

*Fall 2015*

## *Community Association LawLetter*

### MARYLAND COURT GUIDANCE ON ACCESS TO ASSOCIATION RECORDS

Several recent Maryland appeals court decisions provide new guidance to condominium and homeowner associations on owner inspection of association books and records.

#### *Legal Advice and Billing Records*

The Maryland Court of Special Appeals supported a Baltimore condo association's refusal to provide a unit owner with the written legal advice of a condominium attorney. The court concluded, in *100 Harborview Drive Condominium v. Clark*, that the common law and statutory attorney-client privilege — which recognizes the confidentiality of an attorney's legal advice — pre-empts an owner's right of inspection and copying the condominium "books and records" allowed by the Maryland Condominium Act, Section 11-116. Based on the text and legislative history of the Condo Act, the court determined that **all written legal advice is protected from disclosure**, even if the owner requesting such records is the subject of the legal advice.

However, the July 2015 court decision also ruled that **an attorney's detailed billing records** submitted in support of an invoice for legal services must be provided to owners, except to the extent such records include confidential information protected by the

attorney-client privilege or work product doctrine. For instance, billing records which reveal the reason for seeking legal advice, litigation strategy or the specific nature of services provided are protected from disclosure.

#### *Financial Records and Delinquency Reports*

Separately, in the May 2015 "unreported" case of *Brown v. Commission on Common Ownership Communities*, the Maryland Court of Special Appeals upheld the decision of the Montgomery County Commission on Common Ownership Communities (CCOC) that a condominium had complied with the books and records provisions of the Condominium Act by providing **financial records as kept in the ordinary course of business** and it did not have to create new documents which re-format its existing financial records. (An "unreported" appellate decision may not be relied on as precedent in other similar cases).

The CCOC decision upheld by the appeals court also ruled that the books and records provision of the Condo Act requires that, on request, condominium unit owners must be provided with assessment delinquency reports **without redaction of the names of delinquent owners**. That portion of the CCOC decision was not contested in the court appeal.

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ASSOCIATION RECORDS (Cont'd from Page 1)

### *Confidentiality Agreements*

Completing the trilogy of recent rulings regarding access to books and records, the Court of Special Appeals ruled in August 2015 that a person entitled to inspect and copy corporate records may be required to sign a **confidentiality agreement which prohibits disclosing the information to third parties.**



Referring to a Maryland court case from 1898 regarding stockholder rights to inspect the books of a business corporation, the court interpreted the statutory right of inspection to allow use of a confidentiality agreement to protect against disclosure and misuse of confidential documents and information. Although the financial records in *Hogans v. Hogans Agency, Inc.* involved a business corporation, the ruling is also instructive with regard to providing access to the books and records of condominium and homeowner associations.

Based on this new judicial guidance regarding access to books and records, association boards and managers may be able to avoid inspection disputes by adopting, or amending, a written policy for owner inspection and copying of association records.

### **“ONE DWELLING” COVENANT NOT WAIVED BY OTHER STRUCTURES**

A covenant allowing only one dwelling to be constructed on each lot in a Baltimore County community of over 600 homes is not waived by allowing erection of other structures such as pool houses, gazebos, guest houses, and sheds, according to a recent ruling of the Maryland Appeals--the highest state appellate court.

At issue in *Shader v. Hampton Improvement Association, Inc.* was whether a “one dwelling” covenant prohibited construction of a house on each of two subdivided portions of the original lot as it existed when the covenant was first created in 1931. Although the appeals court concluded there had been a waiver of the portion of the covenant which prohibited buildings other than “private dwelling houses”, there had been no waiver of the covenant which prohibited “no more than one dwelling” on each lot.



Explaining that **each clause of the covenant is severable and independent** of the other restrictions, the Maryland Court of Appeals agreed with the trial court and intermediate appeals court that waiver of one clause did not constitute a waiver of other covenant restrictions. Therefore, the “one dwelling” covenant remained enforceable to ensure the residential character of the neighborhood and a house was not allowed on each subdivided portion of the original lot.

## COMMUNITY GOVERNANCE TRAINING FOR MANAGERS

Tom Schild recently taught a 2-day program on *Community Governance* in Baltimore, Maryland. Community association managers from Maryland, Virginia, Pennsylvania and Washington DC attended the class to learn about the legal aspects of operating condos, coops and homeowners associations.

The course is part of the Professional Management Development Program of the Community Associations Institute (CAI), a national organization comprised of community association managers, service providers and volunteer leaders. Topics covered in the Community Governance program include association governing documents; statutes and case law affecting community management; fiduciary responsibilities of association boards and managers; management and service contracts; and developing and enforcing community rules.

Tom is a member of CAI's National Faculty and has taught the *Community Governance* program since 1998 in many cities throughout the United States. He is also a Fellow of CAI's College of Community Association Lawyers (CCAL), which is comprised of fewer than 160 attorneys nationwide who are recognized for their leadership and contributions in the field of community association law.

## MARYLAND APPEALS COURT SINKS CONDOMINIUM BOAT SLIP LEASES

A condominium association's attempt to allow each homeowner to have exclusive use of a boat slip was recently torpedoed by the Maryland Court of Special Appeals.

The court ruled that the board of directors of a waterfront condominium, with 8 owners and 8 boat slips designated as general

common elements, **did not have the authority to lease the boat slips for 10 years to individual unit owners** for their exclusive use even though all but one owner supported the leasing plan.

In *Emerald Bay Townhouse Condominium v. Cioffioni*, the intermediate appeals court rejected the contention of the condo association that the long term leases were allowed by the Maryland Condominium Act and the condominium bylaws which authorize easements, licenses and leases of the common elements in excess of 1 year with the approval 66 2/3 percent of unit owners and their lenders. The court reasoned that, since the boat slips were general common elements owned in common by all unit owners, the board could not lease slips for exclusive individual use without the unanimous consent of all unit owners.



According to the appellate court, Section 11-125 of the Condo Act does not allow the grant of an exclusive right use of the general common elements. Rather, it only allows the lease of such common elements to others in addition to the use by unit owners, and does not allow the **property rights of the unit owners** to be changed by granting a unit owner an exclusive right to use a portion of the common elements.

The *Emerald Bay* decision is “unreported” so it may not be cited as precedent for other similar situations. However, it is instructive on how a 3-judge appeals court panel views the exclusive use of “general common element parking spaces, whether for cars or boats”, without the unanimous consent of the unit owners.

## MARYLAND CONDOMINIUM & HOA LAW BLOG

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**THOMAS SCHILD LAW GROUP, LLC** represents condominiums, cooperatives, and homeowner associations in Maryland and Washington, D.C. The firm advises community associations on all aspects of association operations including covenant enforcement, assessment collection, developer warranties, maintenance and management contracts, and association document interpretation. Thomas Schild Law Group also represents community associations in court litigation and administrative hearings.

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