WARD AND SMITH, P.A.
ATTORNEYS AT LAW

Writing Some Wrongs: General Assembly Amends Planned Community Act and Condominium Act in Response to Unfavorable Court Decisions

Written By Adam M. Beaudoin (amb@wardandsmith.com) **and Justin M. Lewis** (jml@wardandsmith.com)

July 25, 2013


The North Carolina General Assembly recently enacted Session Law 2013-34 ("Act") that impacts homeowner associations and condominium associations (each an, "Association"). The Act was signed into law by Governor McCrory on April 24, 2013.

The Act is meant to provide more certainty to Associations, and pending interpretation by the courts, it does just that. Specifically, the Act may be broken down into three parts:

- Access for Associations and owners over limited common elements for maintenance and repair purposes;
- Establishment of the legal documents from which planned communities derive their authority; and,
- Adoption and enforcement of planned community declaration amendments.

A brief summary of each of these three changes, as well as the reasons behind them, is provided below.

Limited Common Elements

Prior to the Act, the North Carolina Planned Community Act ("Planned Community Act") and the North Carolina Condominium Act ("Condominium Act") provided Associations and lot or unit owners access through another owner's lot or unit for maintenance purposes. However, for Associations and owners to properly perform their respective maintenance obligations, it is sometimes necessary for them to also access limited common elements allocated to another owner.

Some Associations have addressed this issue by including access provisions in their declarations. Unfortunately, some Associations do not have appropriate provisions. The Act saves those Associations the trouble of having to amend their declarations to provide necessary access for maintenance by establishing access as a matter of law.

The first two sections of the Act amend the appropriate sections of the Planned Community Act and the Condominium Act to provide Associations and unit or lot owners with access through limited common elements allocated to another unit or lot when access is reasonably necessary to conduct maintenance, repair, or replacement activities to Association property or common elements or to units or lots belonging to other owners.

Some Associations have placed the burden of repairing damage to Association property, common elements,

or limited common elements on the unit or lot owner who causes the damage by including appropriate provisions in their declarations. The Act makes this shifting of responsibility applicable to all Associations regardless of the terms and conditions of the association's declaration.

The Act also provides that an owner who damages a limited common element shall be required to repair the damaged limited common element or pay for the cost of repair if the Association is required to repair it.

Homeowner Association Authority

Sections three and four of the Act add the following language to two sections of the Planned Community Act (but not the Condominium Act):

> To the extent not inconsistent with the provisions of this Chapter, the declaration, bylaws, and articles of incorporation form the basis for the legal authority for the planned community to act as provided in the declaration, bylaws, and articles of incorporation, and the declaration, bylaws, and articles of incorporation are enforceable by their terms.

These sections of the Act are intended, in part, to address the confusion which resulted from the North Carolina Court of Appeals decision in Fairfield Harbour Property Owners Association, Inc. v Drez, No. COA11-205 (2011).

In the Fairfield Harbour case, the Court ruled that a homeowners association for a planned community ("HOA") did not have the authority to use assessments which were collected from owners in the planned community to purchase recreational amenities. Despite language contained in the governing documents of the planned community which provided that the HOA may acquire and own real and personal property, the Court ruled that the HOA could not use assessments to finance the purchase of the recreational amenities because such use of the assessments was not explicitly authorized in the declaration. The Court was not persuaded by provisions in the Planned Community Act and the North Carolina Nonprofit Corporation Act ("Nonprofit Corporation Act") which authorize HOAs to purchase, receive, or otherwise acquire real or personal property.

The Fairfield Harbour decision has been a hot topic of debate among Association attorneys ever since the opinion was handed down in 2011. Although it is an unpublished opinion and therefore not controlling legal authority for subsequent cases, it is nevertheless persuasive authority and has affected the purchasing decisions of Associations throughout North Carolina. Can HOAs use assessments to buy paper, stamps, or office furniture? Can HOAs use assessments to buy lawn mowers or similar equipment to maintain common elements?

In light of the Fairfield Harbour decision, no one could answer these questions with any certainty. Despite the authority granted to HOAs by the Planned Community Act and the Nonprofit Corporation Act, and regardless of the provisions of their governing documents, HOAs became reluctant to spend money to purchase anything because of the Fairfield Harbour case.

The Act addresses this uncertainty by providing that HOAs may rely on the authority granted to them in their declarations, bylaws, and articles of incorporation and that the actions they take based on this authority will be enforceable (provided it is not inconsistent with provisions of the Planned Community Act). These sections of the Act apply to all planned communities, including those created prior to the adoption of the Planned Community Act in 1999, but not condominiums.

Accordingly, if the Articles of Incorporation of a planned community provide the HOA with the powers outlined in the Nonprofit Corporation Act, the HOA can rely on the latter authority alone for using assessments to

purchase land, etc., even if the planned community's declaration is silent on the issue. HOAs should now be able to breathe a little easier, especially when using assessments to purchase real or personal property necessary to govern their planned community, as long as they abide by the terms of their governing documents, the Planned Community Act, and the Nonprofit Corporation Act.

Amendments to Declarations

Section five of the Act amends Section 47F-2-117(d) of the North Carolina General Statutes, the section of the Planned Community Act regarding amendments to declarations, to provide that:

> Any amendment passed pursuant to the provisions of this section or the procedures provided for in the declaration are presumed valid and enforceable.

The purpose of this section is to address the uncertainty in the adoption of amendments to declarations created by the decisions in Armstrong v. The Ledges Homeowners Association, 360 N.C. 547, 633 S.E.2d 78 (2006) and Southeastern Jurisdictional Administrative Council, Inc. v. Emerson, 363 N.C. 749, 688 S.E.2d 692 (2009).

Ledges and Emerson both provide that an amendment to a declaration is invalid if it is deemed to be unreasonable under the facts and circumstances including the nature of the community and the "reasonable expectations" of owners who purchased property prior to the amendment. Section 5 of the Act attempts to make the requirement of unreasonableness harder to prove.

The decisions in Ledges and Emerson left HOAs with little guidance as to what kind of amendment is "reasonable." With that uncertainty, HOAs could not know whether an amendment passed pursuant to the terms of their declarations (and if subject to the Planned Community Act, consistent with its terms) would later be found to be invalid because it was not "reasonable."

Section 5 of the Act provides simply that an HOA may amend its declaration pursuant to the provisions of the Planned Community Act or pursuant to the terms set forth in its declaration, and such amendment shall be presumed valid and enforceable.

Of course, this presumption may be rebutted, but Section 5 of the Act shifts the burden of proof to the party challenging the validity, rather than requiring the HOA or owner relying on the amendment to prove that it is reasonable.

The Act should also help an HOA for a community created prior to the adoption of the Planned Community Act if the declaration for that planned community does not contain amendment provisions or contains unclear amendment provisions. Such an HOA may now rely on the provisions of the Planned Community Act to amend its declaration.

Conclusion

The effects of the Act will be felt immediately. With the exception of Section 5, regarding amendments to declarations, which becomes effective on October 1, 2013, the Act became effective when it was signed into law on April 24, 2013.

Laws regarding Associations are constantly up for debate and we will not know how the North Carolina appellate courts will interpret the Act for a while. However, with the passage of the Act, Associations, particularly HOAs, should now be able to more confidently maintain and govern their community, use assessments to make necessary expenditures, and, in a few months, amend their declarations.

--