

PAMELA B. SOROTA

Attorney at Law
10721 Midsummer Lane
Columbia, MD 21044
(410) 964-2304 (Telephone) (410) 908-3544 (Cell)

psorota@aol.com

June 4, 2015

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED

Virginia M. Thomas, Co-Chair
William R. McCormack, Co-Chair
Board of Directors
Oakland Mills Community Association
The Other Barn
5851 Robert Oliver Place
Columbia, MD 21045

You have asked me to advise you with respect to the authority and responsibilities of the Oakland Mills Board of Directors (the "Board") in connection with the complaint-driven covenant enforcement process, as detailed in the governing documents which were provided to me with your letter dated March 16, 2015. Specifically, you have asked me to clarify the relationship between the Board and The Columbia Association, to address the roles of the various parties ultimately involved following notice of a potential covenant violation, to provide you with an overview of the process itself, and to outline the rights and obligations of Oakland Mills Village residents to assure fair and equitable compliance. This letter is intended as a summary of and follow-up to our meeting of May 26, with emphasis on the specific questions contained in the Scope of Work outlined in your letter.

As noted in our meeting, in order to provide this information to you, I have reviewed all of the governing documents, researched relevant provisions of Maryland and Howard County law, and at your request, consulted with CA's counsel. I have also relied on my experience as a commercial real estate lawyer and inquired as to the policies and procedures utilized in another village with respect to architectural control.

I. Overview of the Complaint-Driven Covenant Compliance Process:

As you well know, although it is the second largest population center in Maryland, the new town of Columbia was never incorporated as a city or municipality.

Its infrastructure and services are provided by Howard County. Some governance, however, is provided by the non-profit Columbia Association ("CA"), which manages common areas and functions as a homeowners association with regard to private property. The relationship between the owners of real property and CA is detailed in the Declaration of Covenants, Easement, Charges and Liens (the "CA Covenants"), and with respect to the Village of Oakland Mills (the "Village"), in the Oakland Mills Village Covenants (the "Village Covenants") both of which were recorded among the Land Records of Howard County prior to the sale of a subdivided lot within the Village to its first homeowner or commercial property owner. These documents "run with the land" and constitute a private contract, binding on all subsequent owners of land within Oakland Mills. Under these recorded documents, the owners agree to pay an annual fee to CA, and agree to restrict their property to certain architectural and use covenants detailed in the Village Covenants.

The governance and management of the Village is set forth in the two documents creating its legal existence as a homeowners association. According to its Articles of Incorporation, the Oakland Mills Community Association, Inc. ("the Association") is a non-profit civic organization formed to "*benefit, aid, promote and provide for peace, health, safety, convenience, comfort and the general welfare of the owners of property in, and the residents of the Village, and to assist CA in the operation, maintenance and development of community facilities and services*" located in the Village. The Oakland Mills Association By-Laws further explain that Lot owners (and/or their Tenants) within the Village constitute the voting Members of the Association, who elect a Board of Directors (the "Board"), to set policies for the governance of the Village. The Chairman of the Board (the "Board Chair") is elected by the Board from its members. Under the governing structure, the Board has the power and authority *inter alia*: (i) to appoint a person (who does not have to be a member of the Association) to serve as the Manager of the Association (the "Village Manager"), whose duties include managing the day to day operation of the Association, under the supervision of the Board, (ii) to form and appoint standing and *ad hoc* committees, and (iii) to determine from time to time whether and to what extent the books, accounts and documents of the Association shall be open to the inspection of residents of the Village.

It is the Village Covenants which expressly address architectural requirements and restrictions and provide the following relevant information with respect to maintenance obligations and enforcement:

Section 6.01 provides that each Owner shall keep all Lots owned by him and all improvements therein "*in good order and repair, including but not limited to, the seeding, watering and mowing of all lawns, the pruning and cutting of all trees and shrubbery and the painting (or other appropriate external care) of all buildings and other improvements,*" in a manner and with such frequency as is consistent with good property management. Section 7.06 provides that if any structure is "*altered, erected, placed or maintained in violation of the plans and specifications*" approved by the Architectural Committee, any such use shall be "*removed or realtered, and terminated so as to extinguish such violation.*"

A. What is the responsibility, authority and oversight obligations for covenant compliance of: Village Board of Directors/Architecture Committee Members, Village Board of Directors Chairperson, Architecture Committee Chairperson, Village Manager, Covenant Advisor, Agent of the OMCA:

The Covenants provide extensive details of architectural control, specifying that an Architectural Committee composed of three or more individuals designated from time to time by CA and the Association (CA having the authority to appoint a majority thereof) shall adopt rules and regulations for and make findings determinations, authorizations or approvals of all material exterior changes to any existing structure. According to the Oakland Mills Architectural Committee By-Laws approved by the Board on 4/10/90 and amended 2/13/96 (the "AC By-Laws"), the Architectural Committee ("AC") is comprised of **all** of the members of the Board.

Although the provisions addressing procedures for applications for exterior changes to any structure or use within a Lot (and appeals from the denial thereof) are clear and straightforward (and beyond the scope of this letter), the provisions specifying the procedures for the investigation, resolution and enforcement of covenant violations have caused some confusion as to the roles and responsibilities of the Architectural Committee *vis-à-vis* those of the Board, CA, and the Village Covenant Advisor ("Covenant Advisor") - a paid administrative employee, hired and supervised by the Village Manager, who is, in turn, hired and supervised by the Board. In accordance with a policy on Covenant Administration, adopted by the Board of April 26, 1994 (the "Policy"), the prevailing principle in all aspects of the Covenant Advisor's job is educating residents about the covenants and guidelines, and with respect to allegations of covenant and maintenance violations, "to use his or her own judgment in determining the appropriate response", taking care "to avoid the violations process being used as a vehicle for neighborhood disputes."

Except with respect to the creation of the Architectural Committee, nothing in the governing documents or the Covenants themselves expressly requires the Board to assume responsibility, authority or oversight obligations for Covenant compliance. Nor does the Board Chair or the Village Manager participate directly in the process. Although over the years, from time to time, the Board and/or the Village Manager may have assumed or been required to assume oversight of the process, I was not provided with evidence of historical instances where this has occurred.

It should be noted, however, that none of the governing documents mentions or provides for a covenant advisor. This position is apparently created under the auspices of the policies and recommendations of CA and the earlier actions of the Board. The Oakland Mills Community Association Architectural Guidelines, most recently revised in January 2012 (the "Guidelines"), as well as the AC By-Laws as originally adopted by the Board in April of 1990, and most recently amended in February of 1996), establishes the relationship between the Covenant Advisor and the Architectural Committee. This document states that with respect to Covenant violations, it is the Covenant Advisor who determines whether reported problems are violations of the Covenants, and *will report those which cannot be resolved to the Architectural Committee*", which will then "visit the site of violations reported to it by the Covenant Advisor and will, at a public meeting, determine whether to send a 15 day notice."

As can be seen by the quoted language from the AC By-Laws, the Architectural Committee does not get officially involved in the enforcement process until such time as the Covenant Advisor determines that a violation cannot be resolved.

B. *When may each of the above individuals or groups enter onto a property owner's lot to assess the condition of the property?*

Under Section 7.09 of the Covenants, any agent of CA, the Association or the Architectural Committee "may at any reasonable time or times enter upon and inspect any Lot and any improvements thereon for the purpose of ascertaining whether the maintenance of such Lot and the maintenance, construction, or alteration of Structures thereon are in compliance with the provisions" of the Covenants, without being deemed to "have committed a trespass or other wrongful act by reason of such entry or inspection." A member of the Board, the Architectural Committee Chairperson, the Village Manager, and the Covenant Advisor would all qualify as an "agent" for purposes of this right. As to when entry is permitted, it would appear to be triggered by some complaint. Section 8.08 further provides for a right of entry by CA and the Association to trim or prune trees, hedges or other planting which in their determination are unreasonably detrimental to the adjoining property or obscures the view of street traffic or is unattractive in appearance, on fifteen days prior written notice.

C. *Who has Standing to make a Covenant Complaint?*

The restrictions in the Covenants inure to the benefit of and are enforceable by CA, the Association and any owner of any Lot until December, 2016, after which the Covenants are automatically extended for successive periods of ten years. Although the complaint process itself is not specifically addressed, implicit in the language "inure to the benefit of" is the authority to commence a complaint with the intent to enforce the Covenants. Columbia, as a planned community, is deemed to be a "general scheme of development" and the covenants and restrictions deemed to be of benefit to all residents. A Board Member may initiate a complaint with respect to specific property, as well as any member of the Village or agent of the Association.

D. *Upon receipt and conformation of covenant violations, when should a 360 be conducted on the property?*

The procedures for Covenant enforcement are not mandated by any of the governing documents. However, the following process seems to be currently in effect: after filing of complaint, the Covenant Advisor makes a site visit within 1-14 days. If violations complained about are confirmed, a letter is sent, requesting that those violations be corrected by a certain date. If there is no response or the property owner fails to correct the noted violations, a second letter is sent with a new time for correction of violations. If there is still no resolution, the Covenant Advisor may ask Architectural Committee to issue 15-day notice and refer the matter to CA. Although there is no definitive requirement that all violations be noted at any particular point in

time, it is a policy decision to be adopted by the Board as to when the Covenant Advisor, the Architectural Committee, or any agent of the Association may (or should) make a site visit and include **all** noticeable violations or potential violations in the notice to the Lot Owner. This process appears to be different in other villages within Columbia.

E. What is the minimum timeframe to work through each step of the process that meets legal scrutiny?

As noted above, it would appear that the minimum time frames for resolution of Covenant violations are not mandated by governing documents. Likewise, there is no specific requirement in the Homeowners Association Act, except for adequate notice (which means whatever the covenant enforcement scheme may specify for each particular association). In the Village, these time frames depend in large degree upon the amount of cooperation the violator offers. There are situations where the Covenant Advisor, in an attempt to meet the Board's direction set forth in the Policy, determines that because of health or financial considerations, longer periods of time for correction of violations may be required. On the other hand, direct refusals or deliberate disregard for the requirements to correct violations may, in the Board's opinion, require much speedier attention by the Covenant Advisor, and if so, the Policy should be revised to fast-track such cases. The current process is cumbersome, leaves a great deal of (presumably) unsupervised discretion to the Covenant Advisor, and provides no requirements for feedback to the complaining members of the public or to the Board. CA General Counsel's view seemed to be that the process would take a minimum of 45 days to one year at the Village level (with at least three different notices being sent). Documentation of all notices and photographs are then submitted to CA's Architectural Resource Committee ("ARC"), which meets once per month to review all requests for legal action. Site visits by the ARC are required. If the ARC accepts the case, it is then referred to the President of CA who decides within one week to whether to accept or decline ARC's recommended action, which can include taking legal action against the property owner, flagging the file in the court records to note the violations, denying access to CA facilities until violations are corrected, or placing the property under the recently adopted by CA as its Abandoned/Vacant House policy, performing basic maintenance required, billing the property owner, and placing a lien on the property. The process could easily take two years from the time of the filing of the original complaint until resolution. CA's General Counsel indicated that once the property owner receives notice that the matter has been referred to CA for court action, which could include CA's legal fees, most violators agree to bring the property into compliance. It should be noted that under the provisions of the Maryland Contract Lien Act, a party seeking to create a lien against a property as a result of a breach of contract (e.g. Covenant violation) must do so within two years of the breach. This provision would apply only when CA (and/or the Association itself) has determined to exercise "self-help"--- in other words, take action to correct the violation and charge the property owner for its expenses, including costs and reasonable attorney's fees. CA points with pride to its success in the courts, indicating that 100% of its cases have resulted in judgments for the Association. Although action could be taken by the Association under the self-help provisions, it appears that only in the case of dangerous nuisances has it or CA done so.

II. The Board's Rights as a Homeowners Association:

A. *What is the relationship between the OMCA as an HOA and the CA?*

In addition to its Articles of Incorporation (the "Charter") and By-Laws, CA has the benefit of the document entitled Deed, Agreement and Declaration of Covenants, Easements, Charges and Liens, dated December 13, 1966 ("CA Covenants"). The Charter provides for the future establishment of non-profit membership corporations, which includes the Association. The CA Covenants establish the private contract between CA and all owners of property in Columbia with respect to the provision of certain services and the payment of annual charges. Although not strictly a "tax", these annual charges constitute a lien on all properties in the Village and has priority over all mortgages recorded after the date of the CA Covenants. It does not impose architectural restrictions.

As noted earlier in this letter, the Village Covenants address the relationship with CA in several ways, including the election of a representative from the Village to the Board of Directors of CA, and the right of CA to appoint the majority of the members of the Architectural Committee. CA also has the right to have its agents enter onto properties within the Village in connection with covenant enforcement, and to promulgate and adopt reasonable rules and regulations regarding the administration, interpretation and enforcement of the Covenants, taking into consideration the best interests of the property Owners "*to the end that the Property shall be preserved and maintained as a high quality community.*" In the 40+ years since the administration of the Covenants has been in the hands of each of the various villages in Columbia, various policies and procedures have been recommended by CA and adopted by the Association in order to facilitate the enforcement of the Covenants.

1. *Does CA have any legally binding duty to OMCA for covenant litigation and maintenance enforcement, and who (CA or the Board) is ultimately responsible to Oakland Mills lot owners for covenant maintenance enforcement?*

It should be noted that the current procedures, as outlined in a presentation by CA to the Board dated November 20, 2014, envision a relationship whereby CA takes over the enforcement of covenant violations, following the investigation and failed attempts at resolution by the Association. However, CA does not have a legally-binding duty to the Association to take a particular case to court to ensure enforcement of the Covenants. [SEE: I. E. above for role of ARC and President of CA.]

2. *Can a lot owner in OM sue the Board for not enforcing the OMCA Covenants Village-wide?*

Of course, frustrated complaining Lot Owners might attempt to hold the Board or CA responsible for failure to enforce the Covenants, but the individual members of the Board would be protected from liability under the provisions of Article Ninth, paragraph 4 of the Association's Articles of Incorporation, except for negligence or misconduct in the performance of duty. It is extremely unlikely that such a suit

would be successful against the Board, since it has no direct responsibility for Covenant enforcement. Private suits between neighbors can be maintained for monetary damages arising out of the violation of the Covenants.

3. What is the relationship between OMCA as an HOA and other HOA's within OM (i.e. townhomes and condominium associations) regarding their Covenant enforcement and OMCA covenant enforcement?

Some properties within the Village are also are part of a particular development homeowners or condominium association, with its own governing board, maintenance obligations, fee structure, and in some cases, separate recorded architectural and use restrictions. If and to the extent these private development homeowners associations fail to comply with the Covenants, the Association has the authority to enforce the restrictions. However, these private developments have sole responsibility for enforcement of more restrictive covenants contained in their own governing documents. As an aside, from my own personal experience whenever I have formed a private homeowners association for a development within Columbia, I have incorporated by reference the relevant village covenants, and required that all applications for changes to exterior structures and uses go through the relevant process adopted by the village in which the development is located, and have provided that enforcement may be undertaken either by the private association or by the village architecture authorities in accordance with the village covenants, or both.

4. Can OMCA cite these sub-HOAs lots if OMCA maintenance covenants have greater maintenance requirements?

Yes. [See 3. Above]

III. Information Access:

You have indicated that the Board has required a report with specific lot addresses, violations, etc. from the Covenant Advisor (who, citing the Architectural Committee By-Laws, has refused to do so), and you have questioned as to when and under what circumstances a site-specific violation may be investigated by the Board and/or information published and/or discussed in an open meeting of the Board, under what circumstances a meeting of Board must be closed to the public, and what, if any, rights to privacy does a resident have when a complaint is received by the Covenant Advisor.

Rather than address each of your specific questions regarding the right of the Board and the Architectural Committee to obtain site specific information and reports, the privacy and confidentiality rights of those who file complaints as well as those property Owners against whom complaints have been filed, and the rights of the members of the public to have such information, I would like to emphasize again, as I did at our meeting, that the Board and the Architectural Committee are two different and separate bodies. The Board is bound by its three governing documents; it must govern the Association by overseeing the administration and responding to the issues and complaints it receives from the members of the Association. It must see that the Association's business is properly attended to by appointing the Village Manager, who

in turn hires staff to take care of the day-to-day administration of the Association. To the extent that members of the Association notify individual Board Members of problems directly affecting such members, it is entirely appropriate for a Board Member to investigate, be it allegations of financial mismanagement, neighborhood problems, or Covenant enforcement issues. As elected overseers of the Association, the Board has the inherent duty to seek answers and provide those answers to the affected members of the public, subject, of course; to applicable law. Although under the current documentation and written procedures neither the Board, its chairperson(s), nor the Village Manager have a specified role to play in the covenant enforcement process, as with any matter or issue affecting the Village, the Board has the right to obtain certain information of importance to the constituent members of the Association, and the Village Manager has the responsibility to oversee the employees of the Association. If Covenant enforcement is being questioned, then individual members of the Board may certainly be permitted to inquire of the Village Manager and the Covenant Advisor as to specific complaints of violations, and ultimately (with input from the Village Manager) the Board as a whole may evaluate the performance of the Covenant Advisor in terms of his or her compliance with the Guidelines, AC By-Laws, and the Policy.

For that reason, the position can be taken that the Board, acting in its capacity as a Board of Directors, would appear to have the power and authority to request, through the Village Manager, that the Covenant Advisor provide a monthly list of complaints being investigated, the status of each investigation, and the specific addresses of the properties being investigated. (I have attempted to answer the question of whether the Board as a whole should receive that information in open or closed session in the last paragraph of this letter.)

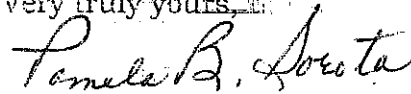
The problem arises in the apparent conflict with the provisions of the enforcement scheme under which the Board has appointed all its members to be the members the Architectural Committee. It could easily be argued that in doing so, it has delegated all of its authority to deal with all things architectural to the Architectural Committee and no longer has the power and authority to act in this arena in its capacity as a Board of Directors. According to the express language of the Guidelines, it is the Architectural Committee (not the Board) that has the authority to require property owners to abide by the provisions of the Covenants. [page 1, *Statement of Responsibility and Authority*.] The Covenant Advisor assists the Architectural Committee in enforcing the Covenants. Because of the Policy adopted in April, 1994 (and quite apparently still in effect) the guiding principle of Covenant administration in the Village is *education*, and the Covenant Advisor is given broad latitude "to exercise his or her judgment regarding both the seriousness of the violation and the nature of the complaint". For that reason, the provisions of the By-Laws indicating that the Architectural Committee's duties with respect to complaint-driven Covenant enforcement appear not to arise until such time as the Covenant Advisor determines to ask for assistance by the issuance of a another 15-day letter and to request CA enforcement, the Covenant Advisor can refuse to provide the requested report to the Architectural Committee (and by extension, arguably, to the members thereof.) (I hasten to add that nothing in the governing documents requires that any member of the Board be a member of the Architectural Committee, as described in the Covenants. A creature of the Board, the Architectural Committee can be dissolved

and reconstituted at any time.) But while it is acting as the Architectural Committee, it must follow the Guidelines, By-Laws, and policies which the Board has determined should govern (which also can be changed from time to time as deemed appropriate by the majority of the Board). It is the responsibility of the Board to update the Guidelines at least every four years, and to amend and revise the rules and regulations with respect to architectural control as it sees fit, and this might be a good time to do so.

Under the Guidelines, complaints about Covenant violations are confidential. It is unclear whether this provision is intended to protect the complaining property owner or the property owner who is in violation, or both. There is nothing in the Maryland Homeowners Act or the Board's governing documents which would absolutely require the protection, privacy and confidentiality rights of either with respect to alleged violations of the Covenants (although there may be policies adopted by CA and/or the Association to the contrary, which have not been provided to me). CA's General Counsel has taken the position that if any requested report deals with specifically-identified property which is likely to go to litigation, then it must be held confidential. Unfortunately, this position does not in any way meet the requirement of providing on-going feedback to the persons who are directly affected by the failure of violations to be addressed in a timely manner so as to "*provide for peace, health, safety, convenience, comfort and the general welfare of the owners of property*" in the Village, nor does it speak to the issue of how the Board can determine the compliance of the Covenant Advisor with the policies and guidelines which the Board has adopted. To the extent that the Board's inquiry is focused on the latter, then under the provisions of the Homeowners Association Act, "*discussions of matters pertaining to employees and personnel*", as well as "*consultation with staff personnel, consultants, board members, or other persons in connection with pending or potential litigation or other legal matters*" must be held in closed session, and its subject matter held confidential. I emphasize again that ~~any Board member may consult with the Village Manager and the Covenant Advisor in order to obtain site-specific information regarding a particular violation and report back to the complaining member of the Village as to the status of that one complaint.~~ It is only when the Board acts as a body and requires the information as to the status of ALL complaints of violations that the above issues arise.

I trust this answers your inquiry.

Very truly yours,



Pamela B. Sorota