Circuit Court for Baltimore City
Case No: 24C19005635

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 735

September Term, 2020

THOMAS G. BREARD, ET UX.

v.

HOMELAND ASSOCIATION, INC.

Graeff,
Nazarian,
Wells,
JJ.

Opinion by Wells, J.

Filed: June 15, 2020

Appellee, Homeland Association Incorporated ("the Association"), the homeowners' association for the residential development known as "Homeland," recorded a "Statement of Covenant Violations" ("the Statement") within the land records of Baltimore City. The Statement was designed to put future purchasers of the residence owned by appellants, Thomas Breard and his wife, Elizabeth Herbst ("the homeowners"), on notice that the homeowners' property was allegedly in violation of the Association's covenants.

Concerned that the Statement would inhibit the sale of the property, the homeowners sued the Association in the Circuit Court for Baltimore City seeking a declaratory judgment and other relief. Later, the homeowners moved for partial summary judgment. The Association responded and filed a cross-motion for summary judgment. After a hearing, in a written memorandum of factual findings and an order, the court granted summary judgment in the Association's favor. In its ruling, the court concluded that the Association had the authority to record the Statement, that the homeowners' due process rights were not violated in so doing, and that neither laches nor limitations barred the Association from filing the Statement.

On appeal, the homeowners present the following questions for our review, which we have only slightly altered:

I. Did Appellee have the authority to record the Statement of Covenant Violations?

II. Was Appellee required to provide due process to Appellants before recording the Statement of Covenant Violations?

In its cross-appeal, the Association poses three questions, two of which essentially reprise the same questions the homeowners asked. The third question, which we rephrase, is: Did the circuit court err in finding that the Association would be time-barred from enforcing the Covenants against the homeowners?[1]

For the reasons to be discussed, we shall affirm the judgment. We hold that the language of the Deed and Agreement grants the Association the authority to record the Statement. Further, the Association is not required to provide due process to the homeowners because the Association is not a state actor and state action was not involved in the filing of the Statement. Finally, we decline to address the Association's separate

[1] The Association's questions as written are:

1. Where the Covenants contain a non-waiver provision that maintaining a violation is itself a violation and Mr. Breard and Ms. Herbst continue to maintain the Alterations and Improvements to the Property in violation of the Covenants, did the Circuit Court err in finding that the Association would be time barred by the statute of limitations from filing any civil action against Mr. Breard and Ms. Herbst to enforce the Covenants?

2. Where the Covenants permitted the Association to take any "other remed[y]" to enforce the Covenants, was the Circuit Court correct in finding that the Association had the ability to record the Statement?

3. Where the Association is not a state actor, the government has not deprived Mr. Breard and Ms. Herbst of any property interest, the Property is not a condominium, and the Statement is not a lien on the Property, was the Circuit Court correct in its determination that the Association's recordation of the Statement did not deprive Mr. Breard or Ms. Herbst of due process?

question because although the circuit court suggested that the Association would be time-barred from enforcing the Covenants against the homeowners or future purchasers, that issue was not before the court. Therefore, we decline to address it on appeal.

FACTUAL AND PROCEDURAL BACKGROUND

A. Homeland

Homeland is a neighborhood located in the north-central section of Baltimore City. It was developed in the 1920s by the Roland Park Company, which also developed the nearby neighborhoods of Guilford and Roland Park. A cursory review of the Homeland Association's website reveals older, tastefully preserved homes of "Norman, Tudor, French country and Early American styling," lining streets named after "good Anglican saints and English hamlets."[2]

The Homeland Association (hereafter, "the Association") is the homeowner's association tasked with administering and enforcing the restrictive covenants found in the Roland Park Homeland Company Deed and Agreement ("the Covenants"), dated October 10, 1924, and recorded among the land records of Baltimore City. Of significance to this appeal, the Covenants prohibit homeowners within Homeland from making changes to the exterior of the properties without the Association's expressed permission. The Association's enforcement powers are derived from a later Deed and Agreement, dated October 14, 1948, which is also recorded in the City's land records.

[2] This information is taken from the Homeland Association's website, "History of Homeland." https://bit.ly/2Q43Oo1.

B. The Homeowners' Modifications

In 1984, Thomas Breard and his wife, Elizabeth Herbst, (hereafter, "the homeowners") purchased 5203 Putney Way ("the Property"), located within the confines of Homeland. Two years later, just as the homeowners were beginning exterior work to the Property, the Association sent them a letter dated December 12, 1986. The letter informed them that exterior modifications had to be approved by the Association's Architectural Committee, which, in this case, the homeowners had not done. The letter cites the applicable section of the Covenants, which states that the homeowners may obtain an application from the Association's office to request an architectural modification. The homeowners responded to this letter with one of their own, dated February 17, 1987, in which they stated they will submit drawings for the Architectural Committee's approval.

From 1986 to 2002, the homeowners made several changes to the exterior of the Property, sometimes seeking the Association's approval, sometimes not, but, making alterations to the Property, in any case. For example, in September 1992, the homeowners sought to "apply siding and paint and repair windows and shutters." The Association denied the request, but, according to the Association's documentation, the homeowners applied the siding anyway. This was but one of several allegedly unapproved modifications the homeowners undertook. Although in 1986 the Association expressed its "concern" with the homeowners' unapproved exterior modifications, it took no immediate action against them. Twice during 1997, in March and August, again, the Association

requested the homeowners bring the Property into compliance with the Covenants and threatened legal recourse. But neither side took any action.

In 2001, the homeowners requested approval for the construction of three additions to the Property. For thirteen reasons, the Association denied the request via a letter, dated June 4, 2001. In the letter, the Association also reminded the homeowners that their use of siding had never been approved. Despite this, the homeowners allegedly made several changes to the exterior of the Property, such as the use of vinyl siding on a garage and the installation of a fence, which, according to the Association, had not been approved. Letters flowed back and forth between the parties throughout 2002, but the Association took no legal action against the homeowners to bring them into compliance with alleged violations of the Covenants.

C. "The Statement" and the Resulting Lawsuit

In May 2016, the homeowners listed the Property for sale. According to the Association, its agents visually inspected the Property and then sent the homeowners a letter, dated May 18, 2016, listing ten "violations of architectural standards." The "violations" included: the installation of fixed, rather than operable shutters, the use of vinyl siding, the use of railroad ties as a retaining wall, and the installation of aluminum "K" rather than rounded copper gutters. The letter stated that these "unapproved" modifications and others should be remedied before the house was transferred.

Then, on April 2, 2018, the Association recorded among the City's land records a document titled "Statement of Covenant Violations" ("the Statement") which announced

that "the Property is currently in violation of the Deed and Agreement," and listed the "violations" found in the May 18, 2016 letter. The Statement urged prospective buyers to contact the Association "to confirm the status of the foregoing violations and their required correction."

As a result of this filing, the homeowners sued the Association. They alleged that the Statement was filed "decades after the alleged violations and without any notice or due process whatsoever." In four separate counts they sought: (1) a declaratory judgment that the Association had no authority to record the Statement, (2) an injunction directing the Association to file another statement to the effect that the Statement was filed in error and that the Property was not in violation of the Covenants, (3) an order quieting title, and (4) damages for "slander of title."

The Association answered, essentially stating that it had a duty to enforce the Covenants and, therefore, the Association was well within its rights to file the Statement. The homeowners, the Association averred, were not denied due process.

Both parties moved for summary judgment: the homeowners as to all but the slander count and the Association on all counts. The circuit court set the matter for a hearing on May 15, 2020. After the hearing, the court rendered a written memorandum opinion, filed August 26, 2020, in which it denied the homeowners' motion but granted summary judgment in the Association's favor.

D. The Circuit Court's Ruling

The circuit court first found that under Maryland Code (1974, 2015 Rep'l. Vol.), Real Property Article ("RP") § 3-102(a), the Statement constituted "any other instrument" affecting real property. Further, the court reasoned that the Statement was "consonant with the basic purpose of recording to give constructive notice, as provided in RP § 3-102(a)(3), and with the more specific requirements of the Homeowners Association Act to ensure that property purchasers are informed of restrictions and claimed violations of those restrictions." The court found that recording the Statement was a remedy available to the Association under the Deed and Agreement.

The court rejected the homeowners' due process argument. The court concluded that the relationship between the Association and the homeowners was entirely a private one. Despite how "tempting" it might be to find that the Association was operating in a quasi-governmental capacity, the Association's authority derived solely from the Deed and Agreement, a private agreement, and did not involve governmental action. Consequently, due process considerations did not apply. The court found the homeowners' other statutory and constitutional arguments were unavailing. The court concluded by noting that the homeowners could scarcely claim surprise, as the dispute between the parties had been ongoing since the mid-1980s. And while the Association would have done well to have given the homeowners notice of its intent to file the Statement, it "was not legally required" to do so.

On the related issues of limitations and laches, the court found that each of the homeowners' modifications to the Property constituted "a series of discrete and completed acts rather than a continuing wrongful act." In the court's opinion, "each alleged change to the Property in violation of the Deed and Agreement accrued for limitations purposes when the change was completed." Consequently, the court determined that the Association had three years from the completion of each act to bring an action for the alleged violation. As the court saw it, because the last alleged discrete violation was in 2002, the Association had until 2005 to bring an enforcement action. But the court pointed out that the issue at hand was the recordation of the Statement, not a demand for relief. Consequently, the court reasoned, the recordation was not subject to either limitations or laches.

At the hearing, the homeowners also argued that if the Association was barred by limitations from enforcement against them, then enforcement was also barred as to subsequent homeowners. The court recognized that the Maryland Homeowners Association Act required the homeowners to give notice to potential purchasers of any pending covenant violations of which they have "actual knowledge," which suggested the survival of such claims against subsequent homeowners. But the court declined to answer this hypothetical question, leaving it for future consideration.

The homeowners subsequently filed this timely appeal. Additional facts will be discussed later in the opinion.

STANDARD OF REVIEW

This Court reviews the circuit court's grant of summary judgment de novo. *Harford Cty v. Saks Fifth Ave. Distrib. Co.*, 399 Md. 73, 82 (2007). We, first, determine whether there is a material factual dispute and second, whether the circuit court was "legally correct in granting judgment in favor of the prevailing party." *James B. Nutter & Co. v. Black*, 225 Md. App. 1, 11 (2015) (citing *Lombardi v. Montgomery Cty.*, 108 Md. App. 695, 710 (1996)). Material facts are facts "that, if found one way or the other, will affect the outcome of the case." *Zitterbart v. Am. Suzuki Motor Corp.*, 182 Md. App. 495, 502 (2008). A denial of a motion for summary judgment is reviewed to determine whether "the trial judge abused [their] discretion, and in the absence of such a showing, the decision of the trial judge will not be disturbed. *Dashiell v. Meeks*, 396 Md. 149, 165 (2006) (citing *Foy v. Prudential Ins. Co. of Am.*, 316 Md. 418, 424 (1989)).

I. The Association Had Authority to File the Deed Based on the Language in the Deed and Agreement that the Homeowners Signed

a. Parties Contentions

The homeowners contend that the Association lacked authority to record the Statement because the Association never determined that a violation existed, which the homeowners claim is a condition precedent to enforcement. They argue that even if violations did exist, the 2016 Letter extinguished any then-existing violations because the Association only requested that prior to the house transferring, the homeowners make certain repairs and replacements. Further, they contend that too much time had passed without action, thus the Association was prohibited from enforcing the violations.

Additionally, they argue that their obligation to inform potential buyers of any existing violations did not also grant the Association the right to file the Statement as the Association is not a party to the sale of the house. They also contend that the Association could not record the Statement because it is not an instrument recognized under Maryland property law.

The Association contends that the plain language of the Deed and Agreement grants it authority to determine if a property is in violation of the Covenants. The Association argues that the same violations identified in the Statement and Letter are violations that the sellers would have to provide to any potential buyer. Additionally, it notes that the Covenants grant it the right to enforce violations using "other remed[ies]," such as recording the Statement.

b. Interpretation of a Deed

Covenants are interpreted in accordance with the general rule of contracts. *Belleview Constr. Co., Inc. v. Rugby Hall Cmty Ass'n, Inc.*, 321 Md. 152, 157 (1990). This Court is guided by the "cardinal principle" that the covenant should be construed in accordance with the "intention of the parties as it appears or is implied from the instrument itself." *Id.* at 157. "[R]estrictive Covenants should be interpreted reasonably and should not be given interpretations leading to unreasonable results." *SDC 214, LLC. v. London Towne Prop. Owners Ass'n*, 395 Md. 424, 434 (2006). If, however, the meaning of the instrument is vague or unclear, then the court should consider "the circumstances surrounding the execution of the instrument" to ascertain the intent of the parties as "the

apparent meaning and object of their stipulations should be gathered from all possible sources." *City of Bowie v. MIE Props., Inc.*, 398 Md. 657, 679 (2007) (quoting *Belleview*, 321 Md. at 157-58.

c. Analysis

The Deed and Agreement grants the Association the sole authority to determine whether homeowners violate the Covenants and through this authority, the Association may pursue legal action or any other remedy against any violators. The Statement is an instrument affecting property and as such, the Association had the authority to record the Statement. Further, the Association maintained its right to pursue "other remedies" to enforce the Covenants because the Deed did not contain a time prohibition, nor did it define the phrase "other remedies."

i. Deed Language

In interpreting the language of the Deed, we begin by examining whether the meaning of the deed is clear based on its terms. *600 N. Frederick Rd., LLC v. Burlington Coat Factory of Md.*, 419 Md. 413, 446 (2011). If the language of the instrument is unambiguous, then the court "should simply give effect to that language 'unless prevented from doing so by public policy or some established principle of law.'" *SDC 214, LLC.*, 395 Md. at 434.

The provision at issue states,

> Violation of any restriction or condition or breach of any covenant or agreement herein contained *shall give the company* in addition *to all other remedies* the right to enter upon the land upon or as to which such violation or breach exists and summarily to abate and remove at the expense of the

> owner thereof any erection thing or condition that may be or exist thereon contrary to the intent and meaning of the provisions hereof and the company shall not thereby be deemed guilty of any manner of trespass

Subdivision XI of the Deed and Agreement (emphasis supplied).

Based on the unambiguous language of the Deed, the Association has the right to pursue "all other remedies" in addition to its right to enter the property to remove the violation. There is no restrictive language in this provision. While the homeowners contend that "all other remedies" are limited to "filing a breach of contract and/or seeking injunctive relief," they are incorrect. The relevant provision is all-encompassing and does not identify any limitations on the type of relief that may be pursued. The Deed clearly grants the Association the authority to pursue whatever remedies necessary when there is a breach of the Covenants. The homeowners' interpretation would have us apply an unreasonable reading to the Deed because their interpretation would have us read limitations into the Deed where there are none. We decline to apply the homeowners' interpretation as it would lead us to an "unreasonable result[]." *SDC 214, LLC.*, 395 Md. at 434. Our reading of the Deed does not go against "public policy or some established principle of law." *Id.*

Applying the "cardinal principle" of interpreting Covenants in accordance with the parties' intentions, we conclude that the parties intended for the Association to have the authority to determine whether a homeowner has violated the Covenants and if they have, then the Association may pursue "all other remedies" as well as "the right to enter upon the land." *Belleview*, 321 Md. at 157. The language is unambiguous. The Association has the right to enforce the violations in the manner that they see fit and if they choose to abate

the violation, then this does not remove their ability to also pursue "all other remedies." Therefore, we conclude that the language of the Deed explicitly grants the Association the authority to file the Statement because it is an "other remedy" authorized under the document that vests the Association with the authority to enforce Covenant violations.

ii. The Association Had the Authority to File the Statement Because It is An Instrument Affecting Property

The homeowners also contend that the Association lacked authority to file the Statement because it was not an instrument that could be properly recorded. We hold that the Statement was properly recorded because first and most importantly, the Statement does affect property and second, it serves as the required notice defined in the Maryland Homeowners Association Act (MHAA). The Statement serves dual purposes. In other words, the Association had authority to file the Statement and the circuit court did not err in concluding that the Statement was properly recorded.

1. "Other Instruments Affecting Property"

Title 3 of the Real Property Article addresses the recording of land interests. RP section 3-102 focuses on "[o]ther instruments affecting property." The types of instruments affecting property are broad as the subsection simply states, "Any other instrument affecting property, including any contract for the grant of property, or any subordination agreement establishing priorities between interests in property may be recorded." RP § 3-102(a)(1). Subsection(a)(2) then highlights other instruments that may also be recorded, but this list is not exhaustive. Finally, subsection (a)(3) notes that "[t]he recording of *any* instrument constitutes constructive notice from the date of recording."

Here, the Statement is an "[o]ther instrument[] affecting property" because the Statement identifies the homeowners' property and the violations. This Statement directly affects the property because it informs potential buyers that this property is in violation of the Covenants. Since the statutory language does not limit the types of documents that may be recorded and because this document affects the property, the Statement is an acceptable instrument that can be filed. Further, the statute aims to ensure that the recorded instruments provide "constructive notice," which is exactly what the Statement aims to do. As the Association explained, the identified violations "are the same violations that [the homeowners] would be statutorily required to provide to any purchaser of the property." [Green Br. 14]. The Statement relates to the property and serves to inform a potential homeowner of the responsibility of abiding by the covenants and bringing the property into compliance.

2. The Maryland Homeowners Association Act

The Maryland Homeowners Association Act (MHAA) also provides support for the conclusion that the Statement may be recorded as an "other instrument affecting property." Section 11B-106 of the MHAA outlines the disclosure and notice requirements for individuals selling a home that is subjected to a homeowners' association. Under section 11B-106, a contract is not enforceable, unless the contract of sale includes the following notice:

> "This sale is subject to the requirements of the Maryland Homeowners Association Act (the "Act"). The Act requires that the seller disclose to you at or before the time the contract is entered into, or within 20 calendar days

> of entering into the contract, certain information concerning the development in which the lot you are purchasing is located.
>
> ***
>
> By purchasing a lot within this development, you will automatically be subject to various rights, responsibilities, and obligations, including the obligation to pay certain assessments to the homeowners' association within the development. The lot you are purchasing may have restrictions on:
>
> (1) Architectural changes, design, color, landscaping, or appearance § 11b-106(a).

Additionally, the property owner must include a statement as to whether they have "actual knowledge of . . . [t]he existence of any unsatisfied judgments or pending lawsuits against the homeowners' association; and . . . [a]ny pending claims, *covenant violation actions*, or notices of default against the lot." *Id.* at (b)(4). Since the purpose of recording the Statement is to provide constructive notice, this informs the sellers that their property is not in compliance and that any potential property purchase would be void.

Although the homeowner argues that the Association had no authority to record the Statement because the Association is not a party to the sale of the house, this notice would have to be provided regardless. The Association informed the homeowners via letter in 2016 that the property was not in compliance. The homeowners knew of their property's noncompliance and knew that changes would need to occur prior to the transfer of the house. Regardless of whether the homeowners thought the property was in violation, the Association has the authority to make that determination and the authority to record the Statement. Therefore, the instrument could be recorded under RP § 3-102 because it provides notice and is an instrument that affects property.

iii. The Statute of Limitations and the Doctrine of Laches do not Apply to the Statement Because It is Not a Civil Action.

The homeowners contend that the statute of limitations and the doctrine of laches prevent the Association from filing the Statement. The short answer to these contentions is that the statute of limitations and the doctrine of laches only apply in civil actions and because recording the Statement is not a civil action, these doctrines do not apply.

In Maryland, a civil action must be filed "within three years from the date it accrues." Md Code Ann., Cts. & Jud. Proc. § 5-101 (2014). The purpose of the statute of limitations is to reflect public policy by "providing adequate time for a diligent plaintiff to bring suit as well as to ensure fairness to defendants by encouraging prompt filing of claims." *Supik v. Bodie, Nagle, Dolina, Smith & Hobbs, P.A.*, 152 Md. 698, 712 (2003) (citing *Fairfax Savings, F.S.B. v. Weinberg & Green*, 112 Md. App. 587, 612 (1996) (cleaned up)).

The doctrine of laches is both an affirmative defense and an equitable defense as it applies "where there is an unreasonable delay in the assertion of one party's rights[,] and that delay results in prejudice to the opposing party." *Ademiluyi v. Md. St. Bd. of Elections*, 458 Md. 1, 32 (2018) (citing *Jones v. State*, 445 Md. 324, 340 (2015)). The purpose of laches is to protect against stale claims and to discourage "fusty demands for the peace of society." *State Ctr. LLC. v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 585 (2014) (citation omitted).

The key aspect to both the doctrine of laches and the statute of limitations is the requirement that a claim exists. *See State Ctr*, 438 Md. at 585 (explaining that the doctrine

of laches protects against stale claims); *Supik*, 152 Md. at 712 (noting that the purpose of the statute of limitations is to encourage prompt filing of a lawsuit). Further, this notion is supported by section 5-101 of the Courts and Judicial Proceedings Article that explicitly states the statute of limitations applies to the filing of civil actions. Given that the definitions of these doctrines consistently emphasize the necessity of filing suit, we conclude that the statute of limitations and the doctrine of laches only apply in the filing of a civil action. The purpose of these defenses is to ensure that plaintiffs do not delay in asserting their rights. Since recording the Statement did not commence a civil action, these doctrines are inapplicable to this case.

With regard to the Association's question posed in the cross-appeal of whether the circuit court erred in ruling that the Association could not legally enforce the Covenant violations against the homeowners, we note that this issue was not before the trial court. In its order, the trial court found that "the Association's ability to obtain an affirmative judicial remedy *against Plaintiffs* as the current owners ha[d] been extinguished by limitations." (Emphasis in original.) However, whether the Association could enforce the existing violations against any subsequent purchaser, the court determined, was a hypothetical question that the court could not answer. Because neither the homeowners nor the Association put the question of enforcement directly before the circuit court, we conclude that in finding that limitations barred enforcement of the Covenants against the homeowners, the court was offering an advisory opinion. We decline to do the same and, therefore, will not address this issue on appeal. *See 120 W. Fayette Street, LLLP v. Mayor*

& City Council of Balt. City, 413 Md. 309, 356 (2010) (noting that if a court were to address "non-justiciable issues," then it "would place courts in the position of rendering purely advisory opinions, a long forbidden practice in this State"); *Dep't of Hum. Res., Child Care Admin. v. Roth*, 398 Md. 137, 142 (2007) (explaining that the Court of Appeals does not issue advisory opinions, thus issues that are moot are dismissed without addressing the merits); *Phillips v. State*, 451 Md. 180, 194 (2017) (same).

II. The Homeowners Were Not Deprived of Constitutional or Statutory Due Process Because the Association's Use of the Land Records Did Not Constitute State Action.

a. Parties' Contentions

The homeowners contend that they were entitled to constitutional due process concerning the recording of the Statement. They argue that the Fifth and Fourteenth Amendments of the United States Constitution apply as well as Article 24 of the Maryland Declaration of Rights because the Association's use of the Land Records office constituted state action. Therefore, they contend the Association was required under both federal constitutional law and Maryland constitutional law to provide them with due process before depriving them of their property. The Association responds that it did not deprive the homeowners of due process because the Association is a private corporation, not a state actor, thus it was not required to provide due process.

b. Due Process

Both the Fourteenth Amendment to the U.S. Constitution and Article 24 of the Maryland Declaration of Rights "protect an individual's interests in substantive and

procedural due process." *Reese v. Dep't of Health & Mental Hygiene*, 177 Md. App. 102, 149 (2007). Procedural due process limits governmental decisions that "deprive individuals of liberty or property interests within the meaning of the Due Process Clause." *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976). The protections deriving from the Due Process Clause ensure that "individuals who have property rights are not subject to arbitrary governmental deprivation of those rights." *Reese*, 177 Md. App. at 149 (citing K.C. Davis & R.J. Pierce, Jr., *Administrative Law Treatise* § 9.4 at 35 (3d ed. 1994)).

To succeed on a claim involving the deprivation of procedural due process, an individual must "demonstrate that [they] had a protected property interest, that [they] [were] deprived of that interest [by the State], and that [they were] afforded less procedure than was due." *Knapp v. Smethurst*, 139 Md. App. 676, 704 (2001) (citing *Samuels*, 135 Md. App. at 523). Since procedural due process aims to protect individuals from "arbitrary governmental deprivation" of their property rights, it follows that state action is an essential aspect to a procedural due process claim. *Pittsenberger v. Pittsenberger*, 287 Md. 20, 27 (1980). An individual alleging a violation of procedural due process "must first show that *state action* has resulted in [them] being deprived of a property interest." *Regan v. Bd. of Chiropractic Exam'rs*, 120 Md. App. 494, 509 (1998) (emphasis supplied). State action requires "sufficient governmental involvement in the action" that is the center of the complaint. *Roberts v. Total Health Care, Inc.*, 349 Md. 499, 510 (1998) (quoting *Riger v. L & B Ltd. P'ship*, 278 Md. 281, 288-89 (1976)). Without state action, there is no constitutional due process issue, "no matter how unfair [private conduct] may be." *Nat'l*

Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 182 (1988); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (explaining that the protections of the Fourteenth Amendment do not extend to "private conduct abridging individual rights"); *see also Wassif v. N. Arundel Hosp. Ass'n, Inc.*, 85 Md. App. 71, 78 (1990) (noting that the protections found in Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the U.S. Constitution "only apply to actions occurring *under color of state law or sufficiently controlled by the state* as to be considered state action" (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974) (emphasis added))).

c. Analysis

i. Constitutional Due Process

For the homeowners to succeed on their claim for the deprivation of procedural due process, they must establish that state action deprived them of their property. The homeowners argue that the Association "invoked the power of the courts" when it recorded the Statement in Baltimore City's Land Records Division ("the Land Records office"). They assert that the Association's use of the Land Records office to record the Statement was state action because the "Land Records & Licenses Division is housed in the Circuit Court for Baltimore City, checks must be made payable to the Circuit Court for Baltimore City and Land Records & Licenses is "literally one of the six divisions of the Circuit Court for Baltimore City."

The Association's use of the Land Records office to record an instrument identifying Covenant violations does not involve state action. The purpose of the Division

is to "maintain records about property in the county." *See What are Land Records*, Md. Courts, https://mdcourts.gov/legalhelp/landrecords. The role of the clerks in the Land Records office is limited to "accepting documents that meet the requirements for inclusion in land records, rejecting documents that do not, and keeping records." *Id.* Additionally, the clerks **cannot** "[h]elp you fill out documents or forms[,] [r]eview your documents prior to being presented for recording[,] [t]ell you if your documents will accomplish your goals[,] [p]erform a title search for you[,] [or] [g]ive you legal advice." *Id.* Individuals must come to the Land Records office with their materials ready for filing because the function of the Land Records office is to accept and record documents affecting land in the county or city.

The homeowners' assertion that "through the power of that State agency . . . Appellee . . . gain[s] the leverage it needs to force Appellants to capitulate to their demands" is incorrect. The Land Records office grants no such leverage, but only serves to provide notice about instruments affecting property. As the circuit court explained, "[i]n recording the Statement, it has at most employed the services of the Land Records office, much as private contractual parties to property transactions do regularly." The Land Records office is merely a processing center for recording titles and other instruments affecting property. Filing a document in the Land Records does not involve "sufficient governmental involvement in the action." *Roberts*, 349 Md. at 510.

The homeowners rely on three cases to support their assertion that state action existed when the Association filed the Statement in the Land Records office. First, they

rely on *Knapp* to establish that this Court has found state action to exist in foreclosure proceedings. 139 Md. App. at 676. However, this case is unhelpful to their argument as there the issue of state action was not contested because appellees conceded that a "mortgage foreclosure conducted pursuant to a legislatively enacted statute and rules promulgated by the Court of Appeals constitute[d] state action." *Id.* at 706. Additionally, the foreclosure in *Knapp* explicitly involved state action as the foreclosure was done in accordance with a legislative statute and court rules. In contrast, here, the Association did not act following a statute but rather acted according to the language of the Deed. The Association's actions involve purely private conduct between the Association and the homeowners, thus there is no state action.

Next, the homeowners rely on *Barry Properties, Inc. v. Fick Brothers Roofing Co.*, which held that the then-current Maryland mechanics' lien statute "deprive[d] an owner of a 'significant property interest'" and so, due process protections were required before a mechanics' lien could be attached to property. 277 Md. 15, 24 (1976) (superseded by statute). There, the mechanics' lien statute allowed private parties to obtain a lien to attach to another's property without notice or an opportunity to be heard. *Id.* at 22. The Court noted that the mechanics' lien statute clearly involved state action because it was "created, regulated and enforced by the State." *Id.* at 22. It explained that the statute diminished the property's equity and the appellant's ability to "legally alienate or further encumber the property" because "he no longer has unfettered title." *Id.* at 24.

Unlike in *Barry* where the property owner was deprived of "unfettered title," here, the homeowners' title is not affected by the recording of the Statement because they are still able to "legally alienate or further encumber the property." The recording of the Statement has not affected their property rights because § 11b-106(a) of the MHAA requires that the seller provide this information to the purchaser of the property. Unlike in *Barry* where the mechanics' lien statute was enforced and regulated by the State, here, the Association is not regulated by the State and the Association is not recording the Statement pursuant to a state statute. The homeowners were not deprived of their equity as this was not a lien. Therefore, the homeowners' reliance on *Barry* is unpersuasive as *Barry* involved a state statute that was enforced by the State and negatively impacted property.

Finally, the homeowners argue that *Fuentes v. Shevin* supports their argument that the Association's use of the Land Records office constituted state action. 407 U.S. 67 (1972). There, the Court held that the prejudgment replevin provisions in Florida and Pennsylvania deprived individuals of their property without due process of law because the statutes did not give individuals an opportunity to be heard before the taking of their property. *Id.* at 97. The Court explained that the statute allowed "[p]rivate parties, serving their own advantage, [to] unilaterally invoke state power to replevy goods from another." *Id.* at 93. Further, it noted that "[t]he State acts largely in the dark" as there is no requirement that the plaintiff provide the court with any information regarding the seizure of property nor is there a requirement that a state official review "the basis for the claim to repossession" or "evaluate[] the need for immediate seizure." *Id.*

Unlike in *Fuentes* where the statute allowed private parties to "invoke state power to replevy goods from another," here, the Association was not using state power to repossess the property as the Association did not seek to repossess the property. Unlike in *Fuentes* where the Court addressed replevin statutes that allowed private companies to essentially unilaterally invoke the State without the State taking any steps, here, the Association is not relying on a statute to "invoke the State," but rather the Association filed the Statement to put prospective purchasers and the current homeowners on notice about the violations.

In conclusion, we hold the homeowners are unable to assert a denial of constitutional due process because the Association's filing of the Statement in the Land Records office does not invoke the power of the State. Without the required element of state action, the constitutional protections afforded by the U.S. Constitution and the Maryland Declaration of Rights do not apply. This was a private contract being enforced by a private party to the contract.

ii. Statutory Due Process

The homeowners contend that the Maryland Contract Lien Act and the Condominium Act are analogous statutes that support their conclusion that the Association owed them due process before filing the Statement. These statutes are inapplicable, however, as there is no lien involved nor do the homeowners reside in a condominium. Additionally, we decline to find that the presence of due process procedures in those two

acts indicate that we should read a due process requirement into the MHAA, despite the legislature explicitly choosing not to do so.

1. Maryland Contract Lien Act

The Maryland Contract Lien Act applies where a party seeks to attach a lien when there has been a breach of contract. RP § 14-203 outlines the requirements for an association or condominium to file a lien. If a breach of contract has occurred, then the party has two years to "give written notice to the party against whose property the lien is intended to be imposed." *Id.* at (a)(1). This statute describes the notice requirements, the rights of the individual against whom the lien is filed, the burden of proof as well as information on filing the lien. *See generally id.*

Under the Maryland Contract Lien Act, the party seeking to enforce the lien must ensure that there is a "contract or covenant running with the land recorded in the land records." *Select Portfolio Servicing, Inc. v. Saddlebrook W. Utility Co.*, 455 Md. 313, 335 (2017) (citing RP § 14-201(b)). The contract or covenant "*must expressly provide* for the creation of a lien, identify the party entitled to establish and enforce the lien, and identify the property against which a lien may be imposed." *See id.* (citing RP § 14-202(a)) (emphasis supplied). Further, the lien creator must give notice to the homeowner upon breach of contract and follow the procedures outlined in the Maryland Contract Lien Act. *Id.* The lien is limited to the recovery of specific categories of damages. *See id.* § 14-201(c) (defining "damages" as the "unpaid sums due under a contract, plus interest accruing on the unpaid sums due under a contract or as provided by law").

Here, the Statement filed by the Association is not a lien because it is not a monetary claim against either the property or the homeowners. Instead, it is a statement that indicates the property is in violation of several sections of the Covenants. The homeowners argue that they received "no notice of hearing, no hearing, no witnesses, and no evidence presented," but the Association was not required to provide any of those protections because this was not a claim for monetary recovery.

Further, the MHAA incorporates the Maryland Contract Lien Act into its statutory language but its scope is restricted to the recovery of a "portion of the homeowners association's liens that has priority," which is the "equivalent of 4 months, of unpaid regular assessments for common expenses that are levied by the homeowners association." *See* RP § 11B-117(c)(3).

As such, the requirements of the Maryland Contract Lien Act simply do not apply. While due process may be required under the Maryland Contract Lien Act, that Act is inapplicable here because the Association did not place a lien on the property nor is the Association seeking monetary recovery. We decline to adopt the view urged by the homeowners because reading the lien requirements into the Association's actions would run counter to the purpose of the statute. Further, because we "must presume that a legislature says in a statute what it means and means in a statute what it says there," then we must presume that the legislature only intended for procedural requirements to attach in addressing unpaid assessments and not in addressing disputes regarding violations of the Covenants. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *see also Mayor &*

City Council of Balt. v. Chase, 360 Md. 121, 128 (explaining that "the context in which the statute appears must be considered . . . and that context may include related statutes, pertinent legislative history" or any other relevant material that helps ascertain the purpose of the legislation).

2. Condominium Act

The homeowners also contend that "the idea of due process rights for homeowners is not a foreign concept" as "several statutes" set forth due process requirements. For instance, the homeowners cite RP § 11-113, which describes the due process requirements that condominium associations must follow in dispute resolution situations. Notably, the homeowners do not live in a condominium and there is no similar statutory requirement in the MHAA. The subsequently enacted MHAA explicitly excludes "any property which is . . . [p]art of a condominium regime." *See id.* at § 11B-102(e). The Condominium Act includes specific notice provisions for disputes, but the MHAA only provides procedural requirements for the enforcement of assessments and charges through a lien, which is then governed by the Maryland Contract Lien Act.

We decline to read similar due process language into the dispute resolution provisions of the MHAA because the General Assembly knew it could incorporate the same dispute resolution mechanisms as in the Condominium Act but chose not to. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461 (2002) (explaining that "it is a general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is

generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'" (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))). The General Assembly adopted the MHAA after the Condominium Act and could have included dispute resolution provisions, but instead chose only to apply procedural requirements to the collection of assessments. *Chase*, 360 Md. at 129 ("In attempting to harmonize [two statutes], we presume that, when the Legislature enacted the later of the two statutes, it was aware of the one earlier enacted" (quoting *Cicoria v. State*, 332 Md. 21, 43 (1993))). Therefore, we conclude that the legislature intended for those due process provisions to remain in the Condominium Act and so, we decline to find a statutory requirement of due process existed.

iii. The Association's Decisions are Subject to the Business Judgment Rule and This Rule Does Not Require that the Association Provide Due Process

The homeowners contend that even if there was no constitutional or statutory due process owed, the Association still owed them some form of due process because the Association must act in good faith. The Association contends that its decisions are protected from review by the business judgment rule unless there has been a showing of fraud or abuse.

Generally, the business judgment rule protects decisions made by a corporation's board of directors from judicial inference. *See Black v. Fox Hills N. Cmty. Ass'n*, 90 Md. App. 75, 81 (1992) (noting that courts usually will not "interfere in the internal affairs of a corporation"). The business judgment rule presumes that a corporation's directors "acted

in good faith and in the best interest of the corporation." *Reiner v. Ehrlich*, 212 Md. App. 142, 156 (2013) (quoting *Danielewicz v. Arnold*, 137 Md. App. 601, 638 (2001)). "The general rule under Maryland law is that decisions made by a homeowners association's board of directors will not be disturbed unless there is a showing of fraud or bad faith." *Reiner*, 212 Md. App. at 155; *see also Black*, 90 Md. App. at 82 (explaining that "[c]ourts will not second-guess the actions of directors unless it appears that they are the result of fraud, dishonesty or incompetence" (quoting *Papalexiou v. Tower W. Condo.*, 401 A.2d 280, 285-86 (1979))).

The homeowners rely on *Black* as support for their argument that the Association needed to provide some sort of notice and hearing before recording the Statement, but *Black* does not stand for this proposition. Instead, *Black* holds that homeowners' associations are corporations protected by the business judgment rule, thus their decisions will be upheld unless there is a showing of bad faith, fraud, or abuse.

In *Black v. Fox Hills*, the Kupersmiths built a fence along their yard with the approval of their homeowners' association. 90 Md. App. at 78. The neighboring homeowner, Black, alleged that the fence was constructed in violation of the covenants and that the board erred in approving the fence. *Id.* at 79. This Court held that the board's decision "to approve the Kupersmith's fence was a decision which it was authorized to make." *Id.* at 83. The Court elaborated that "[w]hether that decision was right or wrong, the decision fell within the legitimate range of the association's discretion. *Id.* Further, the Court explained that without an allegation of fraud or bad faith in the complaint, "the

decision to approve the fence was a business judgment with which a court will not interfere." *Id.*

Unlike in *Black* where the issue centered on a neighborly dispute regarding the appropriateness of a fence, here, the Association flagged the homeowner's violations and put them on notice by sending them a letter and recording the Statement. Like in *Black*, where the board had the authority to approve the fence construction, here, the Association has the authority to identify violations and ensure that potential purchasers and current homeowners are aware of those violations. The Association has the sole authority to ascertain whether a violation exists. Like in *Black*, where the homeowners failed to allege any bad faith or fraud, here, the homeowners have not alleged any bad faith or fraud on the Association's part. While they have stated that "there is no evidence that [the Association] acted reasonably and fairly," they have provided no evidence or argument that the Association's actions were in bad faith or fraudulent. Thus, without a showing of fraud or bad faith, we will not interfere with the internal affairs of the Association. Regardless of whether the Association made the right or wrong decision, that "decision fell within the legitimate range of the association's discretion." Consequently, the Association's decision to file the Statement is protected as a business judgment and we will not disturb it.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; APPELLANT TO PAY COSTS.