

Department of Legislative Services
Maryland General Assembly
2022 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 40

(Delegate Watson, *et al.*)

Environment and Transportation

Judicial Proceedings

Condominiums - Disclosures to Unit Owners and Prohibited Provisions in
Instruments

This bill clarifies that a board of directors of a condominium may not withhold or agree to withhold from the unit owners the terms of any legal agreements to which the council of unit owners is a party. The bill also (1) alters the circumstances under which provisions within specified instruments are unenforceable and (2) establishes enhanced disclosure requirements, including those applicable to a unit owner in contracts for the sale of a condominium unit. The bill only applies to declarations, bylaws, or instruments recorded or executed on or after the bill's October 1, 2022 effective date.

Fiscal Summary

State Effect: The bill does not materially affect State finances or operations.

Local Effect: The bill does not materially affect local finances or operations.

Small Business Effect: None.

Analysis

Bill Summary/Current Law:

Closed Meetings

In general, any meeting of the governing body of a condominium must be open and held at a time and location as provided in the notice or bylaws. However, statutory provisions authorize a board of directors to meet in closed session for specified purposes, including to

(1) consult with counsel on legal matters; (2) investigate proceedings concerning possible or actual misconduct; and (3) consider the terms or conditions of a business transaction in the negotiation stage if the disclosure could adversely affect the economic interests of the council of unit owners. The bill clarifies that the provisions regarding closed meetings may not be interpreted to authorize the board to withhold or agree to withhold from the unit owners the terms of any legal agreement to which the council of unit owners is a party.

Initial Contracts of Sale

Under current law, a contract for the sale of a unit to a member of the public is not enforceable by the vendor unless:

- the purchaser is given on or before the time a contract is entered into between the vendor and the purchaser, a current public offering statement as amended and registered with the Secretary of State containing specific information; and
- the contract of sale, in conspicuous type, contains a notice of (1) the purchaser's right to receive a public offering statement and the purchaser's rescission right, as specified, and (2) the warranties provided under § 11-131 of the Real Property Article.

The bill adds that the notice required above must also include whether the council of unit owners has entered into any agreement that settles or releases the council of unit owners' claims related to common element warranties provided under §11-131 of the Real Property Article.

Unenforceable Provisions in Instruments

Any provision of an instrument, such as a declaration, bylaw, or contract for the initial sale of a condominium unit, made by a developer or vendor in accordance with the Maryland Condominium Act is unenforceable if the provision relates to the right to bring specified claims under applicable law and has specified effects. Currently, a provision is unenforceable if it:

- shortens the statute of limitations applicable to any claim;
- waives the application of the discovery rule or other accrual date applicable to a claim;
- requires a unit owner or the council of unit owners to assert a claim subject to arbitration within a period of time that is shorter than the statute of limitations applicable to the claim; or

- operates to prevent a unit owner or the council of unit owners from filing a lawsuit, initiating arbitration proceedings for a claim subject to arbitration, or otherwise asserting a claim within the statute of limitations applicable to the claim.

The bill requires a board of directors to disclose to the council of unit owners any agreement by the board for the purpose of settling a disputed common element warranty claim under § 11-131 of the Real Property Article at least 21 days prior to the execution of the agreement. A nondisclosure provision in an agreement may not prohibit disclosure by the board of directors to the council of unit owners.

Under current law, the provisions governing enforceability do not apply to agreements or other instruments (1) entered into by a developer or vendor and a council of unit owners for the purpose of settling a disputed claim after the date on which the unit owners, as specified, first elect a controlling majority of the members of the board of directors or (2) entered into by a developer or vendor and a unit owner for the purpose of settling a disputed claim after the date the unit is conveyed to the unit's purchaser. These provisions regarding applicability are unchanged in the bill.

“Vendor” means any person engaged in the business of erecting or creating an improvement on realty or to whom a completed improvement has been granted for resale in the course of his or her business.

Certificates and Notices for the Resale of Condominiums

Under current law, a contract for the resale of a unit by a unit owner other than the developer is not enforceable unless the owner discloses specified information to the purchaser no later than 15 days prior to closing. In addition to requiring that the contract of sale contain a specified notice (as discussed below), the unit owner must provide a certificate containing, among other items:

- a statement detailing the common expense assessment and any unpaid common expense or special assessment adopted by the council of unit owners that is due;
- a statement of any other fees payable by the unit owners to the council of unit owners;
- a statement of any capital expenditures approved by the council of unit owners which are not reflected in the current operating budget;
- the most recent regularly prepared balance sheet and income expense statement, if any, of the condominium;
- a statement of any unsatisfied judgments or pending lawsuits to which the council of unit owners is a party, excluding assessment collection actions; and

- a statement as to whether the council of unit owners has actual knowledge of any violation of the health or building codes with respect to the common elements of the condominium.

The bill adds that the certificate must include (1) a statement as to whether the council of unit owners has entered into any agreement that settles or releases the council of unit owners' claims related to common element warranties under § 11-131 of the Real Property Article and (2) a statement as to whether the board of directors has disclosed to the council of unit owners, in accordance with specified provisions, the board's intention to enter into an agreement for the purpose of settling a disputed common element warranty claim under § 11-131 of the Real Property Article.

The bill also requires specified notice that must be contained in a contract to include statements as to (1) whether the council of unit owners has entered into any agreement that settles or releases the council's claims related to common element warranties and (2) whether the board of directors has disclosed to the council, as specified, the board's intention to enter into an agreement for the purpose of settling a disputed common element warranty claim.

Implied Warranty on Common Elements (Unchanged by Bill)

Generally, in addition to the implied warranties set forth in § 10–203 of the Real Property Article, there is an implied warranty (under § 11-131 of the Real Property Article) on common elements from a developer to the council of unit owners. That warranty applies to the:

- roof;
- foundation;
- external and supporting walls;
- mechanical, electrical, and plumbing systems; and
- other structural elements.

The warranty also provides that the developer is responsible for correcting any defect in materials or workmanship, and that the specified common elements are within acceptable industry standards in effect when the building was constructed.

Section 10–203 of the Real Property Article establishes that, in every sale of property, in addition to any express warranty made by a builder, warranties are generally implied that, at the time of completion, any improvement is:

- free from faulty materials;
- constructed according to sound engineering standards;

- constructed in a workmanlike manner; and
- fit for habitation.

The warranties do not apply to any condition that an inspection of the premises would reveal to a reasonably diligent purchaser at the time the contract is signed.

For more information on condominiums, which, along with cooperative housing corporations and homeowners associations are commonly known as common ownership communities, see the **Appendix – Common Ownership Communities**.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Office of the Attorney General (Consumer Protection Division); Judiciary (Administrative Office of the Courts); State Department of Assessments and Taxation; Department of Legislative Services

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Appendix – Common Ownership Communities

When a person purchases a single-family home, condominium, or an interest in a cooperative housing corporation, he or she may also be required to join an association of owners, which is intended to act in the common interests of all the homeowners, condominium unit owners, or cooperative owners in the community. Collectively, these associations are often referred to as common ownership communities (COCs). In Maryland, a growing number of newly constructed or newly converted residences are located in some form of a COC.

The affairs of a condominium are governed by a council of unit owners, which comprises all unit owners. Among other powers, the council of unit owners has the power to impose assessments on the unit owners to pay common expenses. A council of unit owners may delegate its powers to a board of directors, officers, or a managing agent. Condominiums are governed under Title 11 of the Real Property Article.

Many new housing developments are subject to a homeowners association (HOA) that is created by a governing document and has the authority to impose mandatory fees on lots in the development in connection with the provision of services or for the benefit of the lots, the lot owners, or the common areas. HOAs are governed under Title 11B of the Real Property Article.

A cooperative housing corporation or “cooperative” is a corporation that owns real property. A resident of a cooperative does not own his or her unit; rather, the person owns an interest in the corporation, which leases the unit to the person for residential use. Cooperatives are governed by the laws in Title 5, Subtitle 6B of the Corporations and Associations Article.

Condominiums and HOAs may be authorized by their governing documents to impose liens on units or lots to collect unpaid assessments or fees. In a cooperative, the governing documents usually provide for the collection of delinquent fees, and evictions for unpaid fees are generally pursued by way of a landlord-tenant action.

Since registration of the various COCs is not required statewide, the exact number of COCs in Maryland is unknown. However, public offering statements for condominium regimes are required by law to be registered with the Secretary of State (SOS). SOS registration records show that, as of December 2021, 2,768 condominium regimes have been registered with the State. The State Department of Assessments and Taxation, which maintains assessment records based on class of property, reports that there are more than 225,000 condominium units in the State as of July 2021. The Foundation for Community

Association Research estimated that there were 6,850 community associations with an estimated 1 million residents in these associations in the State in 2020, the most recent information available.

Task Force on Common Ownership Communities

With a growing number of Marylanders residing in COCs, and evidence that some COCs had issues with governance, dispute resolution, and financial stability, the General Assembly created the Task Force on Common Ownership Communities in 2005 (Chapter 469 of 2005). The issues addressed by the task force included the education and training needs of COC boards and prospective buyers, availability of alternative dispute resolution services, special considerations of aging COCs, collection of assessments, and resale of homes within COCs. The task force met 10 times, held five public hearings, and submitted its final report in December 2006. The report's findings and recommendations have served, in subsequent years, as the basis for numerous pieces of legislation intended to improve the operation of COCs. This legislation, enacted from 2007 through 2021:

- authorized a group of three or more unit or lot owners in a condominium or HOA to petition a circuit court to appoint a receiver in specified situations frequently found in aging communities (Chapter 321 of 2007);
- gave the Consumer Protection Division within the Office of the Attorney General increased authority over violations of the Maryland Homeowners Association Act (Chapter 593 of 2007);
- eased restrictions on the ability of condominiums and HOAs to amend their governing documents (Chapters 144 and 145 of 2008 and Chapter 480 of 2017);
- strengthened the transition process from developer to the governing body of a condominium or HOA by allowing the governing body to terminate specified contracts and requiring the developer to provide specified documents (Chapters 95 and 96 of 2009);
- required the governing body of a COC to purchase fidelity insurance or a fidelity bond covering various acts of malfeasance by COC officers, directors, and other specified employees and agents (Chapters 77 and 78 of 2009 and Chapter 615 of 2010);
- granted priority to a specified portion of a lien of a condominium or HOA over the claim of a holder of a first mortgage or first deed of trust in the event of a foreclosure on a unit or lot (Chapter 387 of 2011);
- limited the amount of damages for which the governing body of a condominium or HOA may foreclose on a lien against a unit owner or lot owner (Chapters 448 and 449 of 2013);
- expanded the purposes for which a condominium's board of directors may hold a closed meeting, similar to the law for an HOA, by allowing a meeting to be closed to consider terms or conditions of a business transaction in the negotiation stage if

disclosure could adversely affect the economic interests of the council of unit owners (Chapter 110 of 2013);

- established meeting standards and standards for late charges for delinquent payments, eviction restrictions, an auditing process for books and records, and a dispute settlement mechanism for cooperatives under specified circumstances (Chapter 567 of 2014);
- altered the contents of a required disclosure for the resale of a condominium unit, authorized the assessment of specified fees by a condominium council of unit owners or an HOA for providing specified information, and required the Department of Housing and Community Development to adjust the maximum authorized fees every two years (Chapter 735 of 2016 and Chapter 817 of 2017);
- increased to \$10,000 the maximum amount of the council of unit owners' property insurance deductible for which a specific unit owner is responsible if the cause of any damage to or destruction of the common elements or units of a condominium originates from an event inside that owner's unit (Chapters 56 and 57 of 2020); and
- established that specified COCs in Montgomery and Prince George's counties generally conduct a reserve study every five years to determine the amount and necessity of reserves for anticipated capital replacements, repairs, and improvements. COCs must also adequately fund the recommended reserves, as specified (Chapter 138 of 2020 and Chapter 433 of 2021).

The task force's report also featured findings and recommendations relating to the creation of an ombudsman in local governments. Since the report's release, Prince George's County created its Common Ownership Communities Program in 2007 with the stated purpose of assisting governing bodies, as well as owners and residents of HOAs, residential condominiums, and cooperative housing corporations, with education, training, and alternative dispute resolution. Charles and Montgomery counties have offices dedicated to COCs that predate the task force.

Finally, findings and recommendations of the report that have not been codified in statute pertain to statewide requirements for reserves of COCs and the uniformity of COC depository requirements.