

Who is the Declarant? And Why Does it Matter?

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The concept and designation of the 'Declarant' arise from the formation of a planned community or a condominium.

When the developer declares land to restrictions described in a "Declaration" for a planned community or a condominium, that developer has the opportunity to reserve certain rights to itself as the "Declarant." Although there is no requirement that the developer reserve such

declarant rights, it is common practice to do so and very unusual for a developer to form a planned community or condominium without reserving declarant rights. Subsequently, any party who holds any of the reserved declarant rights is a Declarant.

Although people often associate the concept of "developer" with a specific natural person, the Declarant is often an entity, such as a corporation or a limited liability company. While a natural person may very well be authorized to act on behalf of a corporate Declarant, that authority does not vest the declarant rights in the natural person. Similarly, other entities owned by the same person or by the Declarant itself, for that matter, are not a Declarant unless they have received an assignment or other transfer of declarant rights.

Declarant Rights

Declarant rights are reserved in the recorded Declaration for a planned community or condominium and are part of the contract among the lot or unit owners, the owners association, and the Declarant. The developer of real property is generally free to restrict that real property however it sees fit. Therefore, subject to only a very few statutory limitations, a Declarant is free to establish and reserve whatever declarant rights it wants at the time that a planned community or condominium is formed. Although the North Carolina Planned Community Act and the North Carolina Condominium Act clearly contemplate declarant rights, define them, and, in some limited circumstances restrict the extent of those rights, there are no declarant rights created by statute. If a declarant right is not expressly reserved in the Declaration, it does not exist.

There Are No Secret Declarants

Declarant rights can be transferred, in whole or in part, to other entities or persons. Successors often include home builders, successor developers, and lenders. Therefore, the Declarant identified in the original Declaration for a planned community or condominium may no longer be the Declarant or may share the declarant rights with other parties. The current identity of the Declarant or Declarants can almost always be determined because the law requires that transfers of declarant rights be evident on the public records.

Transfers are not effective until the date that document is recorded or filed.

Transfer of Declarant Rights

The standard way to transfer declarant rights is pursuant to an Assignment of Declarant Rights, executed by both the Declarant-transferor and the new Declarant-transferee and recorded in the office of the Register of Deeds in the county where the planned community or condominium is located. Technically, any recorded instrument that: (i) adequately describes the declarant rights transferred, (ii) is executed by both the transferor and the transferee, and (iii) is recorded in the office of the Register of Deeds may be sufficient to transfer the rights.

In North Carolina, declarant rights can also be transferred without the consent of the Declarant through foreclosure, bankruptcy sale, tax sale, judicial sale, or receivership proceedings pursuant to an explicit statutory mechanism. Although these non-consensual transfers are not all recorded in the Register of Deeds' office, the others will be filed in other public record locations - either the office of the county Clerk of Court or the office of the Clerk of the Bankruptcy Court in the applicable federal judicial district.

The common element of all of these mechanisms is that, with sufficient research, one can determine the holder or holders of the declarant rights by researching and analyzing the public records. Therefore, provided that you are willing to do the research, or retain legal counsel to do that research for you, you can identify the Declarant or Declarants of a North Carolina planned community or condominium.

There May Be More Than One Declarant

Because declarant rights can be transferred in whole or in part, there may be more than one Declarant of a planned community or condominium at any given time. The division of declarant rights works cleanly when the rights transferred relate to specific parcels of real property, either property already included in the planned community or condominium, or development property subject to a Declarant's right to incorporate the property into the planned community or condominium at a later time. It is more difficult to divide control-oriented declarant rights. For example, it creates a practical problem to have more than one Declarant authorized to appoint members to the board of directors of the owners association.

Another area where there may be multiple Declarants is in master communities that include condominiums or other sub-communities. In such projects, which may include residential, commercial, or mixed use arrangements, there are often different Declarants from the beginning, one for the master community and others for each of the sub-communities. It is important to evaluate the status of the Declarant for each community and condominium regime that impacts the property in which you are interested.

Owners, buyers, owners associations, and lenders should carefully consider any scenarios that include, or may include, multiple Declarants, not only to identify the Declarants for a particular project and the extent of each of their rights, but also with an eye toward identifying any problems that may arise out of competing interests in similar declarant rights.

The Termination of Declarant Rights

A Declarant's authority ends when all of the declarant rights for that particular Declarant expire or terminate. There are some limited statutory provisions that require the expiration of certain specific declarant rights, but otherwise, the declarant rights will endure until they either expire by their own terms or are voluntarily terminated by the Declarant. In a North Carolina condominium, the Declaration must describe a time period after which the declarant rights must terminate, but for most rights, there is no limit on the allowable length

of that time period. No such requirement is imposed on planned communities in North Carolina, and we often find declarant rights for planned communities that have no specific expiration date.

The survival of declarant rights after the time period that a Declarant is actually exercising those rights is a problem for all concerned. Those rights carry potential liability for the Declarant, which makes them an undesirable asset after the Declarant no longer has a use for them. It is also awkward for owners and owners associations to function and flourish when stale declarant rights remain. Although a Declaration may provide that some or all of the declarant rights expire upon the Declarant's sale of the last lot, they often do not. Furthermore, the development activity for a planned community or condominium may well be completed long before the last Declarant sells its last unit or lot.

Conclusion

Determination of the identity of the Declarant or Declarants is an important aspect of any party's evaluation of a planned community or condominium. Whether evaluating the asset as a successor developer, a lender, an owners association or a homeowner in a planned community or condominium regime, it is important to know which party or parties hold the declarant rights. The longer the developer period for a project, the more complex the inquiry, but the holders of declarant rights may always be determined with careful and thorough review of the public records.

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