

Winter 2018

## Community Association LawLetter

Thomas Schild Law Group, LLC provides legal services to community associations – condominiums, homeowner associations, and cooperatives – in **Maryland and the District of Columbia**.

Our attorneys advise community associations on all aspects of association governance such as covenant interpretation and enforcement, assessment collection, construction and contract warranties, and fair housing compliance. We also represent associations in court litigation and administrative proceedings.

With more than 30 years' experience working with condo, HOA and co-op communities, we are recognized locally and nationally as leaders in the field of community association law.

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### 2018 Maryland Legislative Hot Topics

2018 marks the last Maryland legislative session before statewide elections in November. With the entire General Assembly and Governor up for election, the legislature is expected to focus on many bills previously considered but not enacted.

For community associations, the hot topics include increasing the condominium **insurance deductible** paid by unit owners where damage originates in a unit; community association **manager licensing**; and **statewide registration** of condominiums, homeowner associations, and housing cooperatives.

Legislation to require periodic **reserve studies** to estimate the cost of replacing and repairing common property may also get another look. And, a proposal to limit association authority to regulate **electric vehicle charging stations** is also likely to be introduced again.

Proposed legislation will also be considered regarding association governance matters such as **director conflicts of interest, books and records, and association websites**. Also expected is a bill to make it easier for the board of directors of a condo to **suspend an owner's use of the common property** parking lot and recreational amenities where the owner is delinquent in payment of assessments.

This legislation would be in response to the 2017 decision of the Maryland Court of Appeals that, unless a condominium Declaration limits an owner's statutory property right to use the common elements, a condominium board of directors could not adopt Rules to limit the use of the common property by an owner who is behind in paying the assessments.

The 2018 Maryland legislative session runs to mid-April.

## Short Term Rentals Coming Soon to Montgomery County

Short term rentals will soon be allowed in all residential areas of Montgomery County, Maryland. A home rented on a daily or weekly basis is often referred to as an AirBnb--which is the dominant online booking web site for short term rentals.

Under current law, no residential rentals are permitted in Montgomery County for less than 30 days. Faced with widespread illegal daily and weekly rentals, the County Council passed legislation in October, 2017 to allow these rentals where the property is the primary residence of the owner or owner-authorized resident of the rental property. **However, condominiums, homeowner associations and housing cooperatives will still be allowed to ban or restrict short term rentals.**



Before a short term rental is allowed, a license must be obtained from the County. On behalf of the Community Associations Institute, attorney Tom Schild wrote to the Council and testified at the Council hearing to request changes to the proposed legislation to include provisions to better protect condos, HOAs, and coops. As enacted, the new law requires an applicant for a short term rental license to certify that the use is not prohibited by the association governing documents and

that the association fees for the property are not more than 30 days past due. Additionally, the person applying for a short term rental license must notify the condo, HOA or coop and the association can challenge an application which does not meet the licensing requirements.

To address concerns of neighboring residents about "party house" rentals, only registered guests will be allowed on the property with no visitors except persons visiting the primary resident.

Many condominium bylaws ban rentals of less than six months and some coop documents prohibit any sublease without the consent of the coop. **For associations which do not currently restrict such use, the governing documents can be amended to restrict or prohibit short term rentals.** The new law takes effect July 1, 2018.

## Developer Declaration Does Not Establish Assessment Lien

A developer's Declaration notifies the purchaser of the property of a potential lien for unpaid assessments, but is not sufficient to create an assessment lien, according to a recent decision of the Maryland Court of Appeals--the top state appeals court. **A lien based on the contractual obligation to pay assessments is valid only if the party asserting the lien complies with the notice procedures of the Maryland Contract Lien Act.**

At issue, in *Select Portfolio Servicing, Inc. v. Saddlebrook West Utility Company, LLC*, was a claimed lien as part of a deferred financing arrangement for the construction of the water and sewer infrastructure for a new home development in Prince George's County, Maryland. To recover the construction cost, the developer executed a Declaration of Deferred Water and Sewer Charges which imposed an annual assessment of \$700 for 23 years to be paid to a developer-affiliated utility financing company and stated the purchaser of each

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residential lot granted a lien to secure a payment by accepting a deed to the lot. The Declaration was recorded in the land records before initial conveyance of the lot and before the purchaser obtained a mortgage loan secured by the lot.

When the utility financing company commenced a foreclosure proceeding for delinquent water and sewer assessments, the owner of the mortgage loan secured by the property filed suit to obtain a judicial determination as to the priority of the liens asserted by the utility financing company and the mortgage company.



Although the trial court and intermediate appeals court ruled that the Water and Sewer Declaration created a lien for assessments which was superior to the mortgage loan lien, the Maryland Court of Appeals disagreed and ruled that an assessment lien can be created only after there is a default in payment of the obligation established by the Declaration. Before the lien can attach to the property, the Maryland Contract Lien Act requires that the property owner must be given notice of the intent to create the lien and an opportunity to contest the lien.

In the context of condominium and homeowner association covenants which require owners to pay assessments, it is common for the covenants to state that there is a lien on the property for the amount of the annual

assessments and related charges. As with the water and sewer assessments at issue in *Select Portfolio*, no lien is created by the covenants. An association assessment lien, may be recorded in the land records only after the owner is provided notice and an opportunity to contest the lien.

## Maryland Appeals Court Rejects Condo Owner Defamation Claim

A Maryland appeals court has ruled that emails sent to owners in a Baltimore condominium association by the condo President regarding a recent burglary were not defamatory with regard to the owner whose condominium unit was broken into.

An email was sent to another owner who reported the burglary and copied to several board members in part stating: "What do you think I should do in response to your email? Should I ask to be appointed police commissioner so I can station cops in our community 24/7? Should I tell our neighbors not to associate with criminals who might want to cause harm to them"?

A second email was sent to all owners which, in part, stated: "This was not a random or opportunistic crime. Although I do not know the status of the Police Department's Investigation, it is apparent that this was a targeted crime in which the perpetrators knew the victim".

The Maryland Court of Special Appeals, in *Shulman v. Rosenberg*, determined that those statements alone were not defamatory because the statements were general and did not refer to the owner who alleged defamation, and the words did not imply that the owner had committed a crime. Nor were the emails defamatory when interpreted in the context of the surrounding circumstances. **The court noted that not every statement which casts an unfavorable or disparaging light on a person supports a legal claim of defamation.**

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The court further explained that, even if the emails could be viewed as defamatory about the owners whose unit was burglarized, communications between members of a group are protected by a qualified "fair comment" privilege. **Members of a condominium or other community may express a fair and reasonable opinion or comment on matters of legitimate public interest without legal liability unless the privilege is abused.**

The emails sent by the President of the condominium association were determined to be subject to the same fair comment privilege that other members of the community enjoyed.

The court noted that opinions could be interpreted as factual if the facts which are the basis for the opinion are not provided. However, allegations that an opinion is based on unverified statements of others and without further investigation in connection with the matter are not sufficient to show an abuse of the fair comment privilege.

Nor was there adequate allegation to show malice which requires showing that the person making the statement knew it was false or had reckless disregard for the truth. Therefore, the court dismissed the defamation suit without a trial because the allegations, even if true, did not establish that the emails were defamatory.

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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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