

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
Third Reader

Senate Bill 258

(Senator Kelley, *et al.*)

Judicial Proceedings

Environment and Transportation

**Condominiums – Claims Against Developers and Vendors – Unenforceability of
Certain Provisions**

This bill establishes that 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 (MCA) is unenforceable if the provision places specified limitations on specified building defect and other claims.

The bill applies prospectively and may not be interpreted to have any effect on any provision of a declaration or bylaws of a condominium recorded in the land records of the county where the property is located or any other instrument executed before the bill's October 1, 2018 effective date.

Fiscal Summary

State Effect: The bill does not directly affect State governmental operations and finances.

Local Effect: The bill does not directly affect local governmental operations and finances.

Small Business Effect: Minimal.

Analysis

Bill Summary: The term “vendor” has the same meaning as it does under § 10-201(e) of the Real Property Article.

The bill states that any provision of an instrument made by a developer or vendor, including a declaration, a bylaw, and a contract for the initial sale of a unit to a member of the public, is unenforceable if the provision:

- 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 applicable statute of limitations.

This nullification applies to a provision relating to any right of a unit owner or council of unit owners to bring a claim under applicable law alleging the failure to comply with (1) applicable building codes; (2) plans and specifications approved by a county or municipality; (3) manufacturer's installation instructions; or (4) specified warranty provisions contained in statute.

The bill does not apply to (1) a unit that is occupied and used solely for nonresidential purposes; (2) an agreement or other instrument entered into by a developer or vendor and a council of unit owners designed to settle a disputed claim after the date on which the unit owners, other than the developer and its affiliates, first elect a controlling majority of the board of directors for the council of unit owners; or (3) an agreement entered into by the developer or vendor and a unit owner to settle a disputed claim after the date the unit is conveyed to the purchaser of the unit.

Current Law: "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.

Under MCA, the governance of every condominium is determined by its bylaws, which must be recorded with the declaration. If the council of unit owners is incorporated, the bylaws must be the bylaws of that corporation. The bylaws also may contain a provision regarding the management and operation of the condominium, including any restriction on or requirement respecting the use and maintenance of the units and the common elements. Generally, the bylaws of a condominium may be amended by the affirmative vote of unit owners "in good standing" having at least 60% of the votes in the council of unit owners, or by a larger percentage if required in the bylaws. "In good standing" means not being more than 90 days in arrears in the payment of any assessment or charge due to the

condominium. In contrast, the declaration of a condominium may be amended in specified circumstances only with the written consent of 80% of the unit owners listed on the current roster.

Background: The Secretary of State advises that, in 2017, there were 2,875 condominium regimes in the State, and the State Department of Assessments and Taxation reports that there were 225,947 condominium units. For more information on common ownership communities, see the **Appendix – Common Ownership Communities**.

Additional Information

Prior Introductions: HB 676 of 2017 passed the House as amended and was referred to the Senate Judicial Proceedings Committee, but no further action was taken. Its cross file, SB 670, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. SB 250 of 2016, a similar bill, received an unfavorable report from the Senate Judicial Proceedings Committee; its cross file, HB 1170 of 2016, likewise received an unfavorable report from the House Environment and Transportation Committee. SB 570/HB 829 of 2015, similar bills, were withdrawn. SB 207 of 2014, another similar bill, passed the Senate but received an unfavorable report from the House Environmental Matters Committee; its cross file, HB 259, also received an unfavorable report from the House Environmental Matters Committee. SB 167 of 2013, another similar bill, passed the Senate as amended but received an unfavorable report from the House Environmental Matters Committee. Likewise, HB 1141 of 2013 (another similar bill) received an unfavorable report from the House Environmental Matters Committee. SB 725/HB 740 of 2012, similar bills, both passed the Senate and the House, but conference committees were not fully appointed to resolve the differences.

Cross File: HB 77 (Delegate Holmes) - Environment and Transportation.

Information Source(s): Secretary of State; Judiciary (Administrative Office of the Courts); State Department of Assessments and Taxation; Foundation for Community Association Research; Office of the Attorney General (Consumer Protection Division); 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). Statewide for 2017, the SOS registration records show that there are 2,875 condominium regimes, and the State Department of Assessments and Taxation, which maintains assessment records based on class of property, reports that there are 225,947 condominium units. The Foundation for

Community Association Research estimated that there were 6,700 community associations in the State in 2016.

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 2017:

- 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); and
- 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).

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 County and Montgomery County 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 reserves of COCs, an insurance deductible cap for unit owners, and the uniformity of COC depository requirements.