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By: **Senators Garagiola, Forehand, Frosh, Jacobs, and Mooney**

Introduced and read first time: February 6, 2004

Assigned to: Judicial Proceedings

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Committee Report: Favorable

Senate action: Adopted

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CHAPTER 292

1 AN ACT concerning

2                                   **Commercial Law - Hotels and Retirement Communities - Operating**  
3                                   **Agreements**

4 FOR the purpose of providing that if a conflict exists between the express terms and  
5 conditions of an operating agreement and the terms and conditions implied by  
6 the law governing the relationship between a principal and agent, the express  
7 terms and conditions of the operating agreement shall govern; authorizing a  
8 court to order a certain remedy notwithstanding the existence of an agency  
9 relationship between the parties to an operating agreement; providing that  
10 express covenants or other provisions of an operating agreement that establish a  
11 party's duties and obligations under the operating agreement create the only  
12 duties and obligations enforceable against the party under the operating  
13 agreement; providing that an operating agreement that states that it shall  
14 continue for a period of time or until the happening of an event shall be  
15 enforceable between the parties until the expiration of the period of time or the  
16 happening of the event unless the operating agreement contains a right of early  
17 termination; requiring that the covenant of good faith and fair dealing be  
18 implied in an operating agreement except under certain circumstances;  
19 prohibiting duties from being implied into an operating agreement unless the  
20 operating agreement contains a covenant or other provision that specifically  
21 incorporates the duty into the operating agreement; prohibiting this Act from  
22 being construed to limit the defenses of fraud, duress, or illegality or affect any  
23 claim between a third party and a party to an operating agreement; defining  
24 certain terms; requiring that this Act be construed to apply to all operating  
25 agreements that are executory agreements as of a certain date or are executed  
26 and delivered after a certain date; and generally relating to operating  
27 agreements that relate to hotels and retirement communities.

1 BY adding to  
2 Article - Commercial Law  
3 Section 23-101 through 23-106, inclusive, to be under the new title "Title 23.  
4 Operating Agreements - Hotels and Retirement Communities"  
5 Annotated Code of Maryland  
6 (2000 Replacement Volume and 2003 Supplement)

7 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF  
8 MARYLAND, That the Laws of Maryland read as follows:

9 **Article - Commercial Law**

10 TITLE 23. OPERATING AGREEMENTS - HOTELS AND RETIREMENT COMMUNITIES.

11 23-101.

12 (A) IN THIS SUBTITLE THE FOLLOWING WORDS HAVE THE MEANINGS  
13 INDICATED.

14 (B) "HOTEL" MEANS A HOTEL OR MOTEL WITH MORE THAN 30 ROOMS FOR  
15 RENT THAT IS PRIMARILY USED BY TRANSIENTS WHO ARE LODGED WITH OR  
16 WITHOUT MEALS.

17 (C) "OPERATING AGREEMENT" MEANS A WRITTEN CONTRACT, AGREEMENT,  
18 INSTRUMENT, OR OTHER DOCUMENT BETWEEN AT LEAST TWO PERSONS THAT  
19 RELATES TO THE MANAGEMENT, OPERATION, OR FRANCHISE OF A HOTEL OR A  
20 RETIREMENT COMMUNITY.

21 (D) "PERSON" DOES NOT INCLUDE AN INDIVIDUAL, A NOT FOR PROFIT ENTITY,  
22 OR A PUBLIC INSTRUMENTALITY.

23 (E) (1) "RETIREMENT COMMUNITY" MEANS A SENIOR LIVING COMMUNITY,  
24 RETIREMENT COMMUNITY, ASSISTED LIVING COMMUNITY, CONTINUING CARE  
25 RETIREMENT COMMUNITY, INDEPENDENT LIVING COMMUNITY, OR SIMILAR  
26 COMMUNITY THAT OFFERS A COMBINATION OF INDEPENDENT LIVING, ASSISTED  
27 LIVING, OR NURSING.

28 (2) "RETIREMENT COMMUNITY" DOES NOT INCLUDE:

29 (I) A FREESTANDING NURSING HOME, AS DEFINED IN § 19-1401 OF  
30 THE HEALTH - GENERAL ARTICLE, THAT IS LICENSED BY THE DEPARTMENT OF  
31 HEALTH AND MENTAL HYGIENE;

32 (II) A STATE FACILITY, AS DEFINED IN § 10-101 OF THE HEALTH -  
33 GENERAL ARTICLE;

34 (III) A PROGRAM LICENSED BY THE DEPARTMENT OF MENTAL  
35 HEALTH AND HYGIENE UNDER TITLE 7 OR TITLE 10 OF THE HEALTH - GENERAL  
36 ARTICLE;

1 (IV) A FREESTANDING HOSPICE CARE PROGRAM REGULATED BY  
2 THE DEPARTMENT OF MENTAL HEALTH AND HYGIENE UNDER TITLE 19, SUBTITLE 9  
3 OF THE HEALTH - GENERAL ARTICLE;

4 (V) A FREESTANDING DAY CARE CENTER FOR THE ELDERLY  
5 REGULATED BY THE DEPARTMENT OF MENTAL HEALTH AND HYGIENE UNDER TITLE  
6 14, SUBTITLE 2 OF THE HEALTH - GENERAL ARTICLE;

7 (VI) A RETIREMENT COMMUNITY THAT IS OWNED BY OR  
8 AFFILIATED WITH A CHURCH OR RELIGIOUS ORGANIZATION;

9 (VII) A COOPERATIVE HOUSING CORPORATION ORGANIZED UNDER  
10 TITLE 5, SUBTITLE 6B OF THE CORPORATIONS AND ASSOCIATIONS ARTICLE AND  
11 CERTIFIED AS A CONTINUING CARE PROVIDER UNDER ARTICLE 70B OF THE CODE  
12 AND SEPARATE ENTITIES CERTIFIED AS CONTINUING CARE PROVIDERS UNDER  
13 ARTICLE 70B OF THE CODE THAT PROVIDE SERVICES TO RESIDENTS OF A  
14 COOPERATIVE HOUSING CORPORATION; OR

15 (VIII) A CONDOMINIUM ORGANIZED UNDER TITLE 11 OF THE REAL  
16 PROPERTY ARTICLE AND CERTIFIED AS A CONTINUING CARE PROVIDER UNDER  
17 ARTICLE 70B OF THE CODE AND SEPARATE ENTITIES CERTIFIED AS CONTINUING  
18 CARE PROVIDERS UNDER ARTICLE 70B OF THE CODE THAT PROVIDE SERVICES TO  
19 RESIDENTS OF A CONDOMINIUM.

20 23-102.

21 (A) IF A CONFLICT EXISTS BETWEEN THE EXPRESS TERMS AND CONDITIONS  
22 OF AN OPERATING AGREEMENT AND THE TERMS AND CONDITIONS IMPLIED BY THE  
23 LAW GOVERNING THE RELATIONSHIP BETWEEN A PRINCIPAL AND AGENT, THE  
24 EXPRESS TERMS AND CONDITIONS OF THE OPERATING AGREEMENT SHALL GOVERN.

25 (B) A COURT MAY ORDER THE REMEDY OF SPECIFIC PERFORMANCE FOR  
26 ANTICIPATORY OR ACTUAL BREACH OR ATTEMPTED OR ACTUAL TERMINATION OF  
27 AN OPERATING AGREEMENT NOTWITHSTANDING THE EXISTENCE OF AN AGENCY  
28 RELATIONSHIP BETWEEN THE PARTIES TO THE OPERATING AGREEMENT.

29 23-103.

30 EXPRESS COVENANTS OR OTHER PROVISIONS OF AN OPERATING AGREEMENT  
31 THAT ESTABLISH A PARTY'S DUTIES AND OBLIGATIONS UNDER THE OPERATING  
32 AGREEMENT CREATE THE ONLY DUTIES AND OBLIGATIONS ENFORCEABLE AGAINST  
33 THE PARTY UNDER THE OPERATING AGREEMENT.

34 23-104.

35 IF AN OPERATING AGREEMENT STATES THAT IT SHALL CONTINUE FOR A  
36 PERIOD OF TIME OR UNTIL THE HAPPENING OF AN EVENT, THE OPERATING  
37 AGREEMENT SHALL BE ENFORCEABLE BETWEEN THE PARTIES UNTIL THE  
38 EXPIRATION OF THE PERIOD OF TIME OR THE HAPPENING OF THE EVENT UNLESS  
39 THE OPERATING AGREEMENT CONTAINS A RIGHT OF EARLY TERMINATION.

1 23-105.

2 (A) THE COVENANT OF GOOD FAITH AND FAIR DEALING SHALL BE IMPLIED IN  
3 AN OPERATING AGREEMENT UNLESS THE OPERATING AGREEMENT STATES THAT A  
4 PARTY MAY PERFORM A DUTY OR OBLIGATION IN THE PARTY'S SOLE DISCRETION.

5 (B) UNLESS AN OPERATING AGREEMENT CONTAINS A COVENANT OR OTHER  
6 PROVISION THAT SPECIFICALLY INCORPORATES A DUTY INTO THE OPERATING  
7 AGREEMENT, NO DUTIES SHALL BE IMPLIED UNDER THE OPERATING AGREEMENT.

8 23-106.

9 THIS SUBTITLE MAY NOT BE CONSTRUED TO:

10 (1) LIMIT THE DEFENSES OF FRAUD, DURESS, OR ILLEGALITY; OR

11 (2) AFFECT ANY CLAIM BETWEEN A THIRD PARTY AND A PARTY TO AN  
12 OPERATING AGREEMENT.

13 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall be  
14 construed to apply to all operating agreements that are executory agreements as of  
15 October 1, 2004 or are executed and delivered after October 1, 2004.

16 SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect  
17 October 1, 2004.