

Winter 2015

Community Association LawLetter

2015 MARYLAND LEGISLATIVE FORECAST

The headline news—Republican Larry Hogan takes over as Maryland Governor.

Beyond the headlines, the leadership of the legislative committees which craft most new laws regulating Maryland condominiums and homeowner associations will undergo the most sweeping change in a nearly decade. Although the Maryland General Assembly remains firmly in Democratic hands, there will be several new committee chairs in 2015.

The previous chair of the Senate Judicial Proceedings Committee has been elected Maryland Attorney General. In the House of Delegates, the longtime chair of the House Environmental Matters Committee is leaving that committee to become chair of the House Appropriations Committee. And, the House Real Property Subcommittee will see new leadership since the prior chair did not run for re-election.

What does this mean for legislation regarding governance of condos and HOAs? Uncertainty.

With changes in committee leadership and newly-elected legislators

joining the committees responsible for reviewing bills concerning the Maryland Condominium Act and Maryland Homeowners Association Act, 2015 will be a year for learning about legislative proposals which have been under consideration the past few years.

Likely to be introduced again are bills concerning state licensing of community association managers, condominium construction warranties, and condominium resale disclosures. Legislation on these matters previously had significant support but will now get a fresh look. Whether any of these bills will pass in 2015 remains to be seen.

Any legislation approved by the General Assembly must also pass scrutiny by the new Governor who campaigned on promises of lower taxes and less government regulation. With extensive business experience in real estate development and sales, Governor Hogan can be expected to carefully review legislation affecting the development, sale, and management of property in condominium and homeowner association communities.

For 2015, the only certainty is uncertainty.

BOARD DECISION NOT TO ENFORCE “GROWING FENCE” COVENANT UPHELD BY MARYLAND APPEALS COURT

A homeowners association board of directors may decide not to enforce a fence covenant as a matter of “business judgment” where there are widespread violations of the covenant throughout the community over several decades, according to a recent ruling of the Maryland Court of Special Appeals.

In *Henry v. Guirand and Bel Pre Recreational Association, Inc.*, a homeowner filed suit against a Montgomery County homeowners association seeking a court order directing the Association to enforce the covenant and requesting damages for an alleged breach of fiduciary duty for not taking enforcement action. Where a covenant prohibited “growing” fences more than 42 inches in height, an owner objected to their neighbor planting trees along the property line. A board motion to take enforcement action failed by a 4 to 4 vote.

The homeowner’s suit contended that an HOA director who voted against taking action acted in bad faith because that director had a growing fence on his property which violated the same covenant. The Montgomery County trial court agreed with the homeowners association that the decision not to enforce the covenant was protected by the business judgment rule and it dismissed the suit against the homeowners association.

The Maryland corporate statute establishes the standard of care for corporate directors and shields from court review actions which are taken in good faith, in a manner reasonably believed to be in the best interest of the corporation, and with care an ordinarily prudent person would use. Noting

that there are no Maryland appellate court decisions which address the concept of “good faith” in the context of enforcement of homeowner association covenants, the appeals court applied a standard that requires a director to act with “absence of any desire to obtain a personal benefit or a benefit for some person other than the corporation” and which embodies the “duty of loyalty” and “duty of fair dealing”.

The Maryland Court of Special Appeals ruled that a director does not act in bad faith when the potential conflict of interest is disclosed to the other directors and there is no direct benefit to the director who votes on whether to enforce a restriction against another homeowner. The court explained that concerns about the legal, financial, and ethical aspects of embarking on a program of selective enforcement of the covenants are appropriate factors for consideration in a director’s exercise of discretion.

A homeowners association board of directors may decide not to enforce a fence covenant as a matter of “business judgment”

Since the allegations and undisputed facts were insufficient to show bad faith by the director who cast the deciding vote against taking enforcement action, the appeals court concluded that the decision of the homeowner association board not to enforce the growing fence covenant was a decision within the scope of the business judgment rule and not subject to further court review.

Bel Pre Recreational Association was represented in this case by Thomas Schild Law Group, LLC.

APPEALS COURT RULES FEDERAL DEBT COLLECTION LAW DOES NOT APPLY TO MARYLAND COMMUNITY ASSOCIATION MANAGERS

A federal appeals court recently ruled that management companies which collect delinquent assessments from homeowners are not debt collectors under the federal Fair Debt Collection Practices Act (FDCPA).

In *Fontell v. Hassett*, the United States Court of Appeals for the Fourth Circuit ruled that, where a management company is engaged to collect assessments for a homeowners association before the assessment is delinquent, the company is not a debt collector subject to the requirements of the federal FDCPA when collecting past due assessments.



The appeals court ruling upheld a prior published federal trial court decision that the FDCPA does not apply in these circumstances. Although the appeals court decision was “unpublished”, and therefore is not a binding precedent, it provides guidance on how the appeals court views the assessment activities of management companies. Decisions of the Fourth Circuit Court apply in Maryland, Virginia and several other states.

The federal trial court in the *Fontell* case previously ruled that management companies and individual managers involved in collection activities are debt collectors under the Maryland Collection Agency Licensing Act (MCALA).

Therefore, they must obtain a state debt collection license to collect any assessments for condos or HOAs. The trial court also ruled that an unlicensed debt collector may be held liable to a debtor for damages under the Maryland Consumer Debt Collection Act (MCDCA) and the Maryland Consumer Protection Act (MCPA). The trial court’s ruling in this regard was not reviewed by the appeals court.

“ONE DWELLING” RESTRICTION NOT WAIVED BY ALLOWING OTHER STRUCTURES

The Maryland Court of Special Appeals recently addressed the principles of waiver and abandonment in finding that a 1931 covenant which provided that “no more than one dwelling may be erected on a Lot” remained enforceable. It was not waived or abandoned where it was consistently enforced with respect to multiple dwellings even though garages, sheds and other structures had been allowed in violation of the covenant.



At issue, in *Shadur v. Hampton Improvement Association, Inc.*, was the subdivision of a lot so that a dwelling could be constructed on each of the two portions of the original lot which was subject to the covenant. The court concluded that the covenant prohibited construction of a second dwelling on the newly subdivided lot.

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ONE DWELLING RESTRICTION
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According to the appeals court, it would be inequitable to find that abandonment of one restriction in a covenant results in abandonment of all other restrictions in the covenant. Otherwise, the Baltimore County community could lose its aesthetic character and low residential

density as homeowners would be able to subdivide their lots and construct multiple dwellings and units to the limits of applicable zoning regulations. That would “defy the clear intent of Paragraph C of the Covenants: to restrict the use of each lot in Hampton to residential, single family purposes.”

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- **Homeowners Association Act**
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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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