COMMISSION ON COMMON OWNERSHIP COMMUNITIES
MONTGOMERY COUNTY, MARYLAND

Spring 2011

CCOC COMMUNICATOR

The Second-hand Smoke Dilemma:
What Can Be Done? What Should Be Done? What *Must* Be Done?

By Jeremy M. Tucker, Esq.

In this issues:

With escalating concerns about secondhand smoke exposure, an increasing number of condominium residents are demanding that their boards address cigarette smoke within their community, by limiting it, banning it, or taking enforcement action to prevent the emanation of cigarette smoke from one unit to another. Responding to these demands requires boards to understand what they can do, and the potential implications of doing nothing.

LEGALITY OF SMOKING

Cigarette smoking is, in general, legal. Most states have adopted laws prohibiting cigarette smoking in public spaces, bars and restaurants due to secondhand smoke exposure concerns. However, they have not addressed cigarette smoking in multi-family residential dwellings. This means condominium boards of directors must address secondhand cigarette smoke complaints.

SMOKING IN THE GENERAL COMMON ELEMENTS

A first step for many condominiums is addressing cigarette smoking the common elements. In general, the board of directors has the authority to regulate the use of the common elements by the adoption of reasonable rules and regulations. These rules may prohibit legal activities if the board determines that such a prohibition is in the best interest of the condominium and there is a reasonable basis to support such a rule. Based on the potential health effects, fire concerns, odor issues, and other concerns, there appears ample basis to support the reasonableness of a ban on smoking in the common elements. As a result, the board has

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CCOC Welcomes New Members

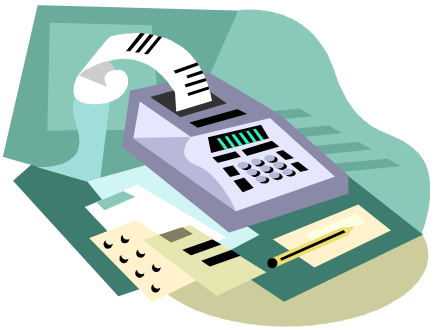
The CCOC is pleased to announce that Elayne Kabakoff, David Weinstein, and Ken Zajic have been appointed to the CCOC by County Executive Ike Leggett. They will join as Resident Members. One vacancy on the CCOC remains and will be filled in the near future. The County will again advertise in late November or early December for applicants to fill the terms of members whose terms expire next January. If you would like to be contacted when the County solicits new applications, please contact the CCOC Staff.

Planning a 5-Year Budget

By Elizabeth Molloy, Vice-chairperson

Many common ownership community boards of directors plan their community's finances no more than a year ahead. However, a better plan is to forecast farther out in time. It isn't difficult to develop a five-year budget once the annual operating budget has been completed. Five-year budgets provide a good picture of how much of each year's assessment income will be consumed by essential, or "un-cuttable," spending. The remainder of the assessment income is then available for non-essential, or discretionary, spending, such as capital improvements. Providing this information to the owners as well as to the Board can give everyone an early warning of the likelihood of future assessment increases.

The key, as with all budgets, is to be realistic about income and expenses. Begin by assuming the current assessment level will remain constant, since the object of a long-range budget is to get a long range view of needed increases in assessments. Assume all other income and expenses will still be present unless you know for a fact that one or more will "drop out."



If a particular income or expense item is known or can be reasonably assured to remain at the same cost level in each future year, then show it as such; if you have a contract that specifies the amount to be paid in the future insert those numbers. If the recent history of the community shows increases, then allow for future increases. One method is to average the past recent increase percentages and apply that percentage to each successive year; another method is to use a consumer price index. If there are costs that occur at certain intervals, include them where appropriate. For example, if you have a reserves study done every five years, put in an estimated amount for it where it will be due.

A five-year budget should show the previous year, the current year, year-to-date, and projected year end amounts, and the next four fiscal years.

In addition to a chart of estimated numbers, it is a good idea to write a description of the assumptions made in making your estimates. For example, you may project an increase of fees every two years and so you would state in your narrative:

> *The Board also has a responsibility to ensure that the Association has enough money to cover expenses, both planned and unexpected. To this end we have charted the anticipated expenses for the next five years and calculated the appropriate association fee needed to cover these projected expenses. This draft budget projection assumes fees of $XX in 20xx, $XX in 20xx, $XX in 20xx, $XX in 20xx, $XX in 2014, and $XX in 2015.*

A forecast with a narrative discussion provides everyone involved with a continuing reminder of all that needs to be done as well as the opportunity to see each of the pieces as a part of a larger whole. With a forecast adopted as a guidance document, annual budget meetings may be quicker and smoother.

The Latest Way to Stay Informed

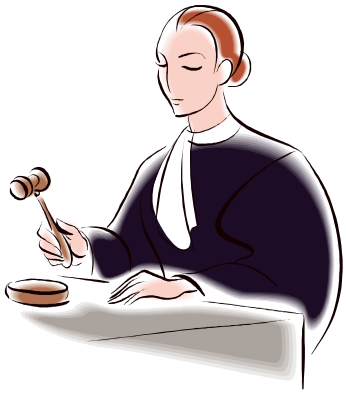
By Elizabeth Molloy, Vice-Chairperson

By signing up for the County's eSubscription service, you can receive free, electronic newsletters, updates and announcements via email. Go to the County's website (www.montgomerycountymd.gov) and then go to the link on the left side for "I want to…" Click on eSubscription. Click on "Create an Account" (or "Update an Account" if you already have one). Mark each item you would like to receive and enter your name and email address. It's that simple. The direct link is:
https://ext01.montgomerycountymd.gov/entp/s1p/esubpublic/newsubscriber.do

The CCOC will be issuing its upcoming newsletter electronically, so if you would like to continue receiving the newsletter, please sign up at eSubscription. CCOC is listed under "Consumer Protection.".

Circuit Court Upholds CCOC Decisions

By the CCOC Staff



Judges of the Montgomery County Circuit Court recently handed down orders upholding two CCOC Decisions.

On March 4, 2011, Judge Thomas Craven dismissed an appeal filed by the homeowners from the decision in CCOC #40-09, *Henry v. Bel Pre Recreational Association.* In that case, the CCOC hearing panel, chaired by Ursula Burgess, had ruled that the HOA's board of directors had the authority under the "business judgment rule" to refuse to take action to enforce a rule on shrubbery height against the neighbor of the homeowners. (The homeowners have since appealed this ruling to the Court of Special Appeals.)

And on March 23, 2011, Judge Ronald Rubin issued an order dismissing the homeowners' appeal of the decision in CCOC #46-09, *Syed v. Gatestone HOA.* In that case, the hearing panel, chaired by Charles Fleischer, had ruled that the HOA acted reasonably to deny an application to build a white vinyl deck in a community of predominantly wood decks. The hearing panel found that although there was a small number of other white decks in the HOA, they had been permitted either by the developer or by an early board president acting on his own authority, and since that time the board had been consistent in requiring that all decks be either of wood or of wood appearance. Judge Rubin held that the CCOC's decision was properly based on facts in the record and that it properly applied the relevant law.

WSSC to Adopt New Billing System for Communities with Commercial Units

The Washington Suburban Sanitary Commission has proposed a new water billing system for properties that contain both residential and commercial units on the same meter (SP #CUS 11-01). Under this rule, commercial "high flow" units must be metered separately from the residential units. As defined by WSSC, commercial units are units that are not residential, which generate profits, and which are used by the public. Thus, homeowner associations which sell pool memberships to the public, and do not restrict pool membership only to the HOA's own members, will have to install separate meters for their pools. The same will be true for other facilities owned by a community association such as tennis courts, gyms, markets, etc., which are can be used by the public for a fee. Commercial units which believe they are not "high flow" may apply for waivers from WSSC. For more information, contact WSSC's Public Relations Office at 301-206-WSSC concerning "CUS 11-01."

Community Focus: American Centre Condominium, Rockville

By Janet Wilson, Commissioner

[Editor's note: From time to time, we will feature articles focusing on some of our member communities in order to show their diversity , how they tackle their problems, and how they build a sense of community.]

Americana Centre Condominium, located in downtown Rockville is considered by its residents as the "residential cornerstone" of downtown Rockville given its more than 40-year history of providing urban condominium living. Built in 1971, Americana Centre consists of 425 studio, 1, 2 and 3-bedroom condos in two high-rise buildings, 22 garden-style buildings and 12 townhomes.

The Association is self-managed and led by a 7-member board of directors. In addition to general management and financial oversight responsibilities, our Board is responsible for underground parking, adult and baby swimming pools, an exercise room, saunas, and a community room. We have an on-site management and engineering staff to keep the community well-maintained and also offer in-unit repair service for our homeowners. The Association offers a complementary A/C preventive maintenance service and smoke detector check once a year. In addition, the community has several active committees including Building & Grounds, Rules & Regulations, Finance, Leisure & Recreation and Communications.

Recently, the Association undertook two major projects: replacement of an in-ground oil storage tank and waterproofing of the concrete plaza deck (and adding lighting and landscaping upgrades). In total, these projects will cost nearly $3.8 million dollars and the Association chose to finance these projects through a loan instead of a special assessment. Americana Centre maintains a 20-year reserves plan and has historically low delinquency rates.

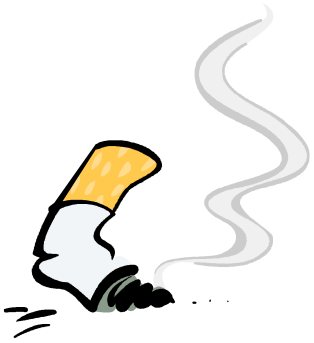
The Association is identifying ways to control costs and increase energy efficiency through an aggressive campaign to encourage owners to replace single-pane windows; installing an energy management system, replacing all common-area lights with CFL bulbs and conducting an Association-wide energy study.

While some residents are original owners, many younger people have joined the community in the last few years. The Association works to encourage residents to come together through a variety of activities including pool parties, National Night Out and bi-weekly summer cook-outs.

New Federal Regulations on Accessible Swimming Pools May Affect Common Ownership Communities

Last year, the Department of Justice issued new regulations requiring swimming pools used by the public to be accessible to handicapped persons. Pools longer than 300 feet must have at least two points of handicapped access; pools shorter than 300 feet must have at least one point of access, and this includes wading pools. Typically, the cheapest means of providing access will be chair lifts. **These rules apply to pools owned by common ownership communities if those pools are open to the public.** A pool is open to the public if it sells pool memberships to persons who are not members of the common ownership community or if the pool is used for events at which non-members can participate, such as swim meets. Pools can also be covered if they belong to associations which actively rent units to the public which are owned by the association or its members. All pools covered by the new rules must be brought into compliance with the new laws no later than March 12, 2012. For more information contact the U.S. Access Board at http://www.access-board.gov/ada-aba/ada-standards-doj-cfm#a1009 or the association's attorney.

The Dilemma of Second-hand Smoke (continued from page 1)



the authority to ban smoking in all of the common elements, including both general common elements, i.e., the lobby, doorways, pools, grounds, community rooms hallways, etc. ("GCE") and limited common elements, i.e., balconies and patios ("LCE"). Before adopting such a sweeping restriction, the board should consider carefully the practical implications of any ban.

When contemplating banning smoking in all of the GCE, boards should consider whether the ban should include both indoor and outdoor portions of the GCE. Most smoking residents will probably understand being unable to smoke in the indoor portions of the GCE. However, banning smoking in outdoor GCE, such as the outside the building, especially near the entrance doors, may be contested, as the potential health affects arguably are reduced. As a compromise, the board may choose to ban smoking within a certain number of feet of the entrance door. Regardless, the decision to ban smoking on the GCE is vested in the board of directors.

Ironically, even though LCE are generally located outside, the reasons for banning smoking on the LCE may be more compelling than for the GCE. Cigarette smokers tend to smoke on their balconies and patios to avoid smoking in their units. However, cigarette smoke blows with the wind, easily entering any open window of a neighboring unit, directly exposing neighbors to secondhand smoke and the accompanying odor. On the other hand, LCE are a resident's exclusive use area and, if they smoke, which is still legal, this is where they may smoke at their home. Some longtime smoking residents may have been smoking on their balconies well before the heath concerns of secondhand smoke became widely understood. Banning smoking on the LCE will negatively affect these residents' enjoyment of their home. The board must balance these competing concerns, and do what it believes is in the best interest of the condominium.

SMOKING IN THE UNITS

Most residents' cigarette smoking associated complaints arise from smoke infiltration into their units from neighboring units. Responding to these complaints presents a number of challenges for boards. While, many state statutes and bylaws grant boards rule making authority, arguably allowing boards to adopt a rule banning cigarette smoking, adopting such a rule is not recommended. A rule banning smoking within a unit would be subject to challenge as an unauthorized amendment to the recorded condominium documents, which contain the unit use restrictions. Furthermore, as a practical consideration, any ban on in-unit smoking will require a board to become the smoking police. Unit owners should determine if this issue warrants such a dedication of the condominium's resources.

Given the controversial nature of banning in-unit smoking, which prohibits residents from doing something legal in their own homes, and the potential drain on resources, the unit owners should vote on any proposed in-unit ban as an amendment to the bylaws. As with rules, to withstand a challenge, an amendment to the bylaws must be reasonable. Again, due to the potential health effects, fire concerns, odor issues, and other concerns related to smoking, an amendment prohibiting smoking in units should be found reasonable if challenged.

Typically, an amendment to the bylaws requires the approval of a supermajority of the unit owners, a difficult achievement for any medium to large condominium. Absent such an amendment to the bylaws, a board may find itself in the difficult position of having to respond to complaints of cigarette smoke from residents without express authority to take enforcement action.

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Useful County Phone Numbers for Common Ownership Communities

Most County Government agencies may now be reached by phone by dialing "311" during ordinary business hours. The operator will then refer the caller to the proper agency. This service includes non-emergency Police services such as reporting abandoned cars and community outreach, Libraries, the Circuit Court, Landlord-Tenant Affairs, Housing Code Enforcement, the Office of the County Executive, Cable TV regulation, the Department of Permitting Services and the Department of Transportation.

Some County agencies may be called directly or through 311, including:

Office of Consumer Protection	240-777-3636
CCOC	240-777-3766
County Council	240-777-7900

Parks & Planning Commission

Planning Board	301-495-4605
Parks Headquarters	301-495-2595

Citizens of the City of Rockville may still call their City agencies directly.

For emergency services, dial "911."

For more information on the new "311" system or to search for agencies by computer, go to:

Http://www3.montgomerycountymd.gov/311/Home.asp

FY 2011 Commission Participants (as of April 8, 2011)

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The Dilemma of Second-hand Smoke (continued from page 5)

RESPONDING TO UNIT OWNER COMPLAINTS

Although banning smoking in the common elements may be a good start, it may do little to address complaints from residents about cigarette smoke emanating from their neighbor's unit. While a board of directors may not have a duty to protect the health of the condominium's residents, the board is required to enforce the provisions of the governing documents. Most bylaws contain prohibitions on nuisances or offensive activities. Unless otherwise defined in the bylaws, what constitutes a "nuisance" or an "offensive activity" is a question of fact for the board to determine in its business judgment. Given the board's duty to enforce the governing documents, the board of directors should respond to a complaint of cigarette smoke as it would any other complaint. If determined appropriate, the association should send a notice of violation or a cease and desist notice to the smoking resident, demanding that the unit owner take the necessary steps to stop cigarette smoke from emanating from his or her unit. If the complaints continue, the board should publicize and hold a hearing. At the hearing, the board may determine whether or not the smoking constitutes a violation of the condominium governing documents. If they find a violation, they may impose sanctions. The violation determination and what sanctions to impose are decisions that rest with the board of directors and the correctness of the decision should be protected from court review based on the business judgment rule, in Maryland and Virginia, and the lesser standard of the rule of reasonableness, in the District of Columbia. The key is, the board must make a decision, one way or the other, and not ignore the complaint. The board can also encourage the complaining unit owner to address the issue with his or her neighbor directly and can provide assistance in that regard.

If the board chooses to do nothing, it runs the risk of having the condominium sued for failure to enforce the condominium documents. Condominium residents around the country have filed suits against their condominiums seeking declaratory judgment that complained smoking is a violation of respective condominium documents and seeking compensatory damages from condominiums for failing to enforce the condominium documents, with mixed results. To date, there have been no reported cases in the Maryland, Virginia or the District of Columbia addressing these issues, but there is a case pending in the Maryland Circuit Courts, involving a residential cooperative, where many of these same issues have been raised.

There are tools available for those boards that wish to proactively address cigarette smoking within their condominium. For those boards that do chose to do nothing, beware.

(Jeremy Tucker is an attorney in Lerch, Early & Brewer's Community Association practice group. His practice focuses on representing community associations in a wide range of matters, including general counsel and litigation. To learn how secondhand smoke may impact your association, contact Jeremy at 301-657-0157 or jmtucker@lerchearly.com.)

Priority Lien Bill Passes General Assembly

Advocates of legislation that would give condominium association and HOA liens for unpaid assessments priority over liens for unpaid mortgage payments were pleased when House Bill 1246 passed both houses of the General Assembly in March, but their pleasure was greatly diminished by the fact that a major amendment to the bill limited its coverage only to mortgages written after October, 2011. It may take many years before associations see any benefit from the new law. Once it applies, however, the law will give those associations priority for up to 4 months of unpaid assessments over the mortgage company's liens. The law was signed by the Governor on May 10, 2011.

Recent Important CCOC Decisions

By the CCOC Staff

A condominium must repair casualty damage to private units even if the amount of the damage is less than the deductible on the master insurance policy: **Smallis v. The Willoughby Condominium, CCOC #09-10 (February 18, 2011) (Panel: McCabe, Caudle, Wilson).**

A condominium association refused to repair damages to a private unit caused by a water leak from the upstairs unit on the grounds that the damages suffered ($3300 in the condominium's opinion) was less than the $10,000 deductible on its master insurance policy. The condominium argued that it was only responsible to repair damage covered by the master insurance, and this excluded any damage less than the deductible.

The CCOC hearing panel did not agree. First, the panel ruled that the incident took place in 2008, after the Court of Appeals had ruled that condominiums were not obligated under State law to repair any damage in private units and before the General Assembly overturned that decision by amending the law. But the panel also found that the condominium's bylaws required it to fix such damage and it had not amended its bylaws to take advantage of the Court's decision. Therefore, the duty to repair still remained.

The panel then dealt with the argument that the condominium was only liable when the claim was a "covered claim" under its master insurance policy. The panel noted that such an argument conflicted with the new law that said the condominium could pass on the first $5,000 of the cost of any deductible to the owner of the unit which caused the damage. In addition, amendments to other sections of the Condominium Act made clear that the duty of the condominium to repair casualty damage in private units was an exception to the overall duty of the unit owner to maintain and repair his own unit.

However, the panel did not award any damages to the unit owner. It found that the fair value of her damages was $3300, and she had already been paid $8000 by her own homeowners insurance, and she was not entitled to a double recovery.

Delayed enforcement does not prevent enforcement: **South Village Homes v. Toossi #50-10 (March 22, 2011) (Panel: Burgess, Caudle, Farrar)**

Faced with a complaint that he was parking a commercial truck on his lot in violation of the HOA's rules, the homeowner argued that he had parked commercial vehicles on his lot for at least 8 years before the HOA tried to take any action against him, and therefore, the HOA had waived its rights to enforce the rule against him. Applying Maryland and past CCOC decisions, the panel ruled that in order for a member to claim that an HOA was prevented from enforcing a rule due to its own past delays in enforcement, the member had to prove that he relied to his harm on the delay. He could not prove the necessary facts. The delay in enforcement did not cause him to violate the rules; on the contrary the delay took place after the violation had begun, and the owner benefited from that delay by being able to continue parking the truck on his lot. The panel ordered the lot owner to remove the truck from the lot within 30 days.

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"If the County allows me to build a deck, why do I still need approval from my HOA?", or, The Relationship Between Private Rules and Public Laws.

By the CCOC Staff

The local news have recently featured stories about homeowners who relied on government approval to install driveways or to act as landlords, apparently assuming that such approval took precedence over community covenants prohibiting such activities. Such conduct can then result in expensive litigation between the homeowners involved and their neighbors, or between the homeowners and their community associations. Whose rules prevail when both the government and a common ownership community's rules apply to a given situation?

The Maryland Court of Appeals (the State's highest court) discussed this issue in a 2000 decision, *Colandrea versus Wilde Lake Community Association.* In that case, a lot owner who belonged to an HOA had received government approval to turn two houses into group homes for the elderly. His HOA approved one application and rejected the other, and homeowner went to court. The Court of Appeals upheld the HOA's rejection of the second application for a group home, in spite of the fact that it had received government approval, holding that lots in homeowner associations are subject not only to government land use restrictions but also to private covenants running with the land, and so such lots must comply with the more restrictive of either the laws or the covenants. The Court of Appeals, in a later decision (*City of Bowie versus MIE Properties, Inc.,* 2007), held that local zoning ordinances that allow certain uses of property do not override or defeat private restrictive covenants that run with the land and that prohibit those uses, and it repeated the *Colandrea* holding that when a zoning law and a restrictive covenant are in conflict, the more restrictive of the two will prevail.

"The properties are, of course, subject to local and state government land use restrictions, such as zoning, environmental regulations, etc. Generally, when a property is subject to both zoning and other governmental regulations, and conditions created by real property covenants, that property must satisfy the most restrictive of the regulations or covenants." *Colandrea v. Wilde Lake Community Association.*

For a law to override a restrictive covenant or other rule of a common ownership community, it must be clear from the law itself that it is intended to prevail in the event of a conflict. For example, Montgomery County Code Section 24B-7 states that "notwithstanding any association document to the contrary, a homeowners association may amend its bylaws by a vote of a majority of the lot owners." There are not very many such laws, and in addition to the example above, here is a list of the most important.

*Right of owner to install a TV satellite dish on his own property (FCC Rule on Over the Air TV Reception Devices)

*Right of owner to display US flag and political signs on his own property (Maryland HOA and Condominium Acts)

*Right of owner to operate day care center unless association has properly adopted a rule specifically regulating or prohibiting day care centers (Maryland HOA and Condominium Acts)

*Right of owner to install solar collector on his own property (Section 2-119 of the Maryland Real Property Article)

*Right of owner to install a Class A fire resistant roof on his home (Section 22-98 of the County Code)

*Right of owner to install renewable energy devices on his own property (Section 40-3A of the County Code)

*Duty of home and unit owner to shovel snow off sidewalks adjacent to their homes even if those are common areas owned by the association (Section 49-17 of the County Code).

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www.montgomerycountymd.gov/ccoc

Recent CCOC Decisions (continued from page 8)

Federal law, attorney privileges can override duty to disclose under "open records" laws: **Offen v. Grosvenor Park I Con dominium CCOC #08-09 (February 15, 2011) (Panel: Fleischer, Alkon, Whelan)**

In response to a unit owner's request to inspect all documents relating to its fees for legal matters, the condominium provided several hundred pages of copies of billings from its law firms, but the pages were heavily redacted (censored). The unit owner disagreed with the association's right to redact and the CCOC appointed a hearing panel to decide the case. Because some of the reasons given to justify the redactions involved the attorney-client privilege or attorney work-product, the hearing panel reviewed all the documents and the thousands of separate redactions privately before holding a hearing on its proposed order.

Following a hearing, the panel issued a final order in which it held that the large majority of redactions were not justified and that the condominium had to disclose the information. However, the panel found that many of the redactions were justified to protect the attorneys' confidential advice to the condominium and to protect indications of their legal strategy or research.

The panel went on to hold that the condominium also had the right to withhold from the attorneys' billings the names of the condominium's debtors. Under the Federal Fair Debt Collection Practices Act (FDCPA), debt collectors such as attorneys are forbidden to disclose the names of debtors to the public. The condominium's attorneys therefore were obligated to ensure that the copies of their records which were being released to the unit owner complied with the FDCPA.

In a footnote to its decision, the panel noted that its ruling only applied to copies of bills received from the condominium's lawyers. It was not making a general holding that a condominium did not have to disclose other documents that might contain the names of those who owed money to the condominium. In this case, the unit owner had not asked to see such documents but only the billings for legal-related work.