No. COA23-179 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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DAVID BAYNE ALEXANDER, JOE DOMINGUEZ and wife FRANCES M. CLAIRMONT, TAMELA S. EMANS, PATTY LOU GEORGE, GREEN PAROT HOMES, LLC, GEORGE KAKIDAS and wife LILLIAN KAKIDAS, JAMES B. KNIZLEY and wife PATRICIA J. KNIZELY, LELAND T. LARSON, MARCIA M. MAKL, CONNIE L. MEEKS, Trustee, MARIA C. MURTLE (f/k/a) MARIS C. ACOSTA, BINNIE L. NEEL, MARTIN M. ROONEY and wife JEANNE I. ROONEY, MARY ANN TAYLOR and JANIS M. TURNER, Petitioners v. DIANE K. BECKER and THOMAS H. BECKER, co-trustees of the Diane K. Becker Revocable Living Trust dated December 19, 2006, et al., Respondents/ Third-Party Plaintiffs	)	From Mecklenburg County

v.	)
	)
	)
THE COURTYARDS OF	)
HUNTERSVILLE	)
CONDOMINIUM	)
ASSOCIATION, INC.	)
Third-Party Defendant	)
	)
	)

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Brief of *Amicus Curiae*
Community Associations Institute

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No. COA23-179 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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DAVID BAYNE ALEXANDER, JOE DOMINGUEZ and wife FRANCES M. CLAIRMONT, TAMELA S. EMANS, PATTY LOU GEORGE, GREEN PAROT HOMES, LLC, GEORGE KAKIDAS and wife LILLIAN KAKIDAS, JAMES B. KNIZLEY and wife PATRICIA J. KNIZELY, LELAND T. LARSON, MARCIA M. MAKL, CONNIE L. MEEKS, Trustee, MARIA C. MURTLE (f/k/a) MARIS C. ACOSTA, BINNIE L. NEEL, MARTIN M. ROONEY and wife JEANNE I. ROONEY, MARY ANN TAYLOR and JANIS M. TURNER, Petitioners v. DIANE K. BECKER and THOMAS H. BECKER, co-trustees of the Diane K. Becker Revocable Living Trust dated December 19, 2006, et al., Respondents/	)	From Mecklenburg County

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Brief of *Amicus Curiae*
Community Associations Institute

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STATEMENT OF IDENTITY AND INTEREST

Community Associations Institute[1] ("CAI") is an international organization dedicated to providing information, education, resources and advocacy for community association leaders, members and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI has more than 43,000 members, including homeowners, board members,

[1] No person or entity other than *amicus curiae* CAI, its members, and its counsel, directly or indirectly, either wrote this Brief or contributed money for its preparation.

association managers, community management firms, and other professionals, who provide services to community associations. CAI is the largest organization of its kind, serving more than 74.1 million homeowners who live in more than 355,000 community associations in the United States.

The North Carolina Condominium Act (the "Condominium Act") is modeled after the Uniform Condominium Act (the "Model Act") published by the National Conference of Commissioners on Uniform State Laws (now Uniform Law Commission). The Condominium Act follows the Model Act at times and deviates from the Model Act at other times. Several provisions of the Condominium Act that follow the Model Act, at least in part, were argued before the trial court in support of the trial court's ruling. CAI has an interest in how provisions that closely follow the Model Act are interpreted by appellate courts throughout the nation, including how this Court may interpret provisions of the Condominium Act that follow the Model Act.

In the context of interpreting provisions based on the Model Act, CAI also is concerned about the trial court's error in conflating ownership interests, maintenance requirements, and assessment obligations under restrictive covenants. The requirement for unanimous approval of any change in allocated common element interest and common expense liabilities under N.C. Gen. Stat. § 47C-2-107(d) mirrors the approval requirement in the Model Act, so CAI has an interest in avoiding case-law confusion about the differences between ownership and maintenance and between allocations and responsibilities. Allocated interests are not the same as how covenants may delineate maintenance and assessment obligations.

CAI also has an interest in allowing communities to govern themselves. Communities should have the ability to make reasonable amendments, including amendments to change maintenance obligations. The trial court's ruling suggests such a change on maintenance of limited common elements can never occur without unanimous approval, which runs contrary to the Model Act and the Condominium Act.

ARGUMENT

I. The trial court's ruling exceeds the scope of remand.

This Court's "interpretation of its own mandate" is an issue of law reviewed *de novo*. *State v. Watkins*, 246 N.C. App. 725, 730, 783 S.E.2d 279, 282 (2016). "[I]n discerning a mandate's intent, the plain language of the mandate controls." *Id.* at 730, 783 S.E.2d at 283. This Court's mandate binds a trial court; it "must be strictly followed, without variation and departure." *Id.* at 730, 246 S.E.2d at 282.

CAI begins with the scope of the remand because of the unusual procedural history here. The original Complaint initiating this action on 31 January 2020 sought a judicial interpretation of restrictive covenants in a Declaration of Condominium for The Courtyards of Huntersville Condominium, as last amended in February 2019 (the "prior covenants" or "Courtyards Declaration"). (R pp 66-131).[2] The Courtyards of Huntersville Condominium Association, Inc.

[2] Represented Petitioners did not include all of the pages of the last amended and restated Declaration with their motion. Tab 2 to the represented Petitioners' motion skips every other page of the Courtyards Declaration and does not have Exhibit C. They also omitted the February 2019 amendments. At the time of filing, a motion to supplement the Record on Appeal was pending. If granted, the entire Courtyards Declaration would be found in the Record at pages 320 to 432.

("Association") was not originally a party to this action, but it was added later. After a trial court ruling, this dispute was brought to this Court and an opinion was issued on 2 November 2021 interpreting the prior covenants. *See Alexander v. Becker*, 280 N.C. App. 131 (2021) ("Prior Appeal").

After this Court's ruling, the Association members exercised their contractual rights to amend the prior covenants. (R pp 118, 281-284). A supermajority of the Association members adopted the Seventeenth Amendment to the Declaration (the "2022 covenant amendments"). (R pp 252). Petitioners' challenge of the 2022 covenant amendments is now before this Court, but they were not challenged in a normal litigation framework. There are no claims for relief in any complaint or petition providing grounds to set aside the amendments, and there are no factual allegations or assertions of legal positions to support those claims. The challenge to the 2022 covenant amendments came by a "motion to strike" on remand, following the Prior Appeal interpreting the prior covenants. (R pp 7-8). The 2022 covenant amendments are not a pleading, so this is not

a motion to strike under Rule 12 of the North Carolina Rules of Civil Procedure. *See generally* N.C. Gen. Stat. § 1A-1, Rule 12(e), (f). A "motion to strike" a covenant not referenced in any prior pleading is novel.

The Association objected repeatedly to the trial court's consideration of the 2022 covenant amendments on remand. (*See e.g.*, R pp 256-57; T p 68). The scope of remand was limited to the trial court entering a final judgment applying this Court's interpretation of the prior covenants. Instead, the trial court entertained—in a hearing on remand—new arguments on a new amendment not before this Court on appeal and not in the original trial court pleadings that led to this Court's prior ruling. The trial court erred when it concluded it was "required to review" the 2022 covenant amendments, as these amendments were not part of the Prior Appeal and were not part of the remand instructions from this Court.

This unique posture is meaningful for an outside participant like CAI. It is difficult to fully evaluate the nature of the dispute beyond the terms of the Final Judgment and what was said in

motions and at hearing. The trial court's Final Judgment is out of place, being outside of any typical civil action with claims met by evidentiary proof as to the propriety of the 2022 covenant amendments. The trial court's Final Judgment should be reversed for this reason alone.

II. The 2022 covenant amendments are valid, and the trial court erred in striking them on remand.

To the extent this Court reaches the merits of the 2022 covenant amendments, this Court should reverse the trial court and not "strike" the 2022 covenant amendments. The 2022 covenant amendments bring clarity to the maintenance obligations for the limited common elements in this community, based on the desires of a supermajority of the owners. (R pp 252, 281-84). They should be upheld.

An opinion from this Court affirming the trial court's position that maintenance responsibility for limited common elements cannot be separated from possession or allocation of limited common elements with a specific unit would have an incredible impact on condominiums throughout this state. It would be a seismic shift,

invalidating countless covenants and covenant amendments. As explained in more detail below, this Court should not allow this deviation from the Condominium Act and the Model Act, as it would take away the right of community members to dictate their own maintenance preferences through their restrictive covenants.

A. The members of the Association have a contractual right to amend, and the trial court erred when it infringed on that right.

A declaration of condominium contains restrictive covenants and is a contract. *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 554, 633 S.E.2d 78, 85 (2006) ("Covenants accompanying the purchase of real property are contracts which create private incorporeal rights, meaning non-possessory rights held by the seller, a third-party, or a group of people, to use or limit the use of the purchased property."). The parties to any contract, including a declaration of condominium, have the rights and obligations spelled out in the contract and are entitled to have them enforced. *Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 401, 584 S.E.2d 731, 736 (2003) ("A court will generally enforce such covenants to the

same extent that it would lend judicial sanction to any other valid contractual relationship.").

Meaningful here, the Association and its members had the contractual ability to amend the prior covenants to meet their desires. (R p 118). Covenant amendments are not unusual for this community, as the 2022 covenant amendments were the *nineteenth* amendment (but only numbered as seventeenth). (R p 253). North Carolina law has consistently allowed communities to reasonably amend their covenants to meet the desires of the membership. *See Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 559, 633 S.E.2d 78, 87 (2006); *Ceplecha v. Pine Knoll Townes Phase II Ass'n*, 176 N.C. App. 566, 569, 626 S.E.2d 767, 769 (2006).

The trial court's Final Judgment runs afoul of the foundational freedom parties have to enter into contracts of their choosing, including in the context of restrictive covenants. *Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 401, 584 S.E.2d 731, 735 (2003) (citing *Bicycle Transit Auth., Inc. v. Bell,* 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) [describing freedom of contract

generally]). Every owner bought a unit in this condominium with actual or constructive notice of the terms of the Courtyards Declaration, originally or as amended over time, which allowed for future amendments. (R p 118). The owners who wanted the 2022 covenant amendments should get the benefit of their bargain when they purchased in this community, and their ability to amend should not be infringed. Similarly, Petitioners and other owners who oppose the 2022 covenant amendments should be held to the burden of their bargain in the covenants too, including the amendment provision.

No one disputes that the 2022 covenant amendment passed by the vote required in the Courtyards Declaration, (R p 118), and required by N.C. Gen. Stat. § 47C-2-117. This Court has upheld amendments that satisfy statutory amendment requirements. *See, e.g.*, *Bowers v. Temple*, 218 N.C. App. 454, 721 S.E.2d 762, 2012 WL 379929, *8-9 (2012) (unpublished) [Add. 1-7]. The 2022 covenant amendments should likewise be upheld.

B. The trial court misapprehended the concepts of ownership allocations and maintenance responsibilities.

The trial court erred when it conflated common element allocations with maintenance obligations. They are different and are treated differently under the Condominium Act.

Throughout the Condominium Act and the Model Act, allocations refer to ownership or possession and the formula that determines an ownership percentage and the payment fraction or percentage that follows that ownership percentage. *See* N.C. Gen. Stat. §§ 47C-2-107 [App. 9-10], 47C-2-108 (describing allocation of limited common elements to certain units and the need for approval of a reallocation by those unit owners affected) (*see also* R p 74 [defining Unit]; Courtyards Declaration, Exhibit C[3] [allocations for Courtyards]). In contrast, maintenance responsibility is not tied to ownership or possession, but it is assigned and accepted by statute or covenant among the association, the owners collectively, or individual owners. *See* N.C. Gen. Stat. § 47C-3-107(a) (describing common element and unit maintenance obligations) [App. 16-17] (*see also* R pp

[3] Exhibit C would be found at pages 428-430 of the Record on Appeal, if the motion to amend it is allowed.

91-92 [maintenance responsibility for Courtyards]). Allocations are tied to ownership or possession; maintenance is not.

Condominiums with horizontal boundaries may be the more common type of condominium structure, but the free-standing condominium structure of The Courtyards is hardly unique. As this Court noted in the Prior Appeal, this community remains, legally, a condominium. This condominium structure for 55-and-over communities can be attractive for owners who want a yard, but who want maintenance responsibility held by someone else, namely the condominium association. Owners, collectively, own the common elements as tenants-in-common, but the maintenance responsibility belongs to the association, just like common elements in other condominium communities. Petitioners cannot rely on this detached-dwelling structure to argue that it somehow limits the Association from changing maintenance responsibilities for limited common elements. Following the Model Act, the Condominium Act does not limit how maintenance responsibilities for limited common elements may assigned or delegated.

Section 47C-3-107(a) of the Condominium Act makes the condominium association responsible to maintain the common elements and the unit owner responsible to maintain the unit. This is what the Condominium Act prescribes, but it does not delineate specifically as to maintenance of limited common elements.

It may be uncomfortable, at times, for a trial court in the absence of a specific directive or limitation in a statute. There is nothing to grasp when a statute does not address a disputed topic directly. But the absence of a restriction or limitation is often the point. It reflects the General Assembly's intent. *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) ("The principal goal of statutory construction is to accomplish the legislative intent.").

That is exactly what occurred with the issue here. Maintenance responsibilities for limited common elements in a condominium are not expressly addressed under either the Condominium Act or the Model Act. They omit directives specific to who must maintain limited common elements. A decision on who has the maintenance responsibilities is left to the community, and the adopted covenants

control the maintenance responsibilities. The members can control their own destiny. It is an issue of contract, and the maintenance responsibilities can change when the contract allows itself to be amended.

This intentional silence to allow covenants, and principles of contract, to direct maintenance of limited common elements is expressed in the Official Comment to the Model Act provision dealing with upkeep and maintenance, section 3-107. [App. 19-21]. The substance of the Model Act was adopted as Section 47C-3-107 of the Condominium Act. *See* North Carolina Comment, N.C. Gen. Stat. § 47C-3-107. The Official Comment to section 3-107 of the Model Act and § 47C-3-107 provides as follows:

> *The Act permits the declaration to separate maintenance responsibility from ownership. This is commonly done in practice.* In the absence of any provision in the declaration, maintenance responsibility follows ownership of the unit or rests with the association in the case of common elements. Under this Act, limited common elements (which might include, for example, patios, balconies, and parking spaces) are common elements. *See* Section 1-103(16). *As a result, under subsection (a), unless the declaration requires that unit owners are responsible for the upkeep of such limited common elements, the association will be responsible for their maintenance.*

> Under Section 3-115(c), the cost of maintenance, repair, and replacement for such limited common elements is assessed against all the units in the condominium, unless the declaration provides for such expenses to be paid only by the units benefitted.

Official Comment, N.C. Gen. Stat. § 47C-3-107 (1986) (emphasis added) [App. 17, 21]. In other words, association maintenance of limited common elements is the default as the association maintains all other common elements, but the covenants will control the maintenance responsibilities, irrespective of allocation of any limited common element to any unit.

Turning to the validity of the 2022 covenant amendments, the Condominium Act allows for maintenance of limited common elements to be determined by the Courtyards Declaration. *See id.* The Association's members had the contractual ability to amend the limited common element maintenance responsibilities because both the Condominium Act and the Courtyards Declaration allow for amendments. *See* N.C. Gen. Stat. § 47C-2-117 [App. 13]. (R p 118). This occurred, and there is no statute in the Condominium Act that prohibited those amendments. In fact, the 2022 covenant

amendments took maintenance of limited common elements, at least in part, back to the baseline of N.C. Gen. Stat. § 47C-3-107(a), which would have been for the Association to maintain all common elements, including all limited common elements. There is nothing improper or unusual about this shift. The trial court erred in not recognizing that the Condominium Act permitted separation between maintenance responsibility and limited common element possession/allocation. The 2022 covenant amendments are valid.

III. Petitioners misunderstand condominium unit ownership and misconstrue the impact of the 2022 covenant amendments.

Represented Petitioners contend that the 2022 covenant amendments changed the allocations for the units in the community when the maintenance responsibilities changed. (R p 8). This is nonsensical.

The common interest allocations are set forth in Exhibit C to the Courtyards Declaration. (R pp 74, 428-430[4]). The 2022 covenant amendments do not amend Exhibit C. (R pp 281-284). This is the

[4] Cited here, in the event the motion to amend the Record is allowed.

simplest and most obvious answer to explain that the allocations did not change.

Additionally, represented Petitioners mistakenly assert—without citation or support—that the limited common elements are "by definition under the statutes and the Declaration part of the unit." (R p 8). This error is obvious. Section 47C-1-103(16) defines a limited common element and explains that it is a "portion" or subset of common elements, not a portion of a unit. § 47C-1-103(16) [App. 2]. This Court likewise acknowledged that the limited common elements are defined to be a subset of the common elements in this very case. *Alexander*, 280 N.C. App. at 136, ¶ 22. Section 47C-2-108(c) further describes limited common elements as being a type of common element designated for possession or use by a certain unit owner. Petitioners calling a limited common element "part of the unit" is simply wrong and contrary to the law of this case, and the trial court erred in adopting Petitioners' mistake.

Pro se Petitioners' understanding of condominium ownership runs even more far afield. *Pro se* Petitioners contend that the unit

owners own more than the defined unit, such as areas that are obviously common element or limited common element. (R p 181). This is contradicted by Article V, Section 2 of the Courtyards Declaration, which describes the unit boundaries. (R pp 86-87). *See also* N.C. Gen. Stat. § 47C-2-105(5) (explaining that the declaration defines a unit). The unit owners do not own the limited common elements, so any challenge to the 2022 covenant amendments on the basis that they take away some property ownership is erroneous.

In summary, there is no foundation for the trial court's Final Judgment finding the 2022 covenant amendments to be connected to any allocation change under § 47C-2-107 or § 47C-2-108 that would require unanimous approval of all members of the Association. No allocations are changed by the 2022 covenant amendments. Likewise, the 2022 covenant amendments are not changing the boundaries of any unit, so § 47C-2-117(d) does not apply.

The 2022 covenant amendments are not special amendments that require a heightened level of approval beyond what the Courtyards Declaration and § 47C-2-117 requires for any run-of-the-

mill amendment. A supermajority approved the 2022 covenant amendments, and that was sufficient. (R pp 118, 252). The 2022 covenant amendments are valid, and the trial court's Final Judgment should be reversed.

IV. The Association's ability to assess for limited common element maintenance is proper.

The trial court also erred when it concluded that the Association could not assess to pay for limited common element maintenance. If the Association has the ability to maintain limited common elements, as shown above, it is axiomatic that it has the ability to assess to pay for maintenance costs too. *See* Official Comment, N.C. Gen. Stat. § 47C-3-107 [App. 17]; *see also* N.C. Gen. Stat. § 47C-3-102(a)(2), (6).

Section 47C-3-115 of the Condominium Act establishes that the Courtyards Declaration dictates the assessment power of the Association. It is the declaration of condominium that dictates who pays assessments for maintenance of limited common elements. *See* N.C. Gen. Stat. § 47C-3-115(c) (prefacing with "[t]o the extent required by the declaration"). Since limited common elements are a

subset of common elements, § 47C-1-103(16), the default is that the Association maintains the limited common elements and may assess for those costs. *See id*; § 47C-3-102(a). But the declaration may change that default rule and allow for only certain owners to pay for maintenance of limited common elements servicing only their units. § 47C-3-115(c); s*ee also* Brian S. Edlin, *Common Interest Communities in North Carolina*, at § 6.03.03 (NCBA Foundation 2019) [App. 23].

Here, the 2022 covenant amendments added maintenance responsibility to the Association as to certain limited common elements. But the assessment provision was not amended. Nothing violates Chapter 47C in the 2022 covenant amendments or in the Courtyards Declaration, as the Association has the ability to assess all owners for maintenance of common elements, including limited common elements. The trial court erred.

CONCLUSION

For the reasons set forth above, CAI asks this Court to reverse the trial court. To the extent this Court reaches the merits of the

2022 covenant amendments, CAI asks this Court to reverse and to remand to the trial court with instructions to uphold the 2022 covenant amendments.

Respectfully submitted this the 1st day of May, 2023.

/s/Alex C. Dale
Alex C. Dale
N.C. State Bar I.D. No.: 28191
Email: acd@wardandsmith.com
Ward and Smith, P.A.
Post Office Box 7068
Wilmington, NC 28406-7068
Telephone: (910) 794-4800
Facsimile: (910) 794-4877
Attorneys for Community Associations Institute

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Community Associations Institute certifies that the foregoing brief, which is prepared using a 14-point proportionally spaced font with serifs, is fewer than 3,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

/s/Alex C. Dale
Alex C. Dale
N.C. State Bar I.D. No.: 28191
Email: acd@wardandsmith.com
Ward and Smith, P.A.
Post Office Box 7068
Wilmington, NC 28406-7068
Telephone: (910) 794-4800
Facsimile: (910) 794-4877
Attorneys for Community Associations Institute

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing BRIEF OF *AMICUS CURIAE* COMMUNITY ASSOCIATIONS INSTITUTE via email addressed to the following persons at the following addresses which are the last addresses known to me:

Harmony Taylor
htaylor@lawfirmcarolinas.com
Law Firm Carolinas
1927 South Tryon Street, Unit 100
Charlotte, NC 28203
Attorneys for all Respondents and for The Courtyards of Huntersville Association, Inc.

Roy H. Michaux
Roy.Michaux@alexanderricks.com
Alexander Ricks, PLLC
1420 E. 7th Street
Charlotte, NC 28204
Attorneys for all Petitioners other than the Pro Se Petitioners

Frances M. Clairmont, *Pro Se*
Joe Dominguez, *Pro Se*
8121 Parknoll Drive
Huntersville, NC 28078
clairmont@outlook.com
Pro Se Petitioners

This the 1st day of May, 2023.

/s/Alex C. Dale
Alex C. Dale
N.C. State Bar I.D. No.: 28191
Email: acd@wardandsmith.com
Ward and Smith, P.A.
Post Office Box 7068
Wilmington, NC 28406-7068
Telephone: (910) 794-4800
Facsimile: (910) 794-4877
Attorneys for Community Associations Institute

ND:4877-5807-8043, v. 2

CONTENT OF APPENDIX

N.C. Gen. Stat. § 47C-1-103

Current through Session Laws 2023-12, except for Session Laws 2023-7, of the 2023 Regular Session of the General Assembly, but does not reflect possible future codification directives from the Revisor of Statutes pursuant to G.S. 164-10.

General Statutes of North Carolina > Chapter 47C. North Carolina Condominium Act. (Arts. 1 — 4) > Article 1. General Provisions. (§§ 47C-1-101 — 47C-1-110)

§ 47C-1-103. Definitions.

In the declaration and bylaws, unless specifically provided otherwise or the context otherwise requires, and in this chapter:

(1) "Affiliate of a declarant" means any person who controls, is controlled by, or is under common control with a declarant. A person "controls" a declarant if the person (i) is a general partner, officer, director, or employer of the declarant, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than twenty percent (20%) of the voting interests in the declarant, (iii) controls in any manner the election of a majority of the directors of the declarant, or (iv) has contributed more than twenty percent (20%) of the capital of the declarant. A person "is controlled by" a declarant if the declarant (i) is a general partner, officer, director, or employer of the person, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than twenty percent (20%) of the voting interests in the person, (iii) controls in any manner the election of a majority of the directors of the person, or (iv) has contributed more than twenty percent (20%) of the capital of the person. Control does not exist if the powers described in this paragraph are held solely as security for an obligation and are not exercised.

(2) "Allocated interests" means the undivided interests in the common elements, the common expense liability, and votes in the association allocated to each unit.

(3) "Association" or "unit owners' associations" means the unit owners' associations organized under *G.S. 47C-3-101*.

(4) "Common elements" means all portions of a condominium other than the units.

(5) "Common expenses" means expenditures made by or financial liabilities of the association, together with any allocations to reserves.

(6) "Common expense liability" means the liability for common expenses allocated to each unit pursuant to *G.S. 47C-2-107*.

(7) "Condominium" means real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.

(8) "Conversion building" means a building that at any time before creation of the condominium was occupied wholly or partially by persons other than purchasers or by persons who occupy with the consent of purchasers.

(9) "Declarant" means any person or group of persons acting in concert who (i) as part of a common promotional plan offers to dispose of his or its interest in a unit not previously disposed of or (ii) reserves or succeeds to any special declarant right.

(10) "Declaration" means any instruments, however denominated, which create a condominium, and any amendments to those instruments.

(11) "Development rights" means any right or combination of rights reserved by a declarant in the declaration to add real estate to a condominium; to create units, common elements, or limited common elements within a condominium; to subdivide units or convert units into common elements; or to withdraw real estate from a condominium.

(12) "Dispose" or "disposition" means a voluntary transfer to a purchaser of any legal or equitable interest in a unit, but does not include the transfer or release of a security interest.

(13) "Executive board" means the body, regardless of name, designated in the declaration to act on behalf of the association.

(14) "Identifying number" means a symbol or address that identifies only one unit in a condominium.

(15) "Leasehold condominium" means a condominium in which all or a portion of the real estate is subject to a lease the expiration or termination of which will terminate the condominium or reduce its size.

(16) "Limited common element" means a portion of the common elements allocated by the declaration or by operation of *G.S. 47C-2-102(2)* or (4) for the exclusive use of one or more but fewer than all of the units.

(17) "Master association" means an organization described in *G.S. 47C-2-120*, whether or not it is also an association described in *G.S. 47C-3-101*.

(18) "Offering" means any advertisement, inducement, solicitation, or attempt to encourage any person to acquire any interest in a unit, other than as security for an obligation. An advertisement in a newspaper or other periodical of general circulation, or in any broadcast medium to the general public, of a condominium not located in this State, is not an offering if the advertisement states that an offering may be made only in compliance with the law of the jurisdiction in which the condominium is located.

(19) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or other legal or commercial entity.

(20) "Purchaser" means any person, other than a declarant or a person in the business of selling real estate for his own account, who by means of a voluntary transfer acquires a legal or equitable interest in a unit other than (i) a leasehold interest (including renewal options) of less than five years, or (ii) as security for an obligation.

(21) "Real estate" means any leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests which by custom, usage, or law, pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. "Real estate" includes parcels, with or without upper or lower boundaries, and spaces that may be filled with air or water.

(22) "Residential purposes" means use for dwelling or recreational purposes, or both.

(23) "Special declarant rights" means rights reserved for the benefit of a declarant to complete improvements indicated on plats and plans filed with the declaration (*G.S. 47C-2-109*); to exercise any development right (*G.S. 47C-2-110*); to maintain sales offices, management offices, signs advertising the condominium, and models (*G.S. 47C-2-115*); to use easements through the common elements for the purpose of making improvements within the condominium or within real estate which may be added to the condominium (*G.S. 47C-2-116*); to make the condominium part of a larger condominium (*G.S. 47C-2-121*); or to appoint or remove any officer of the association or any executive board member during any period of declarant control (*G.S. 47C-3-103(d)*).

(24) "Time share" means a "timeshare" as defined in *G.S. 93A-41(34)*.

(25) "Unit" means a physical portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described pursuant to (*G.S. 47C-2-105(a)(5)*.

(26) "Unit owner" means a declarant or other person who owns a unit, or a lessee of a unit in a leasehold condominium whose lease expires simultaneously with any lease the expiration or termination of which will remove the unit from the condominium, but does not include a person having an interest in a unit solely as security for an obligation.

(27) "Lessee" means the party entitled to present possession of a leased unit whether lessee, sublessee or assignee.

History

1985 (Reg. Sess., 1986), c. 877, s. 1; *2021-163, s. 2(a)*.

Annotations

Notes

Effect of Amendments.

Session Laws 2021-163, s. 2(a), effective October 6, 2021, substituted "means a 'timeshare' as defined in G.S. 93A-41(34)" for "means a 'time share' as defined in G.S. 93A-41(9)" in subdivision (24).

Commentary

Official Comment

1. The first clause of this section permits the defined terms used in the Act to be defined differently in the declaration and bylaws. Regardless of how terms are used in those documents, however, terms have an unvarying meaning in the Act, and any restricted practice which depends on the definition of a term is not affected by a changed term in the documents.

EXAMPLE:

A declarant might vary the definition of "unit owner" in the declaration to exclude himself in an attempt to avoid assessments for units which he owns. The attempt would be futile, since the Act defines a declarant who owns a unit as a unit owner and defines the liabilities of a unit owner.

2. The definition of "affiliate of a declarant" (Section 1-103(1)) is similar to the definitions in *12 U.S.C. § 1730(a)*, which prescribes the authority of the Federal Savings and Loan Insurance Corporation to regulate the activities of savings and loan holding companies, and in 15 U.S.C. § 78(c)(18), which defines persons deemed to be associated with a broker or dealer for purposes of the federal securities laws.

The objective standards of the definition permit a ready determination of the existence of affiliate status to be made. Unlike *12 U.S.C. § 1730(a)(2)*B, no power is vested in an agency to subjectively determine the existence of "control" necessary to establish affiliate status. Thus, affiliate status does not exist under the Act unless these objective criteria are met.

3. Definition (2), "allocated interests," refers to all of the interests which this Act requires the declaration to allocate. *See* Section 2-107.

4. Definitions (4) and (25), treating "common elements" and "units," should be examined in light of Section 2-102, which specifies in detail how the precise differentiation between units and common elements is to be determined in any given condominium to the extent that the declaration does not provide a different scheme. No exhaustive list of items comprising the common elements is necessary in this Act or in the declaration; as long as the boundaries between units and common elements can be ascertained with certainty, the common elements include by definition all of the real estate in the condominium not designated as part of the units.

5. Definition (7), "condominium," makes clear that, unless the ownership interest in the common elements is vested in the owners of the units, the project is not a condominium. Thus, for example, if the common elements were owned by an association in which each unit owner was a member, the project would not be a condominium. Similarly, if a declarant sold units in a building but retained title to the common areas, granting easements over them to unit owners, no condominium would have been created. Such projects have many of the attributes of condominiums, but they are not covered by this Act.

6. Definition (8), "conversion building," is important because of the protection which the Act provides in Section 1-112 for tenants of buildings which are being converted into a condominium. The definition distinguishes between buildings which have never been occupied by any person before the time that the building is submitted to the condominium form of ownership, and buildings, whether new or old, which have been previously occupied by tenants. In the former case, because there have been no tenants in the building, the building would not be a conversion building, and no protection of tenants is necessary.

7. Definition (9), "declarant," is designed to exclude persons who may be called upon to execute the declaration in order to ratify the creation of the condominium, but who are not intended to be charged with the responsibilities imposed on declarants by this Act if that is all they do. Examples of such persons include holders of pre-existing liens and, in the case of leasehold condominiums, ground lessors. (Of course, such a person could become a declarant by subsequently succeeding to a special declarant right.) Other persons similarly protected by the narrow wording of this definition include real estate brokers, because they do not offer to dispose of their own interest in a unit. Similarly, unit owners reselling their units are not declarants because their units were "previously disposed of" when originally conveyed.

The last bracketed clause in this definition must be deleted in any state which chooses not to enact Article 5 of the Act.

8. Definition (11), "development rights," includes a panoply of sophisticated development techniques that have evolved over time throughout the United States and which have been expressly recognized (and regulated) in an increasing number of jurisdictions, beginning with Virginia in 1974.

Some of these techniques relate to the phased (or incremental) development of condominiums which the declarant hopes, but cannot be sure, will be successful enough to grow to include more land than he is initially willing to commit to the condominium. For example, a declarant may be building (or converting) a 50-unit building on Parcel A with the intention, if all goes well, to "expand" the condominium by adding an additional building on Parcel B, containing additional units, as part of the same condominium. If he reserves the right to do so, *i.e.*, to "add real estate to a condominium," he has reserved a "development right."

In certain cases, however, the declarant may desire, for a variety of reasons, to include both parcels in the condominium from the outset, even though he may subsequently be obliged to withdraw all or part of one parcel. Assume, for example, that in the example just given the declarant intends to build an underground parking garage that will extend into both parcels. If the project is a success, his documentation will be simpler if both parcels were included in the condominium from the beginning. If his hopes are not realized, however, and it becomes necessary to withdraw all or part of Parcel B from the condominium and devote it to some other use, he may do so if he has reserved such a development right "to withdraw real estate from a condominium." The portion of the garage which

extends into Parcel B may be left in the condominium (separated from the remainder of Parcel B by a horizontal boundary), or the garage may be divided between Parcels A and B with appropriate cross-easement agreements.

The right "to create units, common elements, or limited common elements" is frequently useful in commercial or mixed-use condominiums where the declarant needs to retain a high degree of flexibility to meet the space requirements of prospective purchasers who may not approach him until the condominium has already been created. For example, an entire floor of a high-rise building may be intended for commercial buyers, but the declarant may not know in advance whether one purchasers will want to buy the whole floor as a single units [unit] or whether several purchasers will want the floor divided into several units, separated by common element walls and served by a limited common element corridor. This development right is sometimes useful even in purely residential condominiums, especially those designed to appeal to affluent buyers. Similarly, the development rights "to subdivide units or convert units into common elements" is most often of value in commercial condominiums, but can occasionally be useful in certain kinds of residential condominiums as well.

9. Definition (12), "dispose" or "disposition," includes voluntary transfers to purchasers of any interest in a unit, other than as security for an obligation. Consequently, the grant of a mortgage or other security interest is not a "disposition," nor is any transfer of any interest to a person who is excluded from the definition of "purchaser," *infra*. However, the term includes more than conveyances and would, for example, cover contracts of sale.

10. Definition (15), "leasehold condominium," should be distinguished from land which is leased to a condominium but not subjected to the condominium regime. A leasehold condominium means, by definition, real estate which has been subjected to the condominium form of ownership. In such a case, units located on the leasehold real estate are typically leased for long terms. At the expiration of such a lease, the condominium unit or the real estate underlying the unit would be removed from the condominium if the lease were not extended or renewed. On the other hand, real estate may not be subjected to condominium ownership, but may be leased directly to the association or to one or more unit owners for a term of years.

This distinction is very significant. Under Section 3-105, the unit owners' association is empowered, following expiration of the period of declarant control, to cancel any lease of recreational or parking areas or facilities to which it is a party, regardless of who the lessor is. The association also has the power to cancel any lease for any land if the declarant or an affiliate of the declarant is a party to that lease. If the leased real estate, however, is subjected by the declarant to condominium form of ownership, that lease may not be cancelled unless it is unconscionable or unless the real estate was submitted to the condominium regime for the purpose of avoiding the right to terminate the lease. *See* Section 3-105.

While the subjective test of declarant's "purpose" may not always be clear, the rights of the association to cancel a lease depend upon the test. Thus, for example, a declarant who wishes to lease a swimming pool to the unit owners would have a choice of subjecting the pool for, say, a term of 20 years to the condominium form of ownership as a common element. At the end of the term, the lease would terminate and the real estate containing the pool would be automatically removed from the condominium unless there were a right to renew the lease. During the 20-year term, the lease would not be cancellable, regardless of the terms, unless it were found to be unconscionable under Section 1-112, or cancellable because submitted for the purpose of avoiding the right to cancel. On the other hand, if the pool were not submitted to the condominium form of ownership and was leased directly to the association for a 20-year term, the association could cancel that lease 90 days after the period of declarant control expired, even if, for example, 18 years remained of the term.

In either case, the terms of the lease would have to be disclosed in the public offering statement.

11. Definition (20), "purchaser," includes a person who acquires any interest in a unit, even as a tenant, if his tenancy entitles him to occupy the premises for more than 20 years. This would include a tenant who holds a lease of a unit in a fee simple condominium for one year, if the lease entitles the tenant to renew the lease for more than 4 additional years. Excluded from the definition, however, are mortgagees, declarants, and people in the business of selling real estate for their account. Persons excluded from the definition of "purchaser" do not receive certain

benefits under Article 4, such as the right to a public offering statement (Section 4-102(c)) and the right to rescind (Section 4-108).

12. Definition (21), "real estate," is very broad, and is very similar to the definition of "real estate" in Section 1-201(16) of the Uniform Land Transactions Act.

Although often thought of in two-dimensional terms, real estate is a three-dimensional concept and the third dimension is unusually important in the condominium context. Where real estate is described in only two dimensions (length and width), it is correctly assumed that the property extends indefinitely above the earth's surface and downwards toward a point in the center of the planet. In most condominiums, however, as in so-called "air rights" projects, ownership does not extend *ab solo usque ad coelum,* because units are stacked on top of units or units and common elements are interstratified. In such cases the upper and lower boundaries must be identified with the same precision as the other boundaries.

13. Definition (23), "special declarant rights," seeks to isolate those rights reserved for the benefit of a declarant which are unique to the declarant and not shared in common with other unit owners. The list, while short, encompasses virtually every significant right which a declarant might seek in the course of creating or expanding a condominium.

Any person who possesses a special declarant right would be a "declarant", including any who succeed under Section 3-104 to any of those rights. Thus, the concept of special declarant rights triggers the imposition of obligations on those who possess the rights. Under Section 3-104, those obligations vary significantly, depending upon the particular special declarant rights possessed by a particular declarant. These circumstances are described more fully in the comments to Section 3-104.

14. Definition (24), "time share," is based on Section 1-102(14) and (18) of the Uniform Law Commissioners' Model Real Estate Time-Share Act.

15. Definition (25), "unit," describes a tangible, physical part of the project, rather than a right in, or claim to, a tangible physical part of the property. Therefore, for example, a "time-share" arrangement in which a unit is sold to 12 different persons each of whom has the right to occupy the unit for one month does not create 12 new units—there are, rather, 12 owners of the unit. (Under the section on voting (Section 2-110), a majority of the time-share owners of a unit are entitled to cast the votes assigned to that unit.)

While a separately described part of the project is not a unit unless it is designed for, and is subject to, separate ownership by persons other than the association, the association developer can hold or acquire units unless otherwise provided in the declaration. *See,* also, Comment 4.

16. Definition (26), "unit owners," contemplates that a seller under a land installment contract would remain the unit owner until the contract is fulfilled. As between the seller and the buyer, various rights and responsibilities might be assigned to the buyer by the contract itself, but the association would continue to look to the seller (for payment of any arrears in common expense assessments, for example) as long as the seller holds title.

The definition makes it clear that declarants, so long as they own units in the condominium, are unit owners and are therefore subject to all of the obligations imposed on other unit owners, including the obligation to pay common expense assessments against those units. This provision is designed to resolve ambiguities on this point which have arisen under several existing state statutes.

North Carolina Comment

This section is not significantly different from the Uniform Act. The North Carolina Act adds a definition of "lessee" which may be helpful in establishing voting rights of persons who have short term possessory rights, see *G.S. 47C-3-110(c)*. The period of twenty years was changed to five years in the definition of purchaser to make that definition

more inclusive. The definition of "time share" was amended to refer to the North Carolina Timeshare Act. The reference to master associations in the definition of special declarant rights was omitted.

CASE NOTES

"Condominium". —

Trial court erred in dismissing a homeowners association's declaration counterclaim because the declaration at issue established a form of property ownership in the planned community's units that was not statutorily recognized. *Conleys Creek Limited Partnership v. Smoky Mt. Country Club Prop. Owners Ass'n, 255 N.C. App. 236, 805 S.E.2d 147, 2017 N.C. App. LEXIS 740 (2017)*.

Special Rights Declarant. —

Special declarant rights recognized in *G.S. 47C-1-103(23)* do not include the right to retain ownership of property that is located within a building in a North Carolina condominium project and not designated as a unit. *Residences at Biltmore Condo. Owners' Ass'n v. Power Dev., LLC, 243 N.C. App. 711, 778 S.E.2d 467, 2015 N.C. App. LEXIS 892 (2015)*.

Description Sufficient. —

Surveyed boundaries set forth on the plat provided a legally sufficient description of the real estate included in each phase of the condominium because the recorded plat showed separate and distinct phases of development of the condominium. *In re Skybridge Terrace, LLC Litig., 246 N.C. App. 489, 786 S.E.2d 5, 2016 N.C. App. LEXIS 358 (2016)*.

Right to Withdraw Property. —

Trial court properly granted a declarant summary judgment in its action seeking a declaratory judgment that it was entitled to withdraw certain property from a condominium because its right to withdraw "any portion" under the declaration and the Condominium Act had to be construed as the right to withdraw only the discrete and clearly identifiable portions of the condominium depicted on the plat. *In re Skybridge Terrace, LLC Litig., 246 N.C. App. 489, 786 S.E.2d 5, 2016 N.C. App. LEXIS 358 (2016)*.

Reformation. —

Homeowners' association was not entitled to reformation of a declaration to provide common areas within the portion of a planned community where condominium-style units were located were held in common by the condominium unit owners rather than by the association when the units did not fit the definition of a condominium because the property interests of the owners of those units were permitted under the Planned Community Act. *Conleys Creek Ltd. P'ship v. Smoky Mt. Country Club Prop. Owners Ass'n, 799 S.E.2d 879, 2017 N.C. App. LEXIS 225 (N.C. Ct. App.)*, sub. op., *255 N.C. App. 236, 805 S.E.2d 147, 2017 N.C. App. LEXIS 740 (2017)*.

Research References & Practice Aids

Legal Periodicals.

For note which examines the history and development of North Carolina law dealing with condominiums, see *66 N.C.L. Rev. 199 (1987)*.

Hierarchy Notes:

N.C. Gen. Stat. Ch. 47C

End of Document

N.C. Gen. Stat. § 47C-2-107

Current through Session Laws 2023-12, except for Session Laws 2023-7, of the 2023 Regular Session of the General Assembly, but does not reflect possible future codification directives from the Revisor of Statutes pursuant to G.S. 164-10.

General Statutes of North Carolina > Chapter 47C. North Carolina Condominium Act. (Arts. 1 — 4) > Article 2. Creation, Alteration, and Termination of Condominiums. (§§ 47C-2-101 — 47C-2-121)

§ 47C-2-107. Allocation of common element, interests, votes, and common expense liabilities.

(a) The declaration shall allocate a fraction or percentage of undivided interests in the common elements and in the common expenses of the association and a portion of the votes in the association to each unit and state the formulas used to establish those allocations. Those allocations may not discriminate in favor of units owned by the declarant.

(b) If units may be added to or withdrawn from the condominium, the declaration must state the formulas to be used to reallocate the allocated interests among all units included in the condominium after the addition or withdrawal.

(c) The declaration may provide: (i) that different allocations of votes shall be made to the units on particular matters specified in the declaration; (ii) for cumulative voting only for the purpose of electing members of the executive board; and (iii) for class voting on specified issues affecting the class if necessary to protect valid interests of the class. A declarant may not utilize cumulative or class voting for the purpose of evading any limitation imposed on declarants by this chapter nor may units constitute a class because they are owned by a declarant.

(d) Except for minor variations due to rounding, the sum of the undivided interests in the common elements and common expense liabilities allocated at any time to all the units must each equal one if stated as fractions or one hundred percent (100%) if stated as percentages. If the declaration allocates to each of the units a fraction or percentage of ownership of the common elements that results in an actual total of such fractions or percentages that is greater or less than the actual whole of such ownership, each unit's ownership of the common elements shall be automatically reallocated so that each unit is allocated the same fraction or percentage of ownership of the actual whole as that unit had of the actual total that was greater or less than the actual whole. The declarant or the association shall file an amendment to the declaration reflecting such reallocation which amendment need not be executed by any other party.

(e) The common elements are not subject to partition, and any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an undivided interest in the common elements made without the unit to which that interest is allocated is void.

History

1985 (Reg. Sess., 1986), c. 877, s. 1.

Annotations

Commentary

Official Comment

1. Most existing condominium statutes require a single common basis, usually related to the "value" of the units, to be used in the allocation of common element interests, votes in the association, and common expense liabilities. This Act departs radically from such requirements by permitting each of these allocations to be made on different bases, and by permitting allocations which are unrelated to value.

Thus, all three allocations might be made equally among all units, or in proportion to the relative size of each unit, or on the basis of any other formula the declarant may select, regardless of the values of those units. Moreover, "size" might be used, for example, in allocating common expenses and common element interests, while equality is used in allocating votes in the association. This section does not require that the formulas used by the declarant be justified, but it does require that the formulas be explained. The sole restriction on the formulas to be used in these allocations is that they not discriminate in favor of the units owned by the declarant. Otherwise, each of the separate allocations may be made on any basis which the declarant chooses, and none of the allocations need be tied to any other allocation.

2. While the flexibility permitted in allocations is broader than that permitted by any present statutes, it is likely that the traditional bases for allocation will continue to be used, and that the allocations for all allocated interests will often be based on the same formulas. Most commonly, those bases include size, equality, or value of units. Each of these is discussed below.

3. If size is chosen as a basis of allocation, the declarant must choose between reliance on area or volume, and the choice must be indicated in the declaration. The declarant might further refine the formula by, for example, excluding unheated areas from the calculation or by partially discounting such areas by means of a ratio. Again, the declarant must indicate the choices he has made and explain the formulas he has chosen.

4. Most existing condominium statutes require that "value" be used as the basis of all allocations. Under this Act a declarant is free to select such a basis if he wishes to do so. For example, he might designate the "par value" of each unit as a stated number of dollars or points. However, the formula used to develop the par values of the various units would have to be explained in the declaration. For example, the declaration for a high-rise condominium might disclose that the par value of each unit is based on the relative area of each unit on the lower floors, but increases by specified percentages at designated higher levels. The formula for determining area in this example could be further refined in the manner suggested in Comment 2, above, and any other factors (such as the direction in which a unit faces) could also be given weight so long as the weight given to each factor is explained in the declaration.

5. The purpose of subsection (b) is to afford some advance disclosure to purchasers of units in the first phase of a flexible condominium of how common element interests, votes and common expense liabilities will be reallocated if additional units are added.

6. Subsection (e) means what it says when it states that a lien or encumbrance on a common element interest without the unit to which that common element interest is allocated is void. Thus, consider the case of a flexible condominium in which there are 50 units in the first phase, each of which initially has a 2 percent undivided interest in the common elements. The declarant borrows money by mortgaging additional real estate. When the declarant expands the condominium by adding phase 2 containing an additional 50 units, he reallocates the common element interests in the manner described in his original declaration, to give each of the 100 units a 1 percent undivided interest in the common elements in both phases of the condominium. At this point, the construction lender cannot have a lien on the undivided interest of phase 1 owners in the common elements of phase 2 because of the wording of the statute. Thus, the most that the construction lender can have is a lien on the phase 2 units together with their common element interests. The mortgage documents may be written to reflect the fact that upon the addition of phase 2 of the condominium, the lien on the additional real estate will be converted into a lien on the phase 2 units

and on the common element interest as they pertain to those units in both phase 1 and phase 2; however, *see* Comment to Section 2-110.

Unless the lender also requires phase 2 to be designated as withdrawable real estate, the phase 2 portion may not be foreclosed upon other than as condominium units and the construction lender may not dispose of phase 2 other than as units which are a part of the condominium. In the event that phase 2 is designated as withdrawable land, then the construction lender may force withdrawal of phase 2 and dispose of it as he wishes, subject to the provisions of the declaration. If one unit in phase 2, however, has been sold to anyone other than the declarant, then phase 2 ceases to be withdrawable land by operation of Section 2-110(d)(2).

7. If a unit owned only by the declarant—as opposed to the same unit if owned by another person—may be subdivided into 2 or more units but cannot be converted in whole or in part into common elements, it is still a unit that may be subdivided or converted into 2 or more units or common elements, within the meaning of the definition of development rights, and is not governed by Section 2-113 (Subdivision of Units).

8. Subsection (c) represents a significant departure from practice in most states concerning the allocation of votes. The usual rule is that a single allocation of votes is made to each unit, and that allocation applies to all matters on which those votes may be cast. This section recognizes that the increasingly complex nature of some projects requires different allocation on particular questions. It may be appropriate, for example, in a project where common expense liabilities, or questions concerning rules and regulations, affect different units differently.

EXAMPLE:

In a mixed commercial and residential project, the declaration might provide that each unit owner would have an equal vote for the election of the Board of Directors. However, on matters concerning ratification of the common expense budget, where the commercial unit owners paid a much larger share than their proportion of the total units, the vote of commercial unit owners would be increased to 3 times the number of votes the residential owners held. Alternatively, of course, it might be possible to treat this question as a class voting matter, but the draftsman is provided flexibility in this section to choose the most appropriate solution.

9. This section recognizes that there may be certain instances in which class voting in the association would be desirable. For example, in a mixed-use condominium consisting of both residential and commercial units, there may be certain kinds of issues upon which the residential or commercial unit owners should have a special voice, and the device described in Comment 9 was not desired. To prevent abuse of class voting by the declarant, subsection (c) permits class voting only with respect to specified issues directly affecting the designated class and only insofar as necessary to protect valid interests of the designated class.

EXAMPLE:

Owners of town house units, in a single project consisting of both town house and high-rise buildings, might properly constitute a separate class for purposes of voting on expenditures affecting just the town house units, but they might not be permitted to vote by class on rules for the use of facilities used by all the units.

The subsection further provides that the declarant may not use the class voting device for the purpose of evading any limitation imposed on declarants by this Act (e.g., to maintain declarant control beyond the period permitted by Section 3-103).

10. The last clause of subsection (c) prohibits a practice common in the planned community or other non-condominium multi-ownership projects, where units owned by declarant constitute a separate class of units for voting and other purposes. Upon transfer of title, those units lose these more favorable voting rights. This section makes clear that the votes and other attributes of ownership of a unit may not change by virtue of the identity of the owner. In those circumstances which such classes were legitimately intended to address, principally control of the association, the Act provides other, more balanced devices for declarant control. *See* Section 3-103(d).

North Carolina Comment

This section does not differ significantly from the Uniform Act except for the second and third sentences of subsection (d) which provides for a mathematical reallocation to ensure that the undivided shares in the common elements, stated as fractions or percentages, in the aggregate, equal either one or one hundred.

Research References & Practice Aids

Hierarchy Notes:

N.C. Gen. Stat. Ch. 47C

End of Document

N.C. Gen. Stat. § 47C-2-117

Current through Session Laws 2023-12, except for Session Laws 2023-7, of the 2023 Regular Session of the General Assembly, but does not reflect possible future codification directives from the Revisor of Statutes pursuant to G.S. 164-10.

General Statutes of North Carolina > Chapter 47C. North Carolina Condominium Act. (Arts. 1 — 4) > Article 2. Creation, Alteration, and Termination of Condominiums. (§§ 47C-2-101 — 47C-2-121)

§ 47C-2-117. Amendment of declaration.

(a) Except in cases of amendments that may be executed by a declarant under G.S. 47C-2-109(d) or 47C-2-110, the association under G.S. 47C-1-107, 47C-2-106(d), 47C-2-112(a), or 47C-2-113, or certain unit owners under G.S. 47C-2-108(b), 47C-2-112(a), 47C-2-113(b), or 47C-2-118(b), and except as limited by subsection (d) of this section, the declaration may be amended only by affirmative vote of, or a written agreement signed by, unit owners of units to which at least sixty-seven percent (67%) of the votes in the association are allocated or any larger majority the declaration specifies. The declaration may specify a smaller number only if all of the units are restricted exclusively to nonresidential use.

(b) As long as the approval requirements for any amendment adopted pursuant to this section or G.S. 47C-2-105(a)(8) have been met, no action to challenge the validity of an amendment adopted by the association pursuant to this section or pursuant to G.S. 47C-2-105(a)(8) shall be brought more than one year after the amendment is recorded.

(c) Every amendment to the declaration shall be recorded in every county in which any portion of the condominium is located and is effective only upon recordation. An amendment shall be indexed in the Grantee's index in the name of the condominium and the association and in the Grantor's index in the name of the parties executing the amendment.

(d) Except to the extent expressly permitted or required by other provisions of this Chapter, no amendment shall create or increase special declarant rights, increase the number of units, or change the boundaries of any unit, the allocated interest of a unit, or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners.

(e) Amendments to the declaration required by this Chapter to be recorded by the association shall be prepared, executed, recorded, and certified on behalf of the association by any officer of the association designated for that purpose or, in the absence of designation, by the president of the association.

(f) This Article and the condominium instruments recorded pursuant to it shall be liberally construed in favor of the valid establishment of a condominium with respect to the submitted property. Except as otherwise provided in the declaration or explicitly prohibited by this Chapter, if any amendment to the declaration is necessary in the judgment of the executive board, then the executive board may, at its discretion, propose an amendment to the declaration for any of the following purposes:

(1) To cure any ambiguity, to establish marketable title to units, or to correct or supplement any provision of the declaration, including plats or plans, that is defective, missing, or inconsistent with any other provision of the declaration or with this Chapter.

(2) To conform to the requirements of any agency or entity that has established national or regional standards with respect to loans secured by mortgages or deeds of trust on units in condominium

projects, such as the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation.

(3) To comply with any statute, regulation, code, or ordinance applicable to the condominium or association.

(4) To make a reasonable accommodation or permit a reasonable modification in favor of persons with disabilities, as may be defined by federal or State laws or regulations applicable to the association or its employees, unit owners, residents, or tenants.

The authority granted to the executive board under this subsection does not limit the authority of the executive board to propose any amendment for any other purpose permitted in the declaration or by this Chapter. Upon approval by the executive board of an amendment pursuant to this subsection, the executive board shall set a date for a meeting of the unit owners to consider ratification of the amendment not less than 10 nor more than 60 days after mailing of notice of the meeting. The notice shall include a copy or summary of the proposed amendment. There is no requirement that a quorum be present at the meeting. The amendment is ratified by the unit owners unless at that meeting unit owners holding a majority of the votes in the association reject the amendment. Any amendment recorded pursuant to this subsection in the office of the register of deeds in the county or counties where the condominium is located operates as a correction of the declaration being corrected that relates back to, and is effective as of, the date the declaration being corrected was originally recorded in the office of the register of deeds, with the same effect as if the declaration were correct when the declaration was first recorded.

History

1985 (Reg. Sess., 1986), c. 877, s. 1; *2020-52, s. 3(a)*; *2022-62, s. 55*.

Annotations

Notes

Editor's Note.

Subsection (d) of *G.S. 47C-1-106*, referred to in subsection (a) of this section, does not exist. It appears that a reference to *G.S. 47C-2-106(d)* was intended.

Effect of Amendments.

Session Laws 2020-52, s. 3(a), effective June 30, 2020, in subsection (b), added the proviso at the beginning and inserted "or pursuant to G.S. 47C-2-105(a)(8)" near the middle; and added subsection (f).

Session Laws 2022-62, s. 55, effective July 8, 2022, in subsection (a), substituted "47C-2-106(d)" for "47C-1-106(d) [47C-2-106(d)]," and substituted "subsection (d) of this section" for "subsection (d)"; substituted "As long as" for "Provided that" in subsection (b); substituted "must" for "shall" in subsection (c); in subsection (f), rewrote the first sentence, and deleted "which may be" preceding "applicable" in subdivision (f)(3); and made stylistic changes throughout.

Commentary

Official Comment

1. This section recognizes that the declaration, as the perpetual governing instrument for the condominium, may be amended by various parties at various times in the life of the project. The basic rule, stated in subsection (a), is that the declaration, including the plats and plans, may only be amended by vote of 67% of the unit owners. The section permits a larger percentage to be required by the declaration, and also recognizes that, in an entirely non-residential condominium, a smaller percentage might be appropriate.

In addition to that basic rule, subsection (a) lists those other instances where the declaration may be amended by the declarant alone without association approval, or by the association acting through its board of directors.

2. Section 1-104 does not permit the declarant to use any device, such as powers of attorney executed by purchasers at closings, to circumvent subsection (d)'s requirement of unanimous consent. This section does not supplant any requirements of common law or of other statutes with respect to conveyancing if title to real property is to be affected.

3. Subsection (e) describes the mechanics by which amendments recorded by the association are filed, and resolves a number of matters often neglected by bylaws.

North Carolina Comment

This section is not significantly different from the Uniform Act.

Research References & Practice Aids

Hierarchy Notes:

N.C. Gen. Stat. Ch. 47C

End of Document

N.C. Gen. Stat. § 47C-3-107

Current through Session Laws 2023-12, except for Session Laws 2023-7, of the 2023 Regular Session of the General Assembly, but does not reflect possible future codification directives from the Revisor of Statutes pursuant to G.S. 164-10.

General Statutes of North Carolina > Chapter 47C. North Carolina Condominium Act. (Arts. 1 — 4) > Article 3. Management of the Condominium. (§§ 47C-3-101 — 47C-3-122)

§ 47C-3-107. Upkeep; damages; assessments for damages, fines.

(a) Except as provided in G.S. 47C-3-113(h), the association is responsible for causing the common elements to be maintained, repaired, and replaced when necessary and to assess the unit owners as necessary to recover the costs of such maintenance, repair, or replacement except that the cost of maintenance, repair or replacement of a limited common element shall be assessed as provided in G.S. 47C-3-115(b). Each unit owner is responsible for maintenance, repair and replacement of his unit. Each unit owner shall afford to the association and when necessary to another unit owner access through his unit or the limited common element assigned to his unit reasonably necessary for any such maintenance, repair or replacement activity.

(b) If damage, for which a unit owner is legally responsible and which is not covered by insurance provided by the association pursuant to G.S. 47C-3-113 is inflicted on any common element or limited common element, the association may direct such unit owner to repair such damage or the association may itself cause the repairs to be made and recover the costs thereof from the responsible unit owner.

(c) If damage is inflicted on any unit by an agent of the association in the scope of his activities as such agent, the association is liable to repair such damage or to reimburse the unit owner for the cost of repairing such damages. The association shall also be liable for any losses to the unit owner.

(d) The bylaws of the association may in cases when the claim under subsection (b) or (c) is five hundred dollars ($500.00) or less provide for hearings before an adjudicatory panel to determine if a unit owner is responsible for damages to any common element or whether the association is responsible for damages to any unit. Such panel shall accord to the party charged with causing damages notice of the charge, opportunity to be heard and to present evidence, and notice of the decision. This panel may assess a liability for each damage incident not in excess of five hundred dollars ($500.00) against each unit owner charged or against the association. Liabilities of unit owners so assessed shall be assessments secured by lien under G.S. 47C-3-116. Liabilities of the association may be offset by the unit owner against sums owing the association and if so offset shall reduce the amount of any lien of the association against the unit at issue.

(e) The declarant alone is liable for maintenance, repair and all other expenses in connection with real estate subject to development rights.

History

1985 (Reg. Sess., 1986), c. 877, s. 1; 2013-34, s. 1.

Annotations

Notes

Effect of Amendments.

Session Laws 2013-34, s. 1, effective April 24, 2013, added "or the limited common element assigned to his unit" in the last sentence of subsection (a); and added "or limited common element" in subsection (b).

Commentary

Official Comment

1. The Act permits the declaration to separate maintenance responsibility from ownership. This is commonly done in practice. In the absence of any provision in the declaration, maintenance responsibility follows ownership of the unit or rests with the association in the case of common elements. Under this Act, limited common elements (which might include, for example, patios, balconies, and parking spaces) are common elements. *See* Section 1-103(16). As a result, under subsection (a), unless the declaration requires that unit owners are responsible for the upkeep of such limited common elements, the association will be responsible for their maintenance. Under Section 3-115(c), the cost of maintenance, repair, and replacement for such limited common elements is assessed against all the units in the condominium, unless the declaration provides for such expenses to be paid only by the units benefitted. *See* Comment 1 to Section 2-108.

2. Under Section 2-110, a declarant may reserve the right to create units in portions of the condominium originally designated as common elements. Prior to creation of the units, title to those portions of the condominium is in the unit owners. However, under Section 3-107(b), the developer is obligated to pay all of the expenses of (including real estate taxes properly apportionable to) that real estate. As to real estate taxes, *see* Section 1-105(c).

North Carolina Comment

Subsections (a), (b), (c) and (e) reflect revisions in language and structure (but not substance) of the Uniform Act. Subsection (d) is new and allows the association in cases when the claim for damages to a common element is $500 or less to hold hearings before an adjudicatory panel to determine whether a unit owner or the association is responsible for the damages. The subsection provides for minimal due process for the party charged with causing the damages. The subsection also provides that the liabilities of unit owners shall be assessments secured by lien under Section 47C-3-116 and the liabilities of the association may be offset by the unit owner against sums owing the association.

CASE NOTES

Marina Association Entitled to Collect Dredge Assessment. —

Pursuant to statutory provisions and the provisions of the declaration of unit ownership establishing a marina association allowed the association to levy assessments from the owners of a private boat slip at the dock of the marina for the maintenance of the common areas, including those portions of the marina basin beneath the slips. *Carolina Marlin Club Marina Ass'n v. Preddy, 238 N.C. App. 215, 767 S.E.2d 604, 2014 N.C. App. LEXIS 1340 (2014)*.

Research References & Practice Aids

Legal Periodicals.

For note which examines the history and development of North Carolina law dealing with condominiums, see *66 N.C.L. Rev. 199 (1987)*.

Hierarchy Notes:

N.C. Gen. Stat. Ch. 47C

End of Document

UNIFORM CONDOMINIUM ACT (1980)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONRS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS EIGHTY-NINTH YEAR
ON KAUAI, HAWAII
JULY 26-AUGUST 1, 1960

WITH COMMENTS

August 16, 2021

The Executive Committee approved technical and conforming amendments to the act at its July 13, 2017 meeting.

(8) provide for any matter required by law of this state other than this [act] to appear in the bylaws of organizations of the same type as the association.

(b) Subject to the declaration and this [act], the bylaws may provide for any other necessary or appropriate matters, including matters that could be adopted as rules.

Comment

1. Because the Act does not require the recordation of bylaws, it is contemplated that unrecorded bylaws will set forth only matters relating to the internal operations of the association and various "housekeeping" matters with respect to the condominium, including matters that could be adopted as rules. The Act requires specific matters to be set forth in the recorded declaration and not in the bylaws, unless the bylaws are to be recorded as an exhibit to the declaration.

2. The requirement, set forth in paragraph (a)(5), that the bylaws designate which of the officers of the association has the responsibility to prepare, execute, certify, and record amendments to the declaration reflects the obligation imposed upon the association by several provisions of this Act to record such amendments in certain circumstances. These provisions include Section 1-107 (Eminent Domain), Section 2-106 (expiration of certain leases), Section 2-112 (Relocation of Boundaries Between Adjoining Units), and Section 2-113 (subdivision or conversion of units). Section 2-117(e) provides that, if no officer is designated for this purpose, it shall be the duty of the president.

Paragraph (a)(6) requires the bylaws to state a method by which the unit owners may amend the bylaws. This provision complements the new text in Section 3-102 (b) that precludes the executive board from amending the bylaws.

3. Paragraphs (a)(7), (a)(8), and subsection (b) conform this Act with comparable UCIOA amendments. Paragraph (a)(7) requires the bylaws to contain any provision necessary to satisfy this Act and the declaration concerning association meetings, voting, and quorum rules. Paragraph (a)(8) requires the bylaws to address any matters that would have to be addressed in the bylaws of an organization of the same type as the association.

SECTION 3-107. UPKEEP OF CONDOMINIUM.

(a) Except to the extent provided by the declaration, subsection (b), or Section 3-113(h), the association is responsible for maintenance, repair, and replacement of the common elements, and each unit owner is responsible for maintenance, repair, and replacement of the unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, access through the unit reasonably necessary for those purposes. If damage is

inflicted on the common elements, or on any unit through which access is taken, the unit owner responsible for the damage, or the association if it is responsible, is liable for the prompt repair thereof.

(b) In addition to the liability that a declarant as a unit owner has under this [act], the declarant alone is liable for all expenses in connection with real estate subject to development rights. No other unit owner and no other portion of the condominium is subject to a claim for payment of those expenses. Unless the declaration provides otherwise, any income or proceeds from real estate subject to development rights inures to the declarant.

Comment

1. The Act permits the declaration to separate maintenance responsibility from ownership. This is commonly done in practice. In the absence of any provision in the declaration, maintenance responsibility follows ownership of the unit or rests with the association in the case of common elements. Under this Act, limited common elements (which might include, for example, patios, balconies, and parking spaces) are common elements. See Section 1-103(19). As a result, under subsection (a), unless the declaration requires that unit owners are responsible for the upkeep of such limited common elements, the association will be responsible for their maintenance. Under Section 3-115(c), the cost of maintenance, repair, and replacement for such limited common elements is assessed against all the units in the condominium, unless the declaration provides for such expenses to be paid only by the units benefited. See Section 2-108, Comment 1.

2. Under Section 2-110, a declarant may reserve the right to create units in portions of the condominium originally designated as common elements. Prior to creation of the units, title to those portions of the condominium is in the unit owners. However, under Section 3-107(b), the developer is obligated to pay all of the expenses of (including real estate taxes properly apportionable to) that real estate. As to real estate taxes, see Section 1-105(c).

SECTION 3-108. MEETINGS.

(a) The following requirements apply to unit owner meetings:

(1) An association shall hold a meeting of unit owners annually at a time, date, and place stated in or fixed in accordance with the bylaws.

(2) An association shall hold a special meeting of unit owners to address any matter affecting the condominium or the association if its president, a majority of the executive

COMMON INTEREST COMMUNITIES IN NORTH CAROLINA

SECOND EDITION

BY
BRIAN S. EDLIN

NORTH CAROLINA
BAR ASSOCIATION
seeking liberty + justice

§ 6.03.03. Limited Common Elements

Under the Condominium Act, a "limited common element" means a portion of the common elements allocated by the declaration for the exclusive use of one or more but fewer than all of the units.[63] Limited common elements are a subset of common elements.[64] They are a type of common elements since the way in which their maintenance costs are funded is usually through assessments from owners. Although not required under the Condominium Act, the Condominium Act allows the association to collect common expenses from the unit owners who directly benefit from the maintenance of the limited common elements. [65] In practice, this is done by the declaration requiring that any common expense associated with the maintenance of a limited common element shall be assessed against the unit to which such limited common element is allocated.[66] The "guts" of the building that are outside the conventional boundaries of the unit, but only serve the unit (as opposed to multiple units), are limited common elements under the Condominium Act.[67] In addition, things such as shutters, awnings, window boxes, doorsteps, stoops, decks, porches, balconies, patios, and all exterior doors and windows or other fixtures designed to serve a single unit but are located outside the technical boundary of a unit are also limited common elements allocated exclusively to that unit.[68] These definitions under the Condominium Act only apply to condominiums formed after 1986.[69]

With respect to pre-1986 condominiums, limited common areas means "those common areas and facilities which are agreed upon by all the unit owners to be reserved for the use of a certain number of units to the exclusion of the other units, such as special corridors, stairways and elevators, sanitary services common to the units of a particular floor, and the like."[70] If the declaration specifies that expenses for the maintenance of portions of the building that benefit specific unit owners are to be taxed against the unit owners, then the cost of such alterations or improvements should be assessed against and collected solely from the owners benefitted and should not be assessed more generally as a common expense that every owner pays.[71]

§ 6.03.04. Distinction Between Units and Common Elements

Distinguishing between units and common elements can be difficult. The Condominium Act uses a "process of elimination" approach where it defines "common elements" as "all portions of a condominium other than the units."[72] Thus, defining the unit boundaries is crucial for labeling all aspects of a condominium building — both common elements and limited common elements alike. The Condominium Act provides default guidelines for determining what the unit boundaries are; however, these guidelines may be varied by the declaration.[73] Thus, the starting point for determining where the boundaries are is in the declaration. Ultimately, the developer is required under the Condominium Act to put in the declaration a description (by reference to the plats or plans) of the boundaries of each unit created by the declaration, including the unit's identifying number.[74]

A common definition of a "unit" in a declaration provides as follows:

> The unfinished surfaces of the walls, floors, windows, exterior doors and ceilings are designated as boundaries of a Unit. All finished surfaces, including paint, wallpaper, tile, paneling, finished flooring

CONTENT OF ADDENDUM

218 N.C.App. 454
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
Court of Appeals of North Carolina.

Thomas D. BOWERS, Herman R. Guthrie and Dorothy G. Guthrie, Plaintiffs

v.

Wayne TEMPLE; Steve Hargis; James Fitts; Corky Jones; and William Whaley, in personam and as The Board of Directors of Leeward Harbor Homeowner's Inc. and Leeward Harbor Homeowner's Inc., Defendants.

No. COA11–566
|
Feb. 7, 2012.

Synopsis

Background: Condominium unit owners brought action against homeowners' association board seeking a declaratory judgment that amendment to condominium declarations regarding use of boat slips by unit lessees was void. The Superior Court, Carteret County, Paul L. Jones, J., granted association summary judgment. Unit owners appealed.

Holdings: The Court of Appeals, Calabria, J., held that:

res judicata did not preclude litigation regarding validity of amendment to declarations restricting unit lessees from using boat slips;

collateral estoppel did not apply to preclude issue regarding validity of amendment; and

association was authorized to amend declarations.

Affirmed.

Attorneys and Law Firms

Wheatly, Wheatly, Weeks & Lupton, P.A., by Claud R. Wheatly, III and Claud R. Wheatly, Jr., for plaintiff-appellants.

Cranfill Sumner & Hartzog, LLP, by Regan S. Toups and Angela W. DiNoto, for defendant-appellees.

***1** Appeal by plaintiffs from order entered 20 December 2010 by Judge Paul L. Jones in Carteret County Superior Court. Heard in the Court of Appeals 25 October 2011.

CALABRIA, Judge.

Thomas D. Bowers ("Bowers"), Herman R. Guthrie and Dorothy G. Guthrie (collectively "plaintiffs") appeal from an order granting summary judgment in favor of Wayne Temple, Steve Hargis, James Fitts, Corky Jones, and William Whaley, in personam[1] and as The Board of Directors of Leeward Harbor Homeowner's Inc. ("the Board") and Leeward Harbor Homeowner's Inc. ("HOA") (the Board and HOA are collectively "defendants"). We affirm.

I. Background

Leeward Harbor is a waterfront condominium complex, consisting of thirty-six units and marina facilities with boat slips, located in Morehead City, North Carolina. Plaintiffs are unit owners at Leeward Harbor. Leeward Harbor's original Declaration Creating Unit Ownership of Property under the provisions of N.C. Gen.Stat. § 47A ("Declaration"), designated the marina facilities as common areas and gave each unit owner an undivided interest in the common areas. Art. IV, Section D of the Declaration stated:

> All marina facilities shall be common areas; provided, however, that the owner or owners of each unit in LEEWARD HARBOR shall be entitled to the exclusive use of one (1) boat slip in the marina. The Board of Directors shall determine the slip which each unit's owner(s) shall be entitled to use; and the use of that slip shall thereafter be appurtenant to the use of such unit, and may not be severed therefrom unless agreeably exchanged between the owners of the units. In the event owners of units reach an agreement of exchange, such exchange shall not be effective until and unless approved by the Board of Directors.

In February 1986, approximately five months after the original Declaration was recorded, an amendment was passed ("1986 amendment"). One of the provisions of the 1986 amendment deleted Art. IV, section D, and replaced it with this language:

> All marina facilities shall be common areas; provided, however, that the owner or owners of each unit in Leeward Harbor shall be entitled to the exclusive use of one boat slip in the marina. The Board of Directors shall determine the slip which each unit's owner(s) shall be entitled to use. The use of that slip shall thereafter be controlled by the Board of Directors. At the discretion of the Board, any slip may subsequently be reassigned.

At the time plaintiffs purchased their units, the 1986 amendment was already in effect.

The Declaration did not restrict the unit owners from leasing their units. However, in the spring of 2008, based on the language of the 1986 amendment which allowed the BOD to control the use of the boat slips and reassign the slips at their discretion, the BOD ruled that lessees were denied the use of the boat slips. Bowers had executed a lease for his unit which was to begin on 1 May 2007 and continue for two years. In May 2008, the BOD notified Bowers that the lessee of his unit must remove her boat by 31 May 2008 or the HOA would remove the boat and store it at Bowers's expense.

***2** Subsequent to the BOD's ruling, Bowers filed an action ("first action" or "prior action") against the HOA and BOD seeking a declaratory judgment and a preliminary injunction. This first action alleged, *inter alia,* that, the HOA's new rule was contrary to the provisions of the Declaration, denied him the right to lease his property, caused him to lose rental income, and he suffered damages as a result of the loss of rental income of his unit. The court found the HOA was without authority to deny lessees the use of the boat slips and awarded Bowers $2,400 in damages as a result of the HOA's unlawful act.

Prior to the resolution of the first action, Bowers filed a separate motion for partial summary judgment regarding the validity of the 1986 purported amendment. After a hearing, the Judge declared the 1986 purported amendment void because it "lack[ed] an adequate acknowledgment and therefore was unlawfully recorded and said document [wa]s without validity and fail[ed] to provide notice to the public." ("2009 judgment") Neither judgment was appealed.

On 28 May 2010, the HOA held a membership meeting to enact another amendment to the original Declaration ("2010 amendment"). Again, the HOA sought to delete the original Art. IV, Section D and replace it with the following new language:

> All marina facilities shall be common areas; provided, however, that, the Owner or Owners of each unit in LEEWARD HARBOR shall be entitled to the exclusive use of (1) one boat slip in the marina as long as the leased marina property remains under lease for the use and enjoyment of the LEEWARD HARBOR Owners. The Board of Directors shall determine the slip that each unit's Owner(s) shall be entitled to use. A list of the slip designations will be provided to the Owners annually. Owners may request a current designation list from the Harbor Master at any time. The specific slip designated for use by the Owner(s) may be changed at the discretion of the Board of Directors.

The 2010 amendment only applied to unit owners who voted in favor of the amendment and to future owners. Those who voted against the 2010 amendment were exempt from the terms of the amendment unless they voluntarily accepted it or voluntarily or involuntarily conveyed or transferred their unit.

On 21 July 2010, plaintiffs filed the current action ("current action" or "second action") seeking a declaratory judgment requesting the court to declare that the 2010 amendment was void. Plaintiffs alleged that because the court declared an amendment that deleted Art. IV, Section D of the Declaration was void in the 2009 judgment, and the 2010 amendment also deleted and replaced Art. IV, Section D of the Declaration, the doctrine of *res judicata* applied. Plaintiffs also requested that the court enjoin defendants from attempting to enact amendments to the Declaration that destroyed owner's vested rights unless all unit owners unanimously agreed by a written agreement.

***3** Defendants timely filed an answer and motion to dismiss. On 19 October 2010, plaintiffs filed a motion for summary judgment. During a hearing on plaintiffs' motion, defendants also made a motion for summary judgment. On 21 December 2010, the court entered an order denying plaintiffs' motion for summary judgment and granting defendants' motion for summary judgment. The court held that the doctrines of *res judicata* and collateral estoppel did not apply. In addition, the court found there was no actual or justiciable controversy regarding the leasing of units in Leeward Harbor and upheld the validity of the 2010 amendment. Plaintiffs appeal.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is *de novo;* such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones,* 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal,* 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007)).

III. Res Judicata and Collateral Estoppel

Plaintiffs argue that the trial court erred in denying their motion for summary judgment, granting defendants' motion for summary judgment and finding the doctrines of *res judicata* and collateral estoppel did not apply. Specifically, plaintiffs allege that *res judicata* and collateral estoppel apply to the 2010 amendment because the 2009 judgment required unanimous consent of owners before an amendment seeking to destroy ownership interests could be enacted, and the 2010 amendment sought to destroy ownership interests without unanimous consent. We disagree.

Initially, we note that plaintiffs alleged in their complaint in the current action that *res judicata* applies because of the judgments from the first action. However, on appeal, the only issues remaining are whether the 2010 amendment, or any future amendments, are valid if, as plaintiffs allege, they attempt to destroy elements of ownership without the unanimous consent of all the owners. Therefore, our review only focuses on whether *res judicata* and collateral estoppel apply to the 2010 amendment as a result of the 2009 judgment.

A. Res judicata

Res judicata and collateral estoppel are companion doctrines that were developed "for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Bockweg v. Anderson,* 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993). *Res judicata* applies "where the second action between two parties is upon the same claim." *Id.* at 492, 428 S.E.2d at 161. "The prior judgment serves as a bar to the relitigation of all matters that were or should have been adjudicated in the prior action." *Id.* To prove *res judicata,* a party must show "(1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits." *Moody v. Able Outdoor, Inc.,* 169 N.C.App. 80, 84, 609 S.E.2d 259, 262 (2005). There is no dispute that the 2009 judgment was a final judgment. However, plaintiffs have the burden to show that the second element of *res judicata* applies in the second action.

***4** In the instant case, plaintiffs contend that the 1986 amendment and the 2010 amendment are essentially the same amendment, even though they were enacted at separate times, and *res judicata* applies. We disagree. While both amendments delete the original Art. IV, Section D and replace it with a new section, the 2010 amendment differs from the 1986 amendment.

Bowers brought the first action because the 1986 amendment allowed the BOD to stop Bowers from leasing his unit with the boat slip, which resulted in a loss of rental income. The 2010 amendment does not hinder Bowers from either leasing his unit or allowing his lessee to use the boat slip. In the second action, plaintiffs claim the 2010 amendment takes away their ability to sell or bequeath their unit with the accompanying boat slip. While both amendments gave the BOD some power to assign the boat slips, the 2010 amendment does not apply to owners, such as plaintiffs, who voted against the amendment. Therefore, unless plaintiffs voluntarily subject themselves to the 2010 amendment, the BOD may not take away plaintiffs' use of the boat slips until they convey or transfer their units.

In *Tar Landing Villas v. Town of Atlantic Beach,* the petitioners claimed that "a previous judgment involving an earlier annexation by the Town of the land in question barred the Town from annexing petitioners' lands under the doctrine of ... *res judicata.*" 64 N.C.App. 239, 240, 307 S.E.2d 181, 183 (1983). There, the Court held that *res judicata* was inapplicable because the second annexation ordinance was enacted subsequent to the first judgment, and therefore its validity had not been determined in the prior action. *Id.* at 242, 307 S.E.2d at 184.

Here, the second action regarding the 2010 amendment is different than the first action because the amendments are different. The 1986 amendment gave the BOD the power to deny unit owner lessees the use of the boat slips, but the 2010 amendment only applied to unit owners who voted in favor of the amendment and to future owners. In addition, the 2010 amendment was passed after the court declared the 1986 amendment was void. Just as the Court found in *Tar*

Landing, that the validity of the second ordinance had not been determined in the prior action, the validity of the 2010 amendment in the instant case was not determined in the prior action.

Plaintiffs failed to show the second element of *res judicata* applies. Since all elements are required to prove *res judicata,* and the second element is not present here, it is unnecessary for us to determine whether the third element of *res judicata* applies. Since the doctrine of res judicata does not apply in the instant case, the prior 2009 judgment does not bar the litigation in the present action.

B. Collateral Estoppel

Although *res judicata* does not apply, we must also determine whether collateral estoppel applies. When the second action involves a different claim, collateral estoppel bars relitigation of "issues actually litigated and determined in the original action." *Bockweg,* 333 N.C. at 492, 428 S.E.2d at 161. Offensive collateral estoppel "occurs when a plaintiff attempts to prevent a defendant from relitigating issues it previously and unsuccessfully litigated." *Tar Landing,* 64 N.C.App. at 244, 307 S.E.2d at 185. There are four requirements to determine whether collateral estoppel is applicable to specific issues:

> ***5** (1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

King v. Grindstaff, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973). The court should consider "judicial economy and fairness to the other party" when applying collateral estoppel. *Tar Landing,* 64 N.C.App. at 244, 307 S.E.2d at 185.

1. Issues Must be Identical, Raised and Actually Litigated in Both Actions

For purposes of collateral estoppel, the issues in both matters must be identical, "if they are not identical, then the doctrine of collateral estoppel does not apply." *Williams v. Peabody,* —— N.C.App. ——, ——, ——S.E.2d ——, —— (2011) (citations and internal brackets omitted). "[A]n issue is actually litigated ... if it is properly raised in the pleadings or otherwise submitted for determination and is in fact determined." *Id.* (citations and internal brackets omitted).

In the first action, Bowers raised the issues of whether the HOA could amend the Declaration without unanimous consent of the owners and whether the 1986 amendment destroyed his ownership interests in his property. Bowers also contended the amendment was not properly recorded in accordance with statutory guidelines. The court included a statement in the 2009 judgment: "the law forbids amendments to declarations and by-laws that strike elements of ownership and rights of use of owners of units unless there is unanimous consent of unit owners" and the 1986 amendment "attempted to delete article 4, section D of the declaration and thereby destroy vested rights and interests of unit owners, including the Plaintiff's."

In the second action, plaintiffs alleged that the original Declaration provided owners with possessive use of a boat slip which could not be severed without the owner's permission. In addition, they contended the 2010 amendment deprived the condominium owners of their right to transfer title for both their unit and boat slip. Therefore, plaintiffs requested that the court declare the 2010 amendment was void.

In both actions, the issues to be concluded were the validity of the amendment, the nature of the owners' interests in the boat slips, and the actions necessary for the HOA to change those interests. Plaintiffs sought determination of whether the Declaration can be amended without unanimous consent of the owners and whether the 2010 amendment destroyed ownership interests in their property. The issues in both actions are identical and both were raised and litigated in the first action. Therefore, plaintiffs are correct that the first two requirements of collateral estoppel apply.

2. Material, Relevant, Necessary and Essential

***6** Since there are four requirements to determine whether collateral estoppel applies, we must also determine whether all issues raised and litigated in the first action were also "material and relevant to the disposition" as well as "necessary and essential to the resulting judgment." *King,* 284 N.C. at 358, 200 S.E.2d at 806. In the first action, Bowers sought a partial summary judgment declaring the 1986 amendment was void on two separate bases. He alleged that the 1986 amendment conflicted with the Declaration because it destroyed ownership interests without the required consent by the owners and restricted his use of the property. In addition, Bowers contended the amendment was not properly recorded in accordance with statutory guidelines.

In the first action, the trial court determined that amendments to the Declaration were controlled by N.C. Gen.Stat. § 47C–2–117, the North Carolina Condominium Act ("NCCA"). The NCCA provides that "[e]very amendment to the declaration must be recorded in every county in which any portion of the condominium is located and is effective only upon recordation." N.C. Gen.Stat. § 47C–2–117(c) (2011).

Therefore, the threshold question in determining the validity of the 1986 amendment in the first action was whether it was properly recorded. In the 2009 judgment, the judge declared the 1986 purported amendment void, stating that it "lack[ed] an adequate acknowledgment and therefore was unlawfully recorded and said document [wa]s without validity and fail[ed] to provide notice to the public."

Once the court found that the 1986 amendment was void on the basis that it was improperly recorded, it was unnecessary for the court to determine the merit of Bowers's other arguments.[2] However, the court included a statement regarding amendments to declarations in the 2009 judgment, the court found: "the law forbids amendments to declarations and by-laws that strike elements of ownership and rights of use of owners of units unless there is unanimous consent of unit owners" and the 1986 amendment "attempted to delete article 4, section D of the declaration and thereby destroy vested rights and interests of unit owners, including the Plaintiff's." Although the court stated unanimous consent by the owners was required and stated the 1986 amendment's effect on owners' rights, the trial court's statements in the 2009 judgment were superfluous to its finding that the 1986 amendment was void due to improper recordation. Therefore, the only issue in the first action that was "material and relevant to the disposition" and "necessary and essential to the resulting judgment" was whether or not the 1986 amendment was properly recorded. *King,* 284 N.C. at 358, 200 S.E.2d at 806. *See also Templeton v. Apex Homes, Inc.,* 164 N.C.App. 373, 378, 595 S.E.2d 769, 772 (2004) (where the Court concluded that, because plaintiffs won on one of their breach of contract claims and were awarded the only remedy plaintiffs sought, trial court's ancillary determinations that plaintiffs lost on two other breach of contract claims were not "necessary" to the judgment).

***7** In the second action, the recording of the 2010 amendment was not an issue. The reason plaintiffs requested a declaratory judgment for the court to decide the validity of the 2010 amendment was because plaintiffs alleged the 2010 amendment severed the owner's possessive use of their boat slip without the owner's permission and deprived the condominium owners of their right to transfer title for both their unit and boat slip. The court's statements in the 2009 judgment were superfluous and therefore not necessary or essential for the court to declare that the 1986 amendment was void. Therefore, the determination of the issues was also not "material and relevant to the disposition" or "necessary and essential to the resulting judgment." *King,* 284 N.C. at 358, 200 S.E.2d at 806.

While we recognize that both the first and second actions discuss amendments, the reason the 1986 amendment was declared void was because it was improperly recorded. Plaintiffs have failed to prove that the issues in the second action were "material and relevant" and "necessary and essential" to the 2009 judgment. We therefore hold that collateral estoppel does not bar the issues presented in the second action. We affirm the ruling of the trial court.

IV. Validity of 2010 Amendment

Plaintiffs next contend that the HOA has no authority to enact the 2010 amendment, and therefore it must be declared void. We disagree.

As a preliminary matter, we must determine which act governs the validity of the 2010 amendment, the NCCA, N.C. Gen.Stat. § 47C, or the Unit Ownership Act ("UOA"), N.C. Gen.Stat. § 47A. Leeward Harbors was built in 1985 and its Declaration was created pursuant to the UOA. However, the 2009 judgment indicated that amendments to the Declaration were governed by the NCCA.

In general, when a "prior judgment was based on an erroneous determination of law or fact" it may still be used for purposes of collateral estoppel. *Thomas M. McInnis & Assoc., Inc. v. Hall,* 318 N.C. 421, 431, 349 S.E.2d 552, 558 (1986). Consequently, an erroneous ruling binds courts for *res judicata* and collateral estoppel purposes. *Id.* However, there is no requirement that all future issues between the same parties must be adjudicated in the same manner when *res judicata* and collateral estoppel do not apply.

Since we have determined that neither *res judicata* nor collateral estoppel apply to the second action, the rule stated in *McInnis,* that all erroneous judgments are binding for *res judicata* and collateral estoppel, also does not apply in this

situation. The Court is free to use the appropriate statute to determine the validity of the 2010 amendment.

Plaintiffs contend that the NCCA is the appropriate act to use to determine the validity of the 2010 amendment. However, since Leeward Harbor was formed prior to 1 October 1986, its' Declaration was created pursuant to the UOA. While there are specific provisions of the NCCA that automatically apply to condominiums created prior to 1 October 1986, none of those apply in the instant case. However, the NCCA also states:

> ***8** The provisions of Chapter 47A, the Unit Ownership Act, do not apply to condominiums created after October 1, 1986 and do not invalidate any amendment to the declaration, bylaws, and plats and plans of any condominium created on or before October 1, 1986 if the amendment would be permitted by this chapter. The amendment must be adopted in conformity with the procedures and requirements specified by those instruments and by Chapter 47A, the Unit Ownership Act. If the amendment grants to any person any rights, powers, or privileges permitted by this chapter, all correlative obligations, liabilities, and restrictions in this chapter also apply to that person.

N.C. Gen.Stat. § 47C–1–102(b) (2011).

This Court has interpreted N.C. Gen.Stat. § 47C–1–102(b) and held that "an owners association may amend its declaration so as to conform to NCCA provisions, even if the amendments would not have been permitted under the UOA." *Ceplecha v. Pine Knoll Townes Phase II Ass'n,* 176 N.C.App. 566, 569–70, 626 S.E.2d 767, 769–70 (2006) (holding that amendment to declarations enacted under the UOA was void where it failed to conform to the applicable NCCA provision). Therefore, when a conflict occurs, the NCCA trumps the UOA even though the condominiums were enacted under the UOA. Nevertheless, amendments to declarations enacted under the UOA must still be "adopted in conformity with the procedures and requirements specified by those instruments and by [the UOA]." N.C. Gen.Stat. § 47C–1–102 (b) (2011).

In the instant case, the original Declaration indicated that "the owner of each unit shall also own ... an undivided interest in the common areas and facilities of LEEWARD HARBOR." All marina facilities were designated as common areas. Each owner also had exclusive use of one, specific, boat slip. Here, the 2010 amendment does not alter the percentage of ownership of the marina common area or boat slips. Each owner is still allocated one boat slip and has full use of the marina common area under both the original Declaration and the 2010 amendment.

Since the 2010 amendment maintained equal ownership in the marina facilities, it did not change the allocated interest of a unit. Therefore, the NCCA requirement that 100% of unit owners must approve changes to the allocated interest of a unit does not apply in the instant case.

Since the 2010 amendment does not conflict with the provisions of the NCCA, we must determine if it was enacted in conformity with the provisions of the UOA. The UOA indicates that, "all agreements, decisions and determinations lawfully made by the association of unit owners in accordance with the voting percentages established" by the declaration "shall be deemed to be binding on all unit owners." N.C. Gen.Stat. § 47A28 (2011).

Art. IX, Section A of the Declaration requires that once an amendment is proposed, it must be approved by 66% of members owning units in the condominium in order to become effective. Art. IX, Section B states that "no alteration in the percentage of ownership in common areas and facilities appurtenant to each unit ... shall be made without the prior written consent of all of the owners of all of the units." Plaintiffs contend that Section B applies, while defendants argue Section A applies. Since the 2010 amendment does not alter the percentage ownership in the common areas and facilities, but rather grants an equal percentage to all owners, Art. IX, Section A of the Declaration applies. Therefore, in order to enact the 2010 amendment, 66% approval was required. The 2010 amendment was approved by members of Leeward Harbor owning 69.44% of the condominium units.

***9** The 2010 amendment meets the requirements set forth in the Declaration and therefore complies with the law of N.C. Gen.Stat. § 47A. Consequently, Leeward Harbor and its members had the authority to enact the 2010 amendment and there is no reason for this Court to reverse the trial court and render it void.

V. Conclusion

Since the court in the first action declared the 1986 amendment was void on the basis that it was not properly recorded, the claims presented by plaintiffs in the second action were not the same as those determined in the first action. Therefore, the trial court correctly held *res judicata*

did not apply. Since only some but not all issues in the second action were previously litigated in the first action, collateral estoppel does not apply in the second action. In addition, based on the language of N.C. Gen.Stat. § 47A and the Declaration, the 2010 amendment is valid and the HOA had the authority to enact the amendment. We affirm.

Affirmed.

Judge McGEE and Judge HUNTER, ROBERT C. concur.

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Report per Rule 30(e).

All Citations

218 N.C.App. 454, 721 S.E.2d 762 (Table), 2012 WL 379929

Footnotes

1 In their brief, plaintiffs indicate they are not pursuing claims against the individual Board members.

2 In addition, we note that the NCCA indicates that no action may be brought to challenge the validity of an amendment more than one year after the amendment is recorded. N.C. Gen.Stat. § 47C–2–117(b) (2011). Therefore, since Bowers challenged the 1986 amendment twenty-two years after it was enacted, he could only challenge the validity of the 1986 amendment on the basis that it was improperly recorded.