Questions and Answers on:
RESIDENTIAL SUBDIVISIONS AND PLANNED COMMUNITIES

As North Carolina becomes an increasingly urban state, more and more people are purchasing homes and lots in residential subdivisions and planned communities. In these subdivisions and communities, there is usually a homeowners association that may be responsible for maintaining the common areas of the development and the enforcement of "restrictive covenants." Many purchasers seek residential subdivisions and planned communities with restrictive covenants (sometimes referred to as "restrictions") because they believe the covenants will help ensure consistency in the neighborhood and the preservation of property value. Restrictive covenants may address everything from whether single or multi-family housing is permitted to the type, size and color of construction.

This publication is intended as an introduction to issues affecting residential subdivisions and planned communities (other than condominiums) that are subject to restrictive covenants. (For information on condominium ownership and townhouse properties, see the Commission publication, *Questions and Answers on: Condos & Townhouses*, or contact your attorney.)

Homeowners Associations

Q: What is a Homeowners Association ("HOA")?

A: It is an association of owners, typically in a residential subdivision or planned community, whose properties are subject to restrictive covenants limiting their use. The association may be responsible for the maintenance and control of the common areas in the development and enforcement of the restrictive covenants.

Q: Do I have to join the association?

A: It depends on whether it is "voluntary" or "mandatory." Membership in an association is typically mandatory if the restrictive covenants are recorded in a property's chain of title. But some neighborhoods have less formal voluntary associations, generally with less power than mandatory associations. Regardless of whether it is mandatory or voluntary, if you are a member of the association, typically you will have a voice in its operation.

Q: Do I have to pay association dues?

A: If your association is voluntary, then any payments necessary to maintain membership are also voluntary. However, if membership in the association is mandatory, you must pay all lawful assessments, dues or charges.

Q: Is there any limit on what an owner has to pay to the association?

A: Not so long as the dues, charges and/or assessments are lawfully imposed in accordance with procedures established by the restrictive covenants. Sometimes, when assessments are for substantial undertakings (road maintenance, utility services, building maintenance, etc.) they can be costly; therefore, prospective purchasers should consider the amount of any current or pending dues, charges and assessments and the financial health of the association when determining whether they can afford the property. If an existing owner believes an association has improperly imposed a charge of some kind, only a court can determine whether it is lawful.

Q: What is the developer's role in a mandatory association? Must it pay dues, charges and assessments?

A: Under North Carolina law, the developer of any real estate project is the owner of all unsold lots or units in the project. As long as the developer owns a

majority of them, it controls the votes and therefore the association itself. The developer (or its successors) may have the power to amend the covenants and restrictions so long as it acts in accordance with the legal documents creating the association. The developer has a fiduciary obligation to act in good faith, in accord with law, and in the best interest of the association. *[Note: Residential developments created on or after January 1, 1999 are covered by the North Carolina Planned Community Act if they have more than 20 lots or units and a covenant in their chain of title requiring owners to pay the expenses for common property. The Act covers creation, alteration and management of planned communities. Smaller projects created after that date and older properties that meet the definition of a planned community may, under certain circumstances, be brought under the Act so long as they have covenants requiring payment of common expenses.]*

Q: What happens if an owner (or the developer) fails to pay funds claimed by the association including assessments, fines, fees or other charges?

A: The association must use the rights granted in the restrictive covenants to collect them. In developments subject to the *Planned Community Act*, liens and foreclosures of the owner's property are permitted.

Q: What is the role of local government in HOA administration?

A: Generally, residential subdivisions and planned communities must be approved by a city or county zoning authority, depending upon the location of the property. When subdivision approval is required, and preliminary plat approval has been obtained, a developer may then offer lots for sale and enter into contracts so long as the contracts:

(1) incorporate a copy of the preliminary plat and obligate the owner to deliver a copy of the recorded plat to the buyer before closing;

(2) plainly and conspicuously notify the buyer that final subdivision approval has not been obtained, that the city or county may not grant approval, that changes between the preliminary and final plat are possible and that the contract can be terminated without the buyer being in breach if the final plat is materially different from the preliminary plat;

(3) provide that even if the final approved plat is not materially different from the preliminary plat, the buyer may not be required to close earlier than five days after delivery of a copy of the final recorded plat; and

(4) provide that if the final approved plat is materially different from the preliminary plat, the buyer may not be required to close any earlier than 15 days after the delivery of the final recorded plat, and during that 15-day period, may terminate the contract and receive a refund of the earnest money or prepaid purchase price, without breach or further obligation.

Typically, after plat approval and inspection of construction, the local government has no further role in administering the homeowner association except to assure compliance with local ordinances or state laws (for example, a Health Department permit for a swimming pool operation).

Q: Are associations and persons who manage them required to be licensed?

A: Not unless they engage in acts classified as real estate brokerage (sales or rental of real estate for others) or time share development. If they do, they must be licensed by the North Carolina Real Estate Commission and act in accordance with Commission rules. Although the Commission cannot referee disputes between an association and its members, it has disciplined its licensees for failing to deliver the *Subdivision Street Disclosure Statement*, selling lots in unapproved subdivisions, misrepresenting material facts in a transaction, mishandling funds, and other violations of the Real Estate License Law. The Consumer Protection Division of the North Carolina Attorney General's Office also has power to act against legal entities engaged in certain unlawful practices [Phone: 919/716-6000].

Property Restrictions

Q: Can property restrictions dictate the style of my home or the colors I choose for its exterior?

A: Yes, if the restrictions are properly drawn and consistently enforced.

Q: Can the developer, through restrictive covenants or sales contracts, control my choice of builder or real estate agent?

A: Not in most cases. However, a developer may lawfully refuse to sell directly to you and instead require you to purchase a lot and home from a particular builder. As to real estate agents, a developer may include the agent's commission in the home's purchase price.

Q: Don't my constitutional rights to freedom of speech, freedom of religion and the enjoyment of my property prevail over the restrictive covenants or the powers of the association?

A: Not in all cases. If you choose to purchase a restricted property, you agree to abide by the restrictions. Display of signs, flags or banners, certain uses of the property, storage of personal property (e.g., boats, RV's, etc.), keeping of animals, and other practices can lawfully be controlled by restrictive covenants if they are properly created and enforced.

Q: What if a purchaser doesn't want to follow the restrictive covenants affecting the property?

A: A purchaser who does not abide by the restrictions on the property can be fined. That fine can become a lien on the property and collected by sale of the property through foreclosure. If the association is subject to the Planned Community Act, it may impose a fine up to $100.00 per day, after giving written notice to the owner of the alleged violation and providing an opportunity to defend against the charge at a hearing.

Q: What can I as an owner do if the association is not performing its duties or if other owners violate restrictive covenants or bylaws?

A: Your remedy is to sue the association and/or the offending property owners in court for an order compelling them to abide by all lawful covenants and bylaws. But remember, these are private rights of action that you must assert on your own. No state agency, other than the court system, can determine or enforce an owner's rights.

Q: Who pays my legal expenses if I am sued by my association?

A: With only rare exceptions, you will be responsible for your own attorney fees and other legal expenses.

Roads and Common Areas

Q: Who owns the roads in a residential subdivision or planned community?

A: Unless the roads have been dedicated to public use and formally accepted by the appropriate government agency, neither the state nor any public agency owns legal title to the land over which a street runs. Where the developer has retained title to the streets (i.e., the lot lines border the edge of the street), it is liable under state law for erosion control and possibly civil damages if injuries result from a lack of maintenance. This is true even after all lots have been sold.

Q: Who is responsible for road maintenance in a subdivision or planned community?

A: Until responsibility for road maintenance is lawfully transferred to a municipality or the North Carolina Department of Transportation, either the developer or the owners will be responsible. However, if the roads are private or the developer becomes insolvent, is dissolved or dies, the owners alone will have to bear the cost unless a government agency takes control. *Since there is no guarantee that any government agency will ever take control of the roads in a subdivision, owners are ultimately called upon to bear the cost of road maintenance in many situations.*

Q: Before I buy, will I know who is responsible for the road maintenance?

A: Not necessarily. Since October 1, 1975, developers and sellers of certain residential subdivision lots have been required by law to give the first purchaser of each property a S*ubdivision Street Disclosure Statement* containing important information about road ownership and maintenance responsibility. However, the application of this law is quite limited, so it is very important that you inquire into the status of roads in the subdivision and find out who is responsible for their maintenance.

Q: How do I know which "common areas" of a subdivision or planned community are reserved for the use of all owners?

A: They will be specified by the developer in the recorded map or plat of the property. Even if the developer retains title to the common areas or conveys them to some other person or entity, these areas (trail systems, recreation areas, lakes, roads, etc.) cannot be used for any other purpose, and all of the owners in the subdivision may use the property for the specified purpose.

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