

Understanding Homeowners Associations and Their Powers to Enforce Restrictive Covenants and Rules in Planned Communities

Overview

The number of homeowners associations (HOAs) in North Carolina continues to rise as developers build new residential subdivisions and condominium complexes throughout our growing state. Planned communities come in a variety of types and styles, such as single-family detached houses, townhouses, or condominium complexes. Despite the many differences as to how a planned community may look, these developments are similar in that they usually give the individual owners and residents the use of common property and facilities, like a pool, gym or play area, and provide for a system of self-governance through a homeowners association.

Under current North Carolina law, a developer must set up an HOA as a corporation before selling the first unit or lot. Like a company, the members of the HOA vote for an executive board that runs the affairs of the corporation and makes sure that all owners in the community follow the same rules. The rules in every community may be different, but you can find the rules in the form of restrictive covenants and a declaration. This article explores a range of issues dealing with HOAs and the restrictive covenants, or restrictions, which dictate how members of the community may use their homes and property.

Membership

If you buy a lot, home, townhouse, or condominium in a planned community, most likely you will automatically become a member of the HOA. Since most homeowners associations have to be set up like a corporation, you should consider yourself a member of that corporation. Just like other corporations, a homeowners association's success depends on how its members participate. Given your status as a member of the HOA, it is your responsibility along with the other owners in your community to ensure that that the association governs all members fairly and effectively.

Fees and Rules

Generally, a homeowners association has the power to establish its own Bylaws, which set the ground rules for its operation. Typically, an HOA is responsible for enforcing restrictions and for maintaining common areas and the community as a whole. At the outset of planning a development, the developer

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must write down many of the community restrictions in a document called a declaration. The developer will record or file the declaration along with a map of the community at the Register of Deeds office located in the same county as the planned community. The HOA declaration sets forth a number of regulations, like the obligation of the association to collect assessments, as well as the obligation of the owners to pay those assessments. In many cases, the HOA will have the express power set forth in the declaration to sue owners for violations of the rules or failure to pay assessments.

Bylaws, Rules, and Regulations

As stated above, the creating document or declaration generally sets the outline or guidelines for running the HOA. In almost every instance, the HOA's executive board has the ultimate responsibility for managing the association. When a developer still owns the majority of lots or units in the planned community, the developer will generally control the board, and therefore, the HOA itself. In addition to the declaration, HOA bylaws establish the rules by which the HOA will be run. Bylaws usually set forth how members vote for the executive board members and officers, the number and term limit of members of the executive board, the duties of the board, the duties of the officers, and other incidental provisions.

An association's executive board may establish rules and regulations governing issues ranging from where you can park to what you can place on a balcony or deck. Associations frequently have guidelines and rules that specify the type of landscaping that may be installed or in some instances, not installed. Rules and regulations can be just as enforceable in an association as the declarations, Bylaws and other state laws. The most frequent type of miscommunication between an owner and the association usually arises from an owner being unaware of the rules and regulations when the association attempts to enforce them. You can easily prevent such misunderstandings by making certain you have a current copy of the rules and regulations, which may be obtained from the HOA or the management company.

It is important to know your HOA's Bylaws to be an effective member and participant in its function. Knowing the rules and being involved in your HOA will also allow you and other members to participate anytime the association wants to create or change the rules and regulations, such as setting the amount of assessments owed by members.

Making Improvements to Your Home

Generally, depending on the type of home that you have (condominium, townhouse, detached, etc.), you may make improvements to your home. However, in addition to the conditions in the declarations, most associations have established rules and regulations (sometimes known as Architectural Guidelines) which must be followed in order to make any alterations or improvements. Generally, associations assist members who wish to improve their property as long as the improvement is performed in a manner consistent with the declarations and rules and regulations.

Renting

Some planned communities restrict the number of units that may be rented by owners. Some declarations require that a rental agreement acknowledge that the tenant is subject to all of the rules and regulations of the association. Some associations' rules and regulations also require that you provide the association with a copy of the rental agreement. In most associations, the declarations and rules state that the owner of the property rented is responsible for the conduct of the tenant. Naturally, it is in the best interest of all parties to prevent problem situations between tenants and owners of other units. If your tenant does damage to the common area or creates a nuisance (for example, loud music or pet problems), the disturbance could become your problem and the association may fine you. Regardless, look to your particular declarations to see how your association handles the issue of rentals.

Management

The homeowners are in charge of the HOA. Homeowners will elect an executive board to operate the association and preserve, enhance and protect the value of the community, but the board answers to the homeowners. It should be noted that it is not unusual for the board to contract with a professional management company to run the day-to-day affairs of the association. Ultimately, however, the board is responsible for the oversight of the homeowners association.

Executive Board Elections

The executive board governs the association. Its members are elected to serve for a length of time as stated in the governing documents of the association. The governing documents also determine the number of board members. Board

members are elected by the members of the association (homeowners) who vote for vacancies as they occur.

Becoming an Executive Board Member

There are two ways to become a member of the executive board. You can request that the association or nominating committee place your name on the election ballot so other members of the association will have an opportunity to vote for you in the next election or you can ask the board of directors to consider appointing you to any interim vacancy on the board. You will ultimately have to be reelected by the members of the HOA to continue to serve on the board.

Executive Board Responsibilities

The board has the ultimate responsibility for operating the association. Board members must deal in good faith on behalf of all the homeowners and exercise reasonable care. The board makes sure that the association's money is collected, its bills are paid, the association operates efficiently, and violations of the rules of the association are addressed.

For example, the board is responsible for reviewing the association's bank statements, preparing a budget, and distributing the budget (or budget summary) to the members prior to the beginning of the association's fiscal year. The board must also prepare a fiscal year-end financial statement for distribution to the members. There are numerous other things for which the board is responsible, as set forth in the association's creating declaration, Bylaws, and its rules and regulations.

Even if the executive board opts to contract with a professional management company to run the day-to-day affairs of the association, the executive board is still ultimately responsible for management of the association.

Homeowner Participation

An association may have a number of committees that perform valuable functions. For example, the architectural committee in large subdivisions will oversee requests for modifications to properties in the development and generally attempts to make sure that modifications and other improvements are consistent with the existing architecture of the development. There may be other committees to join, depending on the type of development in which you live. An association may have a landscape committee to oversee landscaping. There may be a welcoming committee that greets new homeowners or an election committee that

coordinates the election of the board of directors. Committees are usually established by the association's Bylaws, rules and regulations, or the executive board. Be sure to let your executive board know that you would like to participate in your association.

Budget

Each association has a budget that is prepared based on the common area obligations of the planned community, and distributed to all of its members. The budget determines how much money the association is going to need to operate for the following year. The association has the right to bill the members for their fair share of the budgeted amount. This billing is known as an assessment, which is often done monthly, quarterly or some alternative method, but in any event at least once a year.

Ideally, the association collects sufficient money through these assessments and pays the bills for the services and goods contemplated in the budget. If the assessments collected are insufficient to pay the bills, the board of directors is allowed to levy what is known as a special assessment. By paying your fair share of the obligations of the association, through the budget and assessment process, you are proportionally paying for the current and long-term maintenance obligations of the association. Of course, all of the other owners are doing so as well.

Monthly Assessments

When the budget is prepared, the amounts necessary for the daily operation and long term reserves for maintenance and replacement are determined based on the level of service for which the association is both required and willing to pay. For example, sometimes there are specific items defined in the rules that require a certain level of maintenance by the association. Once the annual amount is determined, then it must be collected from the members in order for the association to operate. Each member's assessment is usually collected monthly, in 12 equal installments. Some associations collect assessments on a quarterly or annual basis. The HOA rules and regulations will normally indicate the frequency of assessment collections.

Regular and Special Assessments

There are several types of assessments that may apply to your association. Regular assessments are needed for the operating (day-to-day) and reserve (long-

term maintenance) activities of the association. Special assessments are those levied by the association for major repairs, replacement, or new construction of the common area or for a one-time, unanticipated expense which cannot be covered by the regular assessment, such as a judgment entered against the HOA due to a lawsuit filed against the association.

Note that a special assessment should not be confused with a monetary penalty charged by the association against an individual owner to reimburse the association for an expense such as damage to the common area, or imposed as a disciplinary measure for a violation of an HOA rule and regulation. Homeowners can be fined for damaging common areas or violating any rules and regulations of the association.

Some planned communities establish user fees or special charges for services and activities that are not customary. Typically, these paid by an owner specifically benefiting from the service, such as an owner who wants to use the common area pool, clubhouse, or tennis courts to entertain private guests. The fees are usually on a pay-as-you-go basis. There are other types of assessments that may be designated by the community's homeowners association. For example, an association may have an assessment for cable television service. In any event, the best place to look for the different types of assessments that may apply to a particular community is in the declaration or rules of the association.

Increasing Assessments

The board of directors can increase the amount of the assessment by following certain procedures set forth in the HOA's declaration. The board must circulate a budget to the membership within thirty (30) days after adoption of any proposed budget for the planned community. Additionally, the board must send all owners notice of the meeting time when the proposed budget may be ratified or approved. 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 last budget approved by the lot owners will continue to govern assessments and expenditures until the lot owners ratify or approve a subsequent budget proposed by the executive board.

Foreclosure / Failure to Pay Assessments

The HOA must send you a reminder letter as a first step if you fail to pay your assessment on time. North Carolina law is specific in describing the overall process that an association must follow regarding the collection of unpaid assessments.

In 2011, North Carolina amended the laws that allow an HOA to sell your home or condominium unit if you fail to pay your assessments. An HOA may enforce its rules and collection of fees by filing a document called a claim of lien with the office of the clerk of superior court in the county where the property is located. A claim of lien will state that an assessment owed by a member of the HOA has not been paid and is at least thirty (30) days past due. A minimum of fifteen (15) days before the HOA files the claim of lien, the HOA must mail a statement telling the owner exactly what the member owes.

If the assessment remains unpaid for ninety (90) days or more, then the HOA's executive board may vote to foreclose on the owner's home to collect the assessment. Foreclosure is a serious matter. Should your home go into foreclosure, the HOA may sell your home by public auction. The proceeds of the sale will first go to pay off any mortgage or loan you owe on the property, and then be used to pay the HOA fees that were overdue. The HOA may even be able to collect attorneys' fees and other costs of foreclosing on the property. After all those debts and fees are paid, the owner may receive any remaining proceeds from the sale. In most cases, the owner will lose their house and most likely end up with nothing.

Getting Answers

The first place to look for answers to your questions is the declaration that must be filed by the developer before the first lot or unit is sold in the community. It will be recorded as a public record in the Register of Deeds office located in the same county as the community. Next, you should speak to a board member or, if your association has contracted with a management company, they may be able to provide assistance. Problems with the interior of a home normally are the responsibility of the owner. The association's common area is managed by the association, so the appropriate contact is either one of the association's board members or, if applicable, the management company. When there is a dispute between neighbors, sometimes it is best resolved between those individual owners. Where a dispute involves payment of assessments or an infraction of the association rules or declarations, it would be appropriate to contact the executive board or the management company. North Carolina law establishes the hearing process that all HOAs must follow when seeking to impose a fine or suspension of privileges against an owner.

Management Companies

A management company is a separate business enterprise usually hired to act as the agent of the association. As an agent for the association, they take their direction specifically from the association's board of directors. Typical contractual responsibilities of the managing agent include a variety of services to the association, such as collecting assessments, paying the association's bills, taking direction from the executive board for enforcement of rules infractions, and obtaining various vendors to perform services. Other possibilities for management company duties include assisting with the budget process, preparing meeting agendas and minutes for the executive board, or serving as a neutral third party to help solve problems that can occur in planned communities.

Government Regulation

Generally, residential subdivisions and planned communities must be approved by a local government zoning authority – city or county, depending upon the location of the property. When subdivision approval is required, it is illegal for a developer to offer or contract to sell or to convey an interest in the subdivision until the final plat or map of the subdivision is approved and recorded in the local Register of Deeds office.

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

Licensing

Unless an HOA executive board or property management company performs acts considered to be real estate brokerage (sales or rental of real estate for others), there is no requirement to be licensed in North Carolina and serve as a board member or HOA manager. Although the North Carolina Real Estate Commission cannot referee disputes between an HOA and its members, it has disciplined its licensees for unlawful or negligent conduct related to the sale or rental of properties within a community governed by an HOA. The Attorney General's Office also has power to take action against legal entities, such as an HOA, if it engages in certain unlawful practices. In most cases though, disputes between members and the HOA must be handled in civil court. You should contact a private attorney to determine your individual rights and know your options.

Individual Responsibility

Primarily, you are responsible for paying your assessments on time and abiding by the declarations and all other rules and regulations that exist for community harmony.

Individual Rights

Your individual rights as an owner living in a planned community are based upon the laws of North Carolina and the documents you signed at the time of purchase. Prior to making a purchase, it is advisable to review carefully the declarations and any other governing documents for the community. You may also wish to attend a board meeting and obtain copies of minutes from previous board meetings to understand how the HOA operates. The HOA should be able to demonstrate that it has adequate insurance coverage, a solvent budget and a sufficient reserve account. Generally, the rights of owners include:

- The right to participate in meetings of the board of directors and to be heard
- The right to enter into dialogue with your association board of directors with regard to any problem you may perceive in the development
- The right to a hearing should you be accused of violating any declaration or rules and regulations governing your community
- Use common areas, such as a clubhouse and recreational facilities
- Elect or remove an HOA board
- Vote to change the HOA rules and regulations
- Demand your HOA keep the common areas looking good and safe
- Make sure everyone lives by the association rules and guidelines
- Challenge new rules that seem unfair or unreasonable
- Inspect and copy HOA minutes and financial records

HOA Rights

An HOA also has rights and powers to take action against residents who fail to abide by its rules, restrictions and bylaws. Generally, HOAs have the power to:

- Collect association dues
 - Fee collection may be accomplished by giving notice of the dues owed but not paid, filing a claim of lien, and ultimately selling the member's home through foreclosure proceedings

- Require all members of the HOA to follow its rules and regulations
- Fine members of the HOA who violate any rules and regulations
- Determine what actions you, as a member, may take when wanting to change the appearance or use of your property, which may be governed by the HOA rules or declarations

Selling Your Home

You may wish to contact a licensed real estate professional, the HOA executive board, the professional management company (if your HOA has one) and your mortgage lender for assistance with the many details involved with selling your home. There are a number of documents that an individual owner is legally required to provide to a prospective purchaser of a unit subject to governance by an HOA. You will want to make sure that the buyer is aware of the rules and regulations of the association as well as the assessment obligation so there is not a problem or misunderstanding which could jeopardize the sale of your home. Until the sales transaction is completed and title is transferred, the owner of record is responsible for all assessments and fines unless otherwise stated in the sales and purchase agreement. Generally, new assessments approved during the sale and purchase of your home that become due while the sale is pending are the responsibility of the seller.

CONCLUSION

A successful and viable planned community's HOA is generally one in which homeowners assume an active role, not only by attending association meetings, voting and paying dues on time, but also by running for elected offices, serving on committees and participating in group activities. While governing documents establish a subdivision, involved owners make it a community.