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Commission on Common  
Ownership Communities

Montgomery County, Maryland  
Commission on Common Ownership Communities  
240-777-0311  
CCOC@MontgomeryCountyMD.gov

DHCA

**May 2024**

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Fun Fact:

Did you know that Memorial Day became a Federal Holiday in 1971? Congress passed a law in December 2000 that required all Americans to pause at 3 p.m. local time on Memorial Day to remember and honor the fallen.

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HOA Boards and The Business Judgment Rule!

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Homeowners associations in Maryland are created and governed by Title 11b of the Maryland Code, Real Property Article. That statute, the HOA Act, defines a homeowners association as a

person having the authority to enforce the provisions of a declaration, and states that it includes an incorporated or unincorporated association.

Most homeowners associations incorporate as a protection from individual liability for board members, as a way to have a resident agent for legal process, as a path to opening and operating bank accounts, and as a way to generally receive the benefits of being a corporation. Associations have budgets, conduct elections, enter into contracts, carry insurance, and generally undertake all the activities ordinarily done by corporations.

When a board has its decisions challenged by members of the corporation (in this case homeowners), it may to defend those decision in a court of law.

### **The Business Judgment Rule: The Basics**

Enter the business judgment rule. The Business Judgment Rule, originally applied in shareholder derivative suits against the directors of a corporation, creates a “presumption that directors of a corporation acted in good faith and in the best interest of the corporation.” *Reiner v. Erlich*, 212 Md. App. 142, 156 (2013). In *Black v. Fox Hills N. Cmty. Ass’n, Inc.*, 90 Md. App. 75, 81 (1992), the Maryland Appellate Court (then the Court of Special Appeals) held that the business judgment rule applies to condominium boards of directors. Subsequent decisions have cited *Black* to apply the Business Judgment Rule to homeowners association boards as well.

When a challenge is brought against the decision of a homeowners association, the association board may point out that the court is obligated to presume that they acted in good faith and in the best interests of the association. This Business Judgment Rule defense may be overcome, but in order to do so, “the party challenging the validity of a board’s actions must produce evidence sufficient to rebut this presumption.” *Wittman v. Crooke*, 120 Md. App. 369, 376 (1998). The *Black* court held that this rule then “precludes judicial review of a legitimate business decision of an organization, absent fraud or bad faith.” *Black*, 90 Md. App. at 82.

The plaintiff bears the burden of proving fraud or bad faith sufficient to rebut the Business Judgment Rule presumption set forth above: “The general rule under Maryland law is that decisions made by a homeowners association’s board of directors will not be disturbed unless there is a showing of fraud or bad faith.” *Reiner*, 212 Md. App. at 155. If the plaintiff is unable to make such a showing, then the Business Judgment Rule compels the court to not second-guess the decision of the association: “There was no allegation in the complaint of any fraud or bad faith. Absent fraud or bad faith, the decision . . . was a business judgment with which a court will not interfere.” *Black*, 90 Md App. at 83. This preserves the democratic nature the association. The elected board makes decisions on behalf of the association, and individual owners cannot use the judicial process to substitute in their own judgment or that of the court. The implication is to run for the board and get elected by the homeowners if you want to make decisions for the association.

The business judgment rule insulates business decisions from judicial review absent a showing that the officers acted fraudulently or in bad faith.” *N.A.A.C.P. v. Golding*, 342 Md. 663, 673 (1996)(certain citations omitted)(emphasis added).

### **The Business Judgment Rule Applied Successfully**

Early cases applying the Business Judgment Rule to homeowners association board decisions often saw the Board decision being upheld. *Black*, decided in 1992, is the clearest and most cited example: The plaintiffs claimed that a fence was approved and installed in violation of the association's covenants and restrictions, and sued the association challenging their judgment. The *Black* court held that it was immaterial whether the fence actually violated the association's governing documents, because the enforcement of those rules was within the exclusive purview of the association. “The decision which the association made to approve the owners' fence was a decision which it was authorized to make. Whether that decision was right or wrong, the decision fell within the legitimate range of the association's discretion... There was no allegation in the complaint of any fraud or bad faith. Absent fraud or bad faith, the decision to approve the fence was a business judgment with which a court will not interfere.” *Black*, 90 Md App. at 83.

Citing *Black* with approval, the Court of Special Appeals decided *Reiner v. Erlich*, 212 Md. App. 142 (2013) in similar fashion: “In sum, we hold that the business judgment rule applies because this case falls squarely within the purview of *Black*. Here, the Association rendered a decision denying the Reiners' roof request. The Reiners—much like the plaintiffs in *Black*—sued because they disagreed with the Association's decision. The Reiners did not allege any fraud or bad faith on the part of the Association. Under *Black*, ‘[t]he ‘business judgment’ rule, therefore, precludes judicial review’ of that decision. Accordingly, the Association was entitled to summary judgment as a matter of law.” *Id.* at 156. The business judgment rule defends the decisions of a homeowners association board from second-guessing by aggrieved owners or by judges reviewing the case.

The Court of Special Appeals once again stood by the logic of *Black* in 2020, when it reviewed a case of an owner wishing to make alterations to the property, and the association declining. The court again sided with the association, holding: “Like in *Black*, where the homeowners failed to allege any bad faith or fraud, here, the homeowners have not alleged any bad faith or fraud on the Association's part. While they have stated that ‘there is no evidence that [the Association] acted reasonably and fairly,’ they have provided no evidence or argument that the Association's actions were in bad faith or fraudulent. *Breard v. Homeland Ass'n, Inc.*, No. 735, Sept. Term, 2020, 2020 WL 10053365, at \*12 (Md. Ct. Spec. App. June 15, 2020). Without any such proof, or even an allegation of any specific facts to support any suggestion of bad faith or fraud, the decision of the association stood.

### **Limitations on The Business Judgment Rule**

Of course, not every decision ever made by a homeowners association is protected by the Business Judgment Rule. First, the decision must be one that the association is entitled to make in

the first place. Attorneys began to argue that the Business Judgment Rule allows associations to take any action they choose to, even if it is not a power granted to them by their documents.

In *Yadav v. Pindell Woods Homeowners Ass'n, Inc.*, No. 817, Sept. Term, 2016, 2017 WL 6611976 (Md. Ct. Spec. App. Dec. 26, 2017), the Court of Special Appeals struck down that idea. Footnote 3 very clearly refutes the argument that began to surface after *Reiner*: “it is our obligation to dispel a confusion that our prior opinions may have created. Pindell Woods argues that its interpretation of the Declaration (addressed in the prior section of this Opinion) is protected from court review by the business judgment rule. That is wrong. The question of whether an entity has or does not have the power to take an action—whether an action is *ultra vires* or not—is outside of the business judgment rule and remains subject to court review. *Greenbelt Homes v. Nyman*, 48 Md. App. 42, 57 n.4 (1981) (“An *ultra vires* act is one not within the express or implied powers of the [organization] as fixed by its charter.”). Some of our cases have, by use of short-hand, obscured this black-letter rule. See, e.g., *Reiner*, 212 Md. App. At 156 (“[D]ecisions made by a homeowners association ... will not be disturbed unless there is a showing of fraud or bad faith”). Whether an entity has the power to take an action or whether it is *ultra vires*, however, remains outside of the business judgment rule. *Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509, 539 (2003).” *Id.* at Fn. 3.

An *ultra vires* decision still takes a question out the Business Judgment Rule analysis; if an action by a homeowners association board is not within the power granted to it by the Declaration, then the decision must be overturned.

A decision must not only be within the power of the board for the Business Judgment Rule to apply, but the association board also *must actually exercise judgment*. The business judgment rule defends actions where the association board has considered a situation and acted (or decided not to act).

In *Warshanna v. Hickory Hollow Cmty. Ass'n, Inc.*, No. 2056 Sept. Term 2014, 2016 WL 181614 (Md. Ct. Spec. App. Jan. 12, 2016), owners alleged that the association had obligations to maintain certain common areas under its exclusive control. The Court of Special Appeals held: “Unlike the associations in *Black* and *Reiner*, the Association has thus far failed to demonstrate the basic prerequisite for application of the business judgment rule. The business judgment rule applies to judgments, but the record contains no admissible evidence that anyone exercised any judgment in allegedly failing to respond to the [owners’] maintenance requests.... At present, the record does not even disclose who made any decisions, or how or why the decisions were made... To obtain the benefits of the business judgment rule, a person must do more than simply invoke the rule: the person must show that he or she actually exercised business judgment or discretion in some ascertainable way. See *Reiner*, 212 Md.App. at 156 (the business judgment rule applies when a board has “rendered a decision”).” *Id.* at 9-10.

In order to avail itself of the Business Judgment Rule, an association board must prove that it exercised some judgment. In *Warshanna*, the allegations were simply that the board failed to

act. With no factual support in the record to prove that the board had exercised its judgment, no Business Judgment Rule defense could properly be asserted.

The business judgment rule does not protect a board from otherwise valid contractual or tort claims. In *Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509 (2003), the Court rejected the application of the Business Judgment Rule, saying: “The business judgment rule, which limits the court's role in reversing the actions of a corporation, has never precluded full litigation of complaints sounding in tort or contract against the corporation. A corporation, as a private entity, may be held liable for tortious conduct and breaches of contracts, perpetrated by its officers, directors, and agents, against third parties. See Maryland Code (1975, 1999 Repl.Vol., 2002 Supp.) § 2–103 of the Corporations and Associations Article. Nothing in the jurisprudence of this State would hold otherwise.” *Id.* at 532. This case is cited with approval in several of the association-related cases referenced here, and also led to the decision in *Schuman v. Greenbelt Homes, Inc.*, 212 Md. App. 451 (2013). The *Schuman* court ultimately found that the association had acted within its rights, but the language there is instructive on how courts should treat cases similar to *Sadler*, where a body of law outside of the association documents is at issue.

### **Business Judgment Litigation**

If an association has acted within the powers granted to it by the governing documents, then it may assert a Business Judgment Rule defense to any challenge of its actions. Such a defense is invalid if the allegations involve *ultra vires* activities, or if the facts alleged support a tort or breach of contract claim. Finally, in order to avail itself of the Business Judgment Rule, a board must be able to point to facts that demonstrate that it did indeed exercise its judgment.

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*Author Bio: Brian R. Fellner is the founding attorney of Fellner Legal Services. Brian is an experienced lawyer and litigator who provides legal services to condominiums, homeowners associations, and cooperatives throughout Maryland, Virginia, and the District of Columbia. He has represented clients in all facets of community association governance, management, and dispute resolution. From writing bylaws or rules to enforcing covenants and contracts to collecting delinquent assessments, Brian has worked tirelessly to provide excellent legal services to **FLS** clients and communities of all sorts. The FLS motto is: Service. Success. Simple.*

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[Exhaustion of Association Remedies!](#)



The Commission on Common Ownership Communities (CCOC) has three core objectives: education, legislation, and dispute resolution. The dispute resolution component empowers the CCOC to assist with the resolution of disputes, with due process protections, between owners and the governing body, namely the Board of Directors (“Board”). For the administrative dispute resolution process to commence, an aggrieved party, whether the governing body or an owner, must file a complaint with the CCOC. Exhaustion of association remedies is a prerequisite to filing a complaint, however.

According to the Montgomery County Code (MCC) § 10B-9B(b), a “party must not file a dispute with the [CCOC] until the party makes a good faith attempt to exhaust all procedures or remedies provided in the association documents.”<sup>[1]</sup> At the CCOC, the party who files a complaint is called the Complainant, and the party against whom a complaint is filed is called the Respondent. For the Board to file a complaint against an owner or occupant, it must provide documentation to demonstrate the satisfaction of MCC § 10B-9(b). Associations may utilize either the dispute resolution procedures in the association’s governing documents or the dispute settlement mechanisms articulated in Md. Code Ann., Real Property [§ 11-113](#) (for condominiums associations) or [§ 11B-111-10](#) (for homeowners associations).<sup>[2]</sup> The statutory dispute settlement provision ([SB0015/HB0309](#)) for cooperatives passed during the 2024 legislative session and will go into effect on October 1, 2024.



For an owner or occupant to file a complaint against the Board, first the owner or occupant must, in good faith, employ the association's dispute resolution process, if any. Should the association not have a dispute resolution process, then the recommendation is for the owner or occupant to submit to the Board a written notice of the dispute, affording the Board reasonable time to address or resolve it. Additionally, the Complainant may also submit a written request for a hearing. Nevertheless, pursuant to MCC § 10B-9(c), "a party may file a dispute with the Commission 60 days after any procedure or remedy provided in the association documents has been initiated before the association." Therefore, if the Board fails to resolve the dispute within 60 days, an owner or occupant may file a complaint. A copy of the written notice and/or request for a hearing should be included in the complaint packet to evidence the satisfaction of the exhaustion of association remedies prerequisite.

For more information on the complaint process, click on this link:

[https://montgomerycountymd.gov/DHCA/housing/commonownership/the\\_complaint\\_process.html](https://montgomerycountymd.gov/DHCA/housing/commonownership/the_complaint_process.html)

For a copy of the complaint form and instructions, click on this link:

[https://montgomerycountymd.gov/DHCA/Resources/Files/housing/commonownership/forms/complaint\\_form.pdf](https://montgomerycountymd.gov/DHCA/Resources/Files/housing/commonownership/forms/complaint_form.pdf)

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[1] Pursuant to MCC § 10B-8(8), a party includes an owner, a governing body, or an occupant of a dwelling unit in a common ownership community.

[1] Both statutory provisions went into effect on October 1, 2022, to address complaints or demands arising on or after that date.

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Neighborhood Events Matching Funds Grant Program (NEMF)



The Montgomery County Government established the **Neighborhood Events Matching Funds Grant Program (NEMF)** to promote community engagement, encourage capacity building, networking, and stimulate the local economy.

Neighborhood organizations, block groups, tenant associations, civic clubs, and other community groups that are active and in good standing may apply for funds to hold events and activities by completing an application. Eligible activities include those that are open to residents and create sustainable and lasting impacts for the neighborhood.

Due to increased demand and the limited budget for this program, funding priority will be given to first-time applicants. The maximum fund amount is \$1000 per applicant, per funding cycle. Funds will be given on a first-come, first-served basis.

[Apply Here](#)

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#### [Annual Registration Information](#)

The Licensing & Registration Unit requires completion of the following:

- The completion of the [CCOC Registration Form](#).
- The completion and current copy of the governing documents.
- A list of the rental units in the community.

- A payment of the annual registration fee which is calculated based upon the number of units in the common ownership community.

It is the responsibility of each common ownership community to ensure compliance with this requirement.

Please feel free to contact the Licensing & Registration Department at [ccoregistration@montgomerycountymd.gov](mailto:ccoregistration@montgomerycountymd.gov) with questions and/or concerns you may have.

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**The leadership of each common ownership community must register annually as a requirement as stated in Chapter 10B of the Montgomery County Code.**

#### [Mandatory Board Training](#)



In July 2023, [amendments to the county code](#) continue to require all Board of Directors for common ownership communities to successfully complete the Commission's Board Training program, also known as Community Governance Fundamentals. The new provision requires Board members to recertify every *three (3) years*. Therefore, if you have not completed the training after July 3, 2020, you are required to fulfill this requirement. Information on the free training program and [schedule](#) may be found on the website or [click here](#).

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#### **COC Links and Shortcuts**

[Office of Common Ownership Communities | DHCA \(montgomerycountymd.gov\)](#)- General information and resources for common ownership communities and homeowners.

[Common > "Community Governance Fundamentals" Training Program | DHCA \(montgomerycountymd.gov\)](#)- Mandatory training on Community Governance Fundamentals.

[Common > Registration of Common Ownership Communities | DHCA \(montgomerycountymd.gov\)](#) – Mandatory annual registration of common ownership communities.

[Calendar | DHCA \(montgomerycountymd.gov\)](#) – Calendar of Events.

[Common > Community Information | DHCA \(montgomerycountymd.gov\)](#) – FAQ's

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### Office of Common Ownership Communities

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