

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013

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HOUSE BILL 330
Committee Substitute Favorable 5/2/13
PROPOSED SENATE COMMITTEE SUBSTITUTE H330-PCS30803-SA-68

Short Title: Planned Community Act/Declarant Rights. (Public)

Sponsors:

Referred to:

March 19, 2013

1 A BILL TO BE ENTITLED
2 AN ACT AMENDING THE NORTH CAROLINA PLANNED COMMUNITY ACT
3 REGARDING THE TRANSFER OF SPECIAL DECLARANT RIGHTS.

4 The General Assembly of North Carolina enacts:

5 SECTION 1. G.S. 47F-1-102 reads as rewritten:

6 "§ 47F-1-102. Applicability.

7 ...
8 (c) Notwithstanding the provisions of subsection (a) of this section, G.S. 47F-1-104
9 (Variation), G.S. 47F-2-103 (Construction and validity of declaration and bylaws),
10 G.S. 47F-2-117 (Amendment of declaration), G.S. 47F-3-102(1) through (6) and (11) through
11 (17)(Powers of owners' association), G.S. 47F-3-103(f)(Executive board members and
12 officers), G.S. 47F-3-107(a), (b), and (c)(Upkeep of planned community; responsibility and
13 assessments for damages), G.S. 47F-3-107.1 (Procedures for fines and suspension of planned
14 community privileges or services), G.S. 47F-3-108 (Meetings), G.S. 47F-3-115 (Assessments
15 for common expenses), G.S. 47F-3-116 (Lien for assessments), G.S. 47F-3-118 (Association
16 records), and G.S. 47F-3-121 (American and State flags and political sign ~~displays~~displays),
17 and G.S. 47F-3-104 (Transfer of Special Declarant Rights) apply to all planned communities
18 created in this State before January 1, 1999, unless the articles of incorporation or the
19 declaration expressly provides to the contrary, and G.S. 47F-3-120 (Declaration limits on
20 attorneys' fees) applies to all planned communities created in this State before January 1, 1999.
21 These sections apply only with respect to events and circumstances occurring on or after
22 January 1, 1999, and do not invalidate existing provisions of the declaration, bylaws, or plats
23 and plans of those planned communities. G.S. 47F-1-103 (Definitions) also applies to all
24 planned communities created in this State before January 1, 1999, to the extent necessary in
25 construing any of the preceding sections.

26"
27 SECTION 2. G.S. 47F-1-103 reads as rewritten:

28 "§ 47F-1-103. Definitions.

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

31 (1) "Affiliate of declarant" means any person who succeeds to any special
32 declarant rights and who controls, is controlled by, or is under common
33 control with a declarant. A person "controls" a declarant if the person is any
34 of the following:

35 a. A general partner, officer, director, or employer of the declarant.



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- b. 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 interest in the declarant.
- c. Controls in any manner the election of a majority of the directors of the declarant.
- d. 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 interest 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 subdivision are held solely as security for an obligation and are not exercised.

- ...
 - (11) "Development rights" means any right or combination of rights reserved by a declarant in the declaration (i) to add real estate to a planned community; (ii) to create lots, common elements, or limited common elements within a planned community; (iii) to subdivide or combine lots or convert lots into common elements; or (iv) to withdraw real estate from a planned community.

...."

SECTION 3. G.S. 47F-3-104 reads as rewritten:

"§ 47F-3-104. Transfer of special declarant rights.

~~(a) Except for transfer of declarant rights pursuant to foreclosure, no~~ No special declarant right (G.S. 47F-1-103(28)) defined under this Chapter may be transferred except by an instrument evidencing the transfer recorded in every county in which any portion of the planned community is located. ~~The~~Except for the transfer of declarant rights pursuant to subsection (c) of this section, the instrument is not effective unless executed by the transferee.

(b) Upon transfer of any special declarant right, the liability of a transferor declarant is as follows:

- (1) A transferor is not relieved of any obligation or liability arising before the transfer and remains liable for warranty obligations imposed upon the transferor by this Chapter. Lack of privity does not deprive any lot owner of standing to maintain an action to enforce any obligation of the transferor.
- (2) If a successor to any special declarant right is an affiliate of a declarant (G.S. 47F-1-103(1)), the transferor is jointly and severally liable with the successor for any obligations or liabilities of the successor relating to the planned community.
- (3) If a transferor retains any special declarant rights but transfers other special declarant rights to a successor who is not an affiliate of the declarant, the transferor is liable for any obligations or liabilities imposed on a declarant by this Chapter or by the declaration relating to the retained special declarant rights and arising after the transfer.
- (4) A transferor has no liability for any act or omission or any breach of a contractual or warranty obligation arising from the exercise of a special

1 declarant right by a successor declarant who is not an affiliate of the
2 transferor.

3 (c) Unless otherwise provided in a mortgage instrument, deed of trust, or other
4 agreement creating a security interest, in case of foreclosure of a security interest, sale by a
5 trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under
6 Bankruptcy Code or receivership proceedings of any lots owned by a declarant, or real estate in
7 a planned community subject to development rights, or real estate subject to development rights
8 for a planned community, a person acquiring title to all the property being foreclosed or sold,
9 but only upon the person's request in an instrument recorded in every county in which any
10 portion of the planned community is located, succeeds to all special declarant rights
11 (G.S. 47F-1-103(28)) related to that property held by that declarant and requested by the person
12 acquiring title. The judgment or instrument conveying title shall provide for transfer of only the
13 special declarant rights requested. The mortgage, deed of trust, tax lien, or other conveyance to
14 be foreclosed under this subsection shall not be required to contain specific reference to an
15 assignment of special declarant rights but shall be deemed to include the special declarant
16 rights as part of the right, title, and interest encumbered by the mortgage, deed of trust, tax lien,
17 or other conveyance.

18 (d) Upon foreclosure of a security interest, sale by a trustee under an agreement creating
19 a security interest, tax sale, judicial sale, or sale under Bankruptcy Code or receivership
20 proceedings of all interests in a planned community owned by a declarant, the declarant ceases
21 to have any special declarant rights and the period of declarant control (G.S. 47F-3-103(d))
22 terminates unless either of the following applies:

23 (1) The judgment or instrument conveying title provides for transfer of all
24 special declarant rights held by that declarant to a successor declarant.

25 (2) The declarant transferred special declarant rights related to the appointment
26 of executive board members to another person pursuant to this section prior
27 to the foreclosure or sale.

28 (e) The liabilities and obligations of a person who succeeds to special declarant rights
29 are as follows:

30 (1) A successor to any special declarant right who is an affiliate of a declarant is
31 subject to all obligations and liabilities imposed on the transferor by this
32 Chapter or by the declaration.

33 (2) Unless otherwise specified in the declaration as to the holder of a mortgage
34 instrument, deed of trust, or other agreement creating a security interest, in
35 case of foreclosure of a security interest, sale by a trustee under an
36 agreement creating a security interest, tax sale, judicial sale, or sale under
37 Bankruptcy Code or receivership proceedings, a successor to any special
38 declarant right who is not an affiliate of a declarant, other than a successor
39 described in subdivision (3) or (4) of this subsection, is subject to the
40 obligations and liabilities expressly imposed by this Chapter or the
41 declaration:

42 a. On a declarant which relate to the successor's exercise or nonexercise
43 of special declarant rights; or

44 b. On his or her transferor, other than:

45 1. Misrepresentations by the transferor or any previous
46 declarant;

47 2. Warranty obligations on improvements made by the
48 transferor or any previous declarant or made before the
49 planned community was created;

- 1 3. Obligations and liabilities arising out of contractual
2 agreements between the transferor or any previous declarant
3 and third parties other than the declaration;
4 4. Breach of any fiduciary obligation by the transferor or any
5 previous declarant or his or her appointees to the executive
6 board; or
7 5. Any liability or obligation imposed on the transferor or any
8 previous declarant as a result of the transferor's acts or
9 omissions after the transfer.

10 (3) A successor to only a right reserved in the declaration to maintain sales
11 offices, management offices, signs advertising the planned community, and
12 models, if the successor is not an affiliate of the declarant, may not exercise
13 any other special declarant right and is not subject to any liability or
14 obligation as a declarant.

15 (4) A successor to all special declarant rights held by a transferor who is not an
16 affiliate of the declarant who succeeded to those rights pursuant to a deed or
17 other instrument of conveyance in lieu of foreclosure or a judgment or
18 instrument conveying title under subsection (c) of this section may declare in
19 a recorded instrument the intention to hold those rights solely for transfer to
20 another person. Thereafter, until transferring all special declarant rights to
21 any person acquiring title to any lot or real estate subject to development
22 rights owned by the successor, or until recording an instrument permitting
23 exercise of all those rights, that successor may not exercise any of those
24 rights other than any right held by his or her transferor to control the
25 executive board in accordance with G.S. 47F-3-103(d) for the duration of
26 any period of declarant control, and any attempted exercise of those rights is
27 void. So long as a successor declarant does not have the right to exercise
28 special declarant rights under this subsection, the successor declarant is not
29 subject to any liability or obligation as a declarant other than liability for his
30 or her acts and omissions under G.S. 47F-3-103(d).

31 (f) Nothing in this section subjects any successor to a special declarant right to any
32 claims against or other obligations of a transferor declarant other than claims and obligations
33 expressly arising under this Chapter or the declaration.

34 (g) For purposes of this section, "assignment of declarant rights" shall include any
35 assignment by the declarant of special declarant rights to a person, including, without
36 limitation, an assignment pursuant to this section."

37 **SECTION 4.** This act is effective when it becomes law. Nothing in this act shall be
38 construed as being applicable to or affecting any pending litigation, except that the last
39 sentence of G.S. 47F-3-104(c) shall be applicable to any mortgage, deed of trust, tax lien, or
40 other conveyance providing for foreclosure recorded on or after January 1, 1999.