Before the
Commission on Common Ownership Communities

In the Matter of Richard Haight, Owner, 9434 Horizon Run Road Gaithersburg, MD 20879, Complainant,	x x x x x x	
v.	x x	Case No. 215-O January 12, 1995
William Johns, President, Board of Directors Horizon Run Condominium 10120 Appleridge Road Gaithersburg, MD 20879, Respondent.	x x x x x x	

DECISION and ORDER

The above-entitled case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1984, as amended, and the Commission having considered the testimony and evidence of record, it is therefore, this January 12, 1995, found, determined and ordered as follows:

BACKGROUND and ISSUES

Richard R. Haight filed a Complaint, against Horizon Run Condominium, Montgomery Village Foundation, Inc., as managing agent for Horizon Run, and Washington Suburban Sanitary Commission, with the Commission on Common Ownership Communities on December 31, 1992. The Commission has no jurisdiction over WSSC and Mr. Haight was so advised by the Office of Common Ownership Communities by letter dated July 21, 1993. The original Complaint alleged numerous violations and requested several actions be taken to resolve those violations.

By letter dated January 5, 1993, Molly M. Ellis, Director of Community Operations, Montgomery Village Foundation, Inc., informed the Office of Common Ownership Communities that she had reviewed the Complaint filed by Mr. Haight against Horizon Run Condominium and that Mr. Haight had failed to exhaust the dispute resolution procedures of the community in regard to the issues raised in the Complaint, in accordance with Section 10B-9(b) of the Montgomery County Code, 1984, as amended.

By letter dated February 12, 1993, the Office of Common Ownership Communities notified Mr. Haight that Case No. 215-O had been closed but could be reopened if the dispute continued after exhaustion of the community's dispute resolution procedures.

By letter dated May 14, 1993, Mr. Haight transmitted to the Office of Common Ownership Communities a copy of a "Report of the Dispute Resolution Committee of the Board of Directors Re: Dispute Filed by Richard R. Haight" and requested that the case be reopened.

By letters dated June 9 and 10, 1993, the Office of Common Ownership Communities notified Mr. Haight and Montgomery Village Foundation that Case No. 215-O had been reopened. On behalf of Montgomery Village Foundation, John F. McCabe wrote a letter to the Office of Common Ownership Communities, dated June 17, 1993, pointing out that none of the allegations in Mr. Haight's Complaint involved actions taken by Montgomery Village Foundation and that, if they did, Mr. Haight had failed to exhaust the dispute resolution procedures of the Foundation. Mr. McCabe also wrote a letter to the Office of Common Ownership Communities, dated June 18, 1993, on behalf of Horizon Run Condominium, enclosing a copy of that community's Dispute Resolution Report in response to Mr. Haight's complaint, and indicating that only those issues had been raised and addressed under the community's dispute resolution process.

Eleven additional Complainants were added to the Case by amendment to the Complaint received by the Office of Common Ownership Communities on August 17, 1993. By letter dated October 28, 1993, the Office on Common Ownership Communities advised Mr Haight's attorney in this matter, Christopher Allen, that it was unnecessary to add members of the Condominium as Complainants since all members of the Community would "be affected equally by the result of any Commission action in this matter."

The record includes additional correspondence regarding specification of the issues included in the Complaint. However, the issues addressed in this case are those set forth below as a result of the prehearing conference.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for action pursuant to Section 10B-11(e). On February 2, 1994, the Commission voted to take jurisdiction and hold a public hearing. The Commission Chair requested the designated hearing panel chair to hold a prehearing conference in this matter. The hearing was scheduled for June 22, 1994.

The prehearing conference was convened by Dinah Stevens, hearing panel chairwoman in this Case, on May 20, 1994, to clarify the issues to be considered at the hearing, to determine that all issues were ripe for Commission consideration and to obtain stipulations of fact. Both parties and their attorneys were present. The result of the conference was a Pre-Hearing Conference Summary and Consent Order, issued on May 27, 1994, in which the complained of issues were restated including requested remedies and

it was agreed, on behalf of Horizon Run, that in regard to the issues as stated, there was no further need for exhaustion of the Community's dispute resolution procedures. The agreement of the parties at the conference to develop joint stipulations of fact to the extent possible and to submit memoranda of law, all relevant documents and a list of witnesses prior to the hearing was memorialized.

The issues to be considered as agreed to at the prehearing conference are:

Count 1
Allegation: The decision to grant a right-of-way to Washington Suburban Sanitary Commission by the Board of Directors of Horizon Run Condominium on February 18, 1992, and the consequent assessment on unit owners, were not properly in accordance with Maryland Code section 11-125 (f)(2) and the Master Deed of Horizon Run Condominium. As a remedy, Complainant requests that the grant of right-of-way and assessment of costs against unit owners be declared null and void and the funds collected in assessments be returned to unit owners.

Count 2
Allegation: The exclusion of unit owners who are in arrears in payment of condominium fees but against whose property no liens had been filed by the Association from voting at annual meetings held in 1990, 1991 and 1992 is not in accord with Maryland law, and thus is an improper practice. As a remedy, Complainant requests that Horizon Run Condominium be directed to correct annual meeting election procedures in the future.

Count 3
Allegation: The decision of the Board of Directors not to pursue any remedies which might be available against Kettler Brothers, the developer of Horizon Run Condominium, for the costs of the necessary replacement and repairs to the water and sewer system was improper, particularly in light of the provisions in section 19 of the Horizon Run Condominium Master Deed. As a remedy, Complainant requests that the Board of Directors be directed to convene a meeting of the unit owners to consider whether to get an opinion from an independent counsel as to the availability of remedies against Kettler Brothers.

Count 4
Allegation: Should a quorum count at an annual meeting be taken at the outset of conduct of the meeting of unit owners in accordance with the agenda set forth in Article III, Section 12 in the By-laws. As a remedy, Complainant

requests that Horizon Run Condominium be directed to follow this procedure at all future annual meetings.

Count 5
Allegation: The decision of the Dispute Resolution Committee adopted by the Board of Directors at its regularly scheduled meeting held on April 26, 1993, to deny Complainant access to the ballots from the 1992 election of Directors at the annual meeting was improper and not in accordance with Maryland Code section 11-116 (c). As a remedy, Complainant requests direction to the Board to give him access to these ballots and to make ballots available for inspection by unit owners in the future.

Count 6
Allegation: The vote on the By-law amendment to increase the size of the Board of Directors from five members to seven taken at a special meeting of the Council of Unit Owners on May 21, 1979, was not in accordance with the then applicable provision of Maryland Code, Section 11-104 (e). As a remedy, Complainant requests that the Board of Directors be directed to convene a meeting of the Council of Unit Owners to ratify the By-law amendment increasing Board membership to seven or not ratify thereby returning the number of members of the Board of Directors to five.

The public hearing was held on June 22, 1994. After the hearing, the record was kept open for the submission of additional documents. By letter dated July 21, 1994, Horizon Run Condominium was requested to submit copies of the minutes of the meetings of the Board of Directors held on July 23, 1990 and in August 1990. The copies of the minutes were received by the Office of Common Ownership Communities on July 27, 1994, and the hearing record was closed on July 28, 1994.

FINDINGS OF FACT

Based on the testimony and evidence of record, the Commission makes the following findings:

1. Kettler Brothers, Inc., by various officers and agents, executed and filed with the Clerk's Office of Montgomery County, Maryland, on February 16, 1973, various documents which established a condominium regime and provided for the governance of Horizon Run Condominium. These documents which include a Declaration, a Declaration of Covenants, Conditions and Restrictions, a Master Deed, and By-Laws are filed with the land records for Montgomery County, Maryland.

2. Horizon Run Condominium has 154 units.

3. According to a fact sheet distributed in the Horizon Run community in May of 1990, there had been problems with the community's sewer and water system which were expensive to repair and exceedingly unpleasant.

4. The record indicates that early in 1990 the Board of Directors of Horizon Run Condominium was exploring with various officials of WSSC, and discussing with its counsel, the process, terms and conditions that would be involved in turning the water and sewer system owned and operated by the community over to WSSC for operation and maintenance.

5. The record includes: a notice to Horizon Run homeowners, dated May 4, 1990, of a community meeting to be held on May 24, 1990 regarding the takeover by WSSC of the sewer system; an undated reminder notice of the May 24 meeting; minutes of a May 24, 1990 meeting, with representatives of WSSC and the attorney who had been advising the Horizon Run Board of Directors, at which information regarding the proposed takeover was presented and homeowners had the opportunity to participate; a June 5, 1990 letter from WSSC to the President of Horizon Run explaining the terms and conditions of the proposed takeover; a letter to Horizon Run homeowners dated 13 June 1990 explaining that the Board anticipated voting on the WSSC takeover at the July 23, 1990 meeting, explicitly inviting homeowners to attend and express their views, informing homeowners dissatisfied with the takeover vote that a petition for a meeting of homeowners to express disapproval of the action could be filed within 15 days of the action, reminding homeowners of their affirmative responsibility, in accordance with Article VIII, Section 1 of the Horizon Run Condominium By-Laws, to provide the name and address of their mortgagee, and transmitting the June 5, 1990 letter from WSSC.

6. The minutes of the July 23, 1990 regular meeting of the Horizon Run Board of Directors indicate that the Board discussed the issue of turning over the sewer system to WSSC and that Ms Stearn, a board member, moved to turn the water and sewer system over to WSSC, and the motion was seconded and passed unanimously.

7. Horizon Run homeowners did not petition for a special meeting regarding the decision to turn the water and sewer system over to WSSC, which could have resulted in a vote of the Council of Co-Owners on the question of turning over the Horizon Run Condominium water and sewer

system to WSSC.

8. An "Assessment Agreement" dated November 15, 1991 between WSSC and Horizon Run Condominium was signed by Laurel Young, then President of the Council of Co-Owners of Horizon Run Condominium, and by Richard G. Hocevar on behalf of WSSC. Under this Agreement, WSSC agreed to design and construct a water supply and sewer collection system to serve the Horizon Run units and Horizon Run agreed to the assessment of a special benefit charge at rates established in accordance with Maryland law.

9. An easement and right of way was granted to WSSC by Horizon Run Condominium by document dated February 18, 1992, and signed by Laurel Young, President of the Council of Co-Owners, for the installation, construction, reconstruction, maintenance, repair, operation and inspection of a sanitary sewer, water main and appurtenances thereto, including service connections.

10. By letter dated August 4, 1993, WSSC notified Horizon Run Condominium that the water and sewer systems were released for service.

11. Molly M. Ellis, Director of Community Operations, Montgomery Village Foundation, Inc., as management agent for Horizon Run Condominium, testified that the costs to the community incurred in the transfer of the water and sewer systems to WSSC were those paid for like services by communities of the same class and, that, while the document granting the right-of-way did not include language indemnifying the community for any damage arising out of the installation of the systems, WSSC had restored damaged areas in an adequate manner.

12. The Master Deed for Horizon Run Condominium includes the following provisions, in pertinent part:

TWELFTH: "(a) The administration of the Condominium and the community facilities shall be by the Council as set forth in this Master Deed and the By-Laws hereto appended and shall be in accordance with the provisions of these instruments...."

"(b) The said Council shall be responsible for maintaining the common elements and facilities, administering and enforcing the covenants and restrictions and levying and collecting and disbursing the assessments and charges as hereinafter set forth."

...

"(e) The assessment levied by the Council shall be used for the maintenance, repair or replacement of the common elements and facilities and for payment of utilities and such other items as may be deemed appropriate for the efficient and reasonable operation of the Condominium by the Council of Co-owners."

Section (f) establishes that the Council, or its duly designated agent, at its annual meeting or a special meeting called for the purpose, shall fix and determine the amount necessary to provide for the costs of administration and maintenance and assess that amount against all the Units. The notice of the meeting to be held for this purpose will have attached the estimated budget and an amount recommended by the Board of Directors to cover the budget. An initial maximum assessment is stated and an economic index is provided for changes in that assessment. If the annual assessment is to be increased to more than the amount calculated by use of the designated economic index or if a special assessment is to be imposed, it must be approved by a majority of the Council of Co-Owners.

NINETEENTH: "The Developer hereby covenants to take no action which will adversely affect the rights of the Council with respect to assurances against latent defects in the project or other rights assigned to the Council by reason of the establishment of the Condominium. The Developer warrants that it will execute such documents as may be requisite in the premises."

TWENTY-SECOND:...."(b) The Common Elements of the Condominium, including the on-site water and sewer systems, shall be maintained by the Council of Co-owners."

13. The Horizon Run Condominium By-Laws include the following provisions, in pertinent part:

ARTICLE II - COUNCIL OF CO-OWNERS
"Section 3. Majority of Co-Owners. 'Majority of Co-owners' means the co-owners with 51% or more of the votes of the Condominium."

ARTICLE III - ADMINISTRATION
"Section 1. Council Responsibilities. The Owners of the units who constitute the Council will have the responsibility of administering the Condominium, through the Board of Directors."

"Section 8. Voting Requirements. An owner shall be deemed to be in 'Good Standing' and 'Entitled to Vote' at

any annual meeting or at any special meeting of the Council, if, and only if, he shall have fully paid all assessments made or levied against him and his unit by the Directors as hereinafter provided, together with all interest, costs, attorney's fees, penalties and other expenses, if any, properly chargeable to him and against his unit, at least three (3) days prior to the date fixed for such annual or special meeting."

"Section 9. Quorum. Except as otherwise provided in these By-Laws, the presence in person or by proxy of a majority of the owners of the Council shall constitute a quorum an any annual or special meeting of owners...."

"Section 12. Order of Business. The order of business at all meetings of the Council shall be as follows: (a) roll call, (b) proof of notice of meeting or waiver of notice, (c) reading of minutes of preceding meetings, (d) reports of officers, (e) report of committees, (f) election of inspectors of election, if applicable, (g) election of directors, if applicable, (h) unfinished business, and (i) new business."

ARTICLE IV - BOARD OF DIRECTORS
"Section 2. Powers and Duties. The Board of Directors shall have the powers and duties necessary for the administration of the affairs of the Council and may do all such actions and things as are not by law or by these By-Laws directed to be exercised and done by the owners."

Both the Master Deed, at FIFTH, and the By-Laws, at Article II, Section 2, provide that voting will be on a one vote per unit basis.

14. The record in this matter includes correspondence from Kettler Brothers, Inc. to Horizon Run Condominium dated August 12, 1976, December 1, 1976 and March 6, 1980, and from the President of Horizon Run Condominium to Kettler Brothers dated June 28, 1990 and a response from an attorney on behalf of Kettler Brothers dated August 1, 1990 regarding various aspects of the water and sewer system. The letters of August 12 and December 1, 1976 indicate that Kettler Brothers paid Horizon Run Condominium a total of $19,771.42 toward costs related to the community's water and sewer systems, indicating that Kettler Brothers would have no further liability. The letter from counsel on behalf of Kettler Brothers in 1990 affirmed that that was his client's continued position. No record has been brought to the attention of the Commission panel indicating that the Horizon Run Board of Directors has taken action on whether to further involve Kettler Brothers in regard to any liability they may have

for the water and sewer system.

15. Meeting records indicate that annual meetings of the Council of Unit Owners are held in conjunction with a meeting of the Board of Directors. Minutes of an annual meeting held on November 30, 1992 indicate, by heading, that the quorum determination was made immediately after the Call to Order of the annual meeting. Minutes indicating a scheduled annual meeting was not held for lack of a quorum on October 26, 1992 indicate in the same manner that the quorum count immediately followed the Call to Order. Agendas are included in the record from annual and special meetings which were scheduled to be held on: December 18, 1989, December 2, 1987, October 28, 1985, October 22,1984, October 25, 1982, June 1, 1981, June 2, 1980, May 21, 1979, August 24, 1976 and June 11, 1974, which uniformly indicate that the announcement of a quorum was to take place immediately after the Roll Call or calling the meeting to order. No testimony was offered at the hearing in this matter regarding when in the order of business the Council customarily takes a quorum count.

16. The "Report of the Dispute Resolution Committee of the Board of Directors Re: Dispute Filed by Richard R. Haight" states, in pertinent part:

"Richard Haight has asked to see the proxy/ballots from the last election. The Condominium has declined to give him access to these records because the proxy/ballots identify the unit owner voting and, naturally, the manner in which the unit owner voted. Horizon Run Condominium has traditionally considered its proxy/ballots to be secret. The only persons who see the proxy/ballots are the Election Committee members who count them. The Condominium feels that to allow inspection of the proxy/ballots would be a breach of the representation made to the unit owners who submit proxy/ballots that those votes will be secret except for the Election Committee members.

"The Condominium Act does not address this issue and, in fact, Mr. Haight reads that provision to mean that all records of every kind whatsoever are to be made available to a unit owner. This is by no means an easy question. The Committee believes that before the Condominium should disclose the proxy/ballots there should be a decision either by the Commission on Common Ownership Communities or by a court compelling it to do so. Otherwise, the Condominium should respect the representation to its members that their proxy/ballots will be secret."

17. The record includes a document entitled "Motion List, Horizon Run Condominium, January 21, 1991" which states at item 6, "Mr. Johns moved to establish a policy whereby ballots are destroyed following acceptance of the election committee report and thirty days from the election; this includes all past elections, the election held at the 1990 annual meeting, all future elections. The motion was seconded and passed unanimously."

18. A document provided with the Horizon Run Condominium documents purports to be the record of an amendment to the By-Laws adopted "[b]y action taken at a Special Meeting of the Council of Co-Owners held on May 21, 1979, and in accordance with the requirements of The Annotated Code of Maryland, Section 11-104(e) (75% affirmative vote required), the Board of Directors' membership was changed from five to seven."

19. The record in this case includes a letter dated September 16, 1988, from John F. McCabe, Jr. to Mr. Donald C. Black, General Manager, Montgomery Village Foundation, Inc., transmitting "a certified copy of the Amendment of Bylaws (Horizon Run Condominium) which was recorded on August 29, 1988 at Liber 8440, Folio 514." A copy of the recorded document is included. The recorded document recites the authority of the adoption of the Amendment. This recitation indicates: that Article III, Section 13 of the By-Laws, which is entitled "Modification of System of Administration", provides that "in accordance with Article 21, Section 126(j) of the Annotated Code of Maryland, the Co-owners representing 2/3 of the total value of the whole building or buildings may, at any time, modify the system of administration;...in 1974, the Annotated Code of Maryland was amended to provide in Section 11-104(e) (1), Real Property, that the Bylaws may be amended by the affirmative vote of unit owners having seventy-five percent (75%) or more of the votes;" and further recited that of 154 units in the community, 149 were in good standing and entitled to vote; the proposed amendment received 114 affirmative votes or 76% of those in good standing and entitled to vote; and, thus, the amendment was passed.

In addition to the testimony and record in this matter, the Panel takes judicial notice of the following:

20. In 1978, the Maryland legislature amended section 11-104(e) of the Real Property Article[1] to provide, in

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[1] Laws of Maryland 1978, Ch. 526.

relevant part:

> "The bylaws may be amended by the affirmative vote of units owners having 75 percent or more of the votes."

This language was effective from July 1, 1978 until amended again in 1980.

21. In 1974, the Maryland legislature passed a bill, found at Laws of Maryland 1974, Ch. 641, effective July 1, 1974, which significantly revised Title 11, of the Real Property Article, then known as the "Horizontal Property Act". Two provisions included in the new statute are significant in this case.

First, at section 11-104(d), the following language first appeared in state law:

> "The by-laws may contain a provision prohibiting any unit owner from voting at a meeting of the council of unit owners if the council of unit owners has recorded a statement of condominium lien on his unit and the amount necessary to release the lien has not been paid at the time of the meeting."

Second, section 11-128[2] was added to the law and read, in pertinent part:

> "(a) Except as otherwise provided in this section, this title is applicable to all condominiums, whether established before, on or after the effective date of this title. However, with respect to condominiums existing on the effective date, the declaration or master deed, by-laws, or condominium plat need not be amended to comply with the requirements of this title."

CONCLUSIONS OF LAW

The Commission concludes, based on a preponderance of the evidence, including, but not limited to, testimony and documents admitted into evidence, and after full and fair consideration of the evidence of record, that:

As to **Count One**, in which Complainant alleges that the

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[2] Now found at section 11-142.

grant of the right-of-way to WSSC was improper, the Panel concludes that the grant of the right-of-way by unanimous vote of the Board was in substantial compliance with the provisions of section 11-125(f)(2)[3] of the Real Property

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[3]Real Property Article section 11-125(f), in pertinent part, is set forth below:

> (f) Authority of council of unit owners to grant specific easements, etc., --
> (2) The board of directors may, by majority vote, grant easements, rights-of-way, licenses, leases in excess of 1 year, or similar interests for the provision of utility services or communication systems for the exclusive benefit of units within the condominium regime. These actions by the board of directors are subject to the following requirements:
> (i) The action shall be taken at a meeting of the board held after at least 30-days' notice to all unit owners and mortgagees of record with the condominium;
> (ii) At the meeting, the board may not act until all unit owners and mortgagees shall be afforded a reasonable opportunity to present their views on the proposed easement, right-of-way, license, lease, or similar interest;
> (iii) The easement, right-of-way, license, lease, or similar interest shall contain the following provisions:
> 1. The service or system shall be installed or affixed to the premises at no cost to the individual unit owners or the council of unit owners other than charges normally paid for like services by residents of similar or comparable dwelling units within the same area;
> 2. The unit owners and council of unit owners shall be indemnified for any damage arising out of the installation of the service or system; and
> 3. The board of directors shall be provided the right to approve of the design for installation of the service or system in order to insure that the installation conforms to any conditions which are reasonable to protect the safety, functioning, and appearance of the premises.
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> ...
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> (4) The action of the board of directors granting any easement, right-of-way, license, lease, or similar interest under paragraph (2) or (3) of this subsection shall not be final until the following have occurred:
> (i) Within 15 days after the vote by the board to grant an easement, right-of-way, license, lease, or

Article of the Maryland Code and thus is proper and effective.

The Horizon Run Condominium By-Laws give the Board of Directors extremely broad authority and responsibility, on behalf of the Council of Co-Owners, to carry out those duties which are necessary for the administration of the community. The Board, for reasons alluded to in this record if not set forth in an organized and cogent statement, determined that it would be advantageous to the community to turn the maintenance and repair of the water and sewer system, originally owned and operated by the community, over to WSSC. The Board has the authority to take this action on behalf of the Council of Co-owners and it is within the business judgment of the Board. (See Black v. Fox Hills North Community Association, Inc., 90 Md. App. 75, 599 A.2d 1225 (1992)).

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similar interest, a petition may be filed with the board of directors signed by the unit owners having at least 15 percent of the votes calling for a special meeting of unit owners to vote on the question of a disapproval of the action of the board of directors granting such easement, right-of-way, license, lease, or similar interest. If no such petition is received within 15 days, the decision of the board shall be final;

(ii) If a qualifying petition is filed, a special meeting shall be held no less than 15 days or more than 30 days from the receipt of the petition. At the special meeting, if a quorum is not present, the decision of the board of directors shall be final;

(iii) 1. If a special meeting is held and 50 percent of the unit owners present and voting disapprove the grant, and the unit owners voting to disapprove the grant are more than 33 percent of the total votes in the condominium, then the grant shall be void;

2. If the vote of the unit owners is not more than 33 percent of the total votes in the condominium, the decision of the board or council to make the grant shall be final;

(iv) Mortgagees shall receive notice of and be entitled to attend and speak at such special meeting; and

(v) Any easement, right-of-way, license, lease, or similar interest granted by the board of directors under the provisions of this subsection shall state that the grant was approved in accordance with the provisions of this subsection.

(5) The provisions of this subsection are applicable to all condominiums, regardless of the date they were established.

The Board, substantially complied with the Annotated Code of Maryland, Real Property Article, Section 11-125(f)(2), and by unanimous vote decided to turn the water and sewer system over to WSSC, knowing that as part of the transaction a right-of-way would need to be granted to WSSC to install a new water and sewer system. This action was taken after having given unit owners more than 30 days' notice of the intended action and having provided two opportunities for unit owners to present their views on the transaction. The reasonableness and adequacy of those opportunities were not challenged in this matter. The community was on notice that homeowners who were dissatisfied with the takeover vote would have 15 days after the vote to petition for a meeting of homeowners to express disapproval of the action taken. The record in this matter includes no indication that any homeowner petitioned for such a meeting. This was the opportunity for members of the community who were in disagreement with this action to appeal it. Having failed to avail themselves of this provision for appeal, the grant was final and cannot be effectively appealed at a later date.

The record is not clear whether any mortgagees were notified of the proposed action. It is not disputed that not all mortgagees were notified and given an opportunity to present their views. No mortgagee is a party to this matter and the Commission would not have jurisdiction in a matter in which a mortgagee was a party. The statutory rights of the mortgagees are not within the jurisdiction of the Commission and this Decision and Order does not attempt to address those rights.

The testimony of Molly Ellis and language in the Assessment Agreement indicate that the costs to the community were those normally paid by similar communities and in accordance with rates set under the authority of Maryland state law.

The absence of the indemnification language required by state law in documents prepared by WSSC is troubling. However, the uncontroverted testimony of Molly Ellis that the restoration is adequate and no indemnification was required, indicates that the purpose of this protective provision has been met.

There was substantial and adequate compliance with the provisions of section 11-125(f)(2) as it relates to the parties before the Commission in this matter and those over whom the Commission may exert jurisdiction.

As a result of turning the water and sewer systems over

to WSSC, the water bills and charges for the front foot benefit assessment are now billed directly to the homeowners instead of being paid indirectly through Condominium fees. Complainant has inferred that this is an assessment. While the effect of the shift in payment is similar to an assessment, it is not an assessment.

As to **Count Two** in which Complainant alleged that disenfranchisement of owners in arrears but against whose property no liens have been filed by the community, is not in accordance with Maryland law, the Panel finds that the exclusion of owners from voting at Council of Unit Owner meetings unless the community has filed a lien against their property is not in accordance with Maryland law.

The Horizon Run Condominium By-Laws, at Article III, Section 8, as set forth above, clearly disenfranchise unit owners who have not fully paid levied assessments at least three days before a meeting of the Council of Co-Owners. However, Section 11-104(d) of the Real Property Article of the Annotated Code of Maryland provides that condominium bylaws may contain a provision prohibiting a unit owner from voting at a meeting of the council of unit owners <u>if the council has recorded a statement of condominium lien against his unit</u> (emphasis added) and the amount necessary to release the lien has not been paid at the time of the meeting. This provision is best interpreted to have been intended to establish the exclusive authority under which a unit owner could be disenfranchised and to supersede the By-Laws of any condominium community which establish a lesser requirement for disenfranchising owners from voting on matters in the governance of the community.

The investment in a home is frequently the major investment a person or family makes. The decisions of the councils of unit owners affect the value of the property and financial obligations of owners. Communities' by-laws may include a wide variety of provisions disenfranchising owners from the exercise of their rights in the community governance which may be applied with or without appropriate regard for due process. It would appear that the Maryland legislature authorized this practice only under narrow circumstances which in their exercise include some protection to the homeowners.

The statutory language was effective in 1974. The disenfranchisement of any owner by Horizon Run Condominium in any election since the effective date of the statute for any reason other than the existence of a

recorded statement of lien against the owner's unit was without authority and not in accordance with the law and the By-Laws as amended by operation of law.

As to **Count Three**, in which Complainant alleged that the Board of Directors' decision not to pursue Kettler Brothers for the costs of the water and sewer system replacement was improper, the Panel finds that the actions of the Board to date have been in accordance with the discretion granted under the business judgment rule.

The record does not contain evidence of an affirmative decision by the Board of Directors of Horizon Run Condominium to not pursue any action against Kettler Brothers for any outstanding liability for the water and sewer system. However, there is evidence of correspondence and discussion regarding this matter. The decision to pursue or not to pursue litigation should be a matter of business judgment on the part of the Board of Directors. Even in the absence of a record of an affirmative decision on the matter, it falls within the rule enunciated by the Maryland Court of Special Appeals in Black v. Fox Hills North Community Association, Inc., supra. If a majority of co-owners believe that the Board should reconsider this matter, they can petition the Board for a special meeting for further discussion and achieve the remedy requested in this case. The Commission does not order such a meeting.

As to **Count Four**, regarding the time in the order of business at meetings of the Council of Unit Owners at which a quorum count should be taken, the Panel finds, based on the record in this matter, that the practice of the Board of Directors in the conduct of such meetings appears to have been in accordance with Article III, Section 12 of the By-Laws.

The record indicates that the Board of Directors determines the presence or absence of a quorum at the end of the Call to Order at the beginning of a meeting of the Council of Co-Owners. This is in compliance with the order of business set forth in the Horizon Run Condominium By-Laws.

As to **Count Five**, in which Complainant alleges that the decision to deny him access to ballots from the 1992 annual meeting election of Directors was improper, the Panel finds that there are no ballots extant from the 1992 annual meeting and that there is no controversy which would require production of these ballots to resolve.

The provisions of Section 11-116 of the Real Property Article require condominiums to keep records in accordance with good accounting practices and to make those records available to unit owners and mortgagees on a reasonable basis. The statute does not mention election ballots, nor does its direction necessarily encompass ballots. Horizon Run adopted a policy, the propriety of which has not been questioned, to destroy ballots following acceptance of the election committee's report and thirty days from the election. If this policy has been followed, there are no ballots from the 1992 election of Directors in the records of the condominium. The dispute resolution committee has expressed reasonable balancing considerations for not providing ballots for inspection, though, in this community because each unit is entitled to one equal vote, a different design of the proxy and ballot documents could resolve those concerns. No ballots were produced in response to the Commission's subpoena and it was suggested that no ballots were found. The Commission declines to interpret this statutory provision to require the production of ballots for review in the absence of a controversy requiring review of ballots for resolution.

As to **Count Six**, in which Complainant alleged that the 1979 By-Law amendment vote to increase the number of members of the Board of Directors was not in accordance with applicable law, the Panel finds that the vote count must be reviewed to determine whether the disenfranchised voters who were not counted as eligible voters were owners of units against which liens had been filed.

There has been, throughout this case, confusion regarding requirements for the calculation of a quorum with those required to determine the results of a vote. The Horizon Run Condominium By-Laws at Article III, Section 9, provide that a quorum is a majority of the owners of the Council. This provision means that a quorum for holding a meeting of the Council of Co-Owners is at least 51% of the units, since it speaks in terms of owners not of votes. However, that does not establish the basis for determining the outcome of a vote. The only provision in the Horizon Run Condominium documents setting forth a required minimum vote is that provided in the Master Deed in relation to increasing assessments more than the designated economic indicator would allow and for special assessments. In both of those cases the language in the

Master Deed is "a majority of the Co-owners"[4].

However, the vote which has been challenged was measured against a statutory provision which allowed for adoption of a By-Law amendment "by the affirmative vote of unit owners having 75% or more of the votes."[5] In light of the applicable language of the statute at the time, it was appropriate to calculate a required percent of votes against the total of votes eligible to be cast in that election, rather the total number of votes in the Council of Co-Owners.

In accordance with the decision rendered in Count 2, above, however, unless it can be established that the community had recorded a statement of condominium lien against each of the properties for which the owners were precluded from voting, the disenfranchisement of those owners was improper and the reduction of the number of eligible votes was also improper.

ORDER

In view of the foregoing, based on the evidence of record, for the reasons set forth above, the Commission finds:

1. that the exclusion from voting of any owner unless the community has recorded a statement of condominium lien against the property of that owner is not in accordance with law, and has been not in accordance with law since July 1, 1974, and the Board of Directors of Horizon Run Condominium is directed to take such action as may be necessary to comply with this determination; and

2. that Board of Directors of Horizon Run Condominium is directed to review the vote on the By-Law amendment to increase the Board of Directors from five members to seven members at a special meeting of the Council of Unit Owners on May 21, 1979 to determine whether the property owned by any or all of the unit owners in the community who were disenfranchised had recorded against them statement of condominium liens; and further directed that

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[4] This phrase is defined at Article II, Section 3 of the By-Laws as "the co-owners with 51% or more of the votes of the Condominium."

[5] Laws of Maryland 1978, Ch. 526. In 1984, this section was amended by the addition of the words "in the council of unit owners" at the end of the language quoted.

if the number of eligible voters changes due to the absence of liens such that the amendment failed, the Board convene a meeting to ratify the amendment or take appropriate steps to reduce its membership to five.

The foregoing was concurred in by panel members Fox, Blumberg and Stevens.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this order, pursuant to Chapter 1100, Subtitle B, Maryland Rules of Procedure.

Dinah Stevens
Panel Chairwoman
Commission on Common Ownership Communities

This panel strongly urges the Montgomery County Commission on Common Ownership Communities, in conjunction with such persons or entities as may have appropriate expertise, to move as expeditiously as possible to prepare an addendum, to be sent to all registered communities and distributed with community documents in accordance with the requirements of state law and county code to all new owners of units in common ownership communities, which will inform them of the provisions of the documents which have been superseded by law. The state law reasonably exempts communities from the process of amending documents to comply with the law but by operation of law changes the provisions of those documents. New owners receiving those documents are unaware that they do not contain the accurate controlling provisions. This leads to confusion in the governance of the communities, to litigation and to potential disruption of the management of these communities.