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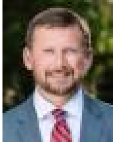
Amending Your Planned Community's Declaration

Written By Justin M. Lewis (jml@wardandsmith.com)
September 17, 2024



The most common question community associations in planned communities (i.e., single, family homes) pose is, 'How can we amend our declaration?'

Of course, this question includes many layers: (1) What is the proper procedure?; (2) What percentage of the membership must approve?; and (3) What challenges might an amendment face? These questions are understandable considering the requirements set forth in the North Carolina Planned Community Act (the "Act") and relevant opinions issued by the North Carolina Supreme Court and the North Carolina Court of Appeals. While there are numerous issues to consider when a community association decides to pursue an amendment to its declaration, there are two (2) determinations that an association in a planned community must make before any others:

1. The level of member approval necessary to amend the declaration; and,
2. Whether the proposed amendment is reasonable and consistent with the original intent of the parties to the declaration

Member Approval

Residential planned communities created on or after January 1, 1999, are subject to the Act and may amend their declaration only with the "affirmative vote or written agreement signed by lot owners of lots to which at least sixty-seven percent (67%) of the votes in the association are allocated." The declaration may require a higher level of member approval, but the minimum level of member approval is 67%.

For planned communities created prior to the Act, it's not so easy. Until legislation enacted in 2013, planned communities formed prior to the Act amended their declaration solely based on the terms of their declaration and other governing documents. In 2013, the Act was amended to make the amendment section of the Act applicable to planned communities formed prior to the Act. The amendment provision of the Act now applies to planned communities created prior to the Act "unless the articles of incorporation or the declaration expressly provides to the contrary." If a declaration for a planned community formed prior to the Act contains a clear and unambiguous provision setting forth the procedure by which members may amend the declaration (by a majority of all members, for example), the provision in the declaration would appear to control over the Act. If, however, a declaration for a planned community formed prior to the Act does not provide for member approval of amendments or contains ambiguous language regarding amendments, the 67% approval requirement of the Act would apply. Accordingly, those planned communities without clear amendment

provisions in their declarations should follow the Act.

Reasonable and Consistent with the Original Intent of the Parties to the Declaration

For many years, the validity of amendments to declarations was considered based on the standard set forth in Armstrong v. The Ledges Homeowners Association and Southeastern Jurisdictional Administrative Council Inc., v. Emerson. Ledges and Emerson both provided that an amendment to a declaration must be reasonable in light of the contracting party's original intent. The Emerson court also considered the legitimate expectations of owners when determining whether an amendment to a declaration was valid. These two cases essentially created a "reasonableness" test when determining the validity and enforceability of declaration amendments. This created some uncertainty among community associations.

In 2013, the amendment section of the Act was revised 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." This revision to the Act applies to any amendments to planned community declarations recorded on or after October 1, 2013. Consequently, as long as an amendment is passed pursuant to provisions in the declaration or in the Act, the amendment will be presumed to be valid. However, based on subsequent appellate court decisions, that presumption may be overcome if the amendment is determined by a court to be "unreasonable."

Based on a few North Carolina Court of Appeals decisions after Ledges and Emerson, it is clear that the "reasonableness" test still applies. In Wallach v. Linville Owners Association, Inc., the North Carolina Court of Appeals considered the validity of an amendment to the declaration of a planned community recorded in 2011 and found that the amendment was invalid and unenforceable because the amendment "disregard[ed] the purpose of the Declaration's original provisions." The Court cited both Ledges and Emerson and agreed with the North Carolina Supreme Court's determination in Ledges that "every amendment must be reasonable in light of the contracting party's original intent." In Poovey v. Vista N.C. Ltd. P'ship, the North Carolina Court of Appeals held that the changes to the amendment section of the Act did not eliminate the reasonableness requirement. Also, in McDougald and Lavigne v. White Oak Plantation Homeowners Association, Inc., the North Carolina Court of Appeals (in an unpublished opinion) applied the Armstrong reasonableness requirement to determine that a 2019 amendment creating rental restrictions was invalid. Although an amendment passed pursuant to provisions in the declaration or in the Act will be presumed to be valid, associations should continue to make sure any amendments to their declaration are reasonable and consistent with the original intent of the parties to the declaration to comply with the "reasonableness" and "original intent" tests established in Ledges and Emerson.

So What Does it All Mean?

The law regarding amendments to planned community declarations will continue to evolve, as is evident by changes to the Act and the North Carolina Court of Appeals cases described above, and it is difficult to know exactly what rules and standards to follow when amending a planned community declaration. In order to best withstand challenges to declaration amendments, planned community associations should follow these two (2) minimum guidelines:

- **Obtain Member Approval -** Planned communities subject to the Act must obtain member approval pursuant to the Act (at least 67% of the total membership). Planned communities formed prior to the Act also should obtain member approval pursuant to the Act unless the articles of incorporation or the declaration clearly set forth a different amendment procedure to follow.
- **Comply with the "Reasonableness" Test** - Make sure the proposed amendment is reasonable and

consistent with the original intent of the parties to the declaration.

This is a part of our September series: "The Power of Preparedness." For more insights, click here.

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