As Americans, it is in our nature to always look for ways to improve anything and everything affecting our lives, including the cars we buy, the food we eat, and yes, even the organizations to which we belong. It's no wonder then that so many residential communities across North Carolina are so often seeking changes and amendments to the existing restrictive covenants that encumber their homes.

Properly adopting a valid change or amendment to the terms set out in restrictive covenants can be a tricky proposition, however, and care should be taken to assure (a) that those persons seeking the amendment have the requisite authority to enact an amendment; and (b) that the substance of the proposed amendment does not conflict with or violate applicable statutory or common law, thus rendering the amendment invalid and unenforceable. The first section that follows below deals with amending the restrictive covenants in all residential planned communities except residential condominiums, which will in turn be examined in the second section.

Amending the Declaration for Residential Planned Communities

A great number of homes in North Carolina are subject to recorded encumbrances often called "Restrictions"; "Restrictive Covenants"; or a "Declaration of Covenants, Conditions, and Restrictions." For purposes of this article, such restrictions will simply be called the "Declaration." The Declaration is ordinarily created and recorded by the subdivision owner/developer (known usually as the "Declarant") of a residential subdivision or planned community prior to or at the same time the community is created, and it is intended to set forth the Declarant's intended plan for the long-term development and continuing life of the community.

The Declaration usually takes the form of a lengthy and sometimes complicated set of covenants, conditions, and restrictions. Many residential planned communities (other than condominiums), called a "Community" or "Communities" in this article, were created under a Declaration that was recorded prior to the enactment of North Carolina General Statutes Chapter 47F, entitled the Planned Community Act, which became effective on January 1, 1999. Section 47F-1-102(d) of the Planned Community Act provides that except for certain specifically enumerated provisions, a Community organized before the Planned Community Act remains exempt from the Planned Community Act unless the Community affirmatively adopts and records an amendment to its Declaration declaring it has elected to be administered under the provisions of the Planned Community Act.
Other residential Communities created after January 1, 1999, are also exempt from the Planned Community Act if they contain no more than 20 lots (including all lots which may be added or created by the exercise of development rights).

Who is Authorized to Amend the Community Declaration?

Communities Exempt From the Act

Prior to July 7, 2014, for Communities not subject to the Planned Community Act, the terms of the Declaration determined the manner in which the Declaration could be amended, including the minimum number of votes of lot owners required to approve any amendment. On the other hand, if the Declaration was silent on the manner of amendment, then each and every owner of a lot which was subject to the Declaration had to consent to any proposed amendment for it to be effective. In July, 2014 an amendment to NCGS §47F-1-102(c) changed this by making all planned communities, whether otherwise exempt from the Planned Community Act or not, subject to the provisions of NCGS §47F-2-117, including NCGS § 47F-2-117(d) to be discussed below.

Communities in General

With the 2014 amendment, all Communities are now subject to the same rules for amending their Declaration. The rules are found in NCGS §47F-2-117 and provide:

- The Declarant creating the Declaration can reserve the right to unilaterally amend the Declaration for limited periods of time without the consent of the lot owners or the Community's owners association ("Association");
- To the extent the Declarant has not reserved the right to amend the Declaration unilaterally or that right has expired or has been released by the Declarant, then at least 67% of the votes allocated to the lot owners are required to affirmatively vote to approve any amendments to the Declaration unless the Declaration itself requires a larger majority for approval;
- Any amendment to the Declaration is only effective from the time that it is duly recorded in the office of the Register of Deeds for the county in which any portion of the Community is located (and it should be recorded in each such county);
- Any duly enacted amendment to the Declaration is "presumed valid and enforceable";
- Once the amendment is recorded, no action to challenge its validity may be brought unless it is brought within one (1) year after the recording date; and,
- Certain lot owners can amend the Declaration in connection with the termination of a Community.

For any Community, whether subject to the Planned Community Act or not, NCGS § 47F-2-103(c) applies, and it provides that in the event of a conflict between the provisions of the Declaration and the bylaws of the Association, the Declaration prevails unless the Declaration is inconsistent with the Planned Community Act, in which case the provisions of the Planned Community Act prevail. This provision permits the Declarant and the lot owners some latitude in fixing the method of amendment of their Declaration so long as the amendment remains consistent with the express provisions of the Planned Community Act.

Additionally, NCGS § 47F-2-103(c) provides that the executive board of an Association (usually called the "Board of Directors") does not possess any unilateral authority to amend the Declaration. That authority resides solely in either the Declarant, if reserved, or the lot owners as explained above. However, executive boards can, and often do, adopt resolutions calling for the amendment of the Declaration, knowing that the proposed amendment must be duly presented to, and approved by, the members (lot owners) of the Association or by the Declarant if the Declarant has reserved the unilateral authority to amend the
Is the Amendment to the Declaration Valid and Enforceable?

Just because a Community has the authority to amend its Declaration, has met all procedural requirements for adoption of an amendment, and has obtained the required number of approvals, the amendment is not necessarily valid and enforceable. The right of a Declarant or the lot owners to amend the Declaration has been successfully challenged in decisions of the North Carolina appellate courts. In the leading case, *Armstrong et al. v. Ledges Homeowners Association, Inc. et al.*, 360 N.C. 547, 633 S.E.2d 78 (2006), the North Carolina Supreme Court ruled that any changes to a Declaration must be “reasonable” in light of the original intent of the Declarant in creating the Community and the expectations of those persons who have purchased lots in the Community in reliance upon continuance of that original plan or scheme of development. What “reasonable” may mean in any particular challenge to an amendment has not been defined precisely; it will obviously rest on the particular facts and circumstance of each case. As a result, anyone considering an amendment to their Declaration must consider what evidence exists to support a finding that the amendment is reasonable in terms of its impact on the Community and the expectations of its lot owners.

In an effort to hopefully remove some of the uncertainty after the *Armstrong* decision, in 2013 the North Carolina General Assembly amended the Planned Community Act by adding Section 47F-2-117(d), which provides that any duly enacted amendment to a Community's Declaration shall be “presumed valid and enforceable.” This puts the burden on the person challenging the validity and enforceability of an amendment to overcome or rebut the presumption of “reasonableness.”

As stated above, when it amended NCGS §47F-1-102(e) in 2014, the General Assembly made it clear that any Community, whether or not created under the Planned Community Act or subject to it, is subject to all of the provisions of N.C. General Statutes §47F-2-117, including § 47F-2-117(d).

Amending the Declaration for a Residential Condominium

Initially, residential condominiums (“Condominiums”) were created without the benefit of a standard statutory scheme or guidelines. However, in 1963, the General Assembly passed the original “Unit Ownership Act” (the “UOA”), which was codified in Chapter 47A of the General Statutes and which governed and, to the extent mentioned below, continues to govern, in large part, Condominiums for which a Declaration was recorded on or after June 5, 1963 and before October 1, 1986. Condominiums created on or after October 1, 1986, are governed by the North Carolina Condominium Act, codified in Chapter 47C of the N.C. General Statutes, entitled the Condominium Act, which replaced the UOA.

Additionally, a number of specific provisions of the Condominium Act are made applicable to older condominiums otherwise still governed by the UOA pursuant to NGCS § 47C-1-102(a) including:

- NCGS § 47C-2-103(c), which is identical to the corresponding section applicable to planned communities (§ 47F-2-103(c) of the Planned Community Act) and which provides that for all Condominiums, including those created before October 1, 1986, in the event of a conflict between the provisions of the Declaration and the bylaws of the Condominium Association, the Declaration prevails unless the Declaration is inconsistent with the Condominium Act, in which case the provisions of the Condominium Act prevail.
- NCGS §47C-1-102(b) which provides that any amendment to a Declaration (including amendments of bylaws, plats, and plans) made after October 1, 1986 by a UOA-governed Condominium is valid if the amendment would be permitted under the provisions of the Condominium Act. This provision requires a thorough review of the Condominium Act provisions affecting any proposed amendment to the
Declaration of a UOA-governed Condominium.

Who is Authorized to Amend the Declaration?

CONDOMINIUMS CREATED UNDER THE UOA

For Condominiums created before October 1, 1986, the UOA provides few statutory requirements for amendment of a Declaration. Under the UOA, the Declarant was required to formulate a method for the passage of an amendment to the Declaration. The UOA provided very little guidance except to require, in NCGS § 47A-13, that the amendment be "consistent with the provisions of the UOA." This lack of direction led to many differing requirements for the adoption of an amendment to a UOA-governed Condominium Declaration.

CONDOMINIUMS CREATED UNDER THE CONDOMINIUM ACT

In contrast, Condominiums created after October 1, 1986 are subject to the detailed requirements for amending a Declaration as set out in Section 47C-2-117 of the Condominium Act. The Condominium Act rules for amending the Declaration follow in most aspects the requirements in the companion statute for planned communities (contained in the Planned Community Act) but with a couple of significant differences.

- NCGS § 47C-2-117 provides in part as follows:
  - At least 67% of the votes allocated to the unit owners must affirmatively vote to approve any amendments to the Declaration unless the Declaration itself requires a larger majority for approval.
  - Any amendment to the Declaration is only effective from the time that it is duly recorded with the Register of Deeds of the county in which any portion of the Condominium is located (and must be recorded in each such county).
  - Once the amendment is recorded, no action to challenge its validity may be brought unless it is brought within one (1) year after the recording date.
  - Except as otherwise expressly permitted or required elsewhere in the Condominium Act, unanimous consent of the unit owners is required for an amendment to the Declaration that:
    - creates or increases special declarant rights;
    - increases the number of units;
    - changes the boundaries of any unit;
    - changes the allocated interest of a unit; or,
    - changes the uses to which any unit is restricted.

- Section 47C-2-117(a) of the Condominium Act allows certain amendments to the Declaration to be executed by the Declarant alone (in the exercise of development rights), by the Condominium Association alone (in matters of eminent domain affecting an interest in common elements), or by certain unit owners alone (in the reallocation of a limited common element, the reallocation of boundaries between units, the subdivision of units, and the termination of the condominium).

Notably absent from the Condominium Act is a provision like the 2013 amendment to the Planned Community Act that provides that any duly enacted amendment to a Community's Declaration shall be "presumed valid and enforceable." Unlike a Community governed by the Planned Community Act, for a Condominium governed by the Condominium Act, when an amendment is challenged, the burden falls upon the amending party to show that the amendment meets the reasonableness standard of review.

Is the Amendment to the Declaration Valid and Enforceable?
By extension of the analysis in the opinion set forth in the Armstrong planned community case, any amendment to the Declaration for a Condominium must be "reasonable" in light of the original intent of the Declarant that created the Condominium and the expectations of those persons who purchased units therein in reliance upon the continuance of that original plan or scheme of development. As with planned communities the "reasonableness" standard for Condominium Declaration amendments will invite future challenges to attempts by the unit owners to amend substantive provisions of their Declaration, and certainly any unit owners considering an amendment to their Declaration in the future will need to consider what evidence exists to support a finding that the amendment is reasonable in terms of its impact on the Condominium and the expectations of its unit owners.

Conclusion

Whether considering changes and amendments to the Declaration of a residential planned community or a residential condominium, strict adherence to the procedures and substantive provisions of the Declaration and the applicable North Carolina statutes is essential as is a thorough analysis of the potential issues affecting the validity and enforceability of a proposed amendment raised by the Armstrong decision and other decisions interpreting, extending, or limiting the reach of Armstrong.

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