

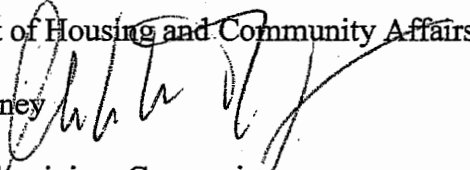


OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

April 5, 2006

TO: Elizabeth Davison, Director, Department of Housing and Community Affairs
FROM: Charles W. Thompson, Jr., County Attorney 
SUBJECT: The Application of Chapter 25A to Condominium Conversions

Your Department has requested my opinion regarding the application of Chapter 25A of the Montgomery County Code (Code), and its attendant regulations, to condominium conversions and how potentially conflicting provisions of County law should be interpreted under the State law that regulates condominium conversions. Specifically, the issue involves the interplay between the Maryland Condominium Act¹ and the requirements of §25A.00.02-2.3 of the Code of Montgomery County Regulations (COMCOR).²

Generally, the laws can be read to harmonize; however, the portion of COMCOR §25A.00.02-2.3 requiring that a unit be offered for purchase to another MPDU certificate holder if the current tenant does not exercise the right of first refusal to purchase the unit creates the potential for conflict. To that extent, I believe the Maryland Condominium Act preempts an interpretation that the regulation requires the unit be sold to an MPDU certificate holder because, as a necessary consequence, this interpretation precludes an MPDU tenant, who elects not to purchase the MPDU, from accepting an extended tenancy on the unit. However, to insure that the purposes of the MPDU law are not thwarted, I believe the owner of an MPDU that is being converted to a condominium must execute a recordable agreement with the County that provides

¹ The Maryland Condominium Act is located in §11-101, *et seq.* of the Real Property Article (Condo Act); Montgomery County's Condominium law is located in Chapter 11A of the Code. Chapter 11A was promulgated under the authority of §11-140 of the Condo Act, which gives local governments limited authority to legislate on matters concerning condominium conversion.

² COMCOR §25A.00.02-2.3 provides:

A household that rents an MPDU and lawfully occupies the unit at the time it is offered for sale must be offered the right-of-first refusal to purchase the MPDU regardless of the household's income as long as the household qualifies for the financing necessary to purchase the unit, and if at the time of the offering, the household met all eligibility standards at the date of original rental. This right-of-first refusal is effective for 60 days from the date the tenant is given notice that the unit is to be offered for sale. If the tenant does not sign a contract and secure financing during that time, the unit must be offered to eligible certificate holders on the lottery list maintained by the Department.

for the sale of the unit to an MPDU certificate holder upon expiration of the extended tenancy through the process described under Chapter 25A.

The Maryland Condominium Act requires the owner of a building who intends to convert it into a condominium provide the residential tenants with a specific notice under §11-102.1 of the Act.³ The notice must include, among other things, a recitation of the owner's intent to convert the building to a condominium, the tenant's right of first refusal to buy the rental unit, and a tenant's right, if the tenant elects not to purchase the unit and meets certain (mostly financial) requirements, to a potential extended lease for three years. §11-102.1 and §11-137 of the Condo Act. This extended lease requirement is limited to 20% of the units in the condominium regime. If more than 20% of the tenants qualify, the 20% requirement is satisfied on a priority basis established by statute. §11-137(k) of the Condo Act. Montgomery County, in Chapter 11A, supplemented these provisions by requiring that certain qualifying tenants in buildings being converted to condominiums must be offered extended leases for their lifetime, but it did not change the 20% limit. §11A-5 of the Code.

Under Chapter 25A, property owners wishing to develop their properties at a threshold number of dwelling units (now 20, formerly 35 dwelling units) must provide a certain number of MPDUs based on a formula set out in the law. §25A-5 of the Code. These MPDU's may be rental units or units for sale, based on the developer's project. The MPDUs must be rented or sold according to the requirements of §25A-7 of the Code and COMCOR §25A.00.05, which are designed to limit the cost of the MPDUs in order to market the units to people who meet certain income qualifications established under Chapter 25A and its regulations. Under Chapter 25A, when a rental MPDU is offered for sale, the tenant must first be offered an opportunity to purchase the unit as an MPDU at a price established by DHCA for an MPDU, even if the tenant is no longer income-eligible to purchase an MPDU under the program.⁴ §25A-4(c) of the Code and COMCOR §25A.00.02-2.3. Nevertheless, the MPDU is subject to covenants that restrict future sale prices and limit future sales to MPDU certificate holders. Thus, when a building housing MPDU rental units converts to a condominium, the Maryland Condominium Act and Chapters 11A and 25A of the County Code all require that an MPDU tenant must be offered a right of first refusal to purchase the unit.

The requirements of the Maryland Condominium Act and Chapter 25A diverge, however, when the MPDU tenant does not exercise the right of first refusal. As noted, under the State and County condominium conversion laws, some tenants, if they qualify, could be entitled to

³ The notice requirements of §11-102.1 and the extended tenancy requirements of §11-137 of the Condo Act apply only to residential units.

⁴ This applies only to MPDU certified tenants whose total annual household income may have increased above the maximum annual household income to purchase between the required deadlines for being certified as income eligible by the County (which is required every two years). It does not apply to over-income tenants who may have been permitted to lease the unit by the owner in violation of the MPDU covenants. §25A-8(a)(10).

extended tenancies of either three years or for a lifetime. However, under the regulations adopted under the authority of Chapter 25A, where an MPDU tenant in a converting building does not exercise the right of first refusal, the unit must be offered for sale to MPDU certificate holders based on the lottery list maintained by DHCA so as to allow a certificate holder to purchase the unit, despite the existing MPDU tenant's interest in and qualification for an extended lease. COMCOR, §25A.00.02-2.3.

Thus, the County's MPDU law would require that a rental MPDU being converted to a condominium be offered to its MPDU tenant, but if its MPDU tenant does not exercise the right to purchase the condominium, it must be offered to other MPDU certificate holders, as opposed to being offered as a rental to the MPDU tenant who qualifies for an extended lease. I believe this provision conflicts with §11-137 of the Condo Act, wherein an eligible tenant must be offered an extended lease for the unit the tenant occupies. §11-137(b).

Accordingly, to the extent of the conflict, the County's law cannot prevail. However, these provisions can be read to harmonize and capture the legislative intent of each if the requirements of the Maryland Condominium Act and Chapter 25A, and the regulations adopted under them, are construed to require that the conflict between them merely acts to postpone the sale of the MPDU to a qualified certificate holder upon the termination of the extended tenancy. The qualifying tenant at the time of the conversion may elect to purchase the unit or may elect to stay in the unit under an extended tenancy, but upon termination of the extended tenancy the unit must be sold as an MPDU under Chapter 25A. However, a tenant who accepts an extended tenancy is not, at the conclusion of that extended tenancy, automatically eligible to purchase the MPDU under a right of first refusal, but, if qualified as an MPDU certificate holder and selected under the lottery system used to prioritize certificate holders has the same rights as any other MPDU certificate holder to purchase the property⁵. The effect of this interpretation may, in some cases, extend an existing requirement for providing MPDU's.

For example, a condominium conversion after the control period would not require that the unit be sold as an MPDU. However, when the conversion occurs within the control period the unit must be treated as an MPDU, so that an extended lease under the Maryland Condominium Act also extends the control period for the MPDU. Otherwise, the intent of Chapter 25A could be defeated by condominium conversion. In this regard, the definition of "control period" should be construed to require that the unit when sold becomes a new MPDU subject to the then existing control period that may be in effect and requiring covenants be recorded to implement the conversion of the unit from a rental MPDU to a sale MPDU. To accomplish this result, both the regulations under Chapter 25A and the recorded covenants on each MPDU should address the conversion from rental to sale MPDU, including at least: the

⁵ The Condominium Act prohibits an extended lease tenant from being excluded as a purchaser under §11-137(g) which provides: "A designated household which exercises its right under this section [11-137] shall not be denied an opportunity to buy a unit at a later date if one is available."

Elizabeth Davison
April 5, 2006
Page 4

right of an existing, qualifying tenant to an extended lease; the sale of the MPDU upon conclusion of the extended tenancy; and, the establishment of the then existing control period applicable to a sale MPDU.

Thank you for your inquiry. Please call me if you have any questions.