
By: **Senators Garagiola, Forehand, Frosh, Jacobs, and Mooney**
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Assigned to: Judicial Proceedings

A BILL ENTITLED

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.

28 BY adding to
29 Article - Commercial Law
30 Section 23-101 through 23-106, inclusive, to be under the new title "Title 23.
31 Operating Agreements - Hotels and Retirement Communities"
32 Annotated Code of Maryland
33 (2000 Replacement Volume and 2003 Supplement)

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

3 **Article - Commercial Law**

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

5 23-101.

6 (A) IN THIS SUBTITLE THE FOLLOWING WORDS HAVE THE MEANINGS
7 INDICATED.

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

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

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

17 (E) (1) "RETIREMENT COMMUNITY" MEANS A SENIOR LIVING COMMUNITY,
18 RETIREMENT COMMUNITY, ASSISTED LIVING COMMUNITY, CONTINUING CARE
19 RETIREMENT COMMUNITY, INDEPENDENT LIVING COMMUNITY, OR SIMILAR
20 COMMUNITY THAT OFFERS A COMBINATION OF INDEPENDENT LIVING, ASSISTED
21 LIVING, OR NURSING.

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

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

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

28 (III) A PROGRAM LICENSED BY THE DEPARTMENT OF MENTAL
29 HEALTH AND HYGIENE UNDER TITLE 7 OR TITLE 10 OF THE HEALTH - GENERAL
30 ARTICLE;

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

34 (V) A FREESTANDING DAY CARE CENTER FOR THE ELDERLY
35 REGULATED BY THE DEPARTMENT OF MENTAL HEALTH AND HYGIENE UNDER TITLE
36 14, SUBTITLE 2 OF THE HEALTH - GENERAL ARTICLE;

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

3 (VII) A COOPERATIVE HOUSING CORPORATION ORGANIZED UNDER
4 TITLE 5, SUBTITLE 6B OF THE CORPORATIONS AND ASSOCIATIONS ARTICLE AND
5 CERTIFIED AS A CONTINUING CARE PROVIDER UNDER ARTICLE 70B OF THE CODE
6 AND SEPARATE ENTITIES CERTIFIED AS CONTINUING CARE PROVIDERS UNDER
7 ARTICLE 70B OF THE CODE THAT PROVIDE SERVICES TO RESIDENTS OF A
8 COOPERATIVE HOUSING CORPORATION; OR

9 (VIII) A CONDOMINIUM ORGANIZED UNDER TITLE 11 OF THE REAL
10 PROPERTY ARTICLE AND CERTIFIED AS A CONTINUING CARE PROVIDER UNDER
11 ARTICLE 70B OF THE CODE AND SEPARATE ENTITIES CERTIFIED AS CONTINUING
12 CARE PROVIDERS UNDER ARTICLE 70B OF THE CODE THAT PROVIDE SERVICES TO
13 RESIDENTS OF A CONDOMINIUM.

14 23-102.

15 (A) IF A CONFLICT EXISTS BETWEEN THE EXPRESS TERMS AND CONDITIONS
16 OF AN OPERATING AGREEMENT AND THE TERMS AND CONDITIONS IMPLIED BY THE
17 LAW GOVERNING THE RELATIONSHIP BETWEEN A PRINCIPAL AND AGENT, THE
18 EXPRESS TERMS AND CONDITIONS OF THE OPERATING AGREEMENT SHALL GOVERN.

19 (B) A COURT MAY ORDER THE REMEDY OF SPECIFIC PERFORMANCE FOR
20 ANTICIPATORY OR ACTUAL BREACH OR ATTEMPTED OR ACTUAL TERMINATION OF
21 AN OPERATING AGREEMENT NOTWITHSTANDING THE EXISTENCE OF AN AGENCY
22 RELATIONSHIP BETWEEN THE PARTIES TO THE OPERATING AGREEMENT.

23 23-103.

24 EXPRESS COVENANTS OR OTHER PROVISIONS OF AN OPERATING AGREEMENT
25 THAT ESTABLISH A PARTY'S DUTIES AND OBLIGATIONS UNDER THE OPERATING
26 AGREEMENT CREATE THE ONLY DUTIES AND OBLIGATIONS ENFORCEABLE AGAINST
27 THE PARTY UNDER THE OPERATING AGREEMENT.

28 23-104.

29 IF AN OPERATING AGREEMENT STATES THAT IT SHALL CONTINUE FOR A
30 PERIOD OF TIME OR UNTIL THE HAPPENING OF AN EVENT, THE OPERATING
31 AGREEMENT SHALL BE ENFORCEABLE BETWEEN THE PARTIES UNTIL THE
32 EXPIRATION OF THE PERIOD OF TIME OR THE HAPPENING OF THE EVENT UNLESS
33 THE OPERATING AGREEMENT CONTAINS A RIGHT OF EARLY TERMINATION.

34 23-105.

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

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

4 23-106.

5 THIS SUBTITLE MAY NOT BE CONSTRUED TO:

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

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

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

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