

Leverage Shift: Community Associations Facing Developer Transition Benefit From Court of Appeals' Decision

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The North Carolina Court of Appeals recently issued an opinion that should make it easier for owners associations to pursue remedies against developers if they discover construction defects in the common elements after control of the association is transferred from the developer to the members. *Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC* (N.C. App 2014). In *Trillium*, Trillium Ridge Condominium Association, Inc. (the "Association") sued Trillium Links & Village, LLC (the "Developer"), the construction company and other individuals and entities

involved in the construction of the condominium for construction defects. The trial court granted the Developer's motions for summary judgment, which dismissed the Association's case. The Association appealed and the Court of Appeals reversed the trial court's decision and sent the Association's case back to the trial court to be tried. The Court of Appeals ruled on several issues in *Trillium*, but two of the Court's decisions will be beneficial to owners associations dealing with construction defects caused by the developer.

Fiduciary Duty

As is common in most condominiums and planned communities, the Developer in *Trillium* initially appointed the board of directors of the Association. During this period of developer control, an engineering report that revealed construction defects was given to the directors and the construction company. Neither the Developer nor the directors appointed by the Developer informed the Association of these defects or the engineering report when control of the Association was turned over to the members. The Association claimed the Developer and directors breached their fiduciary duty to the Association by failing to disclose information regarding the engineering reports and construction defects.

The North Carolina Condominium Act provides that directors of the association owe a fiduciary duty to the association and the unit owners, and the Court of Appeals held that the directors in *Trillium* were obligated to disclose material facts regarding construction defects to the Association. The North Carolina Condominium Act does not create a fiduciary relationship between a condominium developer and the association, but the Court of Appeals found that a fiduciary relationship existed as a matter of fact. "As a result of the fact that [Developer] had a position of dominance over [Association] and the fact that individual unit owners or prospective unit owners had little choice except to rely upon [Developer] to protect their interests during the period of developer control, we hold that the record contains sufficient evidence from which the existence of a fiduciary duty between the two entities could be established." This is significant. Based on this decision in

Trillium, any owners association now can, at least at the initial stages of a lawsuit, claim that its developer owes a fiduciary duty to the owners association during the period of developer control.

Statute of Repose

The six-year statute of repose contained in NCGS 1-50(a)(5) is a familiar and effective defense for developers facing construction defect claims by an owners association. Essentially, the statute places an absolute time limit on lawsuits against those that improve real property. This statute of repose does contain an exception which states that it "shall not be asserted as a defense by any person in actual possession or control, as owner, tenant or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or control either knew, or ought reasonable to have known, of the defective or unsafe condition." The common elements almost always are constructed while the owners association is under developer control. Prior to *Trillium*, there was little guidance on whether developer control constituted control as contemplated by NCGS 1-50(a)(5). The Court of Appeals has addressed the issue in the context of summary judgment, which is significant to owners associations bringing construction defect claims against developers.

At the time the buildings were built in *Trillium*, the Association was under developer control. The Developer was able to have the Association's case dismissed by the trial court based upon, among other things, the expiration of the six year period in NCGS 1-50(a)(5). The Court of Appeals reversed, holding that there was issue of fact as to whether the Developer's control of the Association constituted control under NCGS 1-50(a)(5). This is an excerpt from the Court's analysis:

As a result, although we conclude that [Developer] is entitled to rely on the statute of repose as a defense to [Association's] negligent construction claims relating to Building Nos. 100 and 200, we further conclude that the extent to which the "possession or control" exception to the statute of repose defense applies to [Developer] is a question for the jury. As a result, although [Developer] is entitled to rely on the statute of repose to the extent that it is not equitably estopped from doing so, there is a jury question concerning the extent to which [Developer] is entitled to rely on the statute of repose.

The significance of this case is that it will make it more difficult for developers to defeat an association action for construction defects based on the statute of repose at the early stages of litigation. This will give associations a chance to get their case before a jury, or to mediation, where they will have a better chance to prevail or reach a settlement.

In sum, the *Trillium* opinion (i) establishes that developers have a fiduciary duty to owners associations during the period of declarant control, and (ii) weakens developers' defense based on the statute of repose in construction defect cases when the developer controlled the association during the period of construction. *Trillium* certainly does not guarantee victory in construction defect claims against developers, but it increases an owners association's chances for recovery.

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