NORTH CAROLINA PLANNED COMMUNITY ACT AND CONDOMINIUM ACT

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The North Carolina Planned Community Act (Chapter 47F of the General Statutes) was enacted in 1998. A "planned community" is defined as real estate with respect to which any person, by virtue of that person's ownership of a lot, is expressly obligated by a declaration to pay real property taxes, insurance premiums, or other expenses to maintain, improve, or benefit other lots or other real estate described in the declaration. The purpose of the Act was to help planned communities move away from the common law doctrines associated with restrictive covenants in older communities and to recognize modern planned communities' fundamental difference with traditional residential subdivisions which look little like their modern day counterparts.

The North Carolina Condominium Act (Chapter 47C of the General Statutes) was enacted in 1986. A "condominium" is defined as 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.

Article 1 General Provisions

47F-1-102 Applicability

Applies to all planned communities created in NC on or after January 1, 1999.
Does NOT apply to a planned community that contains no more than 20 lots, or one in which all lots are restricted exclusively to nonresidential purposes unless the declaration provides or is amended to provide that the Chapter does apply.

The following sections of the Chapter apply to planned communities created before January 1, 1999, unless the articles of incorporation or the declaration expressly provides to the contrary:

- 47F-3-102(1) through (6) and (11) through (17) Powers of owners' association
- 47F-3-103(f) Executive board members and officers
- 47F-3-107(a), (b), and (c) Upkeep of planned community; responsibility and assessments for damages
- 47F-3-107.1 Procedures for fines and suspension of planned community privileges or services
- 47F-3-108 Meetings
- 47F-3-115 Assessments for common expenses
- 47F-3-116 Lien for assessments
- 47F-3-118 Association records
- 47F-3-121 American and State flags and political sign displays

A planned community created prior to 1999, may elect to make the Chapter applicable by amending its declaration. This can be done by affirmative vote or

written agreement signed by lot owners of lots to which at least 67% of the votes in the association are allocated or any smaller majority the declaration specifies.

47F-1-103 Definitions
"Declaration" means any instruments, however denominated, that create a planned community and any amendments to those instruments.

47F-1-104 Variations

47F-1-106 Applicability of local ordinances, regulations, and building codes

47F-1-107 Eminent domain

Article 2. Creation, Alteration, and Termination of Planned Communities.
47F-2-101 Creation of the planned community
A declaration creating a planned community must be executed in the same manner as a deed and recorded in every county in which any portion of the planned community is located.

47F-2-103 Construction and validity of declaration and bylaws
In the event of a conflict between the provisions of the declaration and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with this Chapter.

47F-2-117 Amendment of declaration
Declaration may be amended only by affirmative vote or written agreement signed by lot owners of lots to which at least 67% of the votes in the association are allocated, or any larger majority the declaration specifies, except where the terms of the declaration allow it to be amended by a declarant. The declaration may specify a smaller number only if all of the lots are restricted exclusively to nonresidential use. Every amendment to the declaration must be recorded in every county in which any portion of the planned community is located.

47F-2-118 Termination of planned community
Except in the case of taking of all lots by eminent domain, a planned community may be terminated only by agreement of lot owners of lots to which at least 80% of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the lots in the planned community are restricted exclusively to nonresidential uses.

47F-2-120 Master associations

47F-2-121 Merger or consolidation of planned communities

Article 3 Management of Planned Community

47F-3-101 Organization of owners' association

Membership of the association at all times shall consist exclusively of all the lot owners, or, following termination of the planned community, of all persons entitled to distributions of proceeds. Every association must be organized as a nonprofit corporation. (The Condominium Act provides that the association shall be organized as a profit or nonprofit corporation or as an unincorporated nonprofit corporation.)

47F-3-102 Powers of owners' association

This statute sets out the powers that the association may exert unless the articles of incorporation or the declaration expressly provides to the contrary. In 2005, the General Assembly imposed a cap on the reasonable charges for late payment of assessments. The charge may not exceed the greater of $20 per month or 10% of any installment unpaid.

47F-3-103 Executive board members and officers

The executive board may not act unilaterally on behalf of the association to amend the declaration (47F-2-117), to terminate the planned community (47F-2-118), or to elect members of the executive board or determine the qualifications, powers and duties, or terms of office of executive board members (47F-3-103(e)) The executive board may unilaterally fill vacancies in its membership for the unexpired portion of any term.

Notwithstanding any provision of the declaration or bylaws to the contrary, the lot owners, by a majority vote of all persons present and entitled to vote at any meeting of the lot owners at which a quorum is present, may remove any member of the executive board with or without cause, other than a member appointed by the declarant. (The unit owners under the Condominium Act need at least a 67% vote of all persons present at the meeting.)

Within 30 days after the adoption of a proposed budget for the planned community, the executive board must provide to all lot owners a summary of the budget and a notice of the meeting to consider ratification of the budget, including a statement that the budget may be ratified without a quorum. The meeting of the lot owners to consider ratification of the budget may not be held less than 10 or more than 60 days after mailing of the summary and notice. A quorum is not required at this meeting. The budget is ratified unless at that meeting a majority of all the lot owners in the association or any larger vote specified in the declaration rejects the budget. In the event the proposed budget is rejected, the periodic budget last ratified by the lot owners shall be continued until such time as the lot owners ratify a subsequent budget proposed by the executive board. (The Condominium Act provides that the meeting for ratification of the budget must be not less than 14 or more than 30 days after mailing of the summary.) The declaration may provide for a period of declarant control of the association, during which period a declarant, or persons designated by the declarant may appoint and remove officers and members of the executive board. Not later than the termination of any period of declarant control, the lot owners shall

elect an executive board of at least three members, at least a majority of whom shall be lot owners. The executive board shall elect the officers. (Guidelines for the ultimate end to declarant control are set out in the Condominium Act, but not in the Planned Community Act.) (see G.S. 47C-3-103(d)

In 2005, the General Assembly added language that the association shall publish the names and address of all officers and board members of the association within 30 days of their election.

47F-3-104 Transfer of special declarant rights

47F-3-105 Termination of contracts and leases of declarant

47F-3-106 Bylaws
This statute specifies matters that the bylaws of the association must provide

47F-3-107 Upkeep of planned community; responsibility and assessments for damages
If a lot owner is legally responsible for damage to a common element or if damage is inflicted on any lot by an agent of the association and the damage is less than the amount heard in small claims court ($5,000) the aggrieved party may request a hearing before an adjudicatory panel appointed by the executive board. If no adjudicatory panel is appointed, the executive board will conduct the hearing.

The Condominium Act states the claim must be under $500.

47F-3-107.1 Procedures for fines and suspension of planned community privileges or services
Unless there is a specific procedure for the imposition of fines or suspension of planned community privileges or services in the declaration, a hearing must be held before the executive board or an adjudicatory panel appointed by the executive board to determine if any lot owner should be fined or if planned community privileges or services should be suspended. The lot owner that is charged must be given notice of the charge, an opportunity to be heard and to present evidence, and notice of the decision.

In 2005, language was added that any adjudicatory panel appointed by the executive board must be composed of members of the association who are not officers of the association or members of the executive board. The lot owner may appeal the decision of an adjudicatory panel to the full executive board by delivering written notice of appeal to the executive board within 15 days after the date of the decision. The executive board may affirm, vacate, or modify the prior decision of the adjudicatory body.

Also in 2005, the fine that could be imposed was reduced from a maximum of $150 for each day after the decision that the violation occurs to a maximum of $100 for each day more than five days after the decision that the violation occurs.

47F-3-108 Meetings

The association must hold meetings at least once each year. Special meetings may be called by the president, a majority of the executive board, or by lot owners having 10%, or any lower percentage specified in the bylaws, of the votes in the association. (Condominium Act provides for 20% or less.) Notice of any meeting must be sent not less then 10 or more than 60 days (Condominium Act is 50 days) in advance of the meeting. Notice must be sent by hand, mail, or electronically to lot owners. Notice must include the time and place of the meeting and items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, and budget changes, and any proposal to remove a director or officer.

In 2005, language was added that meetings of the executive board shall be held as provided in the bylaws. At regular intervals, the executive board meeting shall provide lot owners an opportunity to attend a portion of a meeting and to speak to the executive board about their issues or concerns. The executive board may place reasonable restrictions on the number of persons who speak.

Meetings of the association and executive board are to be conducted in accordance with Roberts' Rules of Order Newly Revised, unless the bylaws state otherwise.

47F-3-109 Quorum

Unless the bylaws provide otherwise, a quorum is present at a meeting of the association if persons entitled to cast 10% (20% in Condominium Act) of the votes which may be cast for election of the executive board are present in person or by proxy at the beginning of the meeting. This requirement is low because many planned communities are resort communities where many owners may reside elsewhere.

Unless the bylaws specify a larger percentage, a quorum is present at a meeting of the executive board if persons entitled to cast 50% of the votes of that board are present at the beginning of the meeting. [If a quorum is not present at any meeting, the meeting may be adjourned to a later date by the affirmative vote of a majority of those present in person or by proxy. The quorum requirement at the next meeting will be one-half of the quorum requirement applicable to the meeting adjourned for lack of a quorum. This provision will continue to reduce the quorum by 50% from that required at the previous meeting, as previously reduced, until such time as a quorum is present and business can be conducted.] The bracketed language is not in the Condominium Act.

47F-3-110 Voting proxies

If only one of the multiple owners of a lot is present at an association meeting, the owner who is present is entitled to cast all votes allocated to that lot. If more than one of the multiple owners are present, the votes allocated to that lot may be cast only in

accordance with the agreement of a majority in interest of the multiple owners, unless the declaration or bylaws state otherwise. Votes may be cast by proxy. Lot owners must be given notice of all meetings at which lessees may be entitled to vote.

47F-3-111 Tort and contract liability

The declarant, and not the association or any lot owner, is liable for the declarant's torts in connection with the planned community. Also an action alleging wrongdoing against the association must be brought against the association and not against a lot owner. The Condominium Act also has clarifying language regarding the liability of the declarant for a wrong committed during declarant control: "If an action is brought against the association for a wrong which occurred during any period of declarant control, and if the association gives the declarant who then controlled the association reasonable notice of and an opportunity to defend against the action, such declarant is liable to the association:

1. for all tort losses not covered by insurance carried by the association suffered by the association or that unit owner, and
2. for all losses which the association would not have incurred but for a breach of contract. Nothing in this subsection shall be construed to impose strict or absolute liability upon the declarant for wrongs or actions which occurred during the period of declarant contol.

Also missing from the Planned Community Act, but in the Condominium Act, is language making the declarant liable for litigation expenses and reasonable attorneys' fees incurred by the association and a reference to the nature of liens resulting from judgments against the association.

47F-3-112 Conveyance or encumbrance of common elements

Authorizes the sale or encumbrance of part of the common elements upon the agreement in writing of persons holding 80% of the votes of the association and provides that a higher percentage can be specified in the declaration. The association can contract to convey and convey on behalf of the lot owners. Unlike the Condominium Act where unit owners have an interest in the common elements as tenants in common, there is no need for lot owners in a planned community to execute a deed.

47F-3-113 Insurance

47F-3-114 Surplus funds

47F-3-115 Assessments for common expenses

All common expenses are assessed against all lot owners in accordance with the terms of the declaration. Any past-due common expense assessment or installment bears interest at the rate established by the association not to exceed 18% per year.
The following assessments are not imposed against all lots:

1. Any common expense associated with the maintenance, repair replacements of a limited common element shall be assessed against the lots to which that

limited common element is assigned, equally in any other proportion that the declaration provides.

2. Any common expense or portion thereof benefiting fewer than all the lots shall be assessed exclusively against the lots benefited.
3. The costs of insurance shall be assessed in proportion to risk and costs of utilities shall be assessed in proportion to usage.

If a common expense is caused by negligence or misconduct of a lot owner or occupant, the association may asses that expense exclusively against that lot owner or occupant's lot.

47F-3-116 Lien for assessments

Any assessment against a lot that remains unpaid for 30 days or more becomes a lien on that lot when a lien is filed with the clerk of superior court. Prior to 2005, the association's lien on the lot could be foreclosed in like manner as a mortgage on real estate under power of sale. This is the primary method of foreclosure in North Carolina. There must be notice and hearing procedures before the clerk of court. The notice must be served not less than 10 days prior to the due process hearing before the clerk of court. Foreclosure by power of sale avoids a lengthy and costly foreclosure. If the clerk of court authorizes a sale, then a notice of sale will be published in a newspaper and at the courthouse door.

In 2005, the General Assembly made the following changes to 47F-3-116:

- Prohibited the use of foreclosure by power of sale if the debt securing the lien consisted solely of fines imposed by the association, interest on unpaid fines, or attorneys' fees incurred by the association solely associated with fines imposed by the association. The association may enforce these liens only by judicial foreclosure. These actions must be brought in court and there are pleadings. The procedure is more costly and lengthy. The order to sale the property may be by public or private sale. Any sale must be confirmed by the court.
- Prohibited an association from levying, charging, or attempting to collect a service, collection, consulting, or administration fee from any unit owner unless the fee is expressly allowed in the declaration. Liens secured by nonpayment of these fees may only be enforced by judicial foreclosure.
- Prior to 2005, the judgment on the lien could include costs and reasonable attorneys' fees for the prevailing party. In the 2005 legislation, the lot owner may not be required to pay attorneys' fees and court costs until the owner is notified in writing of the association's intent to seek payment of these fees and costs. The notice must be sent by mail to the property address and, if different, to the mailing address of the unit owner in the association's records. The notice must state the outstanding balance and that the unit owner has 15 days from the mailing of the notice to pay the outstanding balance without the attorneys' fees and court costs. If the owner does not contest the collection of debt and enforcement of lien after the expiration of the 15 days, then reasonable attorneys' fees cannot exceed $1,200. The notice must also inform the unit owner of the opportunity to contact a representative of the association

to discuss a payment schedule for the outstanding balance and provide the name and telephone number of the representative. The association, acting through its executive board and in the board's sole discretion, may agree to allow payment of the outstanding balance in installment payments.

- A claim of lien must set forth the name and address of the association, the name of the record owner of the lot at the time the claim of lien is filed, a description of the lot, and the amount of the lien claimed

In 2009, the General Assembly made the following changes to 47F-3-116:

- Added language that the association must make reasonable and diligent efforts to ensure that its records contain the lot owner's current mailing address. Therefore, the Association should act on any information that managers, board members or attorneys may have that the mailing address in the Association's records is not accurate. This would include knowledge of returned mail from the post office, knowledge that the property is vacant or knowledge that there is a tenant occupying the property rather than the owner. No fewer than 15 days prior to filing the lien, the association must mail a statement of the assessment amount due by first class mail to the physical address of the lot and the lot owner's address of record with the association, and, if different, to the address for the lot owner shown on the county tax records and the county real property records for the lot.
- Added language that the first page of the claim of lien must contain the following statement in boldface, capital letters: **THIS DOCUMENT CONSTITUTES A LIEN AGAINST YOUR PROPERTY, AND IF THE LIEN IS NOT PAID, THE HOMEOWNERS ASSOCIATION MAY PROCEED WITH FORECLOSURE AGAINST YOUR PROPERTY IN LIKE MANNER AS A MORTGAGE UNDER NORTH CAROLINA LAW.** Service of the claim of lien must be both by regular mail and by either certified mail, return receipt requested, or by overnight delivery with a qualified carrier.

<u>47F-3-118 Association records</u>

Prior to 2005, the association was required to keep financial records and make them reasonably available for examination by lot owners and their authorized agents. Within 10 days of receipt of a written request the association has to furnish to the lot owner a statement setting forth the amount of unpaid assessments and other charges against a lot

In 2005, the General Assembly made the following changes:

- Records of meetings of the association and executive board must be made reasonably available for examination by a lot owner and authorized agent. If the bylaws do not specify particular records to be maintained, the association must keep accurate records of all cash receipts and expenditures and all assets and liabilities. The association must also make an annual income and expense statement and balance sheet available to all lot owners at no charge and within 75 days after the close of the fiscal year to which the information relates.

- Notwithstanding the bylaws, a more extensive compilation, review, or audit of the association's books and records for the current or immediately preceding fiscal year may be required by a vote of the majority of the executive board or by the affirmative vote of a majority of the lot owners present and voting in person or by proxy at any annual meeting or any special meeting duly called for that purpose.
- Prohibits financial payments, including payments in the forms of goods and services, to an officer or member of the association's board unless the payments are provided by the bylaws or are made for services and expenses on behalf of the association which are approved in advance by the executive board.

47F-3-119 Association as trustee

47F-3-120 Declaration limits on attorneys' fees

Except as provided in 47F-3-116, in an action to enforce provisions of the articles of incorporation, declaration, bylaws, or adopted rules or regulations, the court may award reasonable attorneys' fees to the prevailing party if recovery of attorneys' fees is allowed in the declaration.

47F-3-121 American and State flags and political sign displays

In 2005, language was added to restrict ability of covenants to regulate the display of a U.S. flag or North Carolina flag that is no greater than four feet by six feet unless (1) for restrictions registered prior to 2005, the restriction specifically uses the terms of flag of the USA, American flag, US flag, or North Carolina flag, and (2) for restrictions registered after 2005, the following restriction must be written in boldface, capital letters on the first page of the deed: **THIS DOCUMENT REGULATES OR PROHIBITS THE DISPLAY OF THE FLAG OF THE UNITED STATES OF AMERICA OR STATE OF NORTH CAROLINA**

The language restricts the ability of covenants to regulate the indoor or outdoor display of a political sign unless (1) for restrictions registered prior to 2005, the restriction specifically uses the term "political signs", and (2) for restrictions registered after 2005, the following restriction is written on the first page of the deed of conveyance in boldface, capital letters" **THIS DOCUMENT REGULATES OR PROHIBITS THE DISPLAY OF POLITICAL SIGNS.**

Even when display of political signs is permitted, an association may prohibit the display of a sign earlier than 45 days before the election and later than 7 days after the election. The association may also regulate the size and number of political signs that may be placed on a member's property if the association's regulation is no more restrictive than the local government ordinance regulating size and number of political signs on residential property. If there is no local government ordinance, the association must permit at least one political sign with the maximum dimensions of 24 inches by 24 inches.

47F-3-122 Irrigation of landscaping

The declaration of covenants cannot require irrigation of landscaping during a period that the area in which the association is located has been designated an area of severe,

extreme, or exceptional drought and the Governor, a State agency, or unit of local government has imposed water conservation measures unless:

- For declarations of covenants registered prior to October 1, 2008, the covenant specifically requires irrigation of landscaping notwithstanding water conservation measures imposed by the Governor, a State agency or unit of local government. An owner cannot be fined, unless the covenant specifically authorizes fines and penalties.
- For covenants registered on or after October 1, 2008, the covenant must specifically state that any requirement to irrigate is suspended to the extent the requirement would be prohibited by the Governor, a State agency, or unit of local government. Fines and penalties may not be imposed unless specifically authorized, and the authorization must be written in boldface type, capital letters on the front page of the declarations of covenants.

Other 2009 changes

S.L. 2009-553 (HB 1387) – invalidates any new restrictive covenants, created on or after December 1, 2009, if those covenants would prohibit the installation of solar collector devices (solar panels, receptors for solar appliances, etc). This law does not apply to any existing restrictions contained in declarations prior to December 1, 2009, and it does not apply in any event to multi-story "stacked" condominiums.

S.L. 2009-310 (HB 182) - Allows the placement of traffic tables or traffic calming devices on State-maintained subdivision streets if the devices are paid for and maintained by a homeowner's association or pursuant to a neighborhood contractual agreement. The homeowner's association must have the written support of at least 70% of the member property owners, and the association must post a performance board with the Department of Transportation to fund maintenance or removal of the tables or devices if the association fails to maintain them or is dissolved. The bond must remain in place for three years from the date of installation. Traffic calming devices include speed bumps, speed humps (wider than speed bumps) and traffic tables (very wide speed humps that are flat on top).

HB 762 would have established the community association manager's licensure act. The intent of the act was to protect the public from persons unqualified to provide community association management and from unprofessional conduct by persons licensed under this Article. This bill was never heard in committee.