration services." Such contracting may have significant implications for OCA's operating budget. OMB feels that further analysis would be needed regarding the cost per hour for mediation or arbitration services by an expert in a specialized field as well as an estimate of the number of cases that might require such specialized services. Further procedures would also need to be established to indicate those circumstances where contracting is necessary or would enhance Bureau services.

The other major issue on which comment is offered is OLO's assessment that the Dispute Resolution Bureau has been less than efficient. It is reasonable to believe that there are questions regarding efficiency, particularly given the establishment in late 1987 of a task force to study problems of homeowners' associations that was specifically charged by the Council to research and analyze how to improve the process for responding to disputes. The conclusion drawn in OLO Report 88-5 on the issue of efficiency, however, requires further analysis and discussion.

One concern regards a definition of "reasonable time" for dispute resolution. Exhibit B illustrates the time to process mediation cases. Eighty-five percent of these cases are resolved in 90 days or less, meaning the great majority of cases requiring mediation were settled in 90 days or less. A 90-day period for effective government intervention may not in fact be unreasonable. A test for "reasonableness" might consider the number of documented mediation cases in which a complaint was lodged with regard to timeliness. Another might be to compare this result to dispute resolutions in other jurisdictions.

Twelve mediation cases documented in Exhibit B were referred to arbitration, which may have resulted in longer time frames for processing. OLO's recommendation to amend 24B-10 (b) to remove the requirement that parties filing disputes must initially choose between mediation and arbitration may result in Bureau staff referring cases to a more appropriate resolution process. This may result in more efficient management of cases.

It is implied on pages 12 and 13 that inefficiency occurs due to a lack of resources dedicated to the Bureau. The cause of the inefficiency is not absolutely clear to us. While it is true that resources have not been dedicated to the Dispute Resolution Bureau, it is not necessarily the case that lack of additional staff is in fact the direct cause of delays.

On page 13, OLO indicates Bureau staff estimates that the average time spent on a mediation case is two to three hours, and on an arbitration case, five to eight hours, including processing the request (and proposing an arbitrator), conducting the mediation session or arbitration hearing, and following-up on the settlement/decision. If we assume that staff estimates are correct, it takes an average of 2.50 hours of staff time for a mediation case and an average of 6.50 hours of staff time for an arbitration case. There were 100 mediation cases in the period from July 1985 to July 1988 (3.00 years), or an average of 33.33 cases per year (100 cases/3.00 years). There were 51 arbitration cases for the period from November 1984 to July 1988 (3.75 years), or an average of 13.60 cases per year (51/3.75 years). This would result in an average of 83.25 person-hours spent on mediation cases in a "typical" year (2.50 hours average x 33.33 cases per year), and an average of 88.40 person-hours spent on arbitration cases (6.50 hours average x 13.60 cases per year). The total estimated hours spent on disputed cases in a "typical" year equals 171.65 hours or .08 workyears (171.65/2080 hours) -- roughly .1 workyear when rounded.

However, on page 8 of the report, it is estimated that a total cost of 0.3 workyears is committed annually to Bureau operations. Given this discrepancy in workyear estimates it would be difficult to draw conclusions regarding staff resources spent on dispute resolutions or to conclude that lack of resources is a cause of inefficiency.

The report states on page 14 that the Office of Consumer Affairs is in the process of revising internal procedures for receiving and classifying complaints, for determining the appropriate method of resolution, for reducing the time required to process each dispute, for standardizing case files, and for obtaining information on the eventual disposition of mediated settlements and arbitrators decisions. It is the opinion of OMB that these management improvements will result in enhanced operational efficiency of the Bureau and that increased expenditure of resources to improve efficiency would be premature.

Thank you for your consideration of these comments.

RKK:ph
8642A

Chapter 24B.

HOMEOWNERS' ASSOCIATIONS.***Article I. In General.**

- § 24B-1. Definitions.
- § 24B-2. Legislative findings and purpose.

Article II. Open Conduct.

- § 24B-3. Open meetings.
- § 24B-4. Voting procedures.
- § 24B-5. Budget.
- § 24B-6. Complaints; investigations; enforcement.
- § 24B-7. Penalties.
- § 24B-8. Civil liability.

Article III. Dispute Resolution.

- § 24B-9. Dispute resolution bureau.
- § 24B-10. Dispute resolution.
- § 24B-11. Effect of settlement of disputes.
- § 24B-12. Trial *de novo*.
- § 24B-13. Assistance to parties.

Article IV. Maintenance Support for Association Roadways.

- § 24B-14. Program of support for maintenance.
- § 24B-15. Qualifying homeowner's associations.
- § 24B-16. Amount of assistance.
- § 24B-17. Limitations on expenditures.
- § 24B-18. Regulations.
- § 24B-19. Sunset date.

ARTICLE I. IN GENERAL.†**Sec. 24B-1. Definitions.**

The following definitions apply to this chapter:

(1) *Association document* means the master deeds, declaration, incorporation documents, bylaws, rules of any homeowners' association, any written private agreement between covered

*Cross references—Consumer protection, ch. 11; condominiums, ch. 11A; cooperative housing, ch. 11C.

†Note—See the editor's note to art. II of this chapter.

parties concerning the operation of the association or maintenance or control of common or limited common property, and any similar document concerning the operation or governance of a homeowners' associations, but does not include a lease covered by section 29-1 of chapter 29, entitled "Landlord-Tenant Relations," unless the lease provides that it shall be enforced pursuant to this chapter.

(2) *Association roadway* means those paved surfaces, exclusive of areas designated for parking which:

a. Provide vehicular access to more than four (4) homes or dwelling units; and

b. Are maintained by a homeowners' association.

(3) *Bureau* means the dispute resolution bureau in the office of consumer affairs, established under section 24B-9 of this chapter.

(4) *Dispute* means any disagreement between or among parties arising from the application or interpretation of association documents or the authority and power of a party to act, except for any dispute regarding:

a. Title to any unit or the common elements; or

b. The percentage interests or votes allocable to a unit;

or

c. Warranties.

(5) *Homeowners' association* means:

a. An association of persons:

(i) Who own units in a condominium as defined in section 11-101 of the Real Property Article of the Annotated Code of Maryland; or

(ii) Who lease units from a housing cooperative as a result of stock or other evidence or membership in the cooperative; or

(iii) Who own homes in developments having community-owned property requiring the establishment of an association whether any of the above is a nonprofit or for-profit corporation, trust, or unincorporated association, but it does not include any organization in which membership is strictly voluntary and not a condition of owning or occupying a unit; and

b. Any nonprofit or for-profit corporation, trust, or unincorporated association;

(i) That owns community-owned property for persons under paragraph (A) of this subsection; and

(ii) In which persons under paragraph (A) of this subsection have voting rights or an ownership interest.

(6) *Parties* means:

- a. Individual homeowners;
- b. Unit owners in condominiums;
- c. Shareholders in or members of cooperatives;
- d. Boards of directors or similar governing bodies; and
- e. Occupants. (1982 L.M.C., ch. 54, § 1; 1985 L.M.C., ch. 1, § 1; 1986 L.M.C., ch. 1, § 1.)

Sec. 24B-2. Legislative findings and purpose.

The county council finds that numerous homeowners' associations deliver services and exercise powers which correspond in many respects to municipal services, and that there exists a need for clear procedures to assure the open conduct of such bodies.

The county council further finds that the number of disputes arising between and among residents and homeowners' associations, like the populations of homeowners' associations themselves, has been rising dramatically. For many types of these disputes there are no adequate resolution methods or forums, and for others, current methods of dispute resolution are costly, time-consuming, complex, inefficient and often provide one or another side with an unfair advantage. Sections 24B-9 through 24B-13 of this chapter seek to meet this need by providing an efficient and even-handed method for resolving homeowners' disputes. (1982 L.M.C., ch. 54, § 1; 1985 L.M.C., ch. 1, § 2.)

ARTICLE II. OPEN CONDUCT.*

Sec. 24B-3. Open meetings.

(a) All meetings of a homeowners' association or any subdivision thereof, including the board of directors or committee created by the board of directors, shall be:

*Editor's note—Section 2B of 1985 L.M.C., ch. 1, designated §§ 24B-3—24B-7 as art. II, with the provisions of §§ 24B-1, 24B-2 being declared art. I.

(1) Held only upon regularly scheduled and established dates or periods at such time and place as shall have been made known to all members by means of public posting, circular, newsletter or other means providing reasonable assurance of general knowledge thereof, or, if not on such regular basis, upon reasonable advance notice, which shall normally be deemed to be at least seventy-two (72) hours' notice given by public notice as hereinabove set forth;

(2) Open to all owners or occupants of units of the association, their guests and any representative of the news media;

(3) Held at places and times convenient to the greatest number of members; and

(4) Held in closed session only for the following purposes:

a. Discussion of the employment, assignment, appointment, promotion, demotion, compensation, discipline, removal or resignation of employees over whom it has jurisdiction, or any other personnel matter affecting one or more particular individual(s);

b. Protection of the privacy or reputation of individuals in matters not related to homeowners' association business;

c. Consultation with legal counsel;

d. Consultation with staff personnel, consultants, attorneys or other persons in connection with pending or potential litigation;

e. Investigative proceedings concerning possible or actual criminal misconduct;

f. Complying with a specific constitutional, statutory or judicially imposed requirement protecting particular proceedings or matters from public disclosure;

g. On an individually recorded affirmative vote of two-thirds of the members present, for some other exceptional reason so compelling as to override the general public policy in favor of open meetings;

h. Acquisition of capital items previously specifically approved as part of a published budget adopted in an open meeting;

i. Short-term investments of funds of the homeowners' association in liquid assets if authorized by an investment policy previously adopted in an open meeting;

j. Conducting collective bargaining negotiations or considering matters and issues in conjunction therewith; or

k. Discussions concerning public security, including the deployment of personnel in connection therewith and the development and implementation of emergency plans.

(b) If a meeting is held in closed session pursuant to subsection (a):

(1) No action may be taken and no matter may be discussed other than those permitted by subsection (a)(4); and

(2) A statement of the time, place and purpose of any closed meeting, the record of the vote of each member by which any meeting was closed, and the authority under this section for closing any meeting shall be made available so as to reasonably notify members of the homeowners' association within fourteen (14) days after the meeting.

(c) The notice provision of subsection 24B-3(a)(1) may be waived upon the declaration of an emergency by the person calling the meeting. (1982 L.M.C., ch. 54, § 1.)

Sec. 24B-4. Voting procedures.

(a) *Election dates and procedures.* Not less than ten (10) nor more than ninety (90) days before an election for the governing body of a homeowners' association, the governing body must give notice of election procedures and the date of the election to all members of the homeowners' association. An initial election for the governing body must be held not later than sixty (60) days after the date that fifty (50) percent of the units have been conveyed by the developer to the initial purchasers.

(b) *Election materials.* All election materials prepared with funds of the homeowners' association:

(1) Must list candidates in alphabetical order; and

(2) Must not suggest a preference among candidates.

(c) *Absentee ballots.* Any unsigned absentee ballot, to be valid, must be:

(1) Received in a signed, sealed envelope, bearing the identification of the dwelling unit and proportional voting percent, if any, on the outside; and

(2) Opened only at a meeting at which all candidates or their delegates have a reasonable opportunity to be present.

(d) *Proxy or power of attorney.* Any proxy or power of attorney valid under state law is valid at any association meeting. However, a proxy that is not appointed to vote as directed must

be appointed only for purposes of meeting quorums and voting on matters of business other than an election for the governing body. If approval of proxy forms is required prior to use, the approval must not be unreasonably withheld by the approving authority.

(e) *Cumulative voting prohibited.* In an election for the governing body, for each unit that a member owns, the member must not cast more than one (1) vote for each candidate.

(f) *Counting votes.* Until the time for voting closes, a homeowners' association must not open or count election ballots.

(g) *Terms of office.* Unless the association documents provide for other terms of office:

(1) A member elected to the governing body of a homeowners' association is elected for a term of two (2) years; and

(2) The individual terms of the entire governing body are staggered, so that as close to one-third as possible are elected each year. (1982 L.M.C., ch. 54, § 1; 1987 L.M.C., ch. 32, § 1.)

Sec. 24B-5. Budget.

Unless the association documents provide otherwise:

(a) The governing body must provide members of the homeowners' association with the proposed budget of the homeowners' association at least thirty (30) days before the governing body votes on the budget; and

(b) The governing body must provide members of the homeowners' association with any proposed amendment to the budget at least thirty (30) days before the governing body votes on the amendment, if the amendment will result in an increase or decrease of more than fifteen (15) percent of the approved budget. This requirement does not apply to expenditures made to respond to an imminent threat to health or safety or of serious property damage. (1987 L.M.C., ch. 32, § 1.)

Sec. 24B-6. Complaints; investigations; enforcement.

(a) Any person subjected to a violation of this article may file a complaint with the office of consumer affairs pursuant to the provisions for filing such complaints as set forth in chapter 11 of this Code.

(b) The office of consumer affairs is hereby authorized and directed to receive complaints filed pursuant to this article, and

Supp. No. 4

to conduct such investigations and hearings as it deems necessary pursuant to the authority vested in that office by chapter 11 of this Code.

(c) Whenever it is determined by the director of the office of consumer affairs that there has been a violation of this article, that office is authorized to:

(1) Attempt to conciliate the matter by conference or otherwise if the matter is susceptible to conciliation; or

(2) Seek a written settlement agreement, that the violation of such an agreement shall be a violation of this article; or

(3) Refer the matter to the county attorney for appropriate legal action. (1982 L.M.C., ch. 54, § 1; 1985 L.M.C., ch. 1, § 1; 1987, L.M.C., ch. 32, § 1.)

Sec. 24B-7. Penalties.

Any association which shall be found to have committed a violation of any of the provisions of this article shall be subject to injunctive or other appropriate action or proceeding to correct any violation of this article; and any court of competent jurisdiction may issue restraining orders, temporary or permanent injunctions or other appropriate forms of relief. (1982 L.M.C., ch. 54, § 1; 1985 L.M.C., ch. 1, § 1; 1987 L.M.C., ch. 32, § 1.)

Sec. 24B-8. Civil liability.

In addition to any action by the office of consumer affairs authorized by this article and any other action otherwise authorized by law, any person may bring an action (1) for injunctive relief to correct any violation of this article; and (2) to recover damages for an injury or loss sustained as the result of a violation of this article. (1982 L.M.C., ch. 54, § 1; 1985 L.M.C., ch. 1, § 1; 1987 L.M.C., ch. 32, § 1.)

Editor's note—Formerly, § 24B-8 granting exception to the provisions of this chapter within incorporated municipalities; was derived from 1982 L.M.C., ch. 54, § 1; and was repealed by § 2A of 1985 L.M.C., ch. 1, and by § 16 of 1985 L.M.C., ch. 31. See § 2-96. The addition of a new § 24B-5 by 1987 L.M.C., ch. 32, necessitated the renumbering of former §§ 24B-5—24B-7 as §§ 24B-6—24B-8.

ARTICLE III. DISPUTE RESOLUTION.

Sec. 24B-9. Dispute resolution bureau.

(a) A dispute resolution bureau is created within the office of consumer affairs.

(b) The bureau shall have jurisdiction to hear any dispute between or among parties arising under any association document.

(c) The county executive shall promulgate, under method (2) of section 2A-15 of chapter 2, regulations and forms for the operation of the bureau, and may establish a reasonable fee to be charged to the parties for the performance of its services. The fees established by the county executive may not exceed the cost to the county of providing the bureau's services. The losing party may be required to pay the entire fee.

(d) The bureau shall have the following duties, powers and authority:

(1) To receive filings of disputes, to hold hearings, compel the attendance of witnesses and parties, administer oaths, take the testimony of any person under oath and, in connection therewith, require the production of any evidence. At any hearing, a party or a witness shall have the right to be advised by counsel present during such hearings.

(2) To issue summonses to compel the attendance of witnesses and parties and the production of documents, papers, books,

records and other evidence in any matter over which this law applies.

(e)(1) If any person fails to comply with any summons issued pursuant to this article and in accordance with standard procedures of the office of consumer affairs, to compel the attendance of witnesses or the production of documents, papers, books, records or other evidence in any matter over which this article applies, then the county, on behalf of the office of consumer affairs, may institute litigation in a court of competent jurisdiction to enforce the summons.

(2) Any court of competent jurisdiction may, upon request of the county, in accordance with the Maryland Rules of Procedure and the Courts and Judicial Proceedings Article of the Maryland Code Annotated, enter an order granting injunctive or other appropriate relief:

(i) Requiring compliance with a summons;

(ii) Requiring the attendance of the named defendant before the county office of consumer affairs at a time and place specified by the court;

(iii) Requiring the production of records, correspondence, documents, papers, books, records or other evidence;

(iv) Requiring the transfer of custody of records, documents, correspondence, papers, books or other evidence to the court;

(v) Prohibiting the destruction of any records, documents, correspondence, papers, books or other evidence pending conclusion of any lawful investigation by the county office of consumer affairs.

(3) Any disobedience of any final order entered pursuant to this section by any court shall be punishable by such court as a contempt thereof. (1985 L.M.C., ch. 1, § 3.)

Sec. 24B-10. Dispute resolution.

(a)(1) Parties may not bring disputes to the bureau without exhausting the procedures or remedies provided for in the association documents.

(2) Notwithstanding paragraph (1) of this subsection, a party may bring a dispute to the bureau sixty (60) days after the dispute procedure has been initiated before the association.

(3) After the association makes a determination of a dispute, the association must notify the other parties of their rights to bring the dispute to the bureau. The association may not take any action to enforce or implement the decision for fourteen (14) days after it notifies the other parties of their rights.

(4) When a dispute is brought before the bureau, the association may not take any action to enforce or implement the association's decision until the bureau's process is completed.

(5) The parties may initiate court proceedings at any time.

(b) Parties who file disputes must choose mediation or arbitration.

(1) *Mediation.*

(i) Any party may file a dispute and request mediation;

(ii) The bureau will notify the other party(ies) of the filing and of the mediation session;

(iii) The bureau will provide a qualified mediator from the bureau's staff to meet with the parties to attempt a settlement of the dispute.

(iv) If any party refuses to attend a mediation session ordered by the bureau, the dispute will go to nonbinding compulsory arbitration.

(2) *Arbitration.*

(i) Any party (including a party who has participated in the mediation described in subsection (b)(1) of this section in which there has not been a signed mediation agreement) may file a dispute and request arbitration;

(ii) Each party notified of a filing under this subsection must attend arbitration.

(iii) The bureau will notify the other party(ies) of the filing and of the schedule arbitration session.

(iv) The bureau will provide a qualified volunteer arbitrator to hear the dispute and render a decision.

(v) A party may be represented by an attorney in arbitration if the party notified the other party of the representation not less than fifteen (15) days before the arbitration hearing.

(vi) The parties to arbitration may agree to be bound by the arbitrator's decision. (1985 L.M.C., ch. 1, § 3.)

Sec. 24B-11. Effect of settlement of disputes.

Settlements of disputes by mediation or arbitration and agreed to by the parties themselves will be binding and have the force and effect of contracts and be enforced accordingly. (1985 L.M.C., ch. 1, § 3.)

Sec. 24B-12. Trial de novo.

Where a party has not agreed to be bound by arbitration, an arbitrator's decision will not be binding and a party may seek trial *de novo* in civil court of the underlying dispute. The arbitrator's decision and the facts supporting it will be admissible by either party in the trial *de novo* of the underlying dispute, or in any other proceeding provided by state law to precede the initiation of court action, and will be given the maximum weight allowed by law without shifting the burden of proof. (1985 L.M.C., ch. 1, § 3.)

Sec. 24B-13. Assistance to parties.

The office of consumer affairs may assist any party who has reached a mediated settlement of a dispute or any party who prevails in arbitration by providing information concerning how the agreement or decision can be enforced. (1985 L.M.C., ch. 1, § 3.)

**ARTICLE IV. MAINTENANCE SUPPORT FOR
ASSOCIATION ROADWAYS.****Sec. 24B-14. Program of support for maintenance.**

(a) There is created a program to assist qualifying homeowners' associations in maintaining association roadways that are continuously open to the public as if they were public roadways.

(b) Assistance provided under this article is not subject to the provisions of chapter 11B of the Code. (1986 L.M.C., ch. 1, § 2.)

Sec. 24B-15. Qualifying homeowner's associations.

A homeowners' association qualifies for assistance under this article if the homeowners' association:

Supp. No. 2

3075

- (1) Has at least one-quarter mile of association roadway;
- (2) Maintains its association roadways at a level of service satisfactory to the county;
- (3) Finances the maintenance of its association roadways with funds collected by the homeowners' association;
- (4) Has a financial officer that is bonded or meets the requirements of financial responsibility that regulations under this article prescribe; and
- (5) Agrees, as a condition of participating in this program, that eligible disputes to which the homeowners' association is a party will be submitted by the homeowners' association to either:
 - (A) The dispute resolution bureau in the office of consumer affairs for:
 - (i) Mediation, and if it fails;
 - (ii) Arbitration; or
 - (B) Another form of mediation and arbitration approved by the office of consumer affairs. (1986 L.M.C., ch. 1, § 2.)

Sec. 24B-16. Amount of assistance.

- (a) The annual amount that a qualifying homeowners' association may receive under this article is the number of its association roadway miles that qualify for assistance under this article, multiplied by the average locally funded cost to the county of providing maintenance and street lights for a mile of county roadway during the previous year.
- (b) If an association roadway that qualifies for assistance under this article is initially open to the public for only part of a year, the annual amount of assistance shall be prorated for that part of the year for which the association roadway was open.
- (c) For fiscal year 1986, the amount that a qualifying homeowners' association receives is one-half of the amount calculated under this section. (1986 L.M.C., ch. 1, § 2.)

Sec. 24B-17. Limitation on expenditures.

- (a) All expenditures of county funds under this article are subject to the limits of the funds appropriated by the county council.
- (b) If the county council does not appropriate enough funds to cover the number of miles of association roadways that qualify

under this article, the amount of assistance for each mile of association roadway is reduced proportionally. (1986 L.M.C., ch. 1, § 2.)

Sec. 24B-18. Regulations.

The county executive must adopt regulations under method (2) of section 2A-15 of this Code to implement this article. (1986 L.M.C., ch. 1, § 2.)

Sec. 24B-19. Sunset date. *

Sections 24B-14 through 24B-19 of this Code are no longer effective after June 30, 1988. (1986 L.M.C., ch. 1, § 2.)

* Repealed by Bill No.16-88, effective
June 27, 1988

[The next page is 3121]

Mediation Cases*
July 1985 - July 1988

(Source: OCA: Dispute Resolution Bureau (DRB) Files)

1. Total number of cases received:

Closed-----	84
Pending-----	16
	<u>100</u>

2. The party requesting dispute mediation:

	<u>Closed</u>	<u>Pending</u>	<u>Total</u>
Individual Unit Owner-----	73	12	85
Group (two or more) unit owners--	3	3	6
Assn. Board of Director/Comte--	8	1	9
	<u>84</u>	<u>16</u>	<u>100</u>

3. Type community involved:

	<u>Closed</u>	<u>Pending</u>	<u>Total</u>
Condo (self-managed)-----	6	0	6
Condo (professionally-managed)--	46	5	51
HOA (self-managed)-----	9	1	10
HOA (professionally-managed)--	23	10	33
	<u>84</u>	<u>16</u>	<u>100</u>

4. Did party requesting dispute mediation first exhaust dispute resolution procedures or indicate he/she had remedies provided by the Association?

	<u>Closed</u>	<u>Pending</u>	<u>Total</u>
Yes-----	73	8	80
No-----	9	1	10
Unknown-----	2	7	9
	<u>84</u>	<u>16</u>	<u>100</u>

5. Nature of dispute (see dispute code, below):

(Note: Three cases had two complaints.)

	<u>Closed</u>	<u>Pending</u>	<u>Total</u>
I-----	17	8	25
II-----	37	3	40
III-----	26	5	31
IV-----	7	0	7
	<u>87</u>	<u>16</u>	<u>103</u>

DISPUTE CODE

- I - Governance by the Association Board of Directors. (Authority, powers and procedures, bi-laws, elections, proxies, open and closed meetings, budgets, reserves, audits, amendments to documents.)
- II - Adoption and enforcement of internal covenants, conditions, and restrictions. (Architectural controls, painting, fences, roofs, landscaping, signs, antennas, vehicles, parking, pets, assessments, fees and fines.)
- III - Quality of construction, maintenance and repairs. (Responsibility for correcting construction defects, satisfying warranties, maintaining public areas and amenities, and repair of damage to individual units.)
- IV - Neighbor and lifestyle problems. (Loud noise, neighbor relationships.)

* The DRB has been in operation since October 1984. From October 1984 - June 1985 - approximately 20 mediation cases were processed. However, the files for those mediation cases were incorporated into the total of general retail consumer complaints; thus, no separate records are available for these 20 cases processed prior to July 1985.

6. Represented by Counsel:	<u>Cases</u>
No-----	57
Yes (Unit owner)-----	4
Yes (Association)-----	20
Unknown-----	5

7. Disposition:	
Mediated settlement achieved-----	55
Referred to arbitration-----	12
Withdrawn prior to completion-----	17
	<u>84</u>

8. Follow-up on Mediated Settlements:	
All parties complied with the settlement---	29
One of the parties did not comply-----	3
Dispute eventually went to arbitration-----	9
Dispute eventually went to litigation-----	1
Unknown-----	13
	<u>55</u>

9. Time to process the case:	
<u>Approximate # Days</u>	
30 days or less-----	24
31-60 days-----	18
61-90 days-----	15
91-120 days-----	5
121-150 days-----	1
151-180 days-----	3
In excess of 6 months-----	1
	<u>67</u>

NOTE: These 67 cases represent the 55 cases where a mediated settlement was achieved and 12 cases which were referred to arbitration. No processing times were available for the 17 cases which were withdrawn.

Arbitration Cases
November 1984 - July 1988

(Source: OCA: Dispute Resolution Bureau (DRB) Files)

1. Total number of cases received:

	<u>Cases</u>
Completed-----	51
Pending-----	0
	<u>51</u>

2. The party requesting dispute arbitration:

Individual unit owner-----	35
Group (two or more) unit owners	1
Assn Bd of Director/Cmtte/Mgmt	15
	<u>51</u>

3. Type community involved:

Condo (self-managed)-----	15
Condo (professionally-managed)-	2
HOA (self-managed)-----	24
HOA (professionally-managed)-	10
	<u>51</u>

4. Did party requesting dispute arbitration first exhaust procedures or remedies provided by the Association?

Yes-----	2
No-----	0
Unknown-----	49
	<u>51</u>

5. Had dispute originally been brought to the DRB for mediation?

Yes-----	14
No-----	34
Unknown-----	3
	<u>51</u>

6. Nature of dispute (see dispute code below).
(Note: One case had two complaints.)

I-----	7
II-----	38
III-----	7
IV-----	0
	<u>52</u>

DISPUTE CODE

- I - Governance by the Association Board of Directors. (Authority, powers and procedures, bi-laws, elections, proxies, open and closed meetings, budgets, reserves, audits, amendments to documents.)
- II - Adoption and enforcement of internal covenants, conditions, and restrictions. (Architectural controls, painting, fences, roofs, landscaping, signs, antennas, vehicles, parking, pets, assessments, fees and fines.)
- III - Quality of construction, maintenance and repairs. (Responsibility for correcting construction defects, satisfying warranties, maintaining public areas and amenities, and repair of damage to individual units.)
- IV - Neighbor and lifestyle problems. (Loud noise, neighbor relationships.)

7. Type arbitration requested:

Cases

Binding-----	27
Non-binding-----	20
Unknown-----	4
	<u>51</u>

8. Type arbitration agreed to:

Binding-----	11
Non-binding-----	36
Unknown-----	4
	<u>51</u>

9. Represented by Counsel:

No-----	24
Yes (Unit owner)-----	9
Yes (Association)-----	24

10. Disposition:

Decided in favor of unit owner-----	26
Decided in favor of Association-----	11
Decision split-----	2
Withdrawn before decision rendered-----	12
	<u>51</u>

11. Follow-up on arbitration decision:

All parties complied-----	11
Association did not comply-----	4
Unit owner did not comply-----	4
Dispute eventually went to litigation-----	0
N/A (Withdrawn)-----	12
Dispute eventually went to litigation-----	1
Unknown-----	19
	<u>51</u>

12. Time to process the case:

30 days or less-----	3
31-60 days-----	9
61-90 days-----	20
91-120 days-----	7
121-150 days-----	6
151-180 days-----	2
In excess of 6 months-----	1
Unknown-----	3
	<u>51</u>



MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

MEMORANDUM

TO: Andrew Mansinne, Jr., Director
Office of Legislative Oversight

FROM: *MF* Michael Faden, Senior Legislative Attorney
EB Elizabeth Beninger, Legislative Analyst

SUBJECT: Arbitration of Homeowners' Association Disputes

DATE: September 1, 1988

At your request we have researched whether the County could require binding arbitration of homeowners' association disputes. Current Maryland case law allows the County to require arbitration of homeowners' association disputes as a precondition to court action--that is, compulsory arbitration. We conclude that the County may not require binding arbitration of these disputes without judicial review. However, the County can establish a stronger arbitration system in which the arbitrator's decision is given only a limited judicial review.

A. The County may require compulsory arbitration of homeowners' association disputes as a precondition to court action.

In our view, compulsory arbitration of homeowners' association disputes is not preempted by state law and does not impair any vested property right. In addition, the Court of Appeals has held that administrative arbitration may be required as a precondition to court action.

1. The state constitution does not prohibit administrative agencies from hearing cases.

The Maryland Constitution, article IV, section 1, limits the exercise of state judicial authority to specifically named courts. The essence of this judicial power is the final authority to render and enforce a judgment [County Council for Montgomery County v. Investors Funding Corporation, 270 Md. 403, 437 (1973)]. In Investors Funding, the court upheld the County Commission on Landlord-Tenant Affairs' power to hear landlord-tenant cases and make decisions affecting private property rights, including awarding money damages and terminating leases. The court found that the Council's action was not an unconstitutional delegation of judicial power to an administrative agency because the Commission's decisions are subject to judicial review and cannot be enforced without court action.

2. Arbitration may be required as a precondition to court action.

In Attorney General of Maryland v. Johnson, 282 Md. 274 (1978) the Court of Appeals upheld the Health Care Malpractice Claims Act's requirement that parties to a medical malpractice claim must participate in administrative arbitration as a precondition to court action. The court in Johnson cited the legislature's power to impose rational conditions on the right to file a court action "'so long as the basis of distinction is real, and the condition imposed has reasonable relation to a legitimate object'" (282 Md. at 282-283). Thus, the County may require arbitration as a precondition to court action if the Council finds that arbitration is an effective way to resolve or narrow homeowners' association disputes without court action.

3. The Maryland Condominium Act probably does not preempt compulsory arbitration of homeowners' association disputes.

The Maryland Condominium Act provides a dispute settlement mechanism which condominium associations must follow before imposing a fine or taking other action against a unit owner (Md. Real Prop. Code Ann. §11-113). That section requires that "[a] decision pursuant to these procedures shall be appealable to the courts of Maryland" [§11-113(b)(4)]. This state law raises a preemption issue for County arbitration of homeowners' association disputes.

The Act expressly preempts local ordinances affecting condominiums. Certain types of local laws are permitted, however, including laws which protect the consumer and are more stringent than provisions of the state Consumer Protection Act. The Maryland Attorney General has interpreted this exception to include the provisions of Chapter 24B regulating voting and open meetings [67 Opinions of the Attorney General 13 (1982)]. Because compulsory arbitration of homeowners' association disputes would probably be seen as a similar consumer protection provision which is more stringent than anything in the Consumer Protection Act, it is probably not preempted by the Condominium Act.

4. Compulsory arbitration of a homeowners' association dispute does not impair a vested property right.

The County's power to require arbitration of homeowners' association disputes is not limited by any special legal status given to covenants on land. The courts treat covenants, whether recorded or not, as contracts for enforcement purposes. For example, the Court of Appeals has held that a zoning ordinance should be applied independent of a conflicting private covenant [Perry v. County Board of Appeals for Montgomery County, 211 Md. 294, 299-300 (1956)]. We did not find any reported Maryland cases which recognize a vested property right in covenants on land. Thus, the County may require arbitration of homeowners' association disputes without impairing any vested property rights flowing from these covenants.

B. The County may not require binding arbitration of homeowners' association disputes without judicial review.

The Court of Appeals in Johnson upheld the mandatory arbitration system for medical malpractice claims, but made it clear that binding arbitration imposed by statute is unconstitutional. The Court said "The general rule with regard to compulsory arbitration -- arbitration to which the consent of at least one of the parties is enforced by statutory provisions (citation omitted) -- appears to be that coercive statutes which close the courts to litigants by compelling resort to arbitrators for final determination of rights are invalid, whereas statutes which aid the courts by providing for arbitration but reserving a right to appeal to a court are generally valid" (282 Md. at 289-290). Maryland constitutional law requires that a party to arbitration retain the right to judicial review of a panel decision. Binding arbitration, strictly defined, eliminates any right of appeal to a court. Thus, if the County requires binding arbitration of homeowners' association disputes, the law would be struck down under Johnson as an unconstitutional delegation of judicial power.

C. The County may establish a stronger arbitration system.

The Investors Funding and Johnson cases present two alternative dispute resolution mechanisms, either of which could be adapted to create a stronger homeowners' association dispute resolution system.

1. Commission on Landlord-Tenant Affairs.

In Investors Funding, the Court of Appeals upheld the Commission on Landlord-Tenant Affairs' power to hear and determine controversies in the context of its regulatory role. In support of its decision, the court cited the public benefit from a forum for rapid and inexpensive resolution of landlord-tenant disputes and the Commission's expertise in this specialized area, both of which apply to arbitration of homeowners' association disputes (270 Md. at 436).

Chapter 24B homeowners' association arbitration could be revised, using this model, to provide that questions of fact are finally determined by the administrative agency and any court review would be based on the record made before the agency. The County may limit judicial review of an agency award to an assessment of the sufficiency of the evidence, based on a substantial evidence standard [St. Leonard Shores Joint Venture v. Supervisor of Assessments of Calvert County, 307 Md. 441, 446-447 (1986)]. However, "the courts (must) retain their inherent power to . . . review the actions of administrative agencies which are illegal, arbitrary, unreasonable or which impair personal or property rights" (Investors Funding, 270 Md. at 437).

2. Health Claims Arbitration Office.

The mandatory arbitration provisions of the Health Care Malpractice Claims Act provide another model of an administrative dispute resolution mechanism

Arbitration of Homeowners' Association Disputes
September 1, 1988

which has survived a legal challenge. Under the Act, a 3-member panel (an attorney, a health care professional, and a member of the public) hear and determine liability and damage issues.

If neither party rejects the panel award within 90 days of the decision, it becomes binding. The panel then files its decision with the court, which confirms it and issues a final judgment. Either party may reject the award for any reason within 90 days by filing a civil action to nullify the award. Before a trial de novo of the case, the court determines if the award should be vacated for fraud or corruption. Unless the award is vacated, it is admissible in evidence at the trial, where it is presumed correct. The burden is on the party rejecting the award to prove the contrary.

D. Conclusion.

The County may not require binding arbitration of homeowners' association disputes without judicial review. However, the County could strengthen the current homeowners' association dispute resolution system using either the Commission on Landlord-Tenant Affairs or the Health Claims Arbitration Office model. We would be glad to discuss this information with you at your convenience or to provide additional information to assist you in your study.

Comparison of Selective Provisions of the Maryland Condominium Act,
the Maryland and Homeowners Association Act,
and the Montgomery County Code

<u>Item</u>	<u>MD Condo Act Article 11</u>	<u>MD HOA Act Article 11B</u>	<u>County Code Charter 24B</u>
1. Internal Dispute Settlement Mechanism	Yes (11-113)	No	No ¹
2. External Alternative Dispute Resolution Methods	No	No	Yes (Art III)
3. Publish Bylaws	Yes (11-104)	No	No ¹
4. Open Meetings	Yes (11-109 & 11-111)	Yes (11B-111)	Yes (Art II)
5. Closed Meetings	Yes (11-109.1)	Yes (11B-111)	Yes (Art II)
6. Voting Procedures	Yes (11-109)	No	Yes (Art II)
7. Adopting Rules and Regulations	Yes (11B-111)	No	No ¹
8. Warranties	Yes (11-131)	Yes (11B-110)	Yes (Chapter 31C, MCC)
9. Budget	Yes (11-109.2)	No	Yes (Art II)
10. Open Books and Records and Inspection of Records	Yes (11-116)	Yes (11B-112)	No ²

¹ Could be included in County Code "for protection of a consumer". See opinion of the Attorney General of Maryland, December 22, 1982 which states, ". . . the [State] Condominium Act does not preempt the authority of local jurisdictions to regulate the meeting and voting procedures of the councils of unit owners of condominiums if - as here - the local regulation is 'for the protection of a consumer' within the meaning of, and does not 'conflict with', the Condominium Act. Chapter 54 is, therefore, not preempted."

² Not necessary for County action because covered in State law.

