THOMAS SCHILD
LAW GROUP, LLC

401 North Washington Street, Suite 500
Rockville, Maryland 20850

Tel: 301-251-1414 law@schildlaw.com
Fax: 301-251-6636 www.schildlaw.com

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Community Association LawLetter

FHA REVISES CONDO GUIDELINES --- AGAIN

The Federal Housing Administration (FHA) has again issued revised eligibility standards for FHA project approval for condominiums.

The new guidelines issued June 30, 2011 include the following changes:

- Bank-owned properties are included in calculating the number of delinquent owners.

- The allowable delinquency rate is increased to 20 percent if specified financial standards are met.

- Management companies must maintain fidelity insurance for officers, employees, and agents to handle association funds.

- For any special assessment, information must be provided as to whether the assessment affects the current or future marketability of the property.

New Certification Requirement

Additionally, the new FHA standards require a certification that the submitter of the FHA application has "no knowledge of circumstances or conditions that might have an adverse effect on the project or cause a mortgage secured by a unit to become delinquent". Such circumstances include (a) defects in construction; (b) substantial disputes or dissatisfaction among unit owners about the operation of the project of the owners association; and (c) disputes concerning unit owners' rights, privileges and obligations.

The new FHA standards also impose a "continued obligation to inform HUD if any material information compiled for the review and acceptance for this project is no longer true and correct".

The Community Associations Institute has informed FHA of its concerns about the revised FHA standards noting that it adds "more uncertainty and confusion to the FHA approval process".

ASSOCIATION COVENANTS REQUIRING TRANSFER FEE OK'D BY FEDERAL AGENCY

The Federal Housing Finance Agency (FHFA), which oversees and regulates Fannie Mae and Freddie Mac, has dropped its opposition to condominium and homeowner association covenants which require a purchaser or seller to pay a transfer fee to the association when a property is sold.

Although transfer fees are not common in the Washington/Baltimore region, such fees are often used in other areas of the country to raise capital reserve funds for associations.

The FHFA had proposed in August 2010 to disallow transfer fees on loans purchased or guaranteed by Fannie Mae or Freddie Mac. In response to strong opposition by the Community Associations Institute and associations which utilize transfer fees, the FHFA announced in a February 2011 proposed rule making that it would allow Fannie Mae and Freddie Mac loans where the seller or purchaser is required to pay a transfer fee to the condominium or homeowners association.

The allowable transfer fees must be used to support maintenance and improvements in the community. The proposed FHFA rule does not address the appropriate level of transfer fees, but invited public comments on that issue. A final FHFA rule has not yet been issued.

Faced with growing budget shortfalls due to the high number of delinquent owners, some associations are amending their governing documents to establish transfer fees as an added source of income.

NEW MARYLAND LAWS EFFECTIVE OCTOBER 1

New laws affecting Maryland condo and homeowner associations enacted earlier this year take effect October 1.

Assessment Liens

For mortgages obtained after October 1, 2011, association assessment liens will have a limited priority over the mortgage in the event of lender foreclosure. The priority will be for up to 4 months of assessments with a maximum of $1200. The priority is for regular assessments and does not cover interest, late fees, collection costs, attorneys fees, fines or special assessments.

At the request of a lender, the association must inform the lender of the amount of the lien priority. The lien must also separately state the priority amount.

Condominium Insurance

Where the cause of damage to common elements or units originates in a unit, the owner of that unit is responsible for payment of up to $5,000 of the repair cost.

Beginning October 1, condominium bylaws may be amended by 51 percent of the voting interests to require homeowners to obtain an HO-6 insurance policy which covers repair costs up to $5,000 of the deductible amount under the condominium master insurance policy.

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NEW MARYLAND LAWS
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By requiring owners to obtain individual insurance policies to cover such repair costs, condominium associations will be better able to recover that cost from the unit owner where the common elements are damaged and the cause originates in the owner's unit. The new law encourages condominiums to require individual HO-6 insurance policies by making it easier to amend the bylaws to require such insurance.

MONTGOMERY COUNTY CCOC ENFORCES ASSOCIATION ARCHITECTURAL COVENANTS

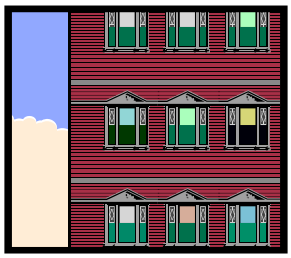
Several recent decisions of Hearing Panels of the Montgomery County Commission on Common Ownership Communities (CCOC) have upheld the actions of condominium and homeowner associations in enforcing architectural covenants.

Air Conditioning Unit Not Allowed

In *Verchinski v. Plymouth Woods Condominium Association*, a homeowner challenged the Board's denial of the owner's request to install an air conditioning unit on the condominium common elements. The owner lived in a third floor unit and sought permission to install a freon line over the common element wall to an air conditioning unit on the ground outside a first-floor unit.

The board of directors denied the architectural application on the basis of the aesthetic appearance of the freon line, the noise generated outside of ground level units and the precedent for other owners wanting to install air conditioning units on the ground level common elements.

In evaluating the action of the condominium board of directors, the CCOC Hearing Panel applied the legal standard articulated by the Maryland Court of Appeals in *Kirkley v. Seipelt* (1957) that "any refusal to approve the external design or the location [by the association] would have to be based on a reason that bears some relation to the other buildings or the general plan of development; and this refusal would have to be a reasonable determination made in good faith, and not high-handed, whimsical or captious in manner."



Noting that the owner's existing air conditioning unit was installed within the condominium unit and that a replacement air conditioning unit could be installed in the condominium unit, the CCOC Hearing Panel concluded that the board was reasonable in denying the owner's request to install a new air conditioning unit outside her unit on the ground level common elements. The CCOC Hearing Panel also noted that allowing ground floor owners to install air conditioning units on the common elements immediately adjacent to their units did not have the same potential to disturb other owners and did not require running a freon line on the exterior common element wall. Therefore, the existence of air conditioning units installed on the common elements by ground floor unit owners did not make unreasonable the denial of the third floor owner's air conditioning unit.

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MONTGOMERY COUNTY CCOC
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Trees Violate Architectural Covenant

In *Foo v. Dellabrooke Homeowners Association, Inc.*, homeowners contested a homeowners association enforcement action with regard to trees which had been installed on the owners' property for more than 6 years.

The architectural covenant required prior approval of any "landscaping modification". In 2003, the owners planted Leyland Cypress trees on their property along the property line without obtaining association approval. In July 2004, the association adopted Guidelines which prohibited trees planted within 3 feet of a property line and grandfathered any previous approval for trees planted closer than 3 feet.

The neighboring homeowner objected to the trees because the tree branches grew over the neighboring property and caused the neighbor to incur tree maintenance responsibility and expenses. The owners who installed the trees contended that they were told by the President of the association when the trees were planted that no architectural change application was necessary. The CCOC Hearing Panel was not convinced that the Association approved or waived its right to require approval by the alleged authorization by the President. It specifically noted that that "oral permission from one officer or director or employee of a community association cannot constitute binding permission from the community itself if the community's rules require approval from a full committee or from the entire board".

The Hearing Panel concluded that the unapproved trees were planted in violation of the architectural covenant and were not grandfathered by the 2004 Guidelines which only allowed previously-approved trees planted within 3 feet of a property line. Nevertheless, the Hearing Panel declined to require removal of the trees and urged the owners and association to negotiate an arrangement satisfactory to all parties or, alternatively, submit a proposed remedy to the Hearing Panel that "balances the needs" of both neighboring owners and the association.

THOMAS SCHILD LAW GROUP, LLC represents condominiums, cooperatives, and homeowner associations in Maryland and Washington, D.C. The firm advises community associations on all aspects of association operations including covenant enforcement, assessment collection, developer warranties, maintenance and management contracts, and association document interpretation. Thomas Schild Law Group also represents community associations in court litigation and administrative hearings.
