Of "Private Governments" and the Regulation of Neighborhoods: The North Carolina Planned Community Act

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"... every morning we start new buildings, new towers, new highways and thus we make changes and commit the city for generations to come."

C. A. Doxiadis

I. INTRODUCTION

A. The Enactment of the Planned Community Act (PCA)

With surprisingly little fanfare and notice by most members of the practicing bar and general public, an extremely important and comprehensive series of statutes, codified as the "North Carolina Planned Community Act" were enacted into law with an
effective date of January 1, 1999.\(^3\) The bottom-line significance of this new legislation is not immediately obvious when one engages in a perusal of the twenty-plus pages of statutes that comprise the Act. The following points must therefore be highlighted and emphasized: The General Assembly has made possible a statutory metamorphosis of the North Carolina law of planned communities. It has converted a confusing and restrictive menagerie of appellate court decisions interpreting sometimes difficult and complex common law real property concepts into a detailed, clear code and enabling act for what the author believes may be best described as statutorily authorized private neighborhood governments, homeowner associations with many of the functions of a local municipality.\(^4\) By enacting a clear statutory foundation, the General Assembly has given identity to an entity that has suffered from a serious legal identity crisis.\(^5\)

This article will highlight the countless instances in which the Planned Community Act deviates in material ways from both the Uniform Planned Community Act and the North Carolina

3. As will be discussed later in this article, parts of the PCA have applicability to "planned communities" created prior to January 1, 1999. This is a point that all attorneys practicing in the real property area will want to be very familiar with. Ten months after the effective date of the PCA, this author had two matters related to planned communities referred to him that were clearly resolved by language in the new Act. Neither the parties nor attorneys involved had any awareness of the existence of the PCA. In defense of their ignorance, the process by which important legislation is communicated to the practicing bar and public needs to be improved.

4. "Misera est servitus ubi jus est vagum et incertum." (The law performs miserably when it is vague and uncertain.) See Dr. J. Stanley McQuade, Ancient Legal Maxims And Modern Human Rights, 18 CAMPBELL L. REV. 75 (1996).

5. For an excellent, comprehensive article written by practitioners, see Wayne S. Hyatt & Jo Anne P. Stubblefield, The Identity Crisis Of Community Associations: In Search Of The Appropriate Analogy, 27 REAL PROP. PROB. & TR. J. 589 (1993), (where the authors at p. 593 note, in part: "This article is written in response to a clear message running throughout discussions of community association law - that community associations have an identity crisis."). The "Editors' Synopsis" of this article notes that the authors "review and critique the various models proposed for classifying common interest communities and, drawing on their practical experience, suggest that community association law is a unique construct." The authors also present "thirteen illustrative issues" faced by every planned community. There are numerous law review and journal articles published that shed light on planned communities. Some are highly theoretical, some practical. A number of these will be referred to regularly throughout this article.

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Condominium Act. Many of these variances and omissions amount to a reinforcement of the power of the declarant and, eventually, the owners' association. In the abstract, many contribute to a fundamental shift in the balance of power from private property owners to private governments. Discussions and summaries of the Planned Community Act to date have not emphasized the numerous policy decisions that were consciously or indirectly made when the General Assembly enacted the greatly modified Act.

The Planned Community Act is much more—or much less, as the case may be—than an amended version of the Uniform Planned Community Act or the North Carolina Condominium Act. Put another way, those other models for the PCA were not slightly edited or modified to reflect the nuances of North Carolina tradition and law; rather, they have been in some respects eviscerated in areas related to the consumer rights and powers of the individual lot owner in a planned community. The changes and deletions made in the final version of the PCA go well beyond prudent legal tinkering and fine tuning and frequently amount to shifts of a consequential nature from the main points and policies that undergird the original uniform act.

As of this writing, there are few experts on the North Carolina version of the PCA. Neophytes are reading and rereading the legislation and expertise will come with familiarity. Real estate attorneys with practical experience in creating sophisticated planned unit developments and similar forms of community association subdivisions will immediately feel comfortable with the format and requirements of the PCA. Others will want to embark upon a patient and probing study before rendering legal advice with reference to the new legislation. To the extent, therefore, that this article is written with a spirit of prophesy concerning possible issues, trouble spots, and interpretations of the PCA,

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6. N.C. Gen. Stat. § 47C (1987). There are numerous instances where PCA provisions are substantially identical to counterpart provisions in the North Carolina Condominium Act; indeed, the organization and language of Chapter 47C served as a model for Chapter 47F.

7. Because it does not cover condominiums, the PCA deals with owners as "lot" rather than "unit" owners.

it is also offered with the intellectual humility of one who will freely admit that different interpretations and viewpoints concerning the effect of the PCA are likely and indeed, welcome. If prior examples such as the North Carolina Condominium Act are any indication, the PCA will not foster dozens of appellate court decisions dealing with its terms. In the real life practice of law, it will be the real property attorneys of this state who will give practical meaning to these statutes through their day-to-day application of the Act.

B. The PCA's Impact on the Real Estate Attorney

The PCA will have an immediate impact on most attorneys specializing in real property law. Opportunities for serving the needs of clients will be numerous and include the following:

(1) Creation of the PCA. Lawyers will be called upon to advise developers concerning the most effective way to create a planned community under the PCA. There are dozens of statutes that allow the PCA documentation "to provide otherwise," and the attorney for the declarant will want to study these options. Lawyers should also advise developers of the benefits of created a planned community governed by the PCA as opposed to a condominium or other land development format.

(2) Opting in to the PCA. Should existing planned communities "opt in" to the PCA? Lawyers will want to engage in providing proactive advice to homeowners associations in pre-1999 planned community developments.

9. The author can identify with Mark Twain, who while reading portions of the United States Revised Statutes while on his way to Nevada to serve as secretary to his brother, the Governor of the Territory, wrote: "I had many an exciting day . . . reading the statutes and the dictionary and wondering how the characters would turn out." MARK TWAIN, ROUGHING IT, ch. 3, reprinted in M. FRANCES McNAMARA, 2000 CLASSIC LEGAL QUOTATIONS 489 (1992).


12. See infra Part II.E.
(3) **Retroactive Reach of the PCA.** Lawyers who advise homeowners associations and developers of pre-1999 planned communities will want to advise their clients of the many substantive provisions of the PCA that apply to planned communities created before January 1, 1999, the effective date of the Act.\(^\text{13}\)

(4) **Procedures & Policies of Homeowners Associations.** Because the PCA lays out clear procedures and guidelines to be followed in certain instances by homeowners associations, it is important that the associations do follow them. The seat-of-the-pants homeowners association that operates with complete informality is not a wise approach to running a planned community under the new PCA. Attorneys specializing in this area may want to consider offering a compliance package for planned communities to bring their documentation and practices in line with PCA provisions. This will be particularly helpful to planned communities created before January 1, 1999. In any event, attorneys should experience an increase in situations where they are retained by homeowners associations.\(^\text{14}\)

(5) **Advising Property Owners.** Property owners in a PCA have a status akin to that of citizenship in a private fiefdom. The newly empowered and legislatively enabled homeowners association can be a power to reckon with and should be viewed as the private, rough equivalent of the governing body of a public municipality. Disputes between individuals as unit owners and the association are inevitable. Attorneys advising property owners will need to be comfortably familiar with the provisions of the PCA.

(6) **Advising Prospective Purchasers.** In North Carolina, as in most states, the attorney does not get involved in the typical residential sales transaction until after the prospective purchasers have signed their life away on the offer to purchase and contract. This is unfortunate. Someone should be making prospective purchasers aware of what they are getting into when they purchase a

\(^{13}\) The most significant retroactive application of the Act is found at N.C. Gen. Stat. § 47F-3-102 (1999), “Powers of owners’ association.” The powers enumerated in subsections (1) through (6) and (11) through (17) apply to planned communities created prior to the January 1, 1999 effective date.

\(^{14}\) See Stubblefield & Hyatt, supra note 5, at 593 (“The continued development of new communities and maturation of older communities have resulted in more volunteer officers and directors seeking legal answers to management issues. Naturally, that process significantly increased the number of attorneys whose practices are heavily weighted with community association clients and who seek appropriate bodies of law to provide at least guidance, if not answers.”).
home or lot in a planned community. Rules and regulations exist in these planned communities that must be abided by. The PCA empowers the homeowners' association to effectively enforce them.

(7) Advising Municipal and County Governments. Public officials, including but not limited to those who serve in the planning and zoning areas, need to be educated about both the growing trend in planned community developments and the nature of North Carolina's new statutory scheme for those communities. From the standpoint of public policy, the impact of planned communities on the greater public community should be considered. What will the relationship between private and public governments be? How will planned communities affect the provision of public services by the municipality or county?

C. Key Issues Under the PCA.

There are key issues that must be addressed in any introductory description and discussion of the PCA. For purposes of organization, the following points will be raised in an article by article discussion of the new legislation:

Does the PCA effectively remedy problems associated with pre-January 1, 1999 “planned communities”? Will it cure likely problems associated with “planned communities” formed on or after January 1, 1999? Should developers of residential property in North Carolina favor the planned community form of development over the condominium or basic subdivision format? Are there sufficient policy considerations to justify the fundamental shift in power to private governments authorized by the PCA? Is the PCA too sweeping in its delegation of powers to the homeowner association?

Are developers, declarants and homeowner associations sufficiently accountable under the PCA? Are consumers – the purchasers of residential property located in a PCA – adequately protected in likely scenarios of conflicts within a planned community? Is there an obligation to advise prospective purchasers of

15. This will be discussed again later in this article. It is the author's opinion that the real estate agent, especially when denominated a “dual” or “buyer’s” agent, should make the prospective purchaser acutely aware of the benefits and burdens of living in a planned community. Perhaps the organized bar can educate the public in a more general way.

property in a planned community concerning the effect of the PCA on their private property rights? If so, who has this responsibility? What is the role of the closing attorney? The real estate agent? The organized bar?

D. The Background and General Need for the PCA

It is estimated that one out of every six Americans (42 million people) currently live in some form of common interest community in which home or unit owners share ownership of common areas and have obligations to help with the cost of maintaining and repairing them.\(^\text{17}\)

Using a generic rather than official definition, a "planned community" can be described simply as a real estate development in which the individual lot owners have responsibilities for the financial support of specified common areas and services. The development can be residential only, both residential and commercial, or commercial only.\(^\text{18}\) In the most common fact situation, financial support for the infrastructure of the planned community comes in the form of an annual assessment specified in private covenants and restrictions running with and burdening each individual lot. Each lot is usually also a beneficiary of these covenants and restrictions. In addition to property law, sophisticated contemporary planned communities are also the product of contract law. In theory, lot or unit owners agree to abide by rules and regulations and assent in advance to the incorporated or unincorporated structure of the homeowners' association.\(^\text{19}\)

The new statutory definition of a "planned community" is found at N.C. Gen. Stat. § 47F-1-103(23). That statutory subsection defines it as meaning "real estate with respect to which any person, by virtue of that person's ownership of a lot, is expressly

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17. Laura Castro Trognitz, Co-Opted Living, 85 A.B.A.J. 54, 55 (1999). Citing statistics provided by the Community Associations Institute, this article estimates a total of 205,000 associations in the country with the breakdown by association type as of 1998 as follows: Condominium - 5,078,756, Cooperative - 748,840, and Planned Community - 10,562,964.

18. Planned communities can also include a resort development with a combination of permanent residents in homes and short-term guests in resort facilities. For an article describing one of the first planned communities in the nation, see Lois Baron, A Window To The Past; Glencarlyn's Grasp on History Appeals to Longtime Residents, THE WASHINGTON POST, May 22, 1999, at G 01.

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. 20

The technical legal definition of a “planned community,” however, constitutes the trees and not the forest. These communities are not merely subdivisions where a group of homeowners of a similar ilk have agreed to pay mandatory assessments for planned community land and services. Rather, these planned communities have the capacity to be powerful private governments that rule over the lives of residents in many significant ways. To rely on the statutory definition, therefore, is to understate. One commentator has observed:

Naturally, the number of legal problems associated with common interest developments has accelerated with the increase of these developments. These problems stem in part from residential association restrictions which have pervaded all aspects of residents' lives, from the provision of services and amenities to the control of behavior outside and inside the individual unit. Further, the all-encompassing scope of the associations’s control over residents has frequently provoked both courts and commentators to view residential associations as miniature private governments. As common interest developments proliferate, their characteristics as residential governments pose questions about longstanding relationships between the individual and the community, and of private groups to the public as a whole. 21

According to the official report on the Uniform Planned Community Act, planned communities, although similar to condominiums, “have operated for years under the common law without the benefit of statutory enablement, and in virtually all states, without the regulatory burdens and consumer protection benefits available to condominiums.” 22 That report goes on to note:

The homeowner associations that administer such common law planned communities often perform exactly the same functions as

22. Prefatory Note, Uniform Planned Community Act, p. 1. See also, Geis, Codifying The Law of Homeowner Associations: The Uniform Planned Community Act, 15 ABA Real Property, Probate and Trust Journal (Winter 1980). This article is a report by a special subcommittee of the ABA Committee on Condominiums, Cooperatives and Homeowner Associations which monitored the drafting of the Uniform Planned Community Act.
the condominium associations that administer statutory condominium regimes. They derive their powers from a declaration of covenants, conditions and restrictions (CC&R declaration) which is recorded at the beginning of the project and which relies for its enforceability on the state common law governing covenants which 'run with the land.' Not surprisingly, large portions of such CC&R declarations are indistinguishable from condominium declarations. The only basis on which CC&R regimes are exempted from state and local condominium regulation is that title to the common areas is held in the name of the homeowner association instead of being divided among the unit owners as tenants in common.23

It should be added that planned communities have become the preferred form of residential real estate development.24 In spite of the inherent pitfalls and insecurity of drafting with regard to the sometimes confusing and inconsistent common law of covenants and restrictions,25 the benefits of a planned community to developers and consumers alike have rendered it the organizational structure of choice in contemporary residential real estate development. In addition, it is the format most preferred by local government planning officials.

The popularity and rising use of the planned community format had a side effect of highlighting the shortcomings of traditional legal structures. It became obvious to attorneys specializing in this area of law in North Carolina and throughout the nation that the planned community organizational structure could no longer rest solely on medieval foundations and attempts by courts to adapt and fashion case law from simpler times to com-

23. Id.

24. See Robert C. Ellickson, New Institutions For Old Neighborhoods, 48 Duke L.J. 75, 81 (1998) ("Residential community associations (RCAs) have been greeted with resounding approval in new real estate developments. The number of RCAs in the United States increased from fewer than 1,000 in 1960 to an estimated 205,000 in 1998. By 1998, more than forty million Americans were living within the jurisdiction of an RCA.") (Citations omitted.) See supra note 16 and accompanying text.

25. See Richard A. Epstein, Covenants And Constitutions, 73 Cornell L. Rev. 906 (1988) ("The law of covenants is the province only of a hardy band of real estate lawyers with the temerity to master a complex and imposing body of rules; vertical and horizontal privity; affirmative and negative covenants; matters in esse and in posse; the touch and concern requirement; notice, actual and constructive; and the ins-and-outs of recordation statutes.").
plex contemporary real estate developments that have no common law counterpart.26

To demonstrate one reason for the need for the PCA, a reference to North Carolina cases dealing with assessments and homeowner associations is helpful. In a fairly typical North Carolina decision on covenants, Allen v. Sea Gate Ass'n, Inc,27 the Court of Appeals reiterated the strict North Carolina rules concerning the enforcement of affirmative assessment covenants. Lot owners who took with full notice of an obligation to pay assessments to a homeowners association challenged the validity of the assessments. Citing earlier Court of Appeals decisions, Judge Lewis noted that assessment provisions in restrictive covenants must: contain a sufficient standard by which liability for assessments can be measured, identify with particularity the property to be maintained, and provide guidance to a reviewing court as to which facilities and properties the association chooses to maintain with the assessments.28

The assessment covenant in Allen reads in pertinent part as follows: “The Buyer . . . agrees to pay . . . $60.00 . . ., said annual charge being a reasonable, necessary and proportionate charge for the maintenance, upkeep and operations of the various areas and

26. Wayne S. Hyatt, Common Interest Communities: Evolution and Reinvention, 31 J. Marshall L. Rev. 303, 364 (1998) (“Changes in the law and in industry practice contribute to the evolution both of the products available and to the ways the community association process is structured and operated. These ‘new realities’ serve to override factors that have given rise to the negative aspects of the common interest community. In addition, the new realities justify if not compel constructive change.”).


28. Id. at 764 (citing Figure Eight Beach Homeowners’ Ass’n, Inc. v. Parker, 62 N.C. App. 367, 376, 303 S.E.2d 336, 341 (1983); quoting Property Owners’ Ass’n, Inc. v. Seifart, 48 N.C. App. 286, 269 S.E.2d 178 (1980)). See also Miesch v. Ocean Dunes Homeowners Ass’n., 120 N.C. App. 559, 464 S.E.2d 64 (1995), cert. denied, 342 N.C. 657, 467 S.E.2d 717 (1996), a case dealing with the former North Carolina Condominium Act, Chapter 47A of the General Statutes. The Court of Appeals affirmed a Superior Court finding that a condominium unit owners association could not impose a “user fee” on short-term rentals of unit by unit owners because there was no express authority – either in the condominium governance documents or by specific statutory provision – for the imposition of such a fee. Writing for the Court, Judge John C. Martin categorized these user fees as covenants imposing affirmative obligations on the unit owners. Therefore, they were to be strictly construed and not enforced without clear and unambiguous language of authorization. The Court cited Property Owners’ Ass’n, Inc. v. Seifart, 48 N.C. App. 286, 269 S.E.2d 178 (1980).
facilities by Sea Gate Association, Inc. . . .” The Court of Appeals rejected this covenant as containing no standard by which the Court could assess how the homeowners’ association was to choose which properties to maintain.

There is no telling how many existing affirmative assessment covenants would be found to be unenforceable under these and other North Carolina appellate court decisions. This raises a straightforward issue under the PCA. Is the Sea Gate Ass’n, Inc. now a “planned community” for purposes of the PCA? Is the Sea-gate development retroactively covered by some provisions of the PCA and can Sea Gate “opt in” to full coverage under the PCA? While the legislature should not have to be concerned with incomplete or careless legal draftsmanship, a major flaw in the PCA is its failure to create a strong presumption in favor of the validity of all private covenants and restrictions (subject to public policy limitations) associated with planned communities. Since the North Carolina version of the PCA already deviates in significant ways from the UPCA, it should have been drafted to eliminate some of the existing problems with regard to the North Carolina approach


30. Allen, 119 N.C. App. at 764. Several hundred years of appellate court decisions have unfortunately taken the law of equitable servitudes far beyond the simple pronouncements of the landmark case of Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Rep. 1143 (Ch. 1848). That case stands for the straightforward proposition that purchasers who take with notice of restrictive covenants can be required to honor them in equity. It would be inequitable to allow a purchaser to disregard an obligation that he or she had clear notice of when acquiring the real property.

31. Significantly, the provisions of N.C. Gen. Stat. §§ 47F-3-115 to -116 (1999) with one exception, apply to planned communities created prior to January 1, 1999, whether or not they opt in to coverage by the entire PCA.


(d) Any planned community created prior to the effective date of this Chapter may elect to make the provisions of this Chapter applicable to it by amending its declaration to provide that this Chapter shall apply to that planned community. The amendment may be made by affirmative vote or written agreement signed by lot owners of lots to which at least sixty-seven percent (67%) of the votes in the association are allocated or any smaller majority the declaration specifies. To the extent the procedures and requirements for amendment in the declaration conflict with the provisions of this subsection, this subsection shall control with respect to any amendment to provide that this Chapter applies to that planned community.
to the enforceability of covenants at law and equitable restrictions.

Enactment of the PCA does not signal by any means the end of the use of covenants and restrictions as the foundational basis for the rules governing those who reside in a planned community. The fundamental improvement is that these familiar property law concepts are now authorized and reinforced by statutory authority. One might describe the situation as a statutory overlay superimposed on traditional rules of law and equity. A sample introductory paragraph from a "Declaration of Planned Community," for example, might now read as follows:

Buies Creek Developers, Inc., a corporation duly organized under North Carolina Law ("Declarant"), hereby makes this Declaration of a Planned Community pursuant to the North Carolina Planned Community Act, Chapter 47F of the General Statutes, and this Declaration of covenants, restrictions, conditions and rules ("Declaration") establishing the planned community of Glacier Lake.

The above language is a vignette from the introduction section of a declaration and is, of course, incomplete. While the declaration for any planned community located in North Carolina is subject to Chapter 47F of the General Statutes in any event, prudent draftsmanship should nonetheless make reference to the PCA in appropriate places. Referring to Chapter 47F serves as a consumer oriented disclosure device and as a reminder to attorneys and judges reviewing the governing documents that the planned community governance structure now rests primarily on a statutory foundation.

33. In the opinion of this author, the practice of cross-referencing the Planned Community Act should continue in the drafting of the bylaws of the association and any additional rules and regulations of the planned community.

34. See William P. Sklar, Concept of Condominium Ownership, Florida Condominium Law and Practice § 1.5 1998 entitled "Declaration of Condominium." Although dealing with condominium and not planned community law, the author raises the issue of the theoretical basis for these types of developments. He writes, in part: "A continuing debate exists about whether the contents of the declaration are a series of servitudes including easements, conditions, and running covenants, or merely are a creature of statute following statutory requirements for the creation of the condominium regime." (Citations omitted.) One response to this debate is that the contents of the declaration fit well into both categories: traditional property law and modern statutory reform. Later, at § 1.6, Sklar notes: "The power and authority of a condominium association to act is a matter of statutory grant combined with additional grants of authority under the declaration of condominium, articles,
E. The Organizational Structure of the North Carolina PCA

The North Carolina Planned Community Act is organized into three major articles: Article 1, "General Provisions," Article 2, "Creation, Alteration and Termination of Planned Communities," and Article 3, "Management of Planned Community." Missing from the North Carolina version of the PCA are Articles 4 and 5 from the Uniform Planned Community Act. Those articles respectively deal with the areas of "Protection of Purchasers" and "Administration And Registration." As noted earlier in this article, the organization and format of the PCA tracks closely that of Chapter 47C of the North Carolina General Statutes, The North Carolina Condominium Act.

The author will therefore be referring at many times in this article to the following related but distinct laws, comments and uniform laws: (1) The Uniform Planned Community Act (hereinafter referred to as the "UPCA") approved by the National Conference of Commissioners on Uniform State Laws in 1980, and the starting point and source for many of the provisions of the North Carolina Planned Community Act. It is important to note that the North Carolina version is altered enough from the UPCA that it can not carry the "uniform act" label.35 (2) The official comments to the UPCA edited by the National Conference of Commissioners. While these comments may be extremely helpful to efforts at interpreting the North Carolina PCA, they are not the official comments to the PCA as enacted in this state. (3) The North Carolina Planned Community Act (the "PCA" or the "Act"), codified as Chapter 47F of the North Carolina General Statutes. (4) The comments to the North Carolina PCA (hereinafter referred to as "North Carolina Comment"). (5) The North Carolina Condominium Act (hereinafter referred to as "the Condominium Act") codified as Chapter 47C of the North Carolina General Statutes.

and bylaws of the condominium association." By analogy, the same is true of planned communities.


This Act is based, in part, on the provisions of the Uniform Planned Community Act. Many sections, however, have been substantially revised from those that appear in the Uniform Act. Some other sections marked "Reserved" contained provisions which were included in the Uniform Act but were deemed inappropriate for inclusion in this Act. Because of these differences, the Official Comments to the Uniform Act have not been included.
II. Article 1 of the PCA — "General Provisions"

A. Contents of Article 1

Article 1 contains the official "short title" of the PCA, a section dealing with the applicability of the PCA to existing and pre-existing planned communities and the method by which pre-existing planned communities can opt in, a statute containing over two dozen key definitions, statutory language dealing with variation of the provisions of the PCA, a statute dealing with the applicability of zoning ordinances, regulations and building codes, a statute dealing with the effect of eminent domain, and a statute noting that supplemental general principles of law are applicable.

B. The Central and Key definition: "Planned Community"

The all important central term, "planned community," is defined in N.C. Gen. Stat. § 47F-1-103(23) as meaning "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." This statutory definition is one that should be

42. N.C. Gen. Stat. § 47F-1-108 (1999) which reads:
The principles of law and equity as well as other North Carolina statutes (including the provisions of the North Carolina Nonprofit Corporation Act) supplement the provisions of this Chapter, except to the extent inconsistent with this Chapter. When these principles or statutes are inconsistent or conflict with this Chapter, the provisions of this Chapter will control.
43. The statute qualifies the definition of "planned community" by excluding the terms cooperative or condominium, although real estate comprising a condominium or cooperative may be part of a planned community. Also, the PCA

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boldly emblazoned in the minds of all practitioners of real property law. The PCA applies to all planned communities within North Carolina.\textsuperscript{44} Specific statutory exceptions include developments of less than 20 lots\textsuperscript{45} and nonresidential developments.\textsuperscript{46} The PCA clearly does not apply to planned communities or lots located outside of North Carolina.\textsuperscript{47}

The PCA as enacted in North Carolina is not intended to cover traditional condominium developments, although a condominium regime can be a part of a PCA. Although no statutory provision explicitly addresses this point, North Carolina Comment 2 to N.C. Gen. Stat. § 47F-1-101 does. It explains the exclusion as follows:

\begin{quote}
It is understood and intended that any development which incorporates or permits horizontal boundaries or divisions between the physical portions of the planned community designated for separate ownership or occupancy will be created under and governed by the North Carolina Condominium Act and not [the PCA].
\end{quote}

The UPCA on the other hand clearly includes the condominium form of ownership within the term “planned community.”\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{44} N.C. Gen. Stat. § 47F-1-102(a).
\item \textsuperscript{45} N.C. Gen. Stat. § 47F-1-102(b)(1) specifies that the PCA does not apply to a planned community “[w]hich contains no more than 20 lots (including all lots which may be added or created by the exercise of development rights) unless the declaration provides or is amended to provide that this Chapter does apply to that planned community . . . .”
\item \textsuperscript{46} N.C. Gen. Stat. § 47F-1-102(b)(2) specifies that the PCA does not apply to a planned community “[i]n which all lots are restricted exclusively to nonresidential purposes, unless the declaration provides or is amended to provide that this Chapter does apply to that planned community.”
\item \textsuperscript{48} In the “Prefatory Note” to the Uniform Planned Community Act, the reporter warns “of the increasing and understandable inclination of developers, in the fact of changing condominium legislation, to choose . . . alternative forms of developing multi-owner projects.” The decision to use a planned community format for development avoids fractionalizing ownership of the common elements and the additional costs associated with compliance with the consumer protection aspects of condominium legislation.
\end{itemize}

Portions of the UPCA that deal with the condominium form of ownership were excluded from the PCA, although one important definition still remains that could cause confusion. N.C. Gen. Stat. § 47F-1-103(25), part of the extensive definitions section of the PCA, follows the UPCA by defining "real estate" — among other things — as including “...parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.” Thus, in spite of the crux of Comment 2 to the PCA (i.e., that horizontal boundaries must be established as condominiums under Chapter 47C), it can be argued that it is technically possible to create a planned community with horizontal boundaries and bypass entirely Chapter 47C. 49 This will not occur, however, for marketability reasons. Comment 2 to the PCA is a message that what would be condominiums should not be created as planned communities. 50 It is doubtful that a clean title insurance policy would be issued to the adventuresome developer attempting to bypass the Condominium Act (Chapter 47C of the General Statutes). 51

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development rights, the purchaser's right to cancel, express and implied warranties, a theory of recovery and attorney's fees for the enforcement of consumer and related rights, provisions related to the labeling of promotional material, the declarant's obligation to complete certain improvements, and a provision related to the substantial completion of units. None of these protections are applicable at the present time to a planned community. The PCA as passed by the General Assembly unfortunately omits the all important Article 4, “Protection of Purchasers,” the counterpart to the same article in the North Carolina Condominium Act.

Referring back to the "Prefatory Note" to the Uniform Planned Community Act, the reporter makes a significant point:

Finally, review of the common-law multi-owner projects persuaded the Conference that homeowner association developments, in which the common elements are owned by the association, offer an attractive alternative to fractionalized ownership, even in buildings containing units divided by horizontal boundaries. Accordingly, the Act has been drafted in a way which would permit the common elements to be owned by the association, even in a high rise building.

49. The term "condominium" is defined at N.C. Gen. Stat. § 47F-1-103(7) as meaning “...real estate, as defined and created under Chapter 47C [of the General Statutes].”


51. There is unfortunately a legitimate way to bypass most of the consumer protections of the condominium act. A condominium regime can be made a part of the planned community under the PCA. Therefore, while buildings with horizontal boundaries must be created in the condominium format, all surrounding land and amenities can be part of a PCA.
There is a large category of developments that are clearly not planned communities nor can they opt to be planned communities under the PCA in their present form. These are subdivisions where lot owners are not legally obligated, by virtue of their ownership of a lot, to pay taxes or expenses or assessments for common areas.

**Example.** Creek-Acre is a subdivision in North Carolina subject to numerous restrictive and protective covenants. The subdivision has no common areas, parks, or private roads and no covenant by which the lot owners promise to support in any way the upkeep of common areas. The subdivision does have a homeowners association that plans such important events as block parties and the annual golf tournament and dinner-dance. Creek-Acre is not a "planned community" under N.C. Gen. Stat. § 47F-1-103(23) regardless of the date it came into legal existence. It is not subject to the PCA and the lot owners cannot opt in to coverage of the PCA absent some major alteration of the nature of the development.

**Example.** Victorian Gardens is a sixty-lot subdivision created in 1890 in a major North Carolina city. The original covenant required each lot owner to pay $5.00 per annum for maintenance of a small garden and fountain located at a corner lot in the subdivision. There has never been a homeowners' association, and inflation long ago rendered the $5.00 assessment meaningless. Indeed, assessments have not been collected since 1915. Victorian Gardens is not a "planned community" as defined by the PCA. By virtue of the doctrines of acquiescence and waiver, the lot owners are no longer "expressly obligated" under N.C. Gen. Stat. § 47F-1-103(23) to make any payment for maintenance of the garden and fountain. It is not subject to the PCA and the lot owners cannot opt in to coverage absent some major alteration of the nature of the development.

On the other hand, very basic real estate developments clearly qualify even though they do not exhibit many of the attributes of the typical planned community.

**Example.** Moccasin-Acre is a subdivision of 21 lots located on each side of a private, unpaved road. The subdivision has no common areas or parks, and no restrictive covenants except for one well-drafted affirmative assessment covenant requiring each lot owner to contribute $35.00/year for maintenance and grading of the road. Moccasin-Acre is a "planned community" for purposes of the PCA.

52. See James A. Webster, Jr., Webster's Real Estate in North Carolina §18-7 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 4th ed. 1994).
It clearly fits the definition in N.C. Gen. Stat. § 47F-1-103(23).\(^{53}\) Even if created prior to the January 1, 1999 effective date of the PCA, it is subject to numerous provisions of the new Act. Also, by following statutory procedures, its residents can, if they desire opt in for full coverage. If created on or after January 1, 1999, it is subject to full coverage by the Act.

C. Pre-January 1, 1999 Planned Communities

What is the applicability of the PCA to planned communities created prior to the January 1, 1999 effective date of the Act? It is twofold. As alluded to above, significant portions of the Act automatically apply to pre-1999 planned communities. There is also a provision enabling pre-1999 planned communities to opt in for full coverage under the Act. N.C. Gen. Stat. § 47F-1-102(d) entitled, "Applicability," provides as follows:

(d) Any planned community created prior to the effective date of this Chapter may elect to make the provisions of this Chapter applicable to it by amending its declaration to provide that this Chapter shall apply to that planned community. The amendment may be made by affirmative vote or written agreement signed by lot owners of lots to which at least sixty-seven percent (67%) of the votes in the association are allocated or any smaller majority the declaration specifies. To the extent the procedures and requirements for amendment in the declaration conflict with the provisions of this subsection, this subsection shall control with respect to any amendment to provide that this Chapter applies to that planned community.

As the above statute indicates, a planned community created prior to January 1, 1999 can opt in and make the entire PCA applicable to it by following the procedures described. Significantly, the provisions of N.C. Gen. Stat. §§ 47F-3-115 to -116, with one exception,\(^ {54}\) apply to planned communities created prior

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53. The author of this manuscript lives in a very unusual but perhaps not unique development. This development has a golf course, private roads, and some common areas. Yet there is absolutely no obligation legally imposed on any lot owner to contribute for the maintenance and upkeep of these areas. While the development is subject to numerous restrictive and protective covenants, it is not a "planned community" under N.C. Gen. Stat. § 47F-1-103 (23). Therefore, it is not subject to any part of the PCA.

54. N.C. Gen. Stat. § 47F-3-116(e) is applicable to actions arising on or after the January 1, 1999 effective date. It provides for costs and reasonable attorneys' fees for a prevailing party in a judgment, decree or order in any action brought under this section.
to January 1, 1999 whether or not they opt in to coverage by the entire PCA. Thus, *Allen v. Sea Gate Ass’n, Inc.*,55 and the other North Carolina Court of Appeals decisions dealing with affirmative assessment covenants are altered to the extent that a planned community covered by the PCA is involved. The authority for the common assessment becomes a statutory one, N.C. Gen. Stat. § 47F-3-115. The lien for enforcement of the assessments also becomes a statutory one, N.C. Gen. Stat. § 47F-3-116. The murky waters of covenants running with the land and special rules applicable to affirmative covenants can be henceforth bypassed by using this statutory authority to both authorize and enforce assessments.

Those existing planned communities with a few recalcitrant homeowners who, protected by the narrow rules of the law of covenants and equitable restrictions, have stood in the way of improvement and progress, will definitely want to consider opting in for full coverage under the PCA. The 67% vote required to achieve this goal is a high enough percentage to assure that a reasonably democratic process will take place concerning the decision to opt in to the Act. A few members of a large subdivision/planned community created prior to 1999 should not be able to continue to exercise in effect a de facto veto power over changes and improvements sought for the good of the entire community. The PCA will facilitate those changes once the planned community duly opts in.

**D. Additional Observations on the “Definitions” Section**

In addition to the definition of “planned community” discussed above, N.C. Gen. Stat. § 47F-1-103 contains over two dozen other definitions that attorneys dealing with planned communities will want to carefully analyze. The definitions parallel in many ways those located in both the North Carolina Condominium Act and the Uniform Planned Community Act. As noted above, since a legislative decision was made to exclude condominiums from coverage under the PCA, it will of course vary in terminology and statutory language from both the Condominium Act and Uniform Act. The PCA, for example, deals with “lot” owners;56 the Condominium Act and Uniform Act each deal with “unit” owners.57 Language in the Uniform Planned Community

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Act directed toward the condominium form of ownership has appropriately been eliminated from the PCA, and, by its nature, the Condominium Act will vary in terminology for the same reason.

It is misleading, however, to conclude that the only deviations of the PCA from the Uniform and Condominium Acts in both the definitions section and elsewhere are based on the elimination of condominium-related provisions from the purview of Chapter 47F of the North Carolina General Statutes. As will be explained in numerous places in this article, other substantive deviations occur that reflect major policy decisions unrelated to the noncoverage of condominiums by the PCA. The main category of these other deletions and alterations is the area of consumer rights. Definitions related to Article 4 of the UPCA, “Protection Of Purchasers,” an article not included in the PCA, are, of course, eliminated. UPCA § 1-103(19), the definition of “offering,” therefore becomes meaningless and is not included in the PCA.

The PCA contains a sweeping definition of “reasonable attorneys’ fees” that has no counterpart in the Uniform or Condominium Acts. That term is defined as meaning “attorneys’ fees reasonably incurred without regard to any limitations on attorneys’ fees which otherwise may be allowed by law.”

E. Variation of the Provisions of the PCA

The statutory section titled “Variation” can be a bit misleading if taken at face value. In subsection (a), it provides: “Except as specifically provided in specific sections of this Chapter, the provisions of this chapter may not be varied by the declaration or bylaws.” To be sure, there are many central statutory provisions

58. As will be expressed in Part IV of this article, the author advocates a repeal of the North Carolina Condominium Act, the adoption of one comprehensive Planned Community Act applicable to all forms of planned communities, including the condominium form, and a return of consumer protection provisions to the Planned Community Act.

59. Since the North Carolina Condominium Act does include a “Protection of Purchasers” article, Article IV, it includes the definition of “offering” at N.C. Gen. Stat. § 47C-1-103(18).

60. N.C. Gen. Stat. § 47F-1-103(26).

61. Id. See Sellers supra note 8, at II-IV (“There can now be no doubt that attorneys fee awards are not subject to limitations or caps imposed by law in other circumstances, including N.C. Gen. Stat. § 6-21.2, as has sometimes been suggested.”) See also Declaration Limits on Attorneys’ Fees, infra at Part III. Z.

that can not be varied by the declaration or bylaws; however, there are also numerous instances throughout the act where the declaration or bylaws can alter significant provisions of the PCA. The following summary demonstrates the flexibility accorded the drafter of planned community governing documents.

INSTANCES WHERE DECLARATION OR BYLAWS CAN ALTER OR AFFECT STATUTORY PROVISIONS

N.C. Gen. Stat. § 47F-1-102
Applicability
Subsection (b)(1) - The PCA is not applicable to a residential development of less than 20 lots unless the declaration provides otherwise.
Subsection (b)(2) - A nonresidential planned community is not subject to the PCA unless the declaration provides otherwise.
Subsection (d) - The declaration of a pre-1999 planned community can call for a smaller majority than 67% to opt in for full coverage under the PCA.

N.C. Gen. Stat. § 47F-1-107
Eminent Domain
Subsection (b) - Allocated interests of a lot can be reduced otherwise than in proportion to reduction in size if the declaration specifies another basis.
Subsection (d) - Where limited common elements are taken by eminent domain, the declaration can provide for an apportionment of the award other than that which is specified by statute.

N.C. Gen. Stat. § 47F-2-117
Amendment of Declaration
Subsection (a) - The terms of the declaration can provide for amendments by the declarant. The declaration can call for a majority higher than 67% to amend a declaration. Where all lots are nonresidential, a declaration can call for a majority of less than 67%.

N.C. Gen. Stat. § 47F-2-118
Termination of Planned Community.
Subsection (a) - The Statutory figure of 80% to terminate can be increased by the declaration. Where all lots are nonresidential, a declaration can call for a percentage lower than 80% to terminate.
Subsection (b) - If the declaration as originally recorded so provides, a termination agreement can provide for the sale of lots in addition to the common elements.

N.C. Gen. Stat. § 47F-3-103
Executive Board Members and Officers.
Subsection (a) - The executive board can act in all instances on behalf of the association unless the declaration (or bylaws) provide otherwise.

Subsection (d) - Declaration can call for a period of declarant control during which the declarant can appoint and remove executive board members and officers.

N.C. GEN. STAT. § 47F-3-107
*Upkeep of planned community; responsibility and assessments for damages.*

Subsection (a) - "Except as otherwise provided in the declaration" the association is responsible for the common elements and each lot owner is responsible for his or her lot and improvements thereon.

N.C. GEN. STAT. § 47F-3-107.1
*Procedures for fines and suspension of planned community privileges or services.*

The declaration can specify a different procedure for the imposition of fines or suspension of planned community privileges or services.

N.C. GEN. STAT. § 47F-3-108
*Meetings.*

Special meetings of the association can be called by lot owners having 10% of the votes or any lower percentage specified by the bylaws.

N.C. GEN. STAT. § 47F-3-109
*Quorums.*

Subsection (a) - A statutory 10% quorum can be altered by the bylaws.

Subsection (b) - The bylaws can alter the requirements of a quorum deemed present throughout the meeting.

N.C. GEN. STAT. § 47F-3-110
*Voting; proxies.*

The declaration can alter a number of statutory rules with regard to voting and proxies.

N.C. GEN. STAT. § 47F-3-112
*Conveyance or encumbrance of common elements.*

Subsection (a) - The 80% requirement for a vote to convey common elements may be raised higher by the declaration.

N.C. GEN. STAT. § 47F-3-113
*Insurance.*

Subsection (b) - The declaration may require the association to carry other insurance besides that required by statute.
**Surplus funds.**
The declaration can alter the payment of surplus funds of the association.

**N.C. Gen. Stat. § 47F-3-115**

*Assessments for common expenses.*
Subsection (a) - Except as otherwise provided in the declaration, until the association makes a common expense assessment, the declarant is responsible for the payment of all common expenses. Subsection (b) - Subject to certain statutory sections, the declaration sets standards for the allocations for common assessments.

In pre-1999 planned communities, the declaration must provide for interest charges.

**N.C. Gen. Stat. § 47F-3-120**

*Declaration limits on attorneys’ fees.*
Court may award reasonable attorneys’ fees in certain actions only if allowed in the declaration.

The above list of instances where the terms of the PCA can be varied represents an understandable policy decision by the drafters of the Uniform Act "to provide great flexibility in the creation of planned communities." Attorneys drafting the declaration and bylaws for a North Carolina planned community will want to become familiar with those areas where the unique requirements of the planned community may dictate a need to deviate from statutory norms.

To avoid evading the statutory requirements by another method, the PCA, like the Condominium Act, prohibits varying the provisions of the Act by agreement. The declarant is also prohibited from utilizing devices such as powers of attorney or proxies to evade the requirements of the PCA. These provisions constitute valuable consumer protections.

**F. Applicability of Local Ordinances, Regulations and Building Codes**

The PCA contains a protection of planned communities from discrimination by local authorities in the areas of zoning, subdivision regulations, building code provisions or other land use laws,

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63. Comment 1 to U.P.C.A. § 1-104 (1980).
64. N.C. Gen. Stat. § 47C-1-104(b).
65. N.C. Gen. Stat. § 47F-1-104(b). This subsection adds: “however, after breach of a provision of this Chapter, rights created hereunder may be knowingly waived in writing.”
ordinances or regulations.67 Other than this nondiscrimination mandate, the Act does not affect land use laws and regulations.68

G. Eminent Domain

Although they will probably be rare events, the PCA deals with the necessary topic of various eminent domain scenarios.69 These scenarios include the taking of all or part of a lot with a remnant that is not useable,70 the reallocation of interests,71 the payment of awards and reduction of allocated interests,72 a requirement that the association promptly prepare, execute and record an amendment reflecting reallocations,73 the payment of awards for the taking of common areas,74 and the recordation of the court decree of eminent domain.75 For additional guidance on eminent domain issues, help can be located at the Official Comment to the corresponding eminent domain provisions in the North Carolina Condominium Act.76 Those comments include four examples of how eminent domain will affect a condominium. They are equally helpful in the planned community context.

H. Supplemental Principles of Law Applicable

The final statutory section in Article 1 of the PCA, N.C. Gen. Stat. § 47F-1-108, reads:

The principles of law and equity as well as other North Carolina statutes (including the provisions of the North Carolina Nonprofit Corporation Act) supplement the provisions of this Chapter, except to the extent inconsistent with this Chapter. When these

68. Id.
71. Id.
principles or statutes are inconsistent or conflict with this Chapter, the provisions of this Chapter will control.\textsuperscript{77}

From the perspective of consumer protection, one cannot help but think of the potential impact of N.C. Gen. Stat. § 75-1.1, declaring unlawful "unfair or deceptive acts or practices in or affecting commerce."\textsuperscript{78} Clearly, no draftsmanship, practice or procedure that complies with the PCA can constitute an unfair or deceptive trade practice. On the other hand, improper sales practices, the misapplication of association rules and regulations, unfair dealings and activities by the declarant, and arbitrary decisions or actions by the homeowners' association have the potential of triggering an unfair or deceptive trade practices action.

I. UPCA Article 1 Provisions Not Included In PCA

A number of sections from Article 1 of the UPCA — some substantive, some simply providing clarification — are not included in the PCA.\textsuperscript{79} A lack of any helpful and official legislative history on these omissions is disappointing. The sections in question are also not included in the Uniform Condominium Act, and that is perhaps the best logic and reasoning to be found.

One of these eliminated provisions, UPCA § 1-112, authorizes a court to refuse to enforce a contract or limit the application of a clause in a contract where the court finds as a matter of law that the contract or clause was unconscionable at the time the contract was made. According to the Official Comment to this UPCA provision, this language is similar to both Section 2-302 of the Uniform Commercial Code and Section 1-311 of the Uniform Land Transactions Act.\textsuperscript{80} The inclusion of this section in the PCA would have helped to establish a favorable legal climate for effective consumer protection.

Another blow to consumer protection is the elimination of UPCA § 1-112 (Obligation of Good Faith) which simply reads:

\textsuperscript{77} This section is identical to the corresponding section of the North Carolina Condominium Act, N.C. Gen. Stat. § 47C-1-108 (1987). It is a simpler, perhaps clearer version of the original provision in U.P.C.A. § 1-108.

\textsuperscript{78} N.C. Gen. Stat. § 75-1.1 (1994).

\textsuperscript{79} Those sections not included are U.P.C.A. § 1-109 (Construction Against Implicit Repeal), § 1-110 (Uniformity of Application and Construction), § 1-111 (Severability), § 1-112 (Unconscionable Agreement or Term of Contract), § 1-113 (Obligation of Good Faith), § 1-114 (Remedies to be Liberally Administered), and § 1-115 (Adjustment of Dollar Amounts).

\textsuperscript{80} Comment to U.P.C.A. § 1-112.
“Every contract or duty governed by this Act imposes an obligation of good faith in its performance or enforcement.” Perhaps it is the comment to this UPCA section that caused some consternation. It reads:

This section sets forth a basic principle running throughout this Act: in planned community transactions, good faith is required by the performance and enforcement of all agreements and duties. Good faith, as used in this Act, means observance of two standards, “honesty in fact” and observance of reasonable standards of fair dealing. While the term is not defined, the term is derived from and used in the same manner as in Section 1-201 of the Uniform Simplification of Land Transfers Act and Sections 2-103(I)(b) and 7-404 of the Uniform Commercial Code.81

Yet another setback for the cause of consumer protection can be found in the failure to include UPCA § 1-114 (“Remedies To Be Liberally Administered”) in the PCA. The key provision reads: “The remedies provided by this Act shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed.” The provision is hardly radical, especially in light of the final sentence of the section which eliminates the awarding of “consequential, special, or punitive damages” unless they are specifically provided in the UPCA or by other rule of law.

III. Article 2 of the PCA – “Creation, Alteration, and Termination of Planned Communities”

A. Contents of Article 2

Article 2 contains the statutory guidance for the creation of a planned community,82 the construction and validity of the declaration and bylaws,83 amendments to the declaration,84 termination of the planned community,85 the creation of master associations,86 and the merger or consolidation of planned communities.87

B. Provisions in the UPCA Omitted from the PCA

Numerous provisions from Article 2 of the UPCA were not included in the North Carolina PCA. A detailed description of unit boundaries, for example, set forth at UPCA § 2-102, is not included in the PCA. While this UPCA section could be applicable to condominium units, it also serves as a helpful guide concerning which parts of the planned community are individual units and which parts constitute the common elements. Because of its absence from the PCA, drafters of the declaration should take special care in precisely defining unit boundaries in townhouse or other common wall developments. Perhaps UPCA § 2-102 can serve as a starting point for drafting purposes in spite of its exclusion from the North Carolina version.

UPCA §§ 2-104 through 2-116 are also not included in the PCA. The exclusion of many of these UPCA provisions is puzzling, unfortunate and in some instances a serious setback for the rights of the consumer. UPCA § 2-104, for example, clarifies what a legally sufficient description of a unit should be. Perhaps the

88. U.P.C.A. § 2-102 [Unit Boundaries] reads as follows:

Except as provided by the declaration:

(1) If walls, floors, or ceilings of a unit are designated as the boundaries of that unit, all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting any part of the finished surfaces thereof are a part of the unit, and all other portions of the walls, floors, or ceilings are a part of the common elements.

(2) If any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture lies partially within and partially outside the designated boundaries of a unit, any portion thereof serving only that unit is a limited common element allocated solely to that unit, and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements.

(3) Subject to the provision of paragraph (2), all spaces, interior partitions, and other fixtures and improvements within the boundaries of a unit are a part of the unit.

(4) Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and all exterior doors and windows or other fixtures designated to serve a single unit, but located outside the unit's boundaries, are limited common elements allocated exclusively to that unit.

89. U.P.C.A. § 2-104 reads:

A description of a unit which sets forth the name of the planned community, the [recording data] for the declaration, the [county] in which the planned community is located, and the identifying number of the unit, is a sufficient legal description of that unit and all rights,
drafters were concerned that the term "unit" would constitute a confusing reference to a condominium unit, but it could just as well be referring to a non-condominium townhouse or planned unit development.

Another important and helpful UPCA provision, "Contents of Declaration,"90 is also not included in the PCA. Once again, valuable consumer rights were sacrificed when this provision was jettisoned from the North Carolina version of the Act. In addition to obvious information that a well drafted declaration would contain in any event,91 the UPCA requirements for the declaration also include the following consumer oriented information: a statement of the maximum number of units which the declarant reserves the right to create,92 a description of any real estate which is or must become common elements and limited common elements,93 a description of any real estate which may be allocated subsequently as limited common elements,94 a description of any development rights and other special declarant rights reserved by the declarant,95 other disclosures concerning development rights,96 and any restrictions on use, occupancy, and alienation of the units.97 After listing these and other requirements for the contents of a declaration, the UPCA then adds that "[t]he declaration may contain any other matters the declarant deems appropriate."98

obligations, and interests appurtenant to that unit which were created by the declaration and bylaws.

91. U.P.C.A. § 2-105(a)(1) - (3) reads as follows:
   (a) The declaration for a planned community must contain:
       (1) the names of the planned community and association;
       (2) the name of every [county] in which any part of the planned community is situated;
       (3) a legally sufficient description of the real estate included in the planned community;

93. U.P.C.A. § 2-105(6), which reads in full: "a description of any real estate which is or must become common elements and limited common elements, other than those specified in Section 2-102(2) and (4), as provided in Section 2-109(b)(10) [of the U.P.C.A.] ."
95. U.P.C.A. § 2-105(8).
96. U.P.C.A. § 2-105(9) and (10).
98. U.P.C.A. § 2-105(b).
Significantly, the downsized PCA contains absolutely no requirement that a developer of a planned community make meaningful consumer disclosures in the declaration, in a public offering statement, or in any materials advertising and promoting the project. In this regard, it varies significantly from both the UPCA and the North Carolina Condominium Act. The one-sided nature of the final version of the PCA calls into question the proverb that a half a loaf is better than none, especially when the half that was enacted will be on the table of the developer/declarant and not the consumer.99

Other major portions of Article 2 of the UPCA were also omitted from Article 2 of the PCA. Omitted sections include UPCA § 2-106 [Leasehold Planned Communities], UPCA § 2-107 [Allocation of Votes and Common Expense Liabilities], UPCA § 2-108 [Limited Common Elements], UPCA § 2-109 [Plats and Plans],100 UPCA § 2-110 [Exercise of Development Rights],101 UPCA § 2-111 [Alteration of Units], UPCA § 2-112 [Relocation of Boundaries Between Units], UPCA § 2-113 [Subdivision of Units], UPCA 2-114 [Easement for Encroachments] or, in the alternative [Monuments as Boundaries], UPCA § 2-115 [Use for Sales Purposes], and UPCA § 2-116 [Easement Rights].

C. Resolution of Conflicts Between Declaration and Bylaws/Marketability of Lots

The PCA contains a useful legal housekeeping provision resolving conflicts between the provisions of the declaration and bylaws102 and providing assurances regarding marketability.103


100. One of the many requirements for a plat that would benefit consumers is found at U.P.C.A. § 2-109(c), which reads: “A plat may also show the intended location and dimensions of any contemplated improvement to be constructed anywhere within the planned community. Any contemplated improvement shown must be labeled either “MUST BE BUILT” or “NEED NOT BE BUILT.”

101. U.P.C.A. Comment 1 to this section reads:

This section generally describes the method by which any development right may be exercised. Importantly, while new development rights may be reserved within new real estate which is added to the planned community, the original time limits on the exercise of these rights which the declarant must include in the original declaration may not be extended. Thus, the development process may continue only within the self-determined constraints originally described by the declarant.

In the event of a conflict between declaration and bylaws, the declaration prevails except to the extent that the declaration is inconsistent with the PCA. An "insubstantial failure" of the declaration to comply with the PCA does not render title to a lot and common elements unmarketable. To be sure, the clear guidelines that the PCA provides for planned communities should have the effect of enhancing marketability.

D. Procedures for Amendment of Declaration

The comment to the amendment section of the UPCA notes that the amendment section "recognizes that the declaration, as the perpetual governing instrument for the planned community, may be amended by various parties at various times in the life of the project." Sophisticated real property attorneys do not need statutory guidelines with regard to the amendment of the planned community declaration because they will have drafted amendment procedures with precision. Unfortunately, not all documentation is drafted by knowledgeable and experienced practitioners, and a statutory procedure for amendment is therefore a wise addition to the PCA. N.C. Gen. Stat. § 47F-2-117(a) provides the central guidelines on amendment as follows:

Except in cases of amendments that may be executed by a declarant under the terms of the declaration or by certain lot owners under N.C. Gen. Stat. 47F-2-118(b), the declaration may be amended only by the affirmative vote or written agreement signed by lot owners of lots to which at least sixty-seven percent (67%) of the votes in the association are allocated, or any larger majority the declaration specifies or by the declarant if necessary for the exercise of any development right. The declaration may specify a smaller number only if all of the lots are restricted exclusively to nonresidential use.

105. N.C. Gen. Stat. § 47F-2-103(d). This subsection adds: "Whether a substantial failure to comply with this Chapter impairs marketability shall be determined by the law of this State related to marketability." N.C. Gen. Stat. § 47F-2-103(b) also cures any potential challenges under the rule against perpetuities.
106. U.P.C.A. Comment 1 to U.P.C.A. § 2-117 [Amendment of Declaration], a section of the U.P.C.A. that is substantially identical to N.C. Gen. Stat. § 47F-2-117 except for the omission of subsection (d) of the U.P.C.A. provisions related to amendment.
Significantly, another statutory subsection adds that "[n]o action to challenge the validity of an amendment adopted pursuant to this section may be brought more than one year after the amendment is recorded."\textsuperscript{107} This statute of limitations is an appropriate way to encourage flexibility through amendments and assure stability if proper procedures are followed and the one year passes. Amendments must also be properly recorded.\textsuperscript{108}

The PCA provisions related to amendment differ from the UPCA in one important respect. Subsection (d) of the UPCA was eliminated from the North Carolina PCA. Once again, the omission is one related to consumer protection. UPCA § 2-117(d) reads:

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

E. Termination of Planned Communities

The official comment to the UPCA section on the termination of a planned community explains the need for a thorough termination procedure as follows:

While few planned communities have yet been terminated under present state law, a number of problems are certain to arise upon termination which have not been adequately addressed by most of those statutes. These include such matters as the percentage of unit owners which should be required for termination; the time frame within which written consents from all unit owners must be secured; the manner in which common elements and units should be disposed of following termination, both in the case of sale and non-sale of all of the real estate; the circumstances under which sale of units may be imposed on dissenting owners; the powers held by the board of directors on behalf of the association to negotiate a sales agreement; the practical consequences to the project from the time the unit owners approve the termination until the transfer of title and occupancy actually occurs; the impact of termination on liens on the units and common elements; distribution of sales proceeds; the effect of foreclosure or enforcement of liens

\textsuperscript{107} N.C. Gen. Stat. § 47F-2-117(b).

\textsuperscript{108} N.C. Gen. Stat. § 47F-2-117(c), (e).
against the entire planned community with respect to the validity of the project; and other matters.\textsuperscript{109}

By following the termination provisions of the UPCA, the PCA therefore appropriately looks ahead to the day when some planned communities will need to be terminated. It sets forth helpful and clear guidelines for termination.\textsuperscript{110} A planned community can be terminated "only by agreement of lot owners of lots to which at least eighty percent (80\%) of the votes in the association are allocated, or any larger percentage the declaration specifies."\textsuperscript{111} A smaller percentage can be specified in the declaration if all of the lots in the planned community are restricted exclusively to nonresidential uses.\textsuperscript{112} Under the UPCA, lenders have a right to require that the declaration specify a higher percentage of unit owner consent or require the consent of a percentage of the lenders.\textsuperscript{113} Without explanation, these provisions are not included in the PCA.\textsuperscript{114}

As with the original declaration, an agreement to terminate a planned community must be properly executed in the same manner as a deed.\textsuperscript{115} It may provide for the sale of the common elements, but it may not require the sale of lots following termination without the consent of all of the lot owners or unless the declaration as originally recorded provided otherwise.\textsuperscript{116}

\textsuperscript{109}. Comment 1 to U.P.C.A. § 2-118(a).
\textsuperscript{111}. N.C. Gen. Stat. § 47F-2-118(a), a subsection that is identical to U.P.C.A. § 2-118(a).
\textsuperscript{112}. Id.
\textsuperscript{114}. There is no detailed legislative history of the PCA. It is clear that some special interest groups objected to numerous parts of the U.P.C.A., and many of these parts were omitted. Official explanations for each omission are not available.
\textsuperscript{115}. N.C. Gen. Stat. § 47F-2-118(b), which provides:
An agreement to terminate shall be evidenced by the execution of a termination agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of lot owners. The termination agreement shall specify a date after which the agreement will be void unless it is recorded before that date. A termination agreement and all ratifications thereof shall be recorded in every county in which a portion of the planned community is situated and is effective only upon recordation.
The language of U.P.C.A. § 2-118(b) is identical.
\textsuperscript{116}. N.C. Gen. Stat. § 47F-2-118(c). This provision is substantially the same as U.P.C.A. § 2-118(d). U.P.C.A § 2-118(c), dealing with planned communities...
Like the UPCA,117 the PCA provides that the association may contract for the sale of real estate in the planned community on behalf of the lot owners.118 Any such contract is not binding until approved pursuant to subsections (a) and (b) of N.C. Gen. Stat. § 47F-2-118.119 Title to planned community real estate constituting common elements that is not to be sold following termination "vests in the lot owners upon termination as tenants in common in proportion to their respective interests as provided in the termination agreement."120

Treatment of proceeds of any real estate sale following termination of the planned community is set forth at N.C. Gen. Stat. § 47F-2-118(f). That subsection provides these guidelines:

Following termination of the planned community, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for lot owners and holders of liens on the lots as their interests may appear. All other creditors of the association are to be treated as if they had perfected liens on the common elements immediately before termination.121

117. U.P.C.A. § 2-118(e).
119. Id. This statutory subsection adds several additional clarifications: "Until the sale has been concluded and the proceeds thereof distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale shall be distributed to lot owners and lienholders as their interests may appear, as provided in the termination agreement." The following language from U.P.C.A. § 2-118(e) was not included in the counterpart PCA subsection: "If any real estate in the planned community is to be sold following termination, title to that real estate, upon termination, vests in the association as trustee for the holders of all interests in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale."
120. N.C. Gen. Stat. § 47F-2-118(e). This provision differs from the counterpart subsection, U.P.C.A. § 2-118(f). Part of the difference is due to the coverage of condominiums by the U.P.C.A. but not by the PCA.
121. This subsection is substantially the same as U.P.C.A. § 2-118(g). N.C. Gen. Stat. § 47F-2-118(g) adds:

If the termination agreement does not provide for the distribution of sales proceeds pursuant to subsection (d) of this section or the vesting of title pursuant to subsection (e) of this section, sales proceeds shall be distributed and title shall vest in accordance with each lot owner's allocated share of common expense liability.

Comment 8, explaining U.P.C.A. § 2-118(g) summarizes the need for sections dealing with creditors rights as follows:
F. Effect of Foreclosure

In the event of a foreclosure of a deed of trust or other lien or encumbrance against the common elements of a planned community, that planned community is not automatically terminated, although a mortgagee or lienholder who puts together a sufficient number of votes through the acquisition of units can institute termination proceedings pursuant to N.C. Gen. Stat. § 47F-2-118(a).122 In the event of foreclosure or enforcement of a lien or encumbrance against withdrawable real estate, that action “does not of itself withdraw that real estate from the planned community, but the person taking title thereto has the right to require from the association, upon request, an amendment excluding the real estate from the planned community.”123

G. Master Associations

The UPCA introductory comment dealing with master associations124 notes that in large or multi-phased planned communities it is common for the declarant to create a master or umbrella association to provide management services or decision-

A complex series of creditors’ rights questions may arise upon termination. Those questions involve competing claims of first mortgage holders on individual units, other secured and unsecured creditors of individual unit owners, judgment creditors of the association to whom a security interest in the common elements has been granted, and unsecured creditors of the association. Subsection (g) [the counterpart of N.C. Gen. Stat. § 47F-2-118(f)] attempts to establish general rules with respect to these competing claims, but leaves to state law the resolution of the priorities of those competing claims.

Comment 8 also contains a series of detailed examples explaining the relationship of the U.P.C.A. to state lien priority rules. These examples should be studied in the event a priorities fact situation arises under the PCA.

122. N.C. Gen. Stat. § 47F-2-118(h). This is the case except as provided in N.C. Gen. Stat. § 47F-2-118(i). That subsection provides:

If a lien or encumbrance against a portion of the real estate comprising the planned community has priority over the declaration and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance may, upon foreclosure, record an instrument excluding the real estate subject to that lien or encumbrance from the planned community.

An official comment to this subsection of the PCA reads: “Rights under subsection (i) are lost upon the partial release of any lien or encumbrance by its holder. Subsection (i) is consistent with the Uniform Planned Community Act.”


124. Comment 1 to U.P.C.A. § 2-120.
making functions for a series of smaller projects. The comment then adds: "This section addresses a number of issues frequently overlooked in such a structure." The PCA, however, does not address all of the issues covered by the UPCA. N.C. Gen. Stat. § 47F-2-120 simply provides:

If the declaration for a planned community provides that any of the powers described in G.S. 47F-3-102 are to be exercised by or may be delegated to a profit or nonprofit corporation which exercises those or other powers on behalf of one or more other planned communities or for the benefit of the lot owners of one or more other planned communities, all provisions of this act applicable to lot owners' associations apply to any such corporation.

**H. Merger or Consolidation of Planned Communities**

The PCA accommodates the possibility that two or more planned communities may find it attractive to merge into a single planned community. Its provisions on merger or consolidation are almost identical to the UPCA counterpart language and deal with issues of authorization, execution and reallocation of interests. As discussed above, another option to merger or consolidation is to create a master association.

The authorization subsection of the statute provides that any two or more planned communities can merge or consolidate into a single planned community by agreement of the lot owners and compliance with applicable PCA procedural requirements. Procedural requirements for merger are the same as those for termination of a planned community. A merger or consolidation agreement shall be evidenced by an agreement prepared, executed, recorded, and certified by the president of the association of each of the preexisting planned communities following approval by owners of lots to which are allocated...
agreement must "provide for the reallocation of the allocated interests in the new association among the lots of the resultant planned community."\textsuperscript{133} Two statutory options for reallocation are identified: the merger or consolidation agreement can state the reallocations or the formulas upon which they are based; or, it can reallocate,

[B]y stating the percentage of overall common expense liabilities and votes in the new association which are allocated to all of the lots comprising each of the preexisting planned communities, and providing that the portion of the percentages allocated to each lot formerly comprising a part of the preexisting planned community shall be equal to the percentages of common expense liabilities and votes in the association allocated to that lot by the declaration of the preexisting planned community.\textsuperscript{134}

The merged or consolidated planned community becomes the legal successor of the pre-existing planned communities, "and the operations and activities of all associations or the pre-existing planned communities shall be merged or consolidated into a single association which shall hold all powers, rights, obligations, assets, and liabilities of all preexisting associations."\textsuperscript{135}

**IV. ARTICLE 3 OF THE PCA – "MANAGEMENT OF PLANNED COMMUNITY"**

**A. Different Perspectives on the Power of the Association**

In an excellent summary of the highlights of the new PCA, Article 3, "Management of Planned Community," is hailed by one expert as "good news for all planned communities."\textsuperscript{136} Article 3 is described as addressing "some of the greatest needs and most vexing problems surrounding the day to day administration and governance of planned communities."\textsuperscript{137} The introduction to Article 3 continues:

*the percentage of votes in each planned community required to terminate that planned community. Any such agreement shall be recorded in every county in which a portion of the planned community is located and is not effective until recorded.*

\textsuperscript{133} N.C. Gen. Stat. § 47F-2-121(c).

\textsuperscript{134} N.C. Gen. Stat. § 47F-2-121(c). There are helpful examples set forth at U.P.C.A. Comment 3 to U.P.C.A. § 2-121.

\textsuperscript{135} N.C. Gen. Stat. § 47F-2-121(a).

\textsuperscript{136} Timothy G. Sellers, *North Carolina Planned Community Act "Better Late Than Never*, 20 Real Property 9 (May 1999). (Real Property is the Newsletter of the North Carolina Bar Association's Real Property Law Section.)

\textsuperscript{137} Id.
While planned communities are usually created by capable professionals, the associations charged with their management are typically administered by elected boards made up of concerned and caring neighbors whose experience and capabilities are as varied as the communities they represent.

These dedicated souls, who almost always serve as volunteers, are expected to run the association with the formality of General Motors while dealing with individual members who are frequently demanding and sometimes belligerent. In Article 3, those boards will find many of the "tools" they have desperately needed to effectively do their job. Some are available to all planned communities; others, only to those created in 1999 and beyond.\textsuperscript{138}

It is clear, therefore, that those who sponsored the PCA desired a strong, clear source of guidelines and authority for the management of planned communities by the association.\textsuperscript{139} Giving associations powers that "cover the waterfront"\textsuperscript{140} is viewed as a positive evolution of North Carolina real property law. To be sure, the policy decision to provide a strong statutory power base for planned communities has merit, but a one-sided approach to this area does not adequately address the possibility of abuses by planned communities and their associations. Associations are not always staffed by "concerned and caring neighbors," nor are individual lot owners asserting their rights and liberties necessarily "frequently demanding and belligerent." In a 1997 Real Estate Law Journal article, another author's description of the power of the property owners' association (referred to as the "POA") sheds an entirely different perspective on this area:

Although a POA is a private organization, it practically constitutes a form of government. The rules, financial practices, and other governing decisions of the POA can be a powerful force for good or for ill in the lives of its members. The latitude of the POA power is great, and it affects many aspects of the lifestyle of the residences. At its extreme the power can affect the types of residents attracted to the POA. However, this power is subject to limitations. Increasingly, it is an organization that wields a

\textsuperscript{138} Id.

\textsuperscript{139} The comments to the U.P.C.A. assume "the need to provide the association with sufficient powers to exercise its 'governmental' functions as the ruling body of the planned community." Comment 5 to U.P.C.A. § 3-102.

\textsuperscript{140} Id.
substantial degree of power which at times may be subject to abuse.\textsuperscript{141}

At the risk of belaboring a theme presented throughout this article, there is much to be said in favor of a strong planned community governance structure so long as it is counterbalanced with an effective array of consumer/lot owner rights. The removal of most of the consumer rights in the final version of the PCA has unfortunately shifted the balance of power – perhaps excessively – in favor of the association. An association under the PCA will truly be "a powerful force for good or ill in the lives of its members." If it acts as a force for ill, its members will find themselves with a very limited number of arrows in their quiver available to redress grievances and inappropriate or overreaching association governance.

B. Contents of Article 3

Article 3 contains the requirements for the organization of the lot owners’ association,\textsuperscript{142} the powers of the association,\textsuperscript{143} the powers and duties of the executive board members and officers,\textsuperscript{144} provisions dealing with the transfer of special declarant rights\textsuperscript{145} and the termination of contracts and leases of the declarant,\textsuperscript{146} and requirements for the bylaws of the association.\textsuperscript{147} Article 3 also contains provisions dealing with the upkeep of the planned community (including responsibility and assessment for damages),\textsuperscript{148} procedures for fines and the suspension of planned community privileges or services,\textsuperscript{149} guidelines on meetings\textsuperscript{150}

\textsuperscript{141} See Gary S. Moore, Notice And Consent To The Financial And Legal Obligations In Property Owners’ Associations, 25 Real Est. L.J. 378 (1997); see also Stubblefield & Hyatt, supra note 3, at 599 ("A community association is an automatic, mandatory membership organization. That means that all owners of property subject to the covenants creating the community association automatically become members of that association by virtue of taking title to that property. They must remain citizens of that association subject to its governing and taxing powers so long as they remain owners.").

\textsuperscript{144} N.C. Gen. Stat. § 47F-3-103 (1999).
quorums,\textsuperscript{151} and voting and proxies.\textsuperscript{152} In addition, Article 3 addresses tort and contract liability,\textsuperscript{153} provisions dealing with the conveyance or encumbrance of the common elements,\textsuperscript{154} provisions related to insurance,\textsuperscript{155} rules on the treatment of surplus funds,\textsuperscript{156} guidelines on assessments for common expenses,\textsuperscript{157} the lien for assessments,\textsuperscript{158} rules related to the keeping of association records,\textsuperscript{159} a description of the association's role as a trustee,\textsuperscript{160} and a provision dealing with the recovery of attorneys' fees.\textsuperscript{161}

C. Comparison of Article 3 of the PCA with the UPCA

The General Assembly retained most of Article 3 of the UPCA intact when they enacted the PCA. One provision was eliminated because it is covered by the North Carolina Condominium Act and was deemed inappropriate for the PCA which is not intended to cover the condominium form of ownership.\textsuperscript{162} As provisions of Article 3 of the PCA are described below, any material deviation from the UPCA counterpart provision will be noted.

D. Requirements for Organization of Owners' Association

The PCA requires that a lot owners' association be incorporated no later than the date that the first lot in the planned community is conveyed.\textsuperscript{163} While this prerequisite is only applicable

\textsuperscript{156} N.C. Gen. Stat. § 47F-3-114 (1999).
\textsuperscript{159} N.C. Gen. Stat. § 47F-3-118 (1999).
\textsuperscript{162} U.P.C.A. § 3-117 [Other Liens Affecting Planned Community]. The North Carolina Comment to N.C. Gen. Stat. § 47F-3-117 [A statutory section designated as “Reserved for future codification purposes”) explains as follows:
The North Carolina Condominium Act as well as the Uniform Planned Community Act on which this act [the PCA] is based both are designed to apply to communities in which title to common elements is vested in individual owners. Because title to common elements under this act is vested in the association, no provision similar to N.C. Gen. Stat. § 47C-3-117 or Section 3-117 of the Uniform Act has been included.
\textsuperscript{163} N.C. Gen. Stat. § 47F-3-101. Comment 1 to U.P.C.A. § 3-101 explains the requirement as follows:
to planned communities created on or after the January 1, 1999 effective date,\textsuperscript{164} it is elementary that pre-1999 planned communities must have an appropriate homeowners’ association in place in order to take advantage of the Article 3 statutory powers of an association. For example, it is meaningless to specify that a homeowners’ association has the power to “adopt and amend bylaws and rules and regulations” under N.C. Gen. Stat. § 47F-3-102 unless there is in fact a bona fide homeowners’ association in existence in a pre-1999 planned community. Since some of these older planned communities operate through informal organizations, there may be some preventive law housekeeping to be done by legal counsel. And it is assumed that a pre-1999 planned community that elects to opt in for full coverage under the PCA will need to have a duly created and functioning homeowners’ association.

Membership in the association is required at all times to consist exclusively of all the lot owners.\textsuperscript{165} A homeowners’ association created after the effective date of the PCA must be organized as a nonprofit corporation.\textsuperscript{166}

\textbf{E. Powers of Unit Owners’ Association}

Because the addition of a statutory inventory of powers of the association represents a sweeping change – paradigm shift – in the North Carolina jurisprudence of planned communities, it is appropriate to commence this discussion by setting forth the powers statute in its entirety. A subsection by subsection analysis will then follow. N.C. Gen. Stat. § 47F-3-102 reads:

\begin{quote}

The first purchaser of a unit is entitled to have in place the legal structure of the unit owners’ association. The existence of the structure clarifies the relationship between the developer and other unit owners and makes it easy for the developer to involve unit owners in the governance of the planned community even during a period of declarant control reserved pursuant to Section 3-103(d).
\end{quote}

\textsuperscript{164} Editor’s Note to N.C. Gen. Stat. § 47F-3-101.

\textsuperscript{165} N.C. Gen. Stat. § 47F-3-101. Following termination of a planned community, membership consists of all persons entitled to distributions of proceeds under N.C. Gen. Stat. § 47F-2-188.

Subject to the provisions of the articles of incorporation or the declaration and the declarant’s rights therein, the association may:

1. Adopt and amend bylaws and rules and regulations;
2. Adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from lot owners;
3. Hire and discharge managing agents and other employees, agents, and independent contractors;
4. Institute, defend, or intervene in litigation or administrative proceedings on matters affecting the planned community;
5. Make contracts and incur liabilities;
6. Regulate the use, maintenance, repair, replacement, and modification of common elements;
7. Cause additional improvements to be made as a part of the common elements;
8. Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, provided that common elements may be conveyed or subjected to a security interest only pursuant to N.C. Gen. Stat. 47F-3-112;
9. Grant easements, leases, licenses, and concessions through or over the common elements;
10. Impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements other than the limited common elements and for services provided to lot owners;
11. Impose reasonable charges for late payment of assessments and, after notice and an opportunity to be heard, suspend privileges or services provided by the association (except rights of access to lots) during any period that assessments or other amounts due and owing to the association remain unpaid for a period of 30 days or longer;
12. After notice and an opportunity to be heard, impose reasonable fines or suspend privileges or services provided by the association (except rights of access to lots) for reasonable periods for violations of the declaration, bylaws, and rules and regulations of the association;
13. Impose reasonable charges in connection with the preparation and recordation of documents, including, without limitation, amendments to the declaration or statements of unpaid assessments;
14. Provide for the indemnification of and maintain liability insurance for its officers, executive board, directors, employees, and agents;
15. Assign its right to future income, including the right to receive common expense assessments;
(16) Exercise all other powers that may be exercised in the State by legal entities of the same type as the association; and

(17) Exercise any other powers necessary and proper for the governance and operation of the association.

Any discussion of the powers of a homeowners’ association under Article 3 of the PCA must revisit the applicability of the Act to pre-1999 planned communities. Subsections (1) through (6) and (11) through (17) of N.C. Gen. Stat. § 47F-3-102, the all important “Powers of Owners’ Association” provision, apply to all planned communities created prior to the January 1, 1999 effective date of the PCA. This point cannot be overemphasized. The applicability of parts of Article 3 to all preexisting planned communities raises a number of challenging issues. The author of a treatise on retroactive land legislation introduces the area, in part, as follows:

The term retroactive when applied to legislation has been used to suggest a variety of meanings, but the sense in which the term is employed here is that a statute is retroactive when it extinguishes or impairs interests acquired under the previously existing law. The problem to be dealt with is that of the constitutional limitations on the power of the legislature to effect changes in the institutions of real property law and to make those changes applicable as to interests arising out of these institutions and in existence at the effective date of the statute.

In addition, the reader is once again reminded that a pre-1999 planned community can, by following clear statutory procedures, opt in for full coverage by Chapter 47F and thereby confer upon its association all of the powers enumerated in N.C. Gen. Stat. § 47F-3-102. Even this “opt in” statute has an element of retroac-

167. See supra Part II.C.
168. See Editor’s Note to N.C. Gen. Stat. § 47F-3-102. The provisions not made applicable to pre-1999 planned communities, subsections (7) through (10) all relate to property rights. Making them inapplicable to pre-1999 planned communities represents a precaution against a constitutional attack by lot owners.
169. JOHN SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 1-2 (William S. Hein & Co., Inc. 1982). Scurlock appropriately draws a distinction between legislation regulating land use and legislation impairing static interests in land. His treatise does not emphasize land use, nor does it address any aspect of community association law.
tivity to it to the extent that the procedures set forth in the Act supersede the procedures of the pre-1999 planned community.\footnote{171 \text{N.C. Gen. Stat.} § 47F-1-102(d) states in part: “To the extent the procedures and requirements for amendment in the declaration conflict with the provisions of this subsection, this subsection shall control with respect to any amendment to provide that this Chapter applies to that planned community.” Thus, the procedures agreed upon for amending a declaration are in a sense retroactively amended by the Planned Community Act.}

A subsection by subsection analysis of N.C. Gen. Stat. § 47F-3-102 is necessary to fully highlight the breadth of the powers now held by associations in planned communities. A number of examples will also be provided. In all examples, assume that the planned community is located in North Carolina. Assume also that the action of the association is not only taken pursuant to proper procedure and authority, but that, in a general sense, it is also “reasonable.” It is not the purpose of the author to provide the reader with nothing but examples having an adverse effect on lot owners in a planned community; however, it is important to emphasize the effect of the many statutory powers of the association on traditional private property rights. Finally, it should be added that all of the examples provided are those of the author. Experts on the PCA may and probably will add their own interpretation of the “powers” provisions.

\textbf{(1) The Power to Adopt and Amend Bylaws and Rules and Regulations}

A common theme runs through all of the subsections of the PCA dealing with powers of the association: the General Assembly has, in essence, created a private form of government with many of the powers of public municipalities.\footnote{172 The comments to the U.P.C.A. assume “the need to provide the association with sufficient powers to exercise its ‘governmental’ functions as the ruling body of the planned community.” U.P.C.A. Comment 5 to U.P.C.A. § 3-102.} The safety valve, in theory, is that this private form of government constitutes a democracy operating under the mandate of a majority of lot owners. N.C. Gen. Stat. § 47F-3-102(1) confers upon the association the power to “adopt and amend bylaws and rules and regulations” of the planned community.

\textit{Example.} Owners purchase a home in a planned community in a coastal resort area. They plan to live in the unit during the off season and rent the unit during peak vacation months. There was no prohibition on the rental of units at the time they purchased their lots. Several years later, the homeowners’ association duly
amends the rules and regulations of the planned community to prohibit the rental of individual units. This appears to constitute a valid exercise by the association of its statutory powers under subsection (1). The lot owners' plans, however, are now frustrated.\textsuperscript{173}

\textit{Example.} A homeowners' association revises rules and regulations to reflect new aesthetic standards for the planned community. These new standards include the requirement of prior approval from an aesthetic committee on matters such as paint colors, design and location of fences, and landscaping in front yards. Subject to case law dealing with the reasonableness of aesthetic standards,\textsuperscript{174} the association appears to have the statutory power to revise its rules and regulations.

While a well drafted set of governance documents for a planned community created in the absence of a PCA might have included the power to adopt and amend bylaws and rules and regulations, it makes a difference that there is now a specific statutory imprimatur for such actions by the association.

(2) \textit{The Power to Adopt and Amend Budgets}

Subsection (2) of N.C. Gen. Stat. § 47F-3-102 provides statutory authority for the association to “[a]dopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from lot owners.” This association power is no longer based on the narrow and restrictive common law rules dealing with covenants and equitable servitudes. By their nature, budgets must reflect current expenses. As with everything else in life, it is inevitable that the assessments will increase through the years to meet the needs of the planned community. This flexible and realistic approach to the fiscal requirements of planned communities provides a refreshing change from the common law rules of property or from a total reliance on skillful draftsmanship of the planned community documentation.

\textsuperscript{173} This example could of course go the other way: When the planned community was created, assume the rental of units was not allowed. The purpose of this prohibition was to encourage the development of a stable neighborhood community. Several years later, the homeowners' association duly amends the rules and regulations to allow the short term rental of individual units. This appears to constitute a valid exercise by the association of its statutory powers under N.C. Gen. Stat. § 47F-3-102(1).

\textsuperscript{174} In the public arena, zoning restrictions aimed at the preservation of neighborhood aesthetic features can clearly be implemented by local authorities. See Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).
**Example.** When Robert and Sue Ferrapples purchased a
townhouse in a planned community, the annual assessment on
their unit was $352. Because of the high costs of operating a
swimming pool, health club and gated community, the association
budget for the next fiscal year includes a 100% increase in the
assessment for common expenses. The Ferrapples are legally
bound to pay the increased assessment.

Purchasers of lots or units in a planned community should be
made aware of this private taxing authority. They should also be
made to realize that the prudent operation and maintenance of a
planned community can be an expensive proposition. It is doubt-
ful that they will receive any meaningful disclosures in advance in
this regard, and, even if they do, it is equally doubtful that the
information will affect their decision to purchase in the planned
community.

(3) **The Power to Hire and Discharge Agents, Employees and
Independent Contractors**

N.C. Gen. Stat. § 47F-3-102(3) authorizes associations to
"[h]ire and discharge managing agents and other employees,
agents, and independent contracts." This provision is a useful
one. Well-drafted documentation creating a planned community
would have included authorization to this effect, but it is helpful to
have the power clearly spelled out by statute.

(4) **The Power to Litigate**

The association is appropriately given the power by N.C. Gen.
Stat. § 47F-3-102(4) to "[i]nstitute, defend, or intervene in litiga-
tion or administrative proceedings on matters affecting the
planned community."¹⁷⁵ Lot owners should keep in mind that the
power to litigate includes the power to assess for the cost of litiga-
tion as a common expense under N.C. Gen. Stat. § 47F-3-102(2).

**Example.** The State proposes to widen a two-lane highway bor-
dering on the planned community to a four-lane highway. The
extra lanes will be created on common areas that had served as a

¹⁷⁵. The language varies slightly from U.P.C.A. § 3-102(4) which reads:
"institute, defend, or intervene in litigation or administrative proceedings in its
own name on behalf of itself or 2 or more unit owners on matters affecting
the planned community." U.P.C.A. Comment 3 to this section states: "This Act
makes clear that the association can sue or defend suits even though the suit
may involve only units as to which the association itself has no ownership
interest." The downsized language of N.C. Gen. Stat. § 47F-3-102(4) is not quite
as clear on this point.
heavily landscaped buffer zone at one boundary of the planned community. A majority of the unit owners want to fight the widening project; a minority want to take the monies received from the exercise of eminent domain and place it in a reserve fund. The executive board of the association decides to retain a law firm specializing in this area of law and litigate, if necessary, over this issue. The board clearly has the power to commit even a substantial amount of money to the legal proceedings.

In a recent California dispute, for example, three different homeowners associations commenced a suit against the builder for extensive construction related defects, including roof leaks and structural problems. Settlements in favor of the associations totaled $14 million dollars and enabled the associations to repair the many defects.

(5) The Power to Make Contracts and Incur Liabilities

It stands to reason that a planned community association organized as a nonprofit corporation would of necessity require "[t]he power to make contracts and incur liabilities."

(6) Power With Regard to the Common Elements

The association is given another necessary power: The power to "[r]egulate the use, maintenance, repair, replacement, and modification of common elements."

Example. As initially designed, a planned community was surrounded by a five-mile bridle path. Not many members of the planned community own horses or make use of the path, and the association decides to pave it, turn it into a jogging and cycling path, and prohibit horses. The association appears to have this power. Whether the homeowners who purchased lots because


177. Id. The article notes that this settlement is not the largest in Orange County history. Previously, a 267-unit San Juan Capistrano association won settlements totaling $26.54 million against the developer because of defective foundations that caused extensive leaking and structural problems.

178. N.C. Gen. Stat. § 47F-3-102(5). This is identical to its counterpart section, U.P.C.A. § 3-102(5).


180. Not to be confused with planned communities catering to single residents that include bridal paths as amenities.

181. Other subsections of N.C. Gen. Stat. § 47F-3-102, such as subsections (1), (5), (7), (16) and (17) also come into play in this example.
of the bridle path have any other potential remedies is speculative.

(7) The Power to Make Additional Improvements

N.C. Gen. Stat. § 47F-3-102(7) gives the association the power to "[c]ause additional improvements to be made as a part of the common elements." This subsection is identical to its UPCA counterpart, and represents a significant source of power that could change the nature of the common elements and increase fees or charges to the unit owners.

Example. A planned community has four outdoor tennis courts. The association duly authorizes the construction of an indoor tennis facility housing four additional tennis courts at a cost in the vicinity of 1.5 million dollars. Subsection (7) appears to provide the authority for this action.

(8) The Power to Acquire Real or Personal Property

N.C. Gen. Stat. § 47F-3-102(8) provides that the association has the power to "[a]cquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, provided that common elements may be conveyed or subjected to a security interest only pursuant to N.C. Gen. Stat. 47F-3-112." This subsection is identical to its UPCA counterpart.

Example. A five-acre parcel of woodlands adjoining the planned community is placed on the market for $75,000. The association appears to have the statutory power to acquire the acreage and add it to the common elements.

(9) The Power to Grant Easements, Leases, Licenses and Concessions

This PCA subsection grants the association the power to "[g]rant easements, leases, licenses, and concessions through or

182. U.P.C.A. § 3-102(7).
183. U.P.C.A. § 3-102(8). U.P.C.A. Comment 4 explains: "Paragraph (8) refers to the power granted by Section 3-112 to sell or encumber common elements without a termination of the planned community upon a vote of the requisite number of unit owners."
184. Query: What if the association of a planned community located in Cary, North Carolina, decides after following proper procedures to purchase an oceanfront cottage at Wrightsville Beach to add to the common area of the planned community?
over the common elements."\textsuperscript{185} It is identical to its UPCA counterpart.\textsuperscript{186} UPCA Comment 4 makes it clear that these rights over the common elements can be granted by the association without a vote of the unit owners.\textsuperscript{187}

(10) The Power to Impose and Receive Payments, Fees or Charges

N.C. Gen. Stat. § 47F-3-102(10) authorizes the association to "[i]mpose and receive any payments, fees, or charges for the use, rental, or operation of the common elements other than the limited common elements and for services provided to lot owners." It is substantially similar to its counterpart provision in the UPCA.\textsuperscript{188}

(11) The Power to Impose Reasonable Charges and Suspend Privileges or Services

N.C. Gen. Stat. § 47F-3-102(11) and allied statutory provisions are significant ones from the standpoint of attorneys specializing in planned community law. It confers the power to:

[i]mpose reasonable charges for late payment of assessments and, after notice and an opportunity to be heard, suspend privileges or services provided by the association (except rights of access to lots) during any period that assessments or other amounts due and owing to the association remain unpaid for a period of 30 days or longer.

This statutory bestowal of power to homeowners’ associations, when combined with related powers,\textsuperscript{189} constitutes a critical and far-reaching change in the law of planned communities in North Carolina. Homeowners’ associations have traditionally suffered the figurative status of the toothless watchdog – barking admirably at violators of planned community rules but too often lacking the power, procedural guidance, comprehensive documentation, and, ultimately, the will to take any meaningful enforcement action. There is also a history of disputes over assessments and

\textsuperscript{185} N.C. Gen. Stat. § 47F-3-102(9).
\textsuperscript{186} U.P.C.A. § 3-102(9).
\textsuperscript{187} U.P.C.A. Comment 4 to U.P.C.A. § 3-102.
\textsuperscript{188} U.P.C.A. § 3-102(10).
\textsuperscript{189} The package of statutes that deal with reasonable charges or fines includes N.C. Gen. Stat. § 47F-3-102(11) - (13); N.C. Gen. Stat. § 47F-3-107.1. It is important to remember that these statutory sections apply to all planned communities, including those created prior to January 1, 1999.
the late payment or nonpayment of assessments by dissident property owners. In addition, the appellate courts of most states have not been friendly to the assertion of power by homeowners' associations. The PCA, as they say, "changes everything," and proponents of the legislation appropriately proclaim that, from the vantage point of the homeowners' association, the changes are for the better.190

Because of its importance, Subsection (11) merits careful scrutiny. It is similar to but deviates somewhat from the counterpart UPCA provision.191 The chief difference is the addition of the power to the PCA to suspend privileges or services provided by the association. Comment 5 to the UPCA provision explains the general need for this section as follows:

The powers granted the association in paragraph (11) to impose charges for late payment of assessments and to levy reasonable fines for violations of the association's rules reflect the need to provide the association with sufficient powers to exercise its "governmental" functions as the ruling body of the planned community. These powers are intended to be in addition to any rights which the association may have under other law.192

One expert on the PCA elaborates on the background of N.C. Gen. Stat. § 47F-3-102 (11) as follows:

While many of the powers granted are quite similar to corresponding provisions in the Condominium Act, several have been expanded or contain important clarifications. Subparagraph (11) permits the imposition of reasonable charges for late payment of assessments. No specific dollar limitation is placed on the association's right to impose late payment charges in order to allow the association maximum latitude in this area. Neither this power nor any power enumerated in § 3-102 is subject to any limitation set forth in Chapter 24 of the General Statutes.193

Advising a property owner in a planned community who is disputing an assessment should be an easy—play it safe—matter. Assessments should be paid "under protest" and then challenged

190. See Sellers, supra note 136, at 9 where Sellers introduces the powers sections of the PCA with the heading "Good News for all Planned Communities."

191. U.P.C.A. § 3-102 grants the power to "impose charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, and rules and regulations of the association."

192. Comment 5 to U.P.C.A. § 3-102. This comment has been referred to at several points in this article.

193. See Sellers supra note 130, at 9.
either through legal procedures including litigation or the democratic process (i.e., protest the matter at a meeting of the association and seek to elect more sympathetic members of the executive board). But there is a catch to any legal challenge. The PCA provision on attorneys' fees combined with astute drafting of the declaration with the declarant and the homeowners' association in mind will probably preclude the awarding of attorneys' fees to a lot owner in a planned community even if he or she has successfully challenged the assessment.\(^{194}\)

\textbf{(12) The Power to Impose Fines or Suspend Privileges or Services for Violations}

In what could become one of the most thorny areas involving the powers authorized by the PCA, subsection (12)\(^ {195} \) allows the homeowners' association to "impose reasonable fines or suspend privileges or services provided by the association (except rights of access to lots) for reasonable periods for violations of the declaration, bylaws, and rules and regulations of the association." This can be accomplished only after "notice and an opportunity to be heard." have been given.\(^ {196} \) The notion of suspending privileges or services is not contained in the UPCA.\(^ {197} \) It is a somewhat radical idea that conspicuously shifts the balance of power in planned community affairs to the homeowners' association. Some examples, based on recent news reports, should drive home this point.

\textit{Example.} The Hush Hollow planned community has clear rules and regulations concerning pets.\(^ {198} \) Each homeowner is limited to no more than two dogs and two cats, and no stray animals are allowed. All pets must be confined to the homeowner's lot by

\footnotesize{\begin{itemize}
\item \(^{194}\) Attorneys' fees are covered at N.C. Gen. Stat. § 47F-3-120 and N.C. Gen. Stat § 3-116(e) of the PCA.
\item \(^{195}\) N.C. Gen. Stat. § 47F-3-102(12).
\item \(^{196}\) \textit{Id.}
\item \(^{197}\) N.C. Gen. Stat. § 47F-3-102(11)-12) are based, in part, on U.P.C.A. § 3-102(11). That subsection of the U.P.C.A. deals only with the imposition of charges and fines.
\item \(^{198}\) Covenants, restrictions, rules and regulations of planned communities can and often do control the lives of residents in very specific ways. In addition to the very common and at times controversial rules concerning pets, a community's rules in one form or another may prohibit clothes lines, rummage or yard sales, the parking of a boat or recreational vehicle outside of a garage or enclosure, the rental of a room in a home to a third party, the planting of unsightly plants, the conversion of all or part of a garage to living space, etc. Restrictions related to pets often limit the number of pets, the categories of allowable pets, the enclosure and leashing of pets, and the behavior of pets.
\end{itemize}
means of a fence, leash or electric fence. Several homeowners do not believe that cats should be confined and allow their melodic felines to roam all over the neighborhood on their nocturnal adventures. The homeowners ignore notices to comply with the pet rules. After proper notice and an opportunity to be heard, the homeowners remain firm in their convictions. These homeowners can be charged a reasonable fine for their ongoing violation; or, they can have privileges or services suspended. They could, for example, be prohibited from using the planned community health club and swimming pool until the violation is cured.\(^{199}\) Furthermore, they may be liable for the cost of the enforcement paperwork and reasonable attorneys' fees of the association.\(^{200}\)

Subsection (12) does invoke the word "reasonable" in two instances. It is safe to predict that a "reasonableness" standard will be applied by the courts to the entire operation of this provision.

In concluding an analysis of this subsection, it is worth underscoring that it is applicable to planned communities created prior to January 1, 1999.\(^{201}\) There is no requirement that an older planned community opt in to the PCA in order to receive the benefits of most of the powers conferred by that Act.\(^{202}\) Through the application of the powers section to pre-1999 planned communities, formerly impotent associations will soon discover that they are now strong. These reinvigorated associations will probably surprise homeowners when they start flexing their enforcement muscles. It would be wise for homeowners associations to schedule information sessions with residents to advise them of the change in law. Attorneys representing associations should take a proactive role in this regard and encourage a cooperative spirit in addressing the new statutory provisions.

\(^{199}\) N.C. Gen. Stat. § 47F-3-107.1. See infra Part IV.F.

\(^{200}\) After disputes over assessments, disputes over pets seems to rank up there in terms of frequency of disputes. In many of these instances, the rules of the planned community are clear. Residents simply do not believe that they need to comply with them. An unjust rule, after all, is one that can be ignored in the "street law" of the subdivision. As has been emphasized before, there is a need for prospective purchasers in planned communities to understand what they are getting into. Planned communities are definitely a poor selection for free spirits.

\(^{201}\) See North Carolina Comment 4 to N.C. Gen. Stat. § 47F-3-102 and the Editor's Note to that section.

\(^{202}\) As has been noted at numerous locations in this article, subsections (1) through (6) and (11) through (17) of N.C. Gen. Stat. § 47F-3-102 apply to planned communities formed prior to January 1, 1999. It is a point worth emphasizing.
(13) **The Power to Impose Reasonable Charges for Documentation**

Subsection (13) of N.C. Gen. Stat. § 47F-3-102 might seem to belabor the obvious; but when it comes to the imposition of charges against individual owners, a specific enumeration of the association's authority in this regard can only be helpful in avoiding legal challenges. It is prudent, therefore, to have a statutory provision spelling out the power of the association to "[i]mpose reasonable charges in connection with the preparation and recordation of documents, including without limitation, amendments to the declaration or statements of unpaid assessments." 203

(14) **The Power to Provide for Indemnification and Maintain Liability Insurance**

The association has the very necessary power to "[p]rovide for the indemnification of and maintain liability insurance for its officers, executive board, directors, employees, and agents." 204 This language of this provision is identical to its UPCA counterpart. 205

(15) **The Power to Assign Future Income**

N.C. Gen. Stat. § 47F-3-102(15) grants power to the association to "[a]ssign its right to future income, including the right to receive common expense assessments." North Carolina Comment 2 to this statute explains:

In subdivision (15), the association is granted the power to assign its right to future income, including assessments regardless of whether or not its declaration expressly allows such assignments. This differs from the North Carolina Condominium Act and is intended to facilitate the acquisition of financing by the association, which is believed to be the primary goal of this provision.

Comment 2 could have added another insight. Subsection (15) differs materially from its UPCA counterpart, Section 3-102(14). That section allows the assignment of future income, "but only to the extent the declaration expressly so provides." 206

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205. U.P.C.A. § 3-102(13).
206. Comment 6 to U.P.C.A. § 3-102(14) sets forth the Uniform Act explanation of the original provision.
(16) The Exercise of Powers That May Be Exercised By Entities of the Same Type

The association is given the power by N.C. Gen. Stat. § 47F-3-102(16) to "exercise all other powers that may be exercised in this State by legal entities of the same type as the association." Since all owners' associations created after the effective date of the PCA must be organized as nonprofit corporations, the provisions of the North Carolina Nonprofit Corporation Act, Chapter 55A of the General Statutes, also have relevance in any inventory of powers available to the association. The Nonprofit Corporation Act has a statute enumerating "general powers" of a nonprofit corporation. The Nonprofit Corporation Act states that unless the articles of incorporation or Chapter 55A provides otherwise (and here one would have to interject, "unless Chapter 47F provides otherwise"), every nonprofit corporation "has the same powers as an individual to do all things necessary or convenient to carry out its affairs." The statute then enumerates nineteen examples or categories of powers of a nonprofit corporation. Some of them overlap the powers enumerated in the PCA; some constitute additional powers. The "general powers" section of the Nonprofit

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Under paragraph (14), the declaration may provide for the assignment of income of the association, including common expense assessment income, as security for, or payment of, debts of the association. The power may be limited in any manner specified in the declaration — for example, the power might be limited to specified purposes such as repair of existing structures, or to income from particular sources such as income from tenants, or to a specified percentage of common expense assessments. The power, in many instances, should help materially in securing credit for the association at favorable interest rates. This inability of associations to borrow because of a lack of assets, in spite of its income stream, has been a significant problem.

The Uniform Act approach to this area is superior to that adopted by the PCA in that the power to assign income may be limited by the declaration.

209. N.C. Gen. Stat. § 47F-1-108 provides:

The principles of law and equity as well as other North Carolina statutes (including the provisions of the North Carolina Nonprofit Corporation Act) supplement the provisions of this Chapter, except to the extent inconsistent with this Chapter. When these principles or statutes are inconsistent or conflict with this Chapter, the provisions of this Chapter will control.

211. N.C. Gen. Stat. § 55A-3-02(a)(1) - (19).
Corporation Act also adds that it is not necessary to set forth any of the powers enumerated in the statute. 212

A recent amendment to the Nonprofit Corporation Act makes it clear that homeowner associations have the power to distribute surplus funds to members. The North Carolina General Assembly amended N.C. Gen. Stat. § 55A-13-02(b)(3) to read as follows:

Except as otherwise provided by statute, a corporation not operated for profit, the membership of which is limited to the owners or occupants of real property in a condominium, cooperative housing corporation, or other real property development, having as its primary purposes the management, operation, preservation, maintenance, and repair of common areas and improvements upon the legal property owned by the members and the corporation or organization, may make distribution to its members of excess or surplus membership dues, fees, or assessments remaining after the payment of or provisions for common expenses and any prepayment of reserves; provided that these distributions are in proportion to the dues, fees, or assessments collected from the members. 213

(17) The Right to Exercise Powers Necessary and Proper for Governance

The final enumeration of the powers of an association should serve as a major general source of authority. N.C. Gen. Stat. § 47F-3-102(17) allows the association to “[e]xercise any other powers necessary and proper for the governance and operation of the association.” 214 This provision, in conjunction with the preceding sixteen enumerations of power, would appear to place the burden of proving a lack of power on the person attacking an action of the association. It constitutes a generic assumption of power in the day-to-day functions of the association.

F. Procedures for Fines and Suspensions

Subsections (11) and (12) of the “Powers of Owners' Association” section of the PCA 215 must be read in conjunction with N.C. Gen. Stat. 47F-3-107.1, “[p]rocedures for fines and suspension of planned community privileges or services.” This provision cre-

212. N.C. Gen. Stat. § 55A-3-02(b).
214. A restrictive covenant or equitable servitude to this effect would clearly be too vague to be enforceable under traditional property law rules.
ates, in essence, a judicial function for the homeowners’ association and also appears to be a successful attempt at interjecting minimum standards of due process into the procedure prior to the imposition of a fine or suspension of community privileges or services.216 Because of the central importance of this provision, it deserves to be set forth in full. It reads:

Unless a specific procedure for the imposition of fines or suspensions of planned community privileges or services is provided for in the declaration, a hearing shall be held before 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 pursuant to the powers granted to the association in N.C. Gen. Stat. 47F-3-102(11) and (12). If the executive board fails to appoint an adjudicatory panel to hear such matters, hearings under this section shall be held before the executive board. The lot owner charged shall be given notice of the charge, opportunity to be heard and to present evidence, and notice of the decision. If it is decided that a fine should be imposed, a fine not to exceed one hundred fifty dollars ($150.00) may be imposed for the violation and without further hearing, for each day after the decision that the violation occurs. Such fines shall be assessments secured by liens under N.C. Gen. Stat. 47F-3-116. If it is decided that a suspension of planned community privileges or services should be imposed, the suspension may be continued without further hearing until the violation or delinquency is cured.217

A first point that must be mentioned about the procedures for fines and suspension statute is its applicability to “all planned communities.”218 This means that it is required of planned communities whether they were created before or after the January 1, 1999 effective date of the PCA.

A second matter to emphasize about this statute is that it operates by default where there is no specific procedure provided for in the declaration. This raises an interesting practical consideration. Should an association operate under special procedures

216. Because “property” or a “property right” of a homeowner is being taken away by the association pursuant to statutory authorization, there is an interesting question raised concerning whether the actions of the association are “under color of state law” for purposes of 42 U.S.C. § 1983. See infra Part IV.D.


218. North Carolina Comment 1 to N.C. Gen. Stat. § 47F-3-107.1 reads: “This section is applicable to all planned communities based on the fact that the power to fine and suspend planned community privileges or services is granted to all planned communities under N.C. Gen. Stat. 47F-3-102 (11) and (12).”
set forth in the declaration, or should the declaration be drafted or amended to simply refer to or conform to the statutory procedures? While viewpoints can differ, it is the opinion of this author that it would be prudent to rely on the basic and straightforward statutory procedures. This approach is the safe one, assuring the association that it in fact has validly imposed a fine. When it comes to enforcing a lien on a lot because of an unpaid fine, compliance with procedures set forth in the statute will be helpful to the association’s legal position.219

The North Carolina Condominium Act contains a similar provision,220 although the PCA statute has been strengthened considerably in terms of the remedies of the association. The Condominium Act provides that the condominium bylaws may authorize a hearing and fine procedure,221 the PCA automatically provides a statutory procedure and authorization that can be altered by a specific procedure provided for in the declaration.222 The Condominium Act is unclear concerning ongoing violations and appears to authorize only one $150.00 fine;223 the PCA clearly provides authority for a $150.00 fine for the violation and (without further hearing) for each day that the violation continues.224 The Condominium Act does not contain a provision allowing the suspension of community privileges or services; the PCA specifically lists suspension as an acceptable association remedy.225

It bears repeating that the guidelines for the hearing follow rudimentary concepts of procedural due process. Four specifics

220. N.C. Gen. Stat. § 47C-3-107.1, titled “Charges for late payments, fines.” This statute reads:
The bylaws of the association may provide for a hearing before an adjudicatory panel to determine if a unit owner should be fined not to exceed one hundred fifty dollars ($150.00) for a violation of the declaration, bylaws or rules and regulations of the association. Such panel shall accord to the party charged with the violation notice of the charge, opportunity to be heard and to present evidence, and notice of the decision. Such a fine shall be an assessment secured by a lien under G.S. 47C-3-116.
222. Id.
223. Id.
224. Id.
225. Id.

http://scholarship.law.campbell.edu/clr/vol22/iss1/2
are covered: notice of the charge, an opportunity for the homeowner to be heard, an opportunity to present evidence, and notice of the decision. The fines and suspensions statute provides two very effective remedies — remedies much clearer and more effective than the common law would allow. The first, a fine not to exceed $150.00 will quickly bring most homeowners into compliance because it “may be imposed for the violation and without further hearing, for each day after the decision that the violation occurs.” For example, a resident who has been defying rules by keeping his dump truck parked in his front driveway will quickly decide to park it elsewhere. The resident who had vinyl siding installed in total disregard of rules prohibiting it had better invest in a crowbar. The resident with six dogs in the back yard — four more than permitted by the rules — should ship four off to Uncle Red and Aunt Minnie on the farm. Another way of looking at this somewhat innocent $150.00 figure is to remember that it will total $4,500 in a thirty-day month of noncompliance. Homeowners who desire to fight these matters on “the principle of the thing,” will need a great deal of optimism and deep pockets. Note that the “fines” option is only applicable to subsection (12) of N.C. Gen. Stat. § 47F-3-102 dealing with violations of the declaration, bylaws, and rules and regulations of the association. A $150/day fine is obviously inappropriate for the late payment of assessments under subsection (11) of that statute. “Reasonable charges” for late payment can be exacted and privileges or services suspended, but no fines are authorized. Suspensions are to last for each day that the violation continues after the adjudicatory panel’s (or executive board’s) decision.

G. The Executive Board of the Association

In terms of governance of the planned community, the PCA provides that an executive board may, subject to several statutory exceptions, “act in all instances on behalf of the association.” Consistent with the flexibility accorded to the drafter of planned

227. Id.
228. Id.
229. Id.
230. N.C. Gen. Stat. § 47F-3-103(a). With the exception of the standard of duty of board members appointed by the declarant, this provision is substantially the same as N.C. Gen. Stat. § 47C-3-103, its counterpart in the North Carolina Condominium Act, and U.P.C.A. § 3-103(a) and (b).
community documents, the declaration and bylaws can further limit the executive board's authority. In addition, there is a statutory exception to the scope of the board's authority: It "may not act unilaterally on behalf of the association to amend the declaration [N.C. Gen. Stat. § 47F-2-117], to terminate the planned community [N.C. Gen. Stat. § 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 [N.C. Gen. Stat. § 47F-3-103(f)]."

In terms of the standard of care of executive board members, the PCA unfortunately establishes a lower standard for board members appointed by the declarant than its counterpart provision in the UPCA. The UPCA holds board members appointed by the declarant to "the care required of fiduciaries of the unit owners." Board members and officers elected by unit owners are held to an "ordinary and reasonable care" standard by the UPCA.

The North Carolina Condominium Act places members of the executive board "in a fiduciary relationship to the association and unit owners."

The PCA holds board members to the standard of care described in the North Carolina Nonprofit Corporation Act. Specifically, it provides: "[o]fficers shall act according to the standards for officers of a nonprofit corporation set forth in G.S. 55A-8-42, and members shall act according to the standards for directors of a nonprofit corporation set forth in G.S. 55A-8-30." Both statutes in the North Carolina Nonprofit Corporation Act require that

231. Id.
232. N.C. Gen. Stat. § 47F-3-103(b). The executive board is authorized to unilaterally fill vacancies on the board for the unexpired portion of any term.
233. U.P.C.A. § 3-103(a). The "very high standard of duty" is justified, according to U.P.C.A. Comment 1, "because the board is vested with great power over the property interests of unit owners, and because there is a great potential for conflicts of interest between the unit owners and the declarant." The U.P.C.A. approach is obviously more appropriate from the vantage point of consumer protection.
234. Id. Comment 1 to U.P.C.A. § 3-103 notes, in part: "This lower standard of care should increase the willingness of unit owners to serve as officers and members of boards."
235. N.C. Gen. Stat. § 47C-3-103(a). The condominium statute further provides that board members "shall discharge their duties in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions."
a director or officer discharge duties in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner that the director or officer reasonably believes to be in the best interests of the corporation.237

H. The Budget

The PCA provision on the approval of budgets is an example of a clear, practical and much needed statutory procedure geared to the special nature of planned community governance and participation or the lack thereof by its homeowners. It provides:

Within 30 days after adoption of any proposed budget for the planned community, the executive board shall provide to all the 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 executive board shall set a date for a meeting of the lot owners to consider ratification of the budget, such meeting to be held not less than 10 nor more than 60 days after mailing of the summary and notice. There shall be no requirement that a quorum be present at the 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 period budget last ratified for the lot owners shall be continued until such time as the lot owners ratify a subsequent budget proposed by the executive board.238

The drafters of this provision and the PCA in general understood well the workings of the typical planned community. On the crucial matter of budget, the pragmatic approach of the PCA will assure the continuation of basic planned community services. Note that no quorum is necessary and that owners are provided with a specific statement to that effect. All owners receive notice

237. N.C. Gen. Stat. §§ 55A-8-30 and 55A-8-42. Both statutes contain additional guidelines. The North Carolina Commentary to N.C. Gen. Stat. § 55A-8-30 begins by explaining that, although the word “fiduciary” is no longer used to describe the duties of a director, there is no intent to change North Carolina law in this area.

238. N.C. Gen. Stat. § 47F-3-103(c). This subsection is substantially the same as its U.P.C.A. counterpart, U.P.C.A. § 3-103(c). The PCA version adds a helpful warning to lot owners that the budget may be ratified without a quorum. The PCA version is almost identical to its North Carolina Condominium Act counterpart, N.C. Gen. Stat. § 47C-3-103(c). The Condominium Act sets the notice at “not less than 14 nor more than 30 days” while the PCA reads “not less than 10 nor more than 60 days.”
of any proposed budget and can in effect veto it by a majority vote or larger vote if specified in the declaration. But even if the proposed budget is rejected, the last ratified periodic budget continues in operation until a subsequent budget is in place. Assessments required by the last ratified periodic budget continue.\(^{239}\)

It is predictable that the drafters of planned community documents will tinker with this process slightly by increasing the percentage of lot owners that it takes to disapprove a budget. The higher the percentage over 50%, the greater the power of the members of the executive board with respect to budget, although disgruntled lot owners always have the option to remove members of the executive board.\(^{240}\) This option would require a majority vote and a quorum present at the meeting.\(^{241}\)

I. Declarant Control

It is typical with planned communities that the declarant controls the association in the early stages of the development. A greatly downsized PCA provision on point simply recognizes this practice by noting that the declaration may provide for a period of declarant control.\(^{242}\) Provisions from the UPCA counterpart sections that set forth a formula for the gradual transfer of control of the association from the declarant to the unit owners and clear guidelines for the ultimate end to declarant control were unfortunately eliminated from the PCA.\(^{243}\) Provisions in the North Carolina Condominium Act to the same effect were also dropped from

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239. U.P.C.A. § 3-103, U.P.C.A. Comment 2 reads: "The provisions of paragraph (c) permit the unit owners to disapprove any proposed budget, but a rejection of the budget does not result in cessation of assessments until a budget is approved. Rather, assessments continue on the basis of the last approved periodic budget until the new budget is in effect."

240. N.C. Gen. Stat. § 47F-3-103(b), which reads in part:

"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."

241. Id. "Quorums" are defined at N.C. Gen. Stat. § 47F-3-109.


243. U.P.C.A. § 3-103(d) provides a formula that terminates declarant regardless of the period provided in the declaration. U.P.C.A. § 3-103(e) provides a formula for the gradual transfer of declarant control to the unit owners.
A provision allowing the declarant to surrender the right to appoint and remove executive board members but retain a veto power was also rejected in the PCA.

These revisions and deletions in the PCA follow the pattern of the North Carolina version to substantially shift the balance of power to the declarant, and later, to the association. The relative power and rights—property rights—of lot owners in a North Carolina planned community are therefore significantly weaker than their counterpart rights under the UPCA or the North Carolina Condominium Act.

There are several disadvantages to the declarant retaining control of the planned community for too long a period of time. Certain contracts and leases favorable to the declarant may be terminated without penalty by the association. Any statute of limitation affecting the homeowners’ association’s right of action under the PCA for tort and contract liability of the declarant is tolled until the period of declarant control terminates.

J. Transfer of Special Declarant Rights

The PCA requires the lot owners to elect an executive board of at least three members not later than the termination of any period of declarant control.

The method of transfer of “special declarant rights” is prescribed by N.C. Gen. Stat. § 47F-3-104 of the PCA. Except for

244. N.C. Gen. Stat. § 47C-3-103(d) - (e). Official Comment 5 to these provisions in the North Carolina Condominium Act, explains:

Subsection (e), in combination with subsection (d), provides for a gradual transfer of control of the association to the unit owners from the declarant. Such a gradual transfer is preferable to a one-time turnover of control since it assures that the unit owners will be involved, to some extent, in the affairs of the association from a relatively early date and that some unit owners will acquire experience in dealing with association matters.

245. U.P.C.A. § 3-103(d); North Carolina Condominium Act, N.C. Gen. Stat. § 47C-3-103(d).

246. As discussed at supra Part IV. G., the PCA drops the “fiduciary” standard of declarant appointed board members.


248. N.C. Gen. Stat. § 47F-3-111. See infra Part IV.R.

249. N.C. Gen. Stat. § 47F-3-103(e). This provision is identical to the North Carolina Condominium Act counterpart, N.C. Gen. Stat. § 47C-3-103(f), and the U.P.C.A. counterpart, U.P.C.A. § 3-103(f).

250. The definitions section of the PCA, N.C. Gen. Stat. § 47F-1-103(28) defines the term as follows:
foreclosure fact situations, declarant rights are transferred only by the proper recordation of an instrument evidencing the transfer. 251 A transfer instrument is understandably not effective unless it is executed by the transferee. 252

Once again, the PCA provision has been substantially downsized from the counterpart provisions in the North Carolina Condominium Act 253 and the UPCA. 254

To what degree are the obligations and liabilities placed on the declarant by the PCA transferred to a recipient of the declarant’s interest in a planned community? Does the declarant/transferrer remain liable on obligations to unit owners? What is the liability of the transferee of the declarant's rights? What if the transferee is an affiliate of the declarant? These and related critical issues are left unanswered in the PCA in spite of the fact that both the UPCA and North Carolina Condominium Act address most of them with clarity and a well balanced approach to the rights of all involved - declarant, transferee, mortgagee, and present and future unit owners. 255 The elimination of clear guidelines applicable to complex legal disputes that are likely to arise is dis-

“Special declarant rights” means rights reserved for the benefit of a declarant including, without limitation, any right (i) to complete improvements indicated on plats and plans filed with the declaration; (ii) to exercise any development right; (iii) to maintain sales offices, management offices, signs advertising the planned community, and models; (iv) to use easements through the common elements for the purpose of making improvements within the planned community or within real estate which may be added to the planned community; (vi) to make the planned community subject to a master association; or (vii) to appoint or remove any officer or executive board member of the association or any master association during any period of declarant control.

“Special declarant rights” may include a reservation of the right to withdraw undeveloped land from the planned community. See Mark Petty, Reserved Development Rights Under Uniform Common Interest Acts, 13 PROBATE AND PROPERTY 44 (June 1999).


252. Id.

253. N.C. Gen. Stat. § 47C-3-104, a statute that covers almost two pages with guidelines in lieu of the PCA's two sentences.

254. U.P.C.A. § 3-104.

255. Subsections (b) through (f) of U.P.C.A. § 3-104 are not present in the PCA. Only subsection (a) of the U.P.C.A. version made its way into the PCA as N.C. Gen. Stat. § 47F-3-104. The North Carolina Condominium Act, at N.C. Gen. Stat. § 47C-3-104 (b) - (e) contains most of the provisions of the U.P.C.A. . To give the reader a feel for the magnitude of the omitted guidelines, the following
turbing from the perspectives of sound preventive law and the protection of rights of lot owners. Because in order to vindicate their rights in these transfer fact situations, the lot owners will be forced to turn to the courts to supply the guidance lacking in the statute. This built in vagueness will benefit the declarant and declarant's transferee.\textsuperscript{256}

\textbf{K. Termination of Contracts and Leases of Declarant}

There needs to be a provision allowing the association to terminate certain contracts and leases entered into by the declarant during the period of declarant control. This need arises because of a history of abuses by declarants who took advantage of the control period to enter into long-term contracts and leases on behalf of the association with the declarant or an affiliate of the declarant.\textsuperscript{257} The PCA provision on point is a downsized version of the UPCA. N.C. Gen. Stat. § 47F-3-105 reads:

If entered into before the executive board elected by the lot owners pursuant to N.C. Gen. Stat. 47F-3-103(e) takes office, any contract or lease affecting or related to the planned community that is not bona fide or was unconscionable to the lot owners at the time entered into under the circumstances then prevailing, may be terminated without penalty by the association at any time after the

\begin{verbatim}
excerpts from provisions of the Condominium Act, N.C. Gen. Stat. § 47C-3-104(b)(1) - (4) provide good samples:
(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 . . .
   (2) If the successor to any special declarant right is an affiliate of a declarant . . ., the transferor is jointly and severally liable with the successor for any obligation or liability of the successor . . .
   (3) If a transferor retains any special declarant right, 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 declarant right by a successor declarant who is not an affiliate of the transferor.

256. Some of the eliminated language deals with warranties for units in the planned community. Since these warranty provisions were also eliminated, the elimination of references to them in this section was a necessity.
\end{verbatim}
executive board elected by the lot owners pursuant to N.C. Gen. Stat. 47F-3-103(e) takes office upon not less than 90 days' notice to the other party.

Once again, provisions protecting both lot owners and the association from the declarant have been eliminated. This is consistent with the diminution of the rights and powers of lot owners throughout the PCA. Both the UPCA and the North Carolina Condominium Act address this area of declarant abuse with effective and clear provisions. The "not bona fide" and "unconscionable" language of the PCA is the third option for dealing with the termination of contracts and leases of the declarant, but it constitutes the only option in the PCA. By limiting protections to this third option, the General Assembly has placed a relatively heavy burden of proof on the plaintiffs in an attempt to reduce contract and lease terminations. When, for example, is a contract "not bona fide"? When is it "unconscionable"?

The ability of the declarant to retain control much longer than is possible under both the UPCA and the North Carolina Condominium Act may render issues under this section largely moot. In terms of wishful thinking in the realm of consumer protection, this may be an area where both plaintiffs and the courts turn to the Unfair or Deceptive Trade Practices Act for guidance.

L. Bylaws of the Association

The PCA provision on bylaws, N.C. Gen. Stat. § 47F-3-106, is almost identical to its counterpart provisions in the North Carolina Condominium Act and the UPCA. The UPCA Comment

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259. N.C. Gen. Stat. § 47C-3-105 of the North Carolina Condominium Act, for example, reads, in part, as follows:
If entered into by or on behalf of the association before the executive board elected by the unit owners . . . takes office, (1) any management contract, employment contract, or lease of recreational or parking areas or facilities, (2) any other contract or lease between the association and a declarant or an affiliate of a declarant, or (3) any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing may be terminated without penalty by the association . . .
260. As discussed at supra Part IV. G., the PCA also eliminates another consumer protection related to this issue: the liability as fiduciaries of executive board members appointed by the declarant.
261. See supra Part IV. I dealing with the period of declarant control.
on point adds this background: "[b]ecause the Act does not require
the recordation of bylaws, it is contemplated that unrecorded
bylaws will set forth only matters related to the internal opera-
tions of the association and various ‘housekeeping’ matters with
respect to the planned community."265

The PCA requires that the bylaws must provide for:

1. The number of members of the executive board and the titles of
the officers of the association;
2. Election by the executive board of officers of the association;
3. The qualifications, powers and duties, terms of office, and man-
ner of electing and removing executive board members and officers
and filling vacancies;
4. Which, if any, of its powers the executive board or officers may
delegate to other persons or to a managing agent;
5. Which of its officers may prepare, execute, certify, and record
amendments to the declaration on behalf of the association; and
6. The method of amending the bylaws.266

The PCA concludes the bylaws section with a catch-all provi-
sion that states that “any other matters the association deems
necessary and appropriate” may be included in the bylaws.267

M. Upkeep of Planned Community

N.C. Gen. Stat. § 47F-3-107 deals with two related topics:
upkeep of the planned community and the responsibility and
assessments for damages.268 Several preliminary points should
be kept in mind when analyzing these statutory sections. First,
concerning general maintenance obligations, the first three sub-
sections of this statute apply to all planned communities, includ-
ing those formed prior to January 1, 1999. Second, the
maintenance and upkeep obligations can be altered if “otherwise
provided in the declaration.”269

In terms of maintenance, repair, or replacement, obligations
depend upon whether the property constitutes common elements,
limited common elements\textsuperscript{270}, or the individually owned lots. The association is responsible for the common elements, owners of lots to which limited common elements are assigned are responsible for limited common elements,\textsuperscript{271} and each lot owner is responsible for his or her lot and improvements thereon. It should be repeated that the declaration can provide otherwise. Comment 1 to N.C. Gen. Stat. § 47F-3-107 explains:

Subsection (a) allocates maintenance, repair and replacement responsibilities when those responsibilities are not otherwise allocated in the declaration. Responsibility for repair, maintenance or replacement of lots, common elements or improvements thereon may be allocated differently by express provisions in the declarations or in a duly authorized and adopted amendment to the declaration.\textsuperscript{272}

Another subsection of the statute states that the association is not liable "for maintenance, repair, and all other expenses in connection with any real estate which has not been incorporated into the planned community."\textsuperscript{273} The UPCA contains a provision making the declarant solely responsible for "all expenses in connection with real estate subject to development rights."\textsuperscript{274} This specific language is not repeated in the PCA.

N. Responsibility and Assessments for Damages to Planned Community Property

The PCA varies from the corresponding section of the North Carolina Condominium Act by making lot owners legally responsible for damage to the common elements caused by them whether or not that damage is covered by insurance provided by the associ-
PLANNED COMMUNITY ACT

Damage to a lot inflicted by an agent of the association acting in the scope of his or her activities as agent are the responsibility of the association.276 These provisions apply to all planned communities, whether created before or after the effective date of the PCA.

The PCA establishes an innovative process to resolve disputes related to damage.277 It sets up an adjudicatory panel and hearing process. Because of the uniqueness and importance of this statutory subsection, it is quoted in its entirety. It provides:

When the claim under subsection (b) or (c) of this section is less than or equal to the jurisdictional amount established for small claims by N.C. Gen. Stat. 7A-210, any aggrieved party may request that a hearing be held before an adjudicatory panel appointed by the executive board to determine if a lot owner is responsible for damages to any common element or the association is responsible for damages to any lot. If the executive board fails to appoint an adjudicatory panel to hear such matters, hearings under this section shall be held before the executive board. 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 liability for each damage incident against each lot owner charged or against the association not in excess of the jurisdictional amount established for small claims by N.C. Gen. Stat. 7A-210. When the claim under subsection (b) or (c) of this section exceeds the jurisdictional amount established for small claims by N.C. Gen. Stat. 7A-210, liability of any lot owner charged or the association shall be determined as otherwise provided by law. Liabilities of lot owners determined by adjudicatory hearing or as otherwise provided by law shall be assessments secured by lien under N.C. Gen. Stat. 47F-3-116. Liabilities of the association determined by adjudicatory hearing or as otherwise provided by law may be offset by the lot owner against sums owing to the association and if so off-

275. N.C. Gen. Stat. § 47F-3-107(b). See also Comment 2 to that statute. The U.P.C.A. is silent on this point.

276. N.C. Gen. Stat. § 47F-3-107(c). This subsection makes the association liable for repair or reimbursement of the lot owner and also liable for "any losses to the lot owner."

277. There is no corresponding provision in the U.P.C.A. The North Carolina Condominium Act has an adjudicatory panel procedure with a jurisdictional limit of $500.00 if the bylaws so provide. N.C. Gen. Stat. § 47C-3-107(d). As noted at supra Part IV. F, the adjudicatory panel also has jurisdiction over fines and the suspension of planned community privileges or services.
set, shall reduce the amount of any lien of the association against the lot at issue.\textsuperscript{278}

The good news about settling disputes within the governance structure of the planned community is that the adjudicatory panel should provide a prompt, fair and relatively inexpensive forum. The newly empowered planned community will settle its disputes in-house and this is as it should be. One danger, of course, is that an adjudicatory panel appointed by the executive board might not always be neutral and fair when weighing claims by or against the association, but let the experiment in self-government proceed and it can be fine tuned later. Claims of a relatively substantial amount can be settled by this process since the small claims jurisdictional limit is nothing to sneeze at. At present, that amount is $4,000. Comment 4 to this subsection adds the clarification that references in the PCA to the small claims statutes "are only for the purpose of establishing the jurisdictional amount for adjudicatory hearings . . . and for no other purpose. They are not intended to nor should they be construed to incorporate any of the rules or procedures which might be otherwise applicable to small claims . . . ."\textsuperscript{279} The adjudicatory panel procedure is not made applicable to pre-1999 planned communities, although those that duly opt in for coverage under the PCA will of course be subject to it.

There is nothing in this PCA provision to preclude a lot owner or the association from taking their claim directly to the court system. Likewise, there is no special deference owed by the courts to the outcome of the adjudicatory panel proceeding, although one wonders about the possibility of having a PCA rule making this proceeding the equivalent of binding arbitration. Finally, claims in excess of the small claims jurisdictional limit must, if not mutually resolved, go to the court system, or must they? Can the rules and regulations of the planned community expand the procedure to cover claims up to a higher limit? There would be no statutory impediment to this idea.

O. Meetings of the Association

The homeowners' association is required to meet at least once each year, and special meetings can be called by the president, a majority of the executive board, or lot owners holding ten percent

\textsuperscript{278} N.C. Gen. Stat. § 47F-3-107(d).

\textsuperscript{279} Comment 3 to N.C. Gen. Stat. § 47F-3-107(d).
(or a lesser percentage specified in the bylaws) of the votes in the association.\textsuperscript{280} Requirements as to notice are practical and clear:

Not less than 10 nor more than 60 days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be hand-delivered or sent prepaid by United States mail to the mailing address of each lot or to any other mailing address designated in writing by the lot owner. The notice of any meeting shall state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, any budget changes, and any proposal to remove a director or officer.\textsuperscript{281}

\textbf{P. Quorums for Association Meetings}

The challenge with quorums in some planned communities is succeeding in mustering a quorum. A comment to the UPCA adds: "[t]he problem is particularly acute in the case of resort planned communities where many owners may reside elsewhere, often at considerable distances, for most of the year."\textsuperscript{282} For this reason, the PCA quorum requirement for a meeting of the association is very low but highly realistic. The statute on point sets forth a quorum of 10\% of the votes that may be cast for election of the executive board.\textsuperscript{283}

Insofar as meetings of the executive board are concerned, a quorum is deemed present throughout the meeting if persons entitled to cast 50\% of the votes on that board are present at the beginning.\textsuperscript{284}

\textsuperscript{280} N.C. Gen. Stat. § 47F-3-108.

\textsuperscript{281} N.C. Gen. Stat. § 47F-3-108. This section follows the language of the North Carolina Condominium Act, N.C. Gen. Stat. § 47C-3-108, with slight variations in the length of notice (not less than 10 nor more than 50 days) and the percentage of owners (20\%) who can call a special meeting. U.P.C.A. § 3-108 is almost identical.

\textsuperscript{282} Comment to U.P.C.A. § 3-109.

\textsuperscript{283} N.C. Gen. Stat. §47F-3-109(a), which reads: "[u]nless the bylaws provide otherwise, a quorum is present throughout any meeting of the association if persons entitled to cast ten percent (10\%) 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 is substantially similar to the North Carolina Condominium Act, N.C. Gen. Stat. § 47C-3-109(a) although the quorum is higher [20\%].

\textsuperscript{284} N.C. Gen. Stat. § 47F-3-109(b). This subsection is identical to the corresponding provisions in the North Carolina Condominium Act, N.C. Gen. Stat. § 47C-3-109(b) and U.P.C.A. § 3-109(b).
Unlike either the North Carolina Condominium Act or the UPCA, the PCA adopts an inventive "diminishing quorum" requirement to assure that business can eventually be duly conducted at meetings. N.C. Gen. Stat. § 47F-3-109(c) provides:

In the event business cannot be conducted at any meeting because a quorum is not present, that meeting may be adjourned to a later date by the affirmative vote of a majority of those present in person or by proxy. Notwithstanding any provision to the contrary in the declaration or bylaws, the quorum requirement at the next meeting shall be one-half of the quorum requirement applicable to the meeting adjourned for lack of a quorum. This provision shall continue to reduce the quorum by fifty percent (50%) from that required at the previous meeting, as previously reduced, until such time as a quorum is present and business can be conducted.

Q. Voting; Proxies

The PCA provisions addressing voting and proxies shed light on the outcome of scenarios likely to arise at association meetings. If only one of the multiple owners of a lot is present at a meeting, he or she is entitled to cast all votes allocated to that lot. If multiple owners are present, the votes allocated to that lot are cast in accordance with the agreement of a majority unless the declaration or bylaws provide otherwise. The statute adds that in a multiple owner situation, majority agreement is "conclusively presumed if any one of the multiple owners casts the votes allocated to that lot without protest being made promptly to the person presiding over the meeting by any of the other owners of the lot."

Clear-cut rules and procedures on casting votes by proxy are also included in the PCA. Another subsection of the voting and

285. N.C. Gen. Stat. § 47F-3-110. This statute is substantially the same as the corresponding provisions in the North Carolina Condominium Act, N.C. Gen. Stat. § 47C-3-110. Subsections (a) through (d) of this statute are substantially the same as the corresponding provisions in U.P.C.A. § 3-110.
287. Id.
288. Id.
289. N.C. Gen. Stat. § 47F-3-110(b), which reads:
Votes allocated to a lot may be cast pursuant to a proxy duly executed by a lot owner. If a lot is owned by more than one person, each owner of the lot may vote or register protest to the casting of votes by the other owners of the lot through a duly executed proxy. A lot owner may not revoke a proxy given pursuant to this section except by actual notice of
proxies statute addresses voting by tenants occupying units in planned communities. Another subsection provides that: "[n]o votes allocated to a lot owned by the association may be cast." Finally, the PCA contains guidelines for subgroup voting. Subject to guidelines in the PCA, the declaration may authorize that on specified issues only a defined subgroup of lot owners may vote.

R. Tort and Contract Liability

N.C. Gen. Stat. § 47F-3-111, dealing with tort and contract liability, duplicates several beneficial rules from corresponding sections in the North Carolina Condominium Act and UPCA but omits clarifications regarding the liability of the declarant for a wrong committed during declarant control. The PCA follows the Condominium Act almost verbatim with respect to subsections (a) and (b) of this statute. The first subsection makes it clear that the declarant—not the association or any lot owner—is liable for the declarant’s torts in connection with any part of the planned community where the declarant has maintenance responsibility. This is a helpful and necessary clarification. The second subsection requires that an action alleging a wrong by the homeowners’ association be brought against the association and not the individual lot owners. The final subsection tolls any statute of limita-

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revocation to the person presiding over a meeting of the association. A proxy is void if it is not dated. A proxy terminates 11 months after its date, unless it specifies a shorter term.

290. N.C. Gen. Stat. § 47F-3-110(c). The U.P.C.A. Comment to U.P.C.A. § 3-110 explains this subsection as follows: Subsection (c) addresses an increasingly important matter in the governance of planned communities: the role of tenants occupying units owned by investors or other persons. Most present statutes require voting by owners in the association. However, it may be desirable to give lessees, rather than lessors, of units the right to vote on issues involving day-to-day operation both because the lessees may have a greater interest and because it is desirable to have lessees feel they are an integral part of the planned community.

292. N.C. Gen. Stat. § 47F-3-110(e), (f).
293. N.C. Gen. Stat. § 47C-3-111.
294. U.P.C.A. §3-111.
296. N.C. Gen. Stat. § 47F-3-111(b). For an example of a tort action involving a condominium association in another jurisdiction, see Randol v. Atkinson, 965 S.W.2d 338 (Mo. Ct. App. 1998), where substantial fire damage occurred at a condominium complex. The fire was caused by the use of a charcoal grill on a wooden deck. Unit owners commenced an action against the individual unit
tions applicable to the association's right of action under this statutory section until the period of declarant control has terminated.\textsuperscript{297} It also provides that a lot owner is not precluded from bringing an action under this statutory section by virtue of his or her status as a lot owner or a member of the association.\textsuperscript{298}

The most straightforward method to demonstrate the language that was \textit{not} carried forward from the Condominium Act to the PCA is to quote in full the missing language. The following subsection of the corresponding statute in the Condominium Act was not included in the PCA:

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 control.\textsuperscript{299}

Also eliminated from the PCA version 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.\textsuperscript{300}

\textsuperscript{297} N.C. Gen. Stat. § 47F-3-111(c). This language constitutes some of the language in the corresponding section of the North Carolina Condominium Act, N.C. Gen. Stat. § 47C-3-111(d).

\textsuperscript{298} The North Carolina Condominium Act, N.C. Gen. Stat. § 47C-3-111(d) and U.P.C.A. § 3-111 adds "or officer of the association," but this is probably redundant since officers are also lot owners or members of the association. At the same time, one wonders why the language was altered in the PCA.

\textsuperscript{299} N.C. Gen. Stat. § 47C-3-111(c). Similar language is found at U.P.C.A. § 3-111.

\textsuperscript{300} N.C. Gen. Stat. § 47C-3-111(d).
One objective of the statute dealing with tort and contract liability is to provide the association or lot owners with a right of action and remedy against the declarant for losses to the plaintiff caused by the declarant's tort or breach of contract during the period of declarant control.\(^{301}\) A window of opportunity to consider legal options will be reached when a homeowners' association board controlled by the homeowners takes power. The remedies in both the Condominium Act and the UPCA include both damages and attorneys' fees and would tend to encourage legal action against the declarant where a tort or breach of contract occurred. The failure of the PCA to include this crucial language represents another example of the diminishment of consumer rights in favor of the legal position of the declarant and will discourage independent boards and homeowners from making declarants appropriately accountable.

S. Conveyance or Encumbrance of Common Elements

Comment 1 to UPCA § 3-112 does a skillful job of illustrating the idea behind and need for a statutory provision clarifying the ability of the association to convey or encumber common elements. It reads, in part:

The ability to sell a portion of the common elements without termination of the planned community gives the regime desirable flexibility. For example, the unit owners, some years after the initial creation of the planned community, may decide to convey away a portion of the open space which has been reserved as a part of the common elements because they no longer find the area useful or because they wish to use sale proceeds to make other improvements. Similarly, the ability to encumber common elements gives the association power to raise money for improvements through the device of mortgaging the improvements.

\(^{301}\) See Comment 2 to U.P.C.A. § 3-111, which reads as follows:

In recognition of the practical control that can (and in most cases will) be exercised by a declarant over the affairs of the association during any period of declarant control permitted pursuant to Section 3-103 [of the U.P.C.A.] provides that the association or any unit owner shall have a right of action against the declarant for any losses (including both payment of damages and attorneys' fees) suffered by the association or unit owner as a result of an action based upon a tort or breach of contract. To assure that the decision to bring such an action can be made by an executive board free from the influence of the declarant, the subsection also provides that any statute of limitations affecting such a right of action by the association shall be tolled until the expiration of any period of declarant control.
themselves. Of course, recreational improvements will frequently not be sufficient security for a loan for their construction. Nevertheless, the ability to take a security interest in such improvements may lead lenders to be more favorably disposed toward making a loan in larger amounts and at lower interest rates.

N.C. Gen. Stat. § 47F-3-112(a) 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. A lower percentage can be specified in the declaration only if all lots are restricted exclusively to nonresidential use. N.C. Gen. Stat. § 47F-3-112(b) states that the association can contract to convey and convey on behalf of the lot owners. Unlike the North Carolina 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 PCA to execute a deed.\(^\text{302}\)

The PCA renders void any purported conveyance, encumbrance, or other voluntary transfer of common elements not made pursuant to this section.\(^\text{303}\) The final statutory subsection dealing with this topic specifies that no conveyance or encumbrance made pursuant to this section may deprive any lot of its rights of access and support.\(^\text{304}\)

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\(^{302}\) See Comment 1 to N.C. Gen. Stat. § 47F-3-112. Other than the difference related to the deed of the common elements, the PCA statute varies in another material way from the corresponding section in the North Carolina Condominium Act, N.C. Gen. Stat. § 47C-3-112. According to Comment 2 to N.C. Gen. Stat. § 47F-3-112:

Subsection (b) (subsection (c) in the North Carolina Condominium Act) has been modified to clarify that if conveyance or encumbrance is authorized by the required percentage of owners, common elements may be conveyed or encumbered free and clear of any easements, rights of way or claims which might be asserted by individual lot owners in or to that common area by virtue of the declaration by virtue of their ownership of lots.

The language of N.C. Gen. Stat. § 47F-3-112 also differs in this regard from the language of U.P.C.A. § 3-112, although the PCA revision seems to supply a very necessary clarification.

\(^{303}\) N.C. Gen. Stat. § 47F-3-112(c).

\(^{304}\) N.C. Gen. Stat. § 47F-3-112(d).
T. Insurance

The PCA contains almost two pages of insurance guidelines and requirements for planned communities. The common sense approach and clarity of these insurance provisions will help planned communities avoid many problems and unnecessary litigation in predictable insurance scenarios, especially those involving property damage or destruction. If reasonably available, property and liability insurance are required to be obtained no later than the time of the first conveyance of a lot to someone other than the declarant. Property insurance at not less than 80% of replacement cost is to be obtained for the common elements with the specifics of coverage provided by statute. Since the drafters of the final version of the PCA did not include UPCA § 2-102, a provision carefully defining unit boundaries, it will be important for the declaration to carefully do so. Liability insurance in reasonable amounts is required covering occurrences commonly insured against by that category of insurance. Of course the association can carry other insurance as authorized by the

305. N.C. Gen. Stat. § 47F-3-113. This PCA statute on insurance follows closely the corresponding provisions in the North Carolina Condominium Act, N.C. Gen. Stat. § 47C-3-113 and U.P.C.A. § 3-113. The main exception to this observation is that both of the other acts have provisions related to condominium units and the need for the association to insure horizontally stacked units. See N.C. Gen. Stat. § 47C-3-113(b) of the North Carolina Condominium Act.

306. If not reasonably available, notice of this fact is to be given to all lot owners. N.C. Gen. Stat. § 47F-3-113(b).


308. N.C. Gen. Stat. § 47F-3-113(a)(1). N.C. Gen. Stat. § 47F-3-113(c) requires insurance policies required to be carried by this section to provide that:
   (1) Each lot owner is an insured person under the policy to the extent of the lot owner's insurable interest;
   (2) The insurer waives its right to subrogation under the policy against any lot owner or member of the lot owner's household;
   (3) No act or omission by any lot owner, unless acting within the scope of the owner's authority on behalf of the association will preclude recovery under the policy; and
   (4) If, at the time of a loss under the policy, there is other insurance in the name of a lot owner covering the same risk covered by the policy, the association's policy provides primary insurance.

309. Perhaps the drafters of the PCA were trying to avoid any reference to provisions that seemed to deal with stacked condominium units. It is possible and commonplace, however, for townhouse developments to have common walls. In any event, boundaries between townhouse units and common areas should be clearly described.

declaration or deemed appropriate by the association. Following a consistent rule found in many parts of the PCA, the statutory insurance provisions can be varied or waived if all of the lots in the planned community are restricted to nonresidential use.

Losses covered by the property insurance policy are payable to the association or an insurance trustee designated for that purpose and not to any mortgagee or beneficiary under a deed of trust. Funds are to be held in trust and disbursed first to restore the damaged property. The statute deals with other contingencies related to options other than repair.

Certificates or memoranda of insurance must be provided by insurers that have issued an insurance policy, and any cancellation or refusal to renew insurance must be preceded by 30 days notice.

U. Surplus Funds

The statutory section dealing with surplus funds begins with the six most common words in the PCA: "unless otherwise provided in the declaration." It is likely that a well drafted declaration will deal with the practical topic of surplus funds; if not, N.C. Gen. Stat. § 47F-3-114 takes what should be all of the guess work out of most potential problems. It provides (subject to the

311. N.C. Gen. Stat. § 47F-3-113(b).
312. N.C. Gen. Stat. § 47F-3-113(h). It is the intent of the drafters of the U.P.C.A. that mixed-use planned communities with some residential units do not qualify for this waiver. U.P.C.A. Comment 9 to U.P.C.A. § 3-113.
313. N.C. Gen. Stat. § 47F-3-113(d). For a recent case from another jurisdiction involving the destruction of most of a condominium complex by an earthquake and entitlement to earthquake insurance, see *Foothill Village Homeowners Assoc. v. Bishop*, 81 Cal. Rptr. 195 (1999). The Court of Appeal of California, Second District, held that the lender was not entitled to earthquake insurance proceeds since the loan documents did not require that this insurance be purchased.
314. Id.
315. N.C. Gen. Stat. § 47F-3-113(g).
317. N.C. Gen. Stat. § 47F-3-114. This statute is almost identical to the North Carolina Condominium Act, N.C. Gen. Stat. § 47C-3-114 and U.P.C.A. § 3-114. The U.P.C.A. Comment explains as follows:

Surplus funds of the association are generally used first for the pre-payment of reserves, and remaining funds are thereafter credited to the account of unit owners or paid to them. In some cases, however, unit owners might prefer that surplus funds be used for other purposes (e.g., the purchase of recreational equipment). Accordingly, this section permits the declaration to specify any other use of surplus funds.
declaration providing otherwise) that "any surplus funds of the association remaining after the payment of or provision for common expenses, the funding of reasonable operating expense surplus, and any prepayment of reserves shall be paid to the lot owners in proportion to their common expense liabilities or credited to them to reduce their future common expense liabilities."

V. Assessments for Common Expenses

As is the case with towns and cities, the private governments of planned communities can not function effectively without a clear authorization to tax its homeowners. A major shortcoming of planned communities in existence in North Carolina prior to the advent of the PCA was the tenuous common legal threads upon which assessments were based, even assuming superior draftsmanship of the planned community documents. N.C. Gen. Stat. § 47F-3-115, a very compelling statutory authorization of assessments for common expenses of the planned community, now provides homeowners' associations with the power, procedure and flexibility to adequately fund community needs. It is crucial to note that this statutory section is applicable to all planned communities, including those created prior to the January 1, 1999 effective date of the PCA. 318

It has been accentuated throughout this article that consumers – potential purchasers of lots or homes in a planned community – should be made fully cognizant of the nature and extent of this private taxing power before they commit themselves to purchasing in the planned community. Educated consumers will elect to live in planned communities in any event, because a well designed planned community will offer numerous benefits not available in traditional subdivisions to homeowners. But those who purchase in ignorance and are later shocked with an annual assessment that increases by a substantial amount will harbor unkind opinions about those who failed to inform them of the financial implications of living in a planned community. 319

319. It is the author's opinion that the real estate agent and the closing attorney both should assume responsibility for educating the consumer. Even though the consumer has already legally committed to purchase, it would be a simple matter for the closing attorney to provide a pamphlet (perhaps prepared
One of the central and fundamental consumer protections present in the UPCA and North Carolina Condominium Act is the purchaser's right to cancel. The UPCA suggests a 15 day time period after receipt of the public offering statement, the Condominium Act has a seven day period. The drafters of the final version of the PCA obviously bowed to industry pressure and rejected the idea of a cooling off period, a consumer protection that is an anathema to the real estate sales industry.

Now, to the specifics of N.C. Gen. Stat. § 47F-3-115. Subsection (a) of that statute allocates payment of the common assessments to the declarant until the association starts making common expense assessments. Under the PCA version, this rule (as so many others) can be altered by providing otherwise in the declaration.

Once made by the association, assessments must be made annually thereafter and be assessed in accordance with the allocations designated in the declaration. As is recommended by the UPCA and is the rule in the North Carolina Condominium Act (as well as many others) can be altered by providing otherwise in the declaration.

by the bar association) or a form letter describing the benefits and detriments of planned community living.

322. Id. The PCA also fails to adopt the public offering statement approach to disclosures.
324. The corresponding subsections of the U.P.C.A., § 3-115(a), and the North Carolina Condominium Act, N.C. Gen. Stat. § 47F-3-115(a) do not include the "except otherwise provided in the declaration" language. Comment 1 to U.P.C.A. § 3-115 points out that a declarant might want to pay all common expenses for awhile. It reads, in part:

This section contemplates that a declarant might find it advantageous, particularly in the early stages of project development, to pay all of the expenses of the planned community himself rather than assessing each unit individually. Such a situation might arise, for example, where a declarant owns most of the units in the project and wishes to avoid billing the costs of each unit separately and crediting payment to each unit. It might also arise in the case of a declarant who, although willing to assume all expenses of the planned community, is unwilling to make payments for replacement reserves or for other expenses which he expects will ultimately be part of the association's budget.

326. N.C. Gen. Stat. § 47F-3-115(b). If common expense liabilities are reallocated, assessments and installments not yet due are to be recalculated in accordance with the reallocated common expense liabilities. N.C. Gen. Stat. § 47F-3-115(f).
Act, past-due assessments or installments bear interest at a hefty eighteen percent per year.\textsuperscript{327} Statutory guidelines also exist for the assessment of expenses associated with limited common elements or any common expense or portion thereof benefiting fewer than all the lots.\textsuperscript{328} Insurance costs are to be assessed in proportion to risk and the cost of utilities in proportion to usage.\textsuperscript{329} In addition, guidelines are established for an assessment to pay a judgment against the association\textsuperscript{330} or to pay a common expense caused by the negligence or misconduct of any lot owner or occupant.\textsuperscript{331}

W. Lien for Assessments

Except for a provision relating to attorneys' fees, the PCA statutory section dealing with assessment liens applies to planned communities created prior to January 1, 1999.\textsuperscript{332} Thus, the lien for assessments in combination with the statutory authority to assess for common expenses constitute a substantive improvement in North Carolina law in terms of empowering planned communities to operate an effective private government.

The central provision of the statute dealing with the lien for assessments provides:

Any assessment levied against a lot remaining unpaid for a period of 30 days or longer shall constitute a lien on that lot when a claim of lien is filed of record in the office of the clerk of superior court of the county in which the lot is located in the manner provided herein. The association may foreclose the claim of lien in like manner as a mortgage on real estate under power of sale under Article 2A of Chapter 45 of the General Statutes. Unless the declaration otherwise provides, fees, charges, late charges, fines, interest, and other charges imposed pursuant to N.C. Gen. Stat. 47F-3-102, 47F-3-107, 47F-3-107.1, and 47F-3-115 are enforceable as assessments under this section.\textsuperscript{333}

\textsuperscript{327} Id. See also U.P.C.A. § 3-115(b) and the North Carolina Condominium Act, N.C. Gen. Stat. § 47C-3-115 which are almost identical to the PCA.

\textsuperscript{328} N.C. Gen. Stat. § 47F-3-115(c)(1), (2) [almost identical to the U.P.C.A. and Condominium Act counterpart subsection].

\textsuperscript{329} N.C. Gen. Stat. § 47F-3-115(c)(3).

\textsuperscript{330} N.C. Gen. Stat. § 47F-3-115(d).

\textsuperscript{331} N.C. Gen. Stat. § 47F-3-116(e).

\textsuperscript{332} See Editor's Note to N.C. Gen. Stat. § 47F-3-116.

\textsuperscript{333} N.C. Gen. Stat. § 47F-3-116(a). This provision is almost identical to the corresponding subsection of the North Carolina Condominium Act, N.C. Gen. Stat. § 47C-3-116. Both the PCA and the Condominium Act vary in several ways
The PCA sets forth a series of rules concerning the priority of the lien for assessments. It is prior to all liens and encumbrances on a lot except liens and encumbrances recorded prior to the docketing of the lien and liens for real estate taxes and other government assessments. This is designed to ensure prompt and efficient enforcement of the lien. Like the North Carolina Condominium Act provision on point, the lien does not affect the priority of mechanics’ or materialmens’ liens.

Unless lien enforcement proceedings are instituted within three years after docketing, the lien is extinguished. Significantly, a judgment, decree, or order in any action brought under this lien for assessments statute “shall include costs and reasonable attorneys’ fees for the prevailing party.”

The lien for assessments statute clarifies the rights of the parties in the event of a foreclosure. It provides:

Where the holder of a first mortgage or first deed of trust of record, or other purchaser of a lot obtains title to the lot as a result of foreclosure of a first mortgage or first deed of trust, such purchaser and its heirs, successors, and assigns, shall not be liable for the assessments against such lot which became due prior to the acquisition of title to such lot by such purchaser. Such unpaid assessments shall be deemed to be common expenses collectible from U.P.C.A. § 3-116(a). N.C. Gen. Stat. § 47F-3-116(d) adds that this statutory section does not prohibit other actions to recover subsection (a) funds nor does it prohibit a deed in lieu of foreclosure. N.C. Gen. Stat. § 47F-3-116(g) sets forth the required contents of a claim of lien.


337. N.C. Gen. Stat. § 47F-3-116(e). This provision is identical to the corresponding subsection in the North Carolina Condominium Act, N.C. Gen. Stat. § 47C-3-116(c) and similar to U.P.C.A. § 3-116(e).

338. N.C. Gen. Stat. § 47F-3-116(e), a subsection not applicable to planned communities created prior to January 1, 1999 (unless they duly opt in for coverage under the PCA). This subsection is identical to N.C. Gen. Stat. § 47C-3-116(e) of the North Carolina Condominium Act and almost identical to U.P.C.A. § 3-116(g). A cynic reviewing the PCA might note that where the association is likely to prevail in a legal action, attorneys’ fees to the prevailing party are called for. When a consumer is likely to prevail or when the plaintiff is likely to prevail against the declarant under other provisions of the PCA, the attorneys’ fees language is often omitted.
from all the lot owners including such purchaser, its heirs, successors, and assigns.\textsuperscript{339}

\textbf{X. Association Records}

The PCA requires the association to keep sufficient financial records.\textsuperscript{340} Financial and other records are to be made reasonably available for examination by a lot owner or his or her authorized agent.\textsuperscript{341} Upon written request, the association must within ten business days after receipt of the request furnish to the lot owner or an authorized agent a statement setting forth the amount of unpaid assessments and other charges against a lot.\textsuperscript{342} Significantly, the statement is binding on the association, the executive board, and every lot owner.\textsuperscript{343}

\textbf{Y. Association As Trustee}

N.C. Gen. Stat. § 47F-3-119\textsuperscript{344} is included in the PCA to protect an innocent third party in his or her dealings with the homeowners' association only when the association is acting in a capacity as trustee for the unit owners pursuant to N.C. Gen. Stat. § 47F-2-118 (following termination of the planned community) or N.C. Gen. Stat. § 47F-3-113 (trustee for insurance proceeds). Based on Section 7 of the Uniform Trustees' Powers Act,\textsuperscript{345} this statute provides that, under these circumstances:

\begin{quote}
[T]he existence of trust powers and their proper exercise by the association may be assumed without inquiry. A third person is not bound to inquire whether the association has power to act as trustee or is properly exercising trust powers, and a third person, without actual knowledge that the association is exceeding or improperly exercising those powers, is fully protected in dealing with the association as if it possessed and properly exercised the powers it purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the association in its capacity as trustee.
\end{quote}

\footnotesize
\textsuperscript{339} N.C. Gen. Stat. § 47F-3-116(f), substantially identical to N.C. Gen. Stat. § 47C-3-116(f). There is no equivalent language in the U.P.C.A. .
\textsuperscript{340} N.C. Gen. Stat. § 47F-3-118(a).
\textsuperscript{341} Id.
\textsuperscript{342} N.C. Gen. Stat. § 47F-3-118(b).
\textsuperscript{343} Id.
\textsuperscript{344} This statute is substantially the same as corresponding provisions in the North Carolina Condominium Act, N.C. Gen. Stat. § 47C-3-119, and U.P.C.A. § 3-119.
\textsuperscript{345} See U.P.C.A. Comment to U.P.C.A. § 3-119.
Z. Declaration Limits on Attorneys' Fees

The final statute in Article 3 of the PCA is a troublesome one because of what attorneys for declarants will do with it. N.C. Gen. Stat. § 47F-3-120, a statute with no counterpart in the North Carolina Condominium Act or the UPCA, authorizes the court to award reasonable attorneys' fees to the prevailing party in an action to enforce provisions of the articles of incorporation, the declaration, bylaws, or duly adopted rules and regulations. However, what the first part of the statute giveth in theory, the last part taketh away in practice. This will be the scenario because this authorization of reasonable attorneys' fees depends upon it being allowed in the declaration.\[346\]

It is predictable that the apparent fairness of the statute will quickly be decimated by the niceties of fine-tuned, declarant-oriented draftsmanship. Obviously, the declaration will be drafted by the declarant's attorney. There will be no negotiation over provisions with representatives of the yet nonexistent homeowners' association or consumers of property in the development. Subject to those provisions of the PCA that cannot be altered, the declarant's attorney at this creation stage will be in absolute control of the legal framework for the planned community and will design a provision in the declaration that, however disguised, will have a chilling effect on legal actions against the declarant and the homeowners association. This is pure and simple good lawyering and preventive draftsmanship for one's client specifically authorized by statute. Unless "might makes right" is acceptable public policy, the statute is difficult to justify. The general North Carolina rule that litigants are responsible for their own attorneys' fees would be preferable.

V. Observations, Reflections, Suggestions, and Conclusions

A. The Function of Comparisons

When this article notes that the PCA deviates from the UPCA or the North Carolina Condominium Act, one predictable response is: "So what!" Where is it written that the UPCA must be the main framework of reference? It was drafted two decades ago and

346. N.C. Gen. Stat. § 47F-3-120, which concludes: "the court may award reasonable attorneys' fees to the prevailing party if recovery of attorneys' fees is allowed in the declaration." One exception to this statute is the attorneys' fee provision in N.C. Gen. Stat. § 47F-3-116(e) (related to lien enforcement actions).
is now obsolete in large part due to current practical requirements and challenges that are faced in developing and operating a planned community. To be sure, the North Carolina Condominium Act has not been warmly embraced by developers and their attorneys who have done their best to avoid and succeeded in avoiding the condominium format whenever possible. But this response misses a fundamental point in terms of the process of enacting legislation. Both the UPCA and the North Carolina Condominium Act present balanced starting points for the consideration of the rights, duties and obligations of all of the major players in a planned community: declarant, homeowners' association and homeowners. The North Carolina Condominium Act made its way to the General Assembly through the North Carolina General Statutes Commission. The PCA did not. When the General Assembly, in response to input from members of the public with very limited perspectives, altered both the PCA in wholesale fashion from corresponding legislation and the UPCA, it is doubtful that any careful policy debate went into the hundreds of alterations and deletions. Builders groups apparently objected, and, as a result, any provisions that appeared to be directly or indirectly adverse to them in any way were altered or deleted. The consumer — the North Carolina home buyer who selects a planned community to live in — is the loser.347

An emphasis in this article on the rights of the consumer is not intended to diminish the business goals and legitimate legal perspective of the developer/declarant, the founder of the planned community. It is the developer, as entrepreneur, who has taken a major financial risk in order to create the new development. The developer is willing to assume this risk because there will be a substantial economic reward if the planned community is successful. It is the author's hope that an equilibrium of perspectives can be reached in which it is in the developer's best interest to concede basic consumer rights and it is in the consumer's best interest to support the developer's legitimate business goals.

B. Should the Planned Community Format be the Developer's Top Choice?

In the "Prefatory Note" to the Uniform Planned Community Act, the reporter warns "of the increasing and understandable
inclusion of developers, in the face of changing condominium legislation, to choose . . . alternative forms of developing multi-owner projects.” The decision to use a planned community format for development avoids fractionalizing ownership of the common elements and the additional costs associated with compliance with the consumer protection aspects of condominium legislation.

In North Carolina, these consumer protections are substantial. Anyone who needs a review of this area should read Article 4, “Protection of Purchasers” of Chapter 47C, the North Carolina Condominium Act. Consumer protections abound in the form of protections concerning development rights, 348 the purchaser’s right to cancel, 349 express and implied warranties, 350 a theory of recovery and attorney’s fees for the enforcement of consumer and related rights, 351 provisions related to the labeling of promotional material, 352 the declarant’s obligation to complete certain improvements, 353 and a provision related to the substantial completion of units. 354 As they say in the movie “Get Shorty”: “Look at me.” None of these protections are applicable at the present time to a planned community. The PCA as passed by the General Assembly omits the all important Article 4, “Protection of Purchasers,” the counterpart to the same article in the North Carolina Condominium Act, Chapter 47C of the General Statutes.

Referring back to the “Prefatory Note” to the Uniform Planned Community Act, the reporter makes a significant point:

Finally, review of the common-law multi-owner projects persuaded the Conference that homeowner association developments, in which the common elements are owned by the association, offer an attractive alternative to fractionalized ownership, even in buildings containing units divided by horizontal boundaries. Accordingly, the Act has been drafted in a way which would permit the common elements to be owned by the association, even in a high rise building.

351. N.C. Gen. Stat. § 47C-4-117, which reads: “If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of person adversely affected by that failure has a claim for appropriate relief. The court may award reasonable attorney’s fees to the prevailing party.”
354. N.C. Gen. Stat. § 47C-4-120.
Back to our question: Should North Carolina developers prefer the planned community form of development over the condominium form? Yes. Yes. Yes. This one is what one of my colleagues calls a "no-brainer." The PCA as enacted provides the developer (declarant) and home owners' association with all of the certainty and rights that were at times fuzzy under the common law. Therefore, it is developer friendly and association friendly. At the same time, the PCA as enacted in North Carolina eliminates the entire consumer protection article.

Moreover, a development identical in physical form to a condominium can be created as a planned community. N.C. Gen. Stat. § 47F-1-103(25) defines "real estate" in part as including "parcels with or without upper or lower boundaries, and spaces that may be filled with air or water." [emphasis added] Therefore, units can be stacked as long as all boundaries, including the upper and lower ones, are accurately described. Why would a developer in North Carolina now select the condominium route?

Another alternative would be to greatly limit the scope of a condominium development and make it a part of a planned community. N.C. Gen. Stat. § 47C-1-103(23), the definition of "planned community," gives the following guidance on this point: "[f]or purposes of this act, neither a cooperative nor a condominium is a planned community, but real estate comprising a condominium or cooperative may be part of a planned community." A developer could therefore qualify one portion of a planned community as a condominium, but greatly limit the area held by the condominium unit owners as tenants in common.

C. Is the System of Private Governance Too Sweeping in Scope?

The PCA creates, in essence, the framework and authority for a private government known as the owners' association. See, for example, N.C. Gen. Stat. §§ 47F-3-102 and 47F-3-107.1. Prior to the passage of the PCA, homeowners' associations were relatively weak in power. The law of covenants and equitable servitudes favored the rights of individual property owners. In a planned community governed by the new PCA, the balance of power has definitely shifted in favor of the homeowners' association and developer/declarant. While the planned community is in theory a democracy, there is room for abuse in this system of private governance. A change and clarification in the law was necessary, but it remains to be seen if the pendulum has swung too far the other way.
In a recent article, a suggestion is made "that the whole structure of residential common interest development housing should be re-evaluated to give more protections to homeowners by curtailing some of the more stringent practices of developers and associations." This is certainly not the approach of the PCA.

D. Is There Appropriate Accountability?

Because Article 4 of the Uniform Planned Community Act was not included in the North Carolina PCA, a strong case can be made for the conclusion that the PCA is largely a one-way street when it comes to accountability. Unit or lot owners are locked in to full accountability concerning their obligations; the declarant and homeowners' association are not. Are consumers — the purchasers of property in the PCA — adequately protected in likely scenarios of what might go wrong with a planned community? The obvious answer to this question is "no" for many of the reasons discussed above.

Because "property" or a "property right" of a homeowner is being taken away by the association pursuant to statutory authorization, there is an interesting question raised concerning whether the actions of the association constitute "state action" for purposes of 42 U.S.C. § 1983. That well known section of the United States Code provides that no person acting "under color of any statute . . . of any State" shall deprive another of any right privilege or immunity "secured by the Constitution and the laws" of the United States. A prerequisite to a homeowner bringing a claim under § 1983 is that the defendant acted "under color of state law." Four principles have been set forth by the Supreme

355. See Trognitz supra note 17, at 59. The author adds:

Some legislative initiatives already are under way. In Texas, for instance, more than 30 bills were introduced in the legislature this year seeking to limit the powers of homeowners associations and the costs associated with foreclosures on common interest development units. One piece of legislation even proposed getting rid of associations altogether.

356. See Rendell-Baker v. Kohn, 457 U.S. 830 (1982); see also Hyatt & Stubblefield, supra note 5, at 601, where the authors observe:

Because community associations have the power to levy assessments against members for common expenses and to impose sanctions for violations of the declaration, a number of commentators have suggested that the community association should be characterized as a "mini-government." A few have suggested that some activities of the community association could be or should be characterized as "state
Court to evaluate a claim of state action. As applied to a homeowners’ association, they can be summarized as follows: (1) whether there exists a “symbiotic relationship” between the entity (homeowners’ association) and the state; (2) whether there is “extensive regulation” of the entity by the state; (3) whether the entity “depended on the state for funds”; and (4) whether the entity “performs a public function.”

E. Informing Prospective Purchasers

Is there an obligation to advise prospective purchasers of real property in a PCA concerning the sweeping nature of the powers and authority of the declarant and the homeowners’ association? Who has this obligation? Does the real estate agent, especially when that agent denominates his or her relationship as a “dual” or “buyer’s” agent? Does the closing attorney have any duties in this regard?

Without regard to the lack of statutory directives on point, it will almost always be in the declarant’s best interest to fully disclose in writing all key details about the planned community. Put succinctly, the declarant ought to declare, to make the terms of the planned community clearly known to prospective purchasers. The declarant ought to painstakingly answer these and related questions: Precisely what package of rights and obligations is the purchaser of a lot in the planned community taking upon themselves? In addition to ownership of his or her lot, what other parts of the planned community does the lot owner acquire rights to enjoy and use? Are there parts of the planned community that the purchaser does not acquire full rights to use? Must all amenities be constructed?

Lawsuits are the product of frustrated expectations. It is in the developer/declarant’s best interest to make consumers—prospective purchasers—fully knowledgeable about what they are getting into when they acquire property in planned communities. Ideally, all key disclosures should be in writing. In addition, sales

action,” requiring that the association extend to property owners the protections guaranteed by the Fourteenth Amendment to the United States Constitution. (citations omitted.)

The authors go on to note that other commentators believe that the application of constitution principles “could have far-reaching, undesirable consequences from the perspective of community association administration and judicial and legislative economy.” Id.

personnel should be carefully trained so as not to “puff” the developer into a lawsuit. They should be exhorted to stick to the written descriptions and disclosures.

It is the position of this author that consumers ought to be fully informed of the nature of a PCA. This is no different than the position I take when a prospective purchaser is looking at a condominium unit. Consumers should be made aware of the nature of the legal relationship they are about to enter. They should understand that living in a PCA is tantamount to subjecting yourself to a private government, albeit a form of democracy. Put simply, you cannot do what you please in these planned communities. In recent articles involving conflicts between property owners and associations, a common theme is the ignorance of the property owner concerning the rules and regulations and enforcement mechanisms of the association.

With reference to real estate agents who purport to be “dual” or “buyer’s” agents, the answer is obvious. Before – repeat – before the prospective purchaser commits to purchasing the property in a PCA by signing a sales contract, that purchaser ought to be fully informed of the nature of the PCA, the rules of the association, the nature of special assessments, the enforcement powers of the association, and other important details. The purchaser ought to know what he or she is getting into, and, if the agent is doing his or her job. It is the agent’s obligation to make the details of the PCA known to the purchaser.

As is the case in many states, the closing attorney gets involved with the transaction after the purchaser has signed his or her life away. Since there is an enforceable sales contract, it is too late for the closing attorney to do much in the area of fostering meaningful consumer awareness. In those rare instances where a client contacts an attorney prior to signing a sales contract, the client should be advised of the difference between ownership of an unrestricted lot and ownership of a lot in a PCA.

F. Suggestions for Study and Possible Revision

1. Curative Provisions for Defectively Created Planned Communities

The definition of “planned community” at N.C. Gen. Stat. § 47F-1-103(23) should be amended to encompass planned communities created before January 1, 1999 that placed an express obligation on lot owners to pay for expenses related to the common areas whether or not that express obligation is enforceable under
the law of covenants and equitable servitudes. This curative type of statute would eliminate needless litigation over whether or not a pre-1999 development is or is not a "planned community" for purposes of coverage of many parts of the PCA. It would also clarify the right of these older developments to opt in for full coverage under the PCA pursuant to the terms of N.C. Gen. Stat. § 47F-1-102(d).

2. Provision Empowering Generic Subdivisions to Opt In

There is what some would consider a revolutionary change in the law of planned communities that would in the opinion of this author have the effect of rejuvenating older "generic subdivisions" where the property owners want to improve the conditions of their community by becoming a planned community: The PCA should be amended to create an "opt in" provision for non-planned community subdivisions. To provide a sense of what this change in the law would accomplish, sample statutory language might read as follows:

Any subdivision created prior to or after the effective date of this Chapter may elect to make the provisions of this Chapter applicable to it by amending its declaration or similar governing document to provide that this Chapter shall apply to that subdivision. The election to opt in for coverage of this Chapter shall be made by affirmative vote or written agreement signed by at least eighty percent (80%) of the lot owners in the subdivision. To the extent the procedures and requirements for amendment in the subdivision declaration or similar governing document conflict with the provisions of this subsection, this subsection shall control with respect to any amendment to provide that this Chapter applies to that subdivision. After a successful election to opt in, the subdivision shall immediately become a "planned community" subject to all of the provisions of this Chapter.

358. See supra Part I. D and the discussion of Allen v. Sea Gate Ass'n, Inc. A second sentence could be added to the definition of "planned community" at N.C. Gen. Stat. § 47F-1-103(23) to read: "[a] provision in a declaration or other document creating a subdivision which expressly imposes an obligation on lot owners to contribute to maintain, improve, or benefit other lots renders that development a "planned community" under this section regardless of whether the promises related to payments by lot owners are enforceable under the law of covenants running with the land or equitable restrictions or servitudes."

359. This subsection could be added to N.C. Gen. Stat. § 47F-1-102(d) dealing with "Applicability" of Chapter 47F. It would be most appropriate for the North Carolina General Statutes Commission, a prestigious and neutral body, to deal
Several examples are in order:

**Example.** Hummingbird Acres (HA) is a 180-lot subdivision developed in the 1960s in a suburb of a large North Carolina city. It began as a simple development in a rural area and is now surrounded by newer residential and commercial developments. There are no common areas, per se, in HA. There is a somewhat sorry looking plywood entrance sign in the shape of a hummingbird hanging and often swinging in the wind from rusted chains at the entrance. There is no homeowners’ association, and there is only haphazard enforcement of protective covenants. The overwhelming majority of lot owners in HA have the desire to develop a strong sense of community and ensure that the subdivision property values do not continue to decline. Of course 100% of the lot owners could agree to become a “planned community,” but there are several dozen who are not interested. Some of these are absentee landlords who have started to rent homes (sometimes creating illegal duplexes or renting to high numbers of college students) and are interested only in the bottom line. Under the proposed statutory reform, if 80% of the lot owners in HA duly opt to become subject to Chapter 47F, the subdivision will become a “planned community” with all of the powers and duties of a regular planned community. A newly invigorated and empowered homeowners’ association will be able to enforce restrictions with statutory procedures and sanctions. If zoning authorities are uninterested in enforcing the zoning laws, the association can put a stop to illegal duplexes and overcrowded rental situations. Homeowners can be assessed to improve the entrance to HA. The hummingbird in its present form must go. The homeowners’ association might consider the acquisition of several vacant lots that are unsuitable for building but that would make an excellent community park. There would be many benefits to becoming a planned community.

**Example.** Victorian Village (VV) is a subdivision consisting of 100 older homes constructed from 1920 to 1930 and a number of small commercial buildings and several warehouses permitted under the original restrictive covenants. It is located near the center of a large city, and has remained a remarkably cohesive community development in spite of economic pressures to rezone additional parts of it for office space and parking structures. It has an active homeowners’ association, but it has relatively little power. An old assessment covenant was well drafted in every respect but one: assessments were limited to no more than $30.00 per annum. with this possibility and to carefully craft language if a change in the law is deemed in the best interests of the public.
Recently, concerns have heightened regarding security. The city police department is fully cooperative, but is spread thin. The association would like to fund projects to improve security, including the installation of additional lighting and the hiring of a private security firm to monitor the area at night. While 100% of the lot owners could convert the development into a “planned community,” there is, as usual, a minority of a dozen or so who object. Under the proposed amendment to the PCA, an 80% vote would allow the residents of VV to become a “planned community” subject to Chapter 47F. Decisions to improve security and hire a security firm, if duly adopted, could be funded with assessments. A strong planned community association could oppose unwanted zoning changes. One home in the development could be purchased by the association and converted into a community center.

The 80% requirement for this transformation is a high and challenging one to achieve in some developments, but it represents a substantial consensus.

G. The Financial Responsibility of Planned Communities

There is another aspect to the relationship between planned communities and the greater community that merits inquiry. Local governments are increasingly prone to delegate governmental functions and responsibilities to planned communities. As Professor Winokur has observed:

Beginning in the 1960s, common interest communities have become a major vehicle for shifting responsibilities previously associated with government agencies to the private sector. As fiscal pressures on local governments have increased, these governments have encouraged development of common interest communities. These communities provide substantial and costly public facilities and services which end up being financed by developers of such servitude regimes and, ultimately, by the residents who buy homes and pay assessments to support these amenities. The public facilities provided range from park-like open spaces to streets, lighting, water and sewer facilities and recreational facilities. Services increasingly provided by common interest communities, but which previously have typically been provided by local governments, include general facilities maintenance, trash collection and disposal, and snow removal. The financial responsibilities of community associations are funded exclusively by the community’s residents, who are required to pay regular and spe-
cial assessments as needed to meet association costs.\(^\text{360}\) (citations omitted.)

What is wrong with the "load-shedding"\(^\text{361}\) of governmental responsibilities on private community associations? Professor Winokur raises valid concerns over the financial capabilities of private associations and notes that these concerns have been raised by other experts. Citing other commentators on community association law,\(^\text{362}\) he raises three questions that, as applied to the North Carolina Planned Community Act and planned communities in general, may be paraphrased as follows: What will happen if a planned community for whatever reason is unable to perform its maintenance and governmental functions? What entity will step forward to take over those functions? What steps should be taken at the state and local level to assure that planned communities have the capability and capacity to carry out their responsibilities?

From the perspective of the North Carolina experience, there are no clear answers in the Planned Community Act to the first two questions. The PCA has no standards concerning the financial responsibility of planned communities. Likewise, there is no procedure that requires another entity such as a local government to step in and take over a financially failing development. The final question can be answered based on history. No steps will be taken at the state or local level to assure that planned communities are financially responsible and capable of carrying out their responsibilities until there are major financial failures of those entities. There is no guarantee what the governmental reaction will be. Professor Winokur warns: "To the extent the community association as an institution is vulnerable to financial collapse, facilities essential to our society will be profoundly threatened. Yet, the financial health of community associations is, under present law, uncertain and therefore vulnerable to failure."\(^\text{363}\)


\(^{361}\) Id. at 1139.


\(^{363}\) Winokur *supra* note 360, at 1142. He observes that a number of factors contribute to this vulnerability, including the complexity of the economic responsibilities involved, challenges inherent in community association politics.
H. The PCA and the Greater Community

What is the effect of the planned community on the greater community? How do private governments affect public ones? What is the effect of the planned community on matters of land use and urban planning? What effect will a proliferation of planned communities have on the city?

When one refers to "the greater community" in modern America, the reference is unfortunately to what is perceived by many to be a place that is the product of a complete lack or failure of effective local and regional planning. The penchant of Americans to worship and therefore construct their cities and counties around automobiles instead of human beings has contributed to an impersonal landscape where one-on-one encounters with fellow members of the community are largely limited to places like the self-service gasoline station, fast food restaurants and the Walmart or K-Mart parking lot. Taking a walk or riding a bicycle can be an ultrahazardous activity in many of America's suburbs. An unrelenting economic pressure for the maximum development of land is another factor that has taken precedence over rational frameworks for the development of cities and suburbs.

North Carolina, like so many other states, now has a landscape of unimaginative cul-de-sac subdivisions, each with its single entrance onto a major thoroughfare. In the country, a small concession at the sometimes impressively bricked and landscaped entrances to these subdivisions on two-lane highways is the addition of an extra lane for ingress and egress. This is achieved by laying asphalt where the shoulder of the road once was. The typical generic subdivision is simply a collection of lots. It has little or no public gathering areas, no sidewalks, and is by most measures an impressively impersonal place.

Impersonal designs beget impersonal preferences. Consumers raised with no sense of the value of social communion may prefer the anonymous habitat of a home and not a community.

and decision-making, and the limited professional competencies of participants in common interest communities.


365. Communities were once based, in part, around school systems, but the neighborhood elementary school and area high school have succumbed to
The neighborhood in the social sense thus ceases to exist as a popular preference. The trendy gated entrance to some developments mimics the castle drawbridge. From there it is a short trip through neighborhoods without visible people until the automatic garage door opener is activated and the inhabiter has managed to complete his or her commute without encountering a single fellow member of the human race.

Not planning or failing to follow through on a plan means ending up in a pattern of disordered land development. Local and county governments check each tree carefully, but ignore the forest. The expansion of urban, suburban and rural population centers has resulted in corridors and islands of development not based upon any clear planning priorities. The perception or concept of being part of a "community" is in large part disappearing. As one shuttles through the happenstance humdrum of modern commercial and residential population centers, the highest score a critic can give from the standpoint of a meaningful sense of community is "mediocre." Travel almost any interstate highway or beltline, select any exit, and it is safe to say from a planning perspective that you will have arrived at a place that can be safely described as "neither here nor there." Circumstances, politics and an unrelenting economic pressure to develop every square foot of America have made a mockery of meaningful, serious land use planning.

Contemporary commercial developments in North Carolina and elsewhere are equally offensive both aesthetically and on a humane level. Some new businesses, for example, utilize the security device of surrounding the building and commerce area with a high chain link fence topped with barbed or piano wire. Several new commercial developments in the county in which this author resides boast the concentration camp fencing and large commercial dumpsters parked openly out in front of the establishment near the highway. Asphalt parking lots and the development of business along highway corridors - often rampant over-

366. Even the venerable shopping mall has fallen on difficult times. It is facing obsolescence and has been described recently as "an unlikely form of urban blight." Richard Stradling, Reinventing The Mall, THE NEWS & OBSERVER, October 10, 1999, at 29A.
development - contribute to what will perhaps soon be described as "NMU."\textsuperscript{367} 

One of the most famous names in city planning, C.A. Doxiadis, hit the nail on the head when he observed: "Today we do exist in human cities, but it is doubtful whether we can call them humane."\textsuperscript{368} He calls for a re-examination of the city and suggests that we not take anything for granted in this process. He astutely observes:

We must start our thinking process by defining how, ideally, we would like them [cities] to be. We should use the occasion of their failure for a thorough re-examination of the kind of city we now have, why and where we want to go, and how we can direct ourselves to go there.\textsuperscript{369}

Doxiadis adds that, at present, "we do not have any common goal for our city, at least not any goal that has been agreed upon between us, and it is very doubtful whether we even have clear, personal goals for the city."\textsuperscript{370} He continues: "We are, therefore, letting our city just happen."\textsuperscript{371} He also makes a simple but telling point when he observes, in part: "every morning we start new buildings, new towers, new highways and thus we make changes and commit the city for generations to come."\textsuperscript{372}

Planned communities, at least properly planned communities, may be able to play a unique and positive role in the physical development of land in America. This is the case because planned communities do not "just happen." Each is the result of careful thought; each has a theme. While they have their own shortcomings in other categories of evaluation, the vast majority of planned communities are just that: carefully crafted private developments designed with a specific theme or series of themes in mind. Frequently, there is a planning agenda related to a concept of "community." Unlike the planning process in public governmental settings, the developer and investors in a major planned community have thought through the entire process. The enlightened self interest generated by their financial investment and professional reputation demands this. Also unlike their public counter-

\textsuperscript{367} "New Millennium Ugly.”
\textsuperscript{368} C.A. DOXIADIS, ANTHROPOPOLIS- CITY FOR HUMAN DEVELOPMENT 3 (1975).
\textsuperscript{369} Id.
\textsuperscript{370} Id. at 4.
\textsuperscript{371} Id.
\textsuperscript{372} Id. at 7.
parts, the founders of planned communities tend to follow through on and enforce their original plan.

The developers of planned communities are, for the most part, selling lot purchasers what they want and perceive to be missing from unplanned subdivisions. Consumers have demonstrated a significant demand for what is admittedly nothing but a private microcosm of the idyllic small village that they recall from an earlier time in our history. Planned communities tend to be picturesque, with meaningful areas of open space, a community center or centers, walking and recreation areas, and security. Whether myth or reality, the modern planned community does offer something that consumers find attractive. As a consequence, planned communities are becoming the most popular format for development. While this is an over generalization, planned communities tend to be more person friendly. The concept of a more humane environment is achieved.

On the downside, planned communities can be islands or enclaves of exclusivity where the problems that must be faced by their public counterparts are simply kept out by a combination of economics, restrictions and rules. If, for example, a restriction limits homes to a minimum square footage of 3500 square feet and requires that each lot owner purchase membership in an associated country club and clubhouse, the planned community planners have eliminated a host of the problems of modern American society. Anyone with a half million dollars to invest in the residence and amenities is, of course, welcome.

Security, for example, ceases to be an internal matter and evolves into a system similar to that required by the feudal lords: keeping watch for invaders at the castle walls. Planned communi-

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373. A trend that some call “new urbanism” is currently popular. This land use philosophy is achieved by creating neighborhoods of higher than traditional density. Homes are on small lots. There are pockets of commercial centers and gathering places mixed in with the residential use. A small town grid pattern is often part of the scene, as are front porches and sidewalks. According to two experts who advocate this design approach, new urbanism “fosters more cohesive neighborhoods where people can more easily relate to their surroundings and to other people.” Richard Stradling, *Design Gurus Give Mixed Reviews*, THE NEWS & OBSERVER, October 16, 1999, at 1B.

374. Bonnie Harris Hayes, *Is Aliso Viejo a Design for the Future? Community’s Placing of Homes Near Work is Being Watched Closely by Other Developers*, Los Angeles Times, December 21, 1998, at A1. (“But lately, planning experts have found that residents are expressing the cyclical need to live in a community that has more of a soul, a spirit. A bigger heart.”)
ties are successful, in large part, because of the exclusionary nature of their personalities.

Concern for the greater community, the greater public town or county in which the planned community is located, can become one hallmarked more by enlightened self interest than the betterment of the greater whole. To be blunt, planned communities can be selfish places where there is little empathy for the outside world, other than the condition of feeder public thoroughfares to the gated entrance.

Living within the realm of a private associational government can also limit the personal freedom of members of planned communities. This important issue is discussed below.

I. The Relationship of the Planned Community to a Democracy

Private governments are fundamentally different constitutional and legal entities than their public counterparts. They are in theory private mini-democracies, but they are too often in fact capable of arbitrary and autocratic whims. A recent New Jersey appellate court decision is illustrative of the challenges encountered when a homeowner takes on the association on an issue central to our democracy.

_Mulligan Foundation v. Brooks_\(^{375}\) involves a failed attempt by a member of a planned community to succeed in a dispute with that planned community on constitutional free speech theories. The controversy is intriguing as much because of the issue that was almost raised as it is because of the issues raised. The case also serves as a catalyst to trigger an inquiry into the public policy effect of the proliferation of planned communities on a democratic society. What effect will the addition of hundreds of thousands of small private formats of governance have on a system that has

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375. Mulligan Found. v. Brooks, 711 A.2d 961 (N.J. App. 1998). This decision was briefly highlighted by Phillip M. Manley in his article Free Speech vs. Property Rights. The author introduces the topic as follows:

Privately owned entities such as shopping centers and gated communities are becoming ever more common, replacing more traditional communities. This trend may have ominous implications for individual rights. Private corporate entities such as gated communities, shopping centers, and condominiums may restrict individual rights to a much greater extent than municipal entities. _Mulligan Foundation v. Brooks_ . . . illustrates this.

heretofore rested in no insignificant part upon the bedrock of public municipalities?

In a sense, Mulligan represents a highly unusual fact situation involving a planned community. The 1,500 acres of planned and gated community, Panther Valley, is comprised of 1,200 households with a total population of approximately 4,000 persons. As is typical, all property owners are members of a homeowners association, the Panther Valley Property Owners Association (PVPOA). PVPOA is governed by a nine-member board of trustees elected by the members. It publishes a monthly newsletter, The Panther, which identifies itself as "The Official Communication Medium of the Panther Valley Community." The Panther is also described as serving as "a community bulletin board" and is mailed free of charge to all residents. PVPOA rules and regulations forbid "soliciting of any kind within Panther Valley" and the newsletter is therefore regarded as "the only effective means of communication affecting all residents of the community." The case relates guidelines for publication and advertising in The Panther, but suffice it to say that the newsletter is wholly controlled by the association and articles or advertising objectionable to the editor are either rejected or edited for content.

One key to understanding Mulligan is to emphasize that the plaintiff, Mrs. Mulligan, a homeowner in Panther Valley, is not from a practical vantage point the true aggrieved party, rather, it is a foundation that she established as a consequence of an unfortunate incident following the death of her husband. The incident involved first aid and rescue squads, and the foundation was established "to clarify the legal rights and obligations of such persons." The association newsletter regularly prints materials favorable to the first aid squad, and Mrs. Mulligan through her foundation wanted to place an advertisement in it that was apparently critical of the squad. Her advertisement was rejected by the editor of The Panther, and it was suggested that she had an

376. Mulligan, 711 A.2d at 962.
377. Id.
378. Id.
379. Id.
380. Id.
381. Id.
382. Mulligan, 711 A.2d at 962.
alternative of writing a letter to the editor.\footnote{383}{Id. at 963.} There was a guideline added, however, that any such letter would be edited and that only "constructive" articles would be published.\footnote{384}{Id.}

Mrs. Mulligan's foundation sued the association seeking the remedy of requiring \textit{The Panther} to publish the advertisement dealing with the first aid squad.\footnote{385}{Id. at 961.} The appellate court affirmed the trial court's entry of summary judgment against the foundation and rejected all of the plaintiff's theories relating to a violation of constitutional guarantees of free speech.\footnote{386}{Id. at 964.} The basis for the rejection under both federal and state constitutional law was the principle that there is no right of free speech on private property.\footnote{387}{Id. The court cited Middle East v. J.M.B., 650 A.2d 757 (1994), cert. denied, 516 U.S. 812 (1995).} The court concludes, in part, on this issue:

Without considering the reasonableness of the restrictions or limitation defendants placed on plaintiff's "advertisement," we conclude that the normal uses of the property, the absence of invitation for public use, and the type of speech involved here do not compel us to limit defendants' rights as owners of private property.\footnote{388}{Mulligan, 711 A.2d at 967.}

The intriguing issue that was "almost raised" in Mulligan relates to the rights of a member of a planned community based on planned community governance documents and principles rather than constitutional theories. At least by hindsight, a tactical error was committed by the plaintiff when she opted to have the foundation serve as plaintiff and failed to include herself as plaintiff in her individual capacity as a homeowner in the community. (She made a belated attempt to add herself as plaintiff after summary judgment was entered.) While the trial judge hearing the summary judgment motion indicated that the result would not have been any different had she been added as plaintiff, the appellate court was justifiably more cautious.\footnote{389}{Id.} Did Mrs. Mulligan have an individual right, a right in her capacity as a member of the homeowners association, to have her views published in the association newsletter? Did the association owe her any legal obligation concerning this matter based on the documents establish-
ing and governing the planned community? Was a specific bylaw violated? The appellate court justifiably deemed it "both unnecessary and unwise to decide the interesting and difficult question" concerning Mrs. Mulligan's individual rights, if any.\textsuperscript{390}

Finally, the \textit{Mulligan} case raises by implication public policy issues concerning the impact of a proliferation of private planned communities throughout this country. Rights taken for granted in a public governmental context may not exist on private property. This does not suggest that the actions of private communities are immune from constitutional scrutiny.\textsuperscript{391} While most courts have not found state action in the private enforcement of restrictive covenants,\textsuperscript{392} they might be more inclined to review the private enforcement of rules and regulations enacted pursuant to state enabling legislation such as the Planned Community Act.

\textbf{J. Scope of Judicial Review}

What is the appropriate scope of judicial review of planned community decisions? Clearly, the narrow, strict constructionist approach of the law of covenants and equitable servitudes is no longer applicable because a sweeping statutory foundation for the power of the homeowners' association and its rules, regulations, assessments and sanctions now exists. Consider the following examples:

\textit{Example.} Sea Shore Dunes is a planned community consisting of 144 townhouse units and several acres of common area. The homeowners' association votes to construct a large swimming pool abutting the front of six of the units. Those unit owners object to the adverse effect that the pool will have on their units. They com-

\textsuperscript{390} Id.

\textsuperscript{391} See Sklar, supra note 34, at § 1.6 ("In addition to statutory constraints placed on a board's rulemaking authority, constitutional constraints are another form of public policy consideration to take into account when analyzing a proposed board-promulgated rule or regulation.") (citing The Rule of Law in Residential Associations, 99 Harv. L. Rev. 472 (1985); Weekland, Condominium Associations: Living Under the Due Process Shadow, 13 PEP. L. Rev. 297 (1986); Rosenberry, The Application of the Federal and State Constitutions to Condominiums, Cooperatives and Planned Developments, 19 REAL PROP. PROP. & TR. J. 1 (Spring 1984)).

\textsuperscript{392} See Sklar, supra note 34, at § 1.6, citing several Florida cases involving condominium developments and noting that this rule does not apply to racial and other suspect classifications.
mence an action in state court to enjoin the construction of the pool.\textsuperscript{393}

Example. Coastal Swamp is a large planned community that includes a championship golf course, an indoor tennis complex, and a large clubhouse for members. After a series of loud and late parties, the homeowners' association passes a rule prohibiting alcoholic beverages on the golf course, in the tennis courts, and in the clubhouse. Several dozen residents retain an attorney to challenge the validity of the rule and enjoin enforcement of it.\textsuperscript{394}

The appropriate scope of judicial review is not addressed in the PCA,\textsuperscript{395} and it is a challenging one to tackle because of the uniqueness of the entity. A search for analogous legal models does not reveal a perfect fit. The Supreme Court of California recently observed:

Our existing jurisprudence specifically addressing the governance of common interest developments is not voluminous. While we have not previously examined the question of what standard or test generally governs judicial review of decisions made by the board of directors of a community association, we have examined related questions.\textsuperscript{396}

\textsuperscript{393} Example 1 is based on Rywalt v. Writer Corp., 526 P.2d 316 (Colo. Ct. App. 1974) and the discussion of that case in a 1992 law journal article. See Brower, supra note 21 at 232-33, where the author describes the case as follows: Rywalt v. Writer Corp. typifies internal reasonableness review. In Rywalt, two subdivision homeowners challenged the association's plans to build a second tennis court in the common area abutting their back yards. The court examined the relevant sections of the subdivision's governing documents and concluded that the tennis court decision fell within the broad grant of authority given the homeowners' association. The bylaws of the association permitted the board of directors to exercise all powers, duties, and authority not expressly reserved to the individual members in other parts of the governing documents. Given these expansive powers and the lack of specific procedures for board activity in the documents, the court upheld the association's action, despite some procedural irregularities in the decisionmaking process.

\textsuperscript{394} Example 2 is based on Hidden Harbour Estates v. Norman, 309 So. 2d 180 (Fla. Dist. Ct. App. 1975), and the discussion of that case by Brower. See Brower, supra note 21 at 233. The Florida appellate court upheld the rule.

\textsuperscript{395} It is also not addressed in either the U.P.C.A. or the North Carolina Condominium Act.

\textsuperscript{396} Lamden v. La Jolla Shores Clubdominium Homeowners Assn., 980 P.2d 940 (Cal. 1999). The court went on to hold that a condominium association board's decision to use secondary, rather than primary, treatment in responding to a termite problem in the development was subject to deferential review. According to the California Supreme Court, the termite problem was a matter entrusted to the discretion of the Board under state law. Where the Board acted
Designing an appropriate formula for judicial review must take into account several distinct questions. First, what is the nature of the planned community itself? Second, what is the nature of the decision or action that is the subject of judicial review?

What is a planned community? When a homeowners' association has taken an action, altered a rule, suspended the privileges of a resident, acquired additional land, or adopted a budget, what kind of entity has taken action? "Well," a law student responding to this question might propose, "a nonprofit corporation has taken an action. Review of planned community decisions should therefore model after review of an action by a Chapter 55A nonprofit association."

The professor responds, "Good, but while the homeowners' association is a nonprofit corporation, doesn't it function as something that is in fact and in law much more than just that?"

"O.K.," the law student concedes, "a homeowners' association is also a statutory entity obtaining its powers and identity chiefly from Chapter 47F of the General Statutes. There is no need to search for an existing term; the format is unique."

While the law student's analysis is moving closer to the mark, an important element is still absent. "I know," another talented law student blurts out, "this association is operating in some respects at least much like a small city. If its actions are governmental in nature, then the court ought to be reviewing them in much the same way that it reviews a decision by a town affecting the personal or property rights of its citizens."

To this dialogue one could add a reference to traditional law: The association is an entity formed, in part, within a contractual and property law framework.

But to characterize a planned community as a legal smorgasbord of nonprofit corporation/Chapter 47F/private government/contractual/property law entity is still incomplete until one superimposes the word "community" on the description. "Community" means many things and countless varieties of things, but it symbolizes a dynamic that should not be ignored by a reviewing court. The fact that a dispute constitutes a "community" dispute is relevant.

upon a reasonable investigation, acted in good faith, and proceeded in a manner that it believed to be in the best interests of the Association and its members, the trial court was correct in deferring to the Board's decision.
Assume for purposes of discussion that we have come to grips with accurately categorizing the legal framework of the planned community. In terms of the appropriate standard for judicial review, our inquiry must now shift to the nature of the dispute. Assuming also that almost all disputes being reviewed by the court will involve challenges by lot owners of community governance decisions, policies, or the enforcement of those policies, the specific nature of the decision or policy involved is significant. Contrast, for example, a homeowners' association action to collect an annual assessment with an action to collect a fine because a lot owner has posted a political campaign sign in his or her window in violation of a recently enacted association rule prohibiting all signs.

This being said, there are some fundamental checkpoints in any judicial review fact situation. First, the authority of the association to enact the rule or regulation involved must be identified. In most instances, the requisite authority will be located in the "powers" section of the PCA or in the governing documents of the planned community. Either source of authority should be legally sufficient.\(^{397}\) Next, the association must demonstrate that it has followed the appropriate procedure for enactment of the rule or regulation that it is now seeking to enforce. Since so many homeowner association board positions are occupied by well intentioned amateurs - part-time volunteers - honest but substantial procedural mistakes are not rare occurrences.

Once it is demonstrated that both authority is present and proper procedure was followed, the association should enjoy a great deal of leeway from the standpoint of judicial review. One commentator identifies the options for the standard of judicial review as based on either reasonableness, business judgment or a contractarian approach.\(^{398}\) Several public policy justifications exist for laissez-faireism on the part of the courts. As has been emphasized throughout this article, a planned community is by definition an encroachment upon pure private property ownership rights. A decision to reside in one is an agreement to abide by duly enacted rules and regulations of the association. In addition,

397. The planned community's governing documents could, of course, restrict or negate some of the powers granted by statute. In that event, subject to public policy concerns, the provisions in the documents would be honored by a reviewing court.

courts already burdened with backlogs of a litigious society will be less than enthusiastic about second guessing the private decisions and enforcement actions of neighborhood associations.

K. Final Thoughts

It can be said that an attorney’s (or law professor’s) way of analyzing and interpreting a law reveals as much about him or her as the contents of the statute. A dozen seasoned real estate experts will no doubt come up with a dozen different perspectives on what the Planned Community Act means and what effect it will have on the rights of individual homeowners and the greater community. It is safe to add that, when those dozen experts reflect on the same statutory language after several years of real life experience with the operation of planned communities under the new statutory regime, their initial impressions and critiques will become refined and in some instances changed.

In practice, many of the provisions of the PCA that bring authority and certainty to the private governments of the new millennium will be beneficial to all involved. Investors, developers, declarants, lenders, homeowners’ associations and home owners will benefit from clear and practical rules that anticipate common problems and challenges to planned community operations. Theory and experience in North Carolina will eventually demonstrate whether the marked shift in the balance of power from homeowner to declarant and association is a serious problem in need of correction. This author obviously believes that to be the case.

In any event, the effect of the new Planned Community Act on consumers, homeowners’ associations, declarants, the planned community as a whole, and the greater public community that we are all members of should be regularly and closely monitored.