



MARYLAND'S BUSINESS & LEGAL NEWS SINCE 1888

Close to home — and out of court

Montgomery County has ADR for homeowners association disputes; the state is studying it

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Summer is here, and a homeowner's fancy turns to thoughts of — privacy.

It's not that Joe Homeowner dislikes his neighbors, exactly. But he'd like to be able to sit outside on those balmy summer evenings, sipping a drink and watching the fireflies rise up out of the grass, without those nosy Parkers next door sniggering at how bad his legs look in a pair of shorts.

So Joe decides to build a deck on the back of his \$500,000 Montgomery County townhome. Not just any deck, mind you, but one with a lattice-work privacy fence around it. The Joneses on the corner have just such a fence — to drown out the noise and lights of cars going by — so Joe figures that there shouldn't be any problem getting the XYZ Homeowners Association to approve his project.

But the result is not what

he expects. The deck is approved, but the privacy fence is not.

As the association is quick to point out, Section II-C of the XYZ Homeowners Association Architectural Guidelines specifically provides that "patios and decks on townhomes may not be screened or enclosed."

The purpose of the rule, of course, is to avoid the "disharmonious" appearance of a hundred different screened-in, glassed-in and covered-over decks, built by a hundred do-it-yourselfers with varying degrees of skill. As for the Joneses, they apparently managed to get a waiver, since their home's previous owner had built the fence without permission.

But to Joe Homeowner, the denial seems arbitrary and unreasonable. He has a grievance, but what should he do about it?

Should he duke it out in court like one California homeowner in 1989 — who reportedly ended up paying \$100,000 in legal fees over a



MAXIMILIAN FRANZ

Thomas C. Schild represents homeowners associations in Montgomery County, where an alternative dispute resolution system is in place. The biggest areas of contention are 'the three P's — pets, people and parking,' Schild says. He adds that the worst thing an association can do is to end up in court.

\$750 fence? Or become like one Maryland plaintiff — whose disputes with an association over parking and a basketball hoop was dismissed by the Court of Special Appeals as the "litigatory equivalent of road rage"?

The three P's

"It's the three P's — pets, people and parking," said Montgomery County condominium law attorney Thomas C. Schild, speaking of the

three biggest problems between owners and the associations attempting to make them conform. "It's summer, people are starting to build again, and most associations require people to approve the changes, the color of your house, color of the shutters." Schild, who represents community associations in Maryland and Washington, sees a little bit of everything in his practice, from liability questions (is it

OK to host a wedding reception by the swimming pool?), to contract issues (what if we spend \$100,000 to redo the lobby and it wasn't done right?), to the way a waterfront community association might assign boat slips.

"I try to discourage my clients from arguing over the shape of the top of the picket of the fence," Schild said. "That's kind of trivial."

On the other hand, "I have communities where people are building two-story additions and they look like they bought whatever was on sale at Home Depot that week," he said. "In those types of cases, the associations are there to protect the overall community."

The worst thing an association can do, Schild said, is to end up in court.

In Montgomery County, there is a pioneering dispute resolution process specifically designed to deal with these kinds of problems.

The **Commission on Common Ownership Communities (CCOC)** — and the related **Office of Common Ownership Communities (OCOC)**, in the county's Division of Consumer Affairs — were created in the 1990s to resolve disputes concerning common ownership communities and to educate the public of the rights and obligations of living in such communities.

"It's unique for a county or state to offer this kind of mechanism for a homeowners association," said Evan Johnson, an administrator in the Division of Consumer Affairs. (Maryland condo law attorneys agreed that it was one-of-a-kind. Charles County is in the process of setting one up; and in Hawaii, the Neighborhood Justice Center operates a state-financed community association dispute resolution service.)

Homeowners with a dispute can file a complaint (along with a \$50 fee) with the OCOC. Parties are advised by staff of the availability of mediation before their case goes before the commission.

According to a 2003 study of 126 CCOC complaints, 35.7 percent of the cases ended before formal mediation was even necessary, just by working with OCOC staff.

"Sometimes when they see how the process is working, they may just decide on their own to close the case or say what they are going to do without a formal meeting," Johnson noted. "What happens is maybe a homeowner files a complaint saying [the association] disapproved of a shed or something, and

sometimes the association, when they hear the arguments, they'll say, OK, there's a miscommunication."

Formal mediation, should it come to that, disposes of a further 19.8 percent of cases. Johnson's staff uses a Montgomery County group called the **Conflict Resolution Center**, with attorneys who do the mediation free of charge.

"Some of these disputes really need to be mediated, because the cases explode under minor issues," said Bethesda community association attorney Jeffrey Van Grack. "Whether it's a batting cage in the backyard, whether it's a green-colored deck, it just gets a life of its own."

Alternative to court

If the dispute is still not resolved by mediation, the matter is submitted to the 15-member commission, which accepts jurisdiction in 90 percent of the cases. The case will go before a three-member hearing panel, consisting of two commission members (who can be residents, property managers, investor-owners, real estate professionals or attorneys) as well as a chair chosen from a list of volunteer arbitrators, who are lawyers practicing in condominium association law.

There is a full evidentiary hearing before the panel, which, within 45 days, issues a written decision that is legally binding, although there is a right to appeal to the circuit court. The opinions of the commission are posted on the Montgomery County Web site.

"It's designed to give parties an alternative to go to court, but they don't lose their right to go to court," explained Walter Wilson, associate county attorney for Montgomery County — adding that the circuit court can stay a case for 90 days after it is notified that a commission hearing is pending.

The annual budget for the program is less than \$300,000. To fund it, every common ownership community in the county, excluding the cities of Rockville and Gaithersburg, registers with the commission, paying \$2.25 per unit — and there are more than 100,000 units.

Schild said that in his experience, the commission generally rules in favor of the associations in the cases it hears. Overall, the 2003 study found that the homeowner prevailed in 26.2 percent of the cases, compared to 39.7 percent for the association; the rest either had a mixed result or were dropped.

And Van Grack, who serves as a panel chair for the commission, admits to delays.

"They are so backed up, you don't get immediate relief," he said, adding that a case filed tomorrow might be heard in November.

"Still, they've done a pretty good job of streamlining and getting some of these cases resolved," he said. "It's not perfect, but it works."

SB 229

A bill to establish a statewide Commission on Common Ownership Communities did not survive the 2004 session of the General Assembly, due to fiscal concerns.

But this year, the General Assembly passed a more informal compromise — SB 229, which will set up a Task Force on Common Ownership Communities to study education, training and issues facing these communities as well as the potential for establishing alternative dispute resolution services for community members.

"I certainly think we should end up with some type of dispute resolution mechanism, that doesn't exist anywhere except in Montgomery County," said Sen. Delores G. Kelley, D-Baltimore County, who sponsored this most recent bill. "I looked at the actual cases [on Montgomery County's Web site] and it looks like something that might be helpful to for us to consider."

Kelley was drawn to the topic through her own experiences with a homeowners association that is attempting to file for bankruptcy.

"As I watched the situation I began to talk to people to see what we had at a state level in terms of resources to assist with all the problems that I saw," she said. "Papers and records are supposed to be open to all association members but there is nothing in the law and nothing institutionalized to help that to happen."

Uniformity?

The task force, which Kelley said will be staffed by August, will also look at the "desirability of adopting" provisions of the 1994 Uniform Common Interest Ownership Act (UCOIA), promulgated by the National Conference of Commissioners on Uniform State Laws.

At present, Maryland relies on three different laws: the state Condominium Act, Homeowners Act and Cooperative

Act.

With three different laws, “the margin for accountability is willy-nilly,” Kelley said.

“We don’t even address a third of the kinds of issues that are being addressed in some other states, with regard to clarifying the lines of responsibility — specifying what to do if your rights are not being attended to,” she said. UCOIA, in contrast, deals with “almost everything imaginable that could ever come up as a substantive issue” for boards, for developers, for managers and for unit owners.

“This is huge,” Schild said of the possibility of adopting UCOIA. “This means that we should look at rewriting in their entirety the condo and homeowners association laws in the state of

Maryland.”

Schild noted that UCOIA would integrate condominium and homeowners association laws to have a single set of rules that apply. The Condominium Act, he agreed, does have a lot more regulation of associations, where the Homeowners Act has more limited provisions on how an association is governed.

Benny L. Kass, a District of Columbia lawyer who serves on the National Conference of Commissioners on Uniform State Laws, said that a uniform act would obviously make it easier for lawyers and lenders to know what the law is.

“The Maryland Condominium Act was a first-generation act, and things have changed,” he said, adding that there

are “a lot of gaps” in the law.

Bethesda lawyer Raymond B. Via Jr. said the uniform act attempts to balance the interests of various groups such as homeowners, developers and managers.

Via — like Schild, a member of the **Legislative Action Committee of the Community Associations Institute** — warns that it’s been difficult to effectuate much change in Maryland condominium law.

“It would be a pretty daunting task at this point to jettison what we have and adopt an entirely new structure,” he said. “The law is what it is. At the Legislative Action Committee we’ve decided to work with it, and make it better.”

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