Ohio Legislative Service Commission

Final Analysis

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128th General Assembly
(As Passed by the General Assembly)

Sens. Seitz, Sawyer, Cates, Gillmor, Grendell, Kearney, R. Miller, Patton, Harris, Hughes

Reps. Murray, Coley, Boyd, Brown, Carney, Combs, Domenick, Garland, Harris, Letson, Luckie, Pillich, B. Williams, Winburn, Yuko

Effective date: September 10, 2010

ACT SUMMARY

- Requires any person establishing a new planned community to file a declaration and bylaws, providing for the operation of the planned community, with the county recorder.
- Requires a planned community to be administered by an owners association through a board of directors and specifies the duties and powers of an owners association.
- Establishes certain rights and responsibilities of planned community lot owners.
- Establishes rules regarding board of director meetings, common expenses, and assessments.
- Authorizes an owners association, under specific circumstances, to place a lien upon the estate or interest in any lot for the payment of any assessment or charge and related fees.
- States that a board of directors of an owners association must comply with all applicable state and federal anti-discrimination laws.
- Requires the board of directors of the owners association of a planned community in existence on the act's original effective date to file and record with the county recorder within specified periods of time the bylaws in effect on that effective date or the bylaws adopted on or after that effective date and requires the board of directors of the owners association of any planned community to file and record

with the county recorder within a specified period of time an amendment to the bylaws.

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CONTENT AND OPERATION

In general

The act establishes requirements to govern the formation and operation of "planned communities." The act defines a "planned community" as a community comprised of individual lots for which a deed, common plan, or declaration requires any of the following: (1) that owners become members of an owners association that governs the community, (2) that owners or the owners association holds or leases property or facilities for the benefit of the owners, or (3) that owners support by membership or fees, property or facilities for all owners to use (R.C. 5312.01(M)).

Condominium property is governed in similar fashion under R.C. Chapter 5311. The act states that condominium property is not a planned community (R.C. 5312.01(M)). Ownership of a unit in a condominium property "includes the right to exclusive possession, use, and enjoyment of the interior surfaces . . ." (R.C. 5311.03(E) not in the act), while an owner in a planned community, under the act, means a person who owns a lot, which is a parcel or tract of land formed by the subdivision of a larger parcel of land under the Platting Law (R.C. Chapter 711.--not in the act). (See "**Definitions**," below, for definitions of terms used in the act.)

The act states that it must be construed to establish a uniform framework for the operation and management of planned communities in Ohio (R.C. 5312.15).

Applicability to pre-existing planned communities

Although the act states that any planned community in the state is subject to provisions of the act, planned communities that are in existence on the act's original effective date apparently are not required to file a declaration (see "**Declaration**" below), with the county recorder (R.C. 5312.02(A)). (See **COMMENT**.)

The act stipulates that its provisions supplement any planned community governing document that is in existence on the effective date of the act. In the event of any specific conflict between the express requirements or restrictions in the governing document and the act, the governing document controls. If a governing document is silent with respect to any provision of the act, the act controls. (R.C. 5312.15.)

The act states that nothing in it invalidates any provision of a document that governs a planned community if that provision was in the document at the time the document was recorded and the document was recorded before the original effective date of the act (R.C. 5312.02(C)).

The act requires the board of directors of the owners association of any planned community that is in existence on the act's original effective date to do the following: (1) file and record the bylaws of that planned community that are in effect on that effective date in the office of the recorder of the county or counties in which the planned community is located within 180 days after that effective date, or (2) file and record the bylaws that are adopted by the owners association on or after that effective date in the office of the recorder of the county or counties in which the planned community is located within 90 days after the date of adoption of the bylaws. It states that nothing in the above provisions requires the board of directors or owners association of any planned community that is in existence on the act's original effective date to adopt bylaws of that planned community.

The act requires the board of directors of the owners association of *any* planned community that adopts an amendment to the bylaws of that planned community to file and record the amendment in the office of the recorder of the county or counties in which the planned community is located within 60 days after the date of adoption of the amendment.

The act prohibits the board of directors of the owners association of a planned community that is in existence on the act's original effective date from pursuing any civil action against any person based upon any provision of the bylaws of that planned community or upon any amendments to the bylaws until the bylaws or amendments are filed and recorded as described above. (R.C. 5312.02(D).)

Declaration

The act requires any person wishing to establish a new planned community to file and record an instrument with the office of the recorder of the county or counties in which the planned community is located. The instrument is called a "declaration" in the act, and its purpose is to declare that certain property is a planned community. The person also must file with the county recorder the bylaws of the planned community. The declaration and bylaws must provide for: (1) the election of the board of directors of the owners association, (2) the number of persons constituting the board, (3) the terms of the directors, with not less than 1/5 to expire annually, (4) the board's powers and duties, (5) the method of removal of directors from office, (6) whether the services of a manager or managing agent may be engaged, (7) the method of amending the declaration and bylaws, (8) the time and place for holding meetings and the manner of and authority for calling, giving notice of, and conducting meetings, (9) the common expenses for which assessments may be made and the manner of collecting from the owners their respective shares of the common expenses, and (10) any other matters the original declarant or the owners association deem necessary and appropriate. (R.C. 5312.02(A) and (B).)

Owners association

The act requires that a planned community be administered by an "owners association" that is comprised of owners of lots in the planned community. A board of directors that is elected by owners from among the owners and their spouses must exercise the power and authority of the owners association. If the owner is not an individual, any principal, member of a limited liability company, partner, director, officer, trustee, or employee of the owner may be elected to the board. Unless otherwise provided, a board of directors may carry out any action the act requires or allows an owners association to take, subject to any vote required of the owners.

The "declarant," defined as the owner of the property who executes and records a declaration, must establish an owners association no later than the date upon which the first lot in the planned community is conveyed to a bona fide purchaser for value. If provided in the declaration, the delcarant may control the owners association for the period of time specified in the declaration, but not later than the time at which all of the lots have been transferred to owners. During the time of declarant control, the declarant or the declarant's designee may appoint and remove the members of the board. Not later than the termination of any period of declarant control, the owners must elect a board of directors comprised of the number of members the declaration or bylaws specify. The owners association must be organized as a nonprofit corporation pursuant to R.C. Chapter 1702. (the Nonprofit Corporation Law) (R.C. 5312.03).

Unless otherwise specified in the declaration or bylaws, the owners, with the consent of 75% of the owners, may amend the declaration and bylaws in writing or in a meeting for that purpose, but no amendment may take effect until it is filed with the county recorder. The board of directors must file and record an amendment to the bylaws within 60 days after the date of its adoption. The unanimous consent of the owners is required to terminate the applicability of the declaration and to dissolve the planned community. (R.C. 5312.05 and 5312.02(D)(3).)

Commencing not later than the time of the first conveyance of a lot to a person other than a declarant, the owners association must maintain to the extent reasonably available and applicable: (1) property insurance on the common elements, (2) liability insurance pertaining to the common elements, and (3) directors and officers liability insurance (R.C. 5312.06(B)).

Also, the owners association must keep: correct and complete books and records of account specifying the receipts and expenditures relating to the common elements and other common receipts and expenses, records showing collection of the common expenses from the owners, minutes of the meetings of the association and board, and records of the names and addresses of the owners (R.C. 5312.06(C)).

Unless otherwise provided by the declaration, the owners association is responsible for reasonable maintenance, repair, and replacement of the "common elements" of the property (R.C. 5312.08(A)).

Restrictions

The act precludes the owners association from assigning the right to common assessments, or the future income from those assessments, or conveying any fee interest or any security interest in any portion of the common elements unless the declaration provides for such a conveyance or 75% of the voting power of the owners association, or any larger percentage the declaration specifies, approves the conveyance. The owners association may not convey any fee interest in a "limited common element" or subject a limited common element to a security interest without the approval of all of the owners of the lots to which the limited common element is allocated. Any proceeds of the conveyance of a limited common element are an asset of the owners association.

The board of directors, on behalf of the owners association, has all powers necessary and appropriate to effect such a conveyance or encumbrance, including the power to execute a deed or other instrument. No contract to convey or subject a common element or a limited common element to a security interest is enforceable against the owners association unless it complies with the preceding paragraph. (R.C. 5312.09.)

Board of directors

The act requires the board of directors of an owners association to elect officers from among the members of the board to include a president, secretary, treasurer, and other officers as the board designates. The board may appoint persons to fill vacancies on the board for an unexpired portion of any term.

The board may act in all instances on behalf of the association unless a provision to the contrary exists elsewhere in the act, or in the community's declaration or bylaws. Except during a period of declarant control, the board must call a meeting of the owners association at least once a year, and the president or a majority of the board may call special meetings. Also, owners representing 50% of the voting power in the owners association, or any lower share of the voting power specified in the declaration or bylaws, may call a special meeting. In lieu of a meeting, the board may take an action with the board members' unanimous written consent that must be filed with the minutes of the board's meetings.

The act gives discretion to a board in determining the method of communication used for meetings, including electronic or telephonic communication, provided that each board member can hear or read in real time and participate and respond to every other member. No owner other than a director may attend or participate in any discussion or deliberation of a meeting of the board of directors unless the board expressly authorizes that owner to attend or participate.

The act states that the board of directors of an owners association must comply with all applicable state and federal laws concerning prohibitions against discrimination on the basis of race, color, religion, sex, military status, national origin, disability, age, or ancestry, including, but not limited to, the Ohio Civil Rights Act. No private right of action additional to those already conferred by the applicable state or federal anti-discrimination law is conferred on any aggrieved individual by the act's statement. (R.C. 5312.04.)

Unless otherwise provided in the declaration or bylaws, the act requires the owners association, through its board of directors: (1) to annually adopt and amend an estimated budget for revenues and expenditures that includes reserves to repair and replace major capital items in the normal course of operations without the necessity of special assessments, and (2) to collect assessments for common expenses from owners. The owners, through a majority vote of the voting power of the owners association, may waive the reserve requirement in (1), above, annually (R.C. 5312.06(A)).

Furthermore, the act provides authority for an owners association, through its board of directors, to do any of the following (R.C. 5312.06(D)):

(1) Hire and fire managing agents, attorneys, accountants, and other independent professionals and employees that the board determines are necessary or desirable in the management of the property and the association;

(2) Commence, defend, intervene in, settle, or compromise any civil, criminal, or administrative action or proceeding that is in the name of, or threatened against, the association, the board of directors, or the property, or that involves two or more owners and relates to matters affecting the property;

(3) Enter into contracts and incur liabilities relating to the operation of the property;

(4) Enforce all provisions of the declaration, bylaws, covenants, conditions, restrictions, and articles of incorporation governing the lots, common elements, and limited common elements;

(5) Adopt and enforce rules regulating the maintenance, repair, replacement, modification, and appearance of common elements, and any other rules as the declaration provides;

(6) Acquire, encumber, and convey or otherwise transfer real and personal property, subject to the provisions described in "**Common expenses**," below;

(7) Hold in the name of the owners association the real property and personal property;

(8) Grant easements, leases, licenses, and concessions through or over the common elements;

(9) Levy and collect fees or other charges for the use, rental, or operation of the common elements or for services provided to owners;

(10) Pursuant to the provisions described in "**Assessments**," below, levy interest and charges for the late payment of assessments, returned check charges, enforcement assessments for violations of the declaration, the bylaws, and the rules of the owners association, and charges for damage to the common elements or other property;

(11) Adopt and amend rules regulating the collection of delinquent assessments and the application of payments of delinquent assessments;

(12) Impose reasonable charges for preparing, recording, or copying the declaration, bylaws, amendments to the declaration and bylaws, resale certificates, or statements of unpaid assessments;

(13) Authorize entry to any portion of the planned community by designated individuals when conditions exist involving imminent risk of damage or harm to common elements, another dwelling unit, or to the health or safety of the occupants of that or another dwelling unit;

(14) Subject to the act's provisions described in the first sentence under "**Restrictions**," above, borrow money and assign the right to common assessments or other future income to a lender as security for a loan to the owners association;

(15) Suspend the voting privileges and use of recreational facilities of an owner who is delinquent in the payment of assessments for more than 30 days;

(16) Purchase insurance and fidelity bonds the directors consider appropriate and necessary;

(17) Invest excess funds in investments that meet standards for fiduciary investments under the Ohio laws;

(18) Exercise powers that are conferred by the declaration or bylaws, necessary to incorporate the owners association as a nonprofit corporation, permitted to be exercised in Ohio by a nonprofit corporation, or necessary and proper for the government and operation of the owners association.

Rights and responsibilities of lot owners

Under the act, generally, lot owners have the right to examine and copy the books, records, and minutes of the owners association, pursuant to reasonable standards set forth in the declaration, bylaws, or rules the board promulgates. The standards may include standards governing the type of documents subject to examination and copying, the times and locations at which those documents may be examined or copied, and the specification of a reasonable fee for copying the documents. However, unless approved by the board of directors, an owner may not examine or copy information that pertains to property-related personnel matters, communications with legal counsel or attorney work product pertaining to potential, threatened, or pending litigation or other property-related matters, information pertaining to contracts or transactions currently under negotiation, confidential information in a contract or agreement, information that relates to the enforcement actions of the owners association against owners, or information the disclosure of which is prohibited by state or federal law. (R.C. 5312.07.)

If the owners association places a lien upon the estate or interest in any lot for the payment of any assessment or charge, or other fees or costs that are chargeable against the lot, the owner may commence an action for the discharge of the lien in the court of

common pleas if the owner believes that the liability for the unpaid assessment or charge for which the owners association filed a certificate of lien was improperly charged. If the court determines that the unpaid assessment or charge related to the lien was improperly charged to the owner, the court must enter an order that it determines to be just, which may provide for a discharge of the record of all or a portion of the lien and an award of attorney's fees to the owner. (R.C. 5312.12(D).)

Each owner is responsible for maintenance, repair, and replacement of the owner's lot and improvements to that lot, including the dwelling unit and the utility lines serving that unit. An owner must permit agents or employees of the owners association and other owners access through the owner's lot and dwelling unit for the purpose of fulfilling the association's duties. Any damage to the common elements, lot, or dwelling unit due to that access is the responsibility of the owner causing the damage or the owners association if it is responsible for the damage. That owner or the owners association is liable for the prompt repair of any damage and, if not repairable, for the value of the damaged property or item as it existed immediately prior to that damage. (R.C. 5312.08.)

Common expenses

In accordance with its declaration, all costs the owners association incurs in the administration, governance, and maintenance of a planned community are common expenses. A common expense is defined as "any expense or financial liability of the owners association including allocations the association designates for reserves." Unless otherwise provided in the declaration, all costs of the administration, operation, maintenance, repair, and replacement of the common elements are common expenses. (R.C. 5312.01(D) and 5312.10(A)(1).)

The common expense liability of each lot must be allocated in accordance with the allocation set forth in the declaration. If the declaration does not establish any allocation, the common expense liability must be allocated equally among all the lots. The board of directors must assess the common expense liability for each lot at least annually, based on a budget the board adopts at least annually, and the board must charge interest on any past due assessment or installment at the rate the board establishes (not to exceed any maximum rate allowed by law).

The board may not charge a common expense assessment unless the declaration provides for or contemplates the charging of such assessments. If the declaration limits the amount of such assessments, the board may not increase it without an amendment to the declaration by the consent of 75% of the owners. (R.C. 5312.10(A)(2) and (3), (B), and (C).)

Assessments

An owners association may assess an individual lot for any of the following (R.C. 5312.11(A)):

(1) Enforcement assessments and individual assessments for utility service imposed or levied in accordance with the declaration, and expenses the board incurs in collecting those assessments;

(2) Costs of maintenance, repair, or replacement incurred due to the willful or negligent act of an owner or occupant of a lot or their family, tenants, guests, or invitees, including attorney's fees, court costs, and other expenses;

(3) Costs associated with the enforcement of the declaration or the rules and regulations of the owners association, including attorney's fees, court costs, and other expenses;

(4) Costs or charges the declaration or bylaws permit.

Unless otherwise provided by the declaration, bylaws, or rules, the owners association must credit any amount it receives from a lot owner pursuant to this provision in the following order: (1) to interest owed to the owners association, (2) to administrative late fees or enforcement assessments owed to the owners association, (3) to collection costs, attorney's fees, and paralegal fees incurred in collecting the assessment, and (4) to the oldest principal amounts the owner owes to the owners association for the common expenses chargeable against the dwelling unit or lot (R.C. 5312.11(B)).

Prior to imposing a charge for damages or an enforcement assessment, the board of directors must give the owner a written notice that includes a description of the property damage or violation, the amount of the proposed charge or assessment, a statement that the owner has a right to a hearing before the board to contest the proposed charge or assessment, a statement setting forth the procedures to request a hearing, and a reasonable date by which the owner must cure a continuing violation to avoid the proposed charge or assessment if such an opportunity to cure is applicable.

To request a hearing, the owner must deliver a written notice to the board not later than the tenth day after receiving the notice described in the preceding paragraph. If the owner fails to make a timely request for a hearing, the right to that hearing is waived, and the board immediately may impose a charge for damages or an enforcement assessment pursuant to the above provisions. If an owner requests a hearing, at least seven days prior to the hearing the board must provide the owner with a written notice that includes the date, time, and location of the hearing. The board

cannot levy a charge or assessment before holding any requested hearing. Within 30 days after a hearing at which the board imposes a charge or assessment, the owners association must deliver a written notice of the charge or assessment to the owner. Any required written notice must be delivered to the owner or any occupant of the dwelling unit by personal delivery, by certified mail, return receipt requested, or by regular mail. (R.C. 5312.11(C) and (D).)

Lien for assessments

Under the act, an owners association has a lien upon the estate or interest in any lot for the payment of any assessment or charge levied as described above in "**Assessments**," as well as any related interest, administrative late fees, enforcement assessments, collection costs, attorney's fees, and paralegal fees, that are chargeable against the lot and that remain unpaid ten days after any portion has become due and payable. The act sets forth requirements to perfect and enforce such liens. The lien is effective on the date that a certificate of lien is filed for record in the office of the county recorder pursuant to authorization by the board of directors. The certificate must contain a description of the lot, the name of the lot's record owner, and the amount of the unpaid assessment or charge. It must be subscribed to by the president of the board or other designated representative of the owners association. The lien is a continuing lien subject to automatic adjustments reflecting any additional unpaid interest, administrative late fees, enforcement assessments, collection costs, attorney's fees, paralegal fees, and court costs. The lien is valid for a period of five years unless it is sooner released or satisfied in a manner provided by law for the release and satisfaction of mortgages on real property or unless it is discharged by the final judgment or order of a court in an action brought to discharge the lien. The lien is prior to any lien or encumbrance subsequently arising or created, except liens for real estate taxes and assessments of political subdivisions and liens of first mortgages filed for record prior to the recording of the lien, and may be foreclosed in the same manner as a mortgage on real property in an action brought by the owners association. (R.C. 5312.12(A) and (B).)

If a holder of a lien commences a foreclosure action, the holder must name the owners association as a defendant in the action, and the owners association or the holder of the lien is entitled to the appointment of a receiver to collect rental payments due on the property. Any rental payment a receiver collects during the pendency of the action must be applied first to the payment of the portion of the common expenses chargeable to the lot during the foreclosure action. Unless prohibited by the declaration or the bylaws, the owners association or an agent the board authorizes is entitled to become a purchaser at the foreclosure sale. (R.C. 5312.12(C)(1) and (2).)

Other provisions

The act provides that a mortgage on a lot may contain a provision that secures the mortgagee's advances for the payment of the portion of the common expenses chargeable against the lot upon which the mortgagee holds the mortgage (R.C. 5312.12(C)(3)).

The act requires the owners association and all owners, residents, tenants, and other persons lawfully in possession and control of any part of an ownership interest to comply with any covenant, condition, and restriction in any recorded document to which they are subject, and with the bylaws and the rules of the owners association, as lawfully amended. Any violation is grounds for the owners association or any owner to commence a civil action for damages, injunctive relief, or both, and an award of court costs and reasonable attorney's fees. (R.C. 5312.13.)

The act provides that in any action relating to the common elements or to any right, duty, or obligation possessed or imposed upon the owners association by statute or otherwise, the owners association may sue or be sued as a separate legal entity. Service of process may be made upon the owners association by serving the process personally upon the president of the board of directors or the person named as statutory agent of the association if it is an incorporated entity. Any action brought by or on behalf of the owners association must be pursuant to authority granted by the board of directors. (R.C. 5312.14.)

Definitions

The act also includes the following definitions (R.C. 5312.01):

"Assessment" means the liability for an expense that is allocated to a lot in a planned community.

"Bylaws" means an instrument filed with the declaration that provides for the operation of the owners association. "Bylaws" also is referred to as "regulations" pursuant to R.C. Chapter 1702. (Nonprofit Corporation Law).

"Common element" means any property in a planned community that the owners association holds in fee or has use of pursuant to a lease or easement.

"Common expense" means any expense or financial liability of the owners association, including allocations the association designates for reserves.

"Declarant" means the owner of property who executes and records a declaration that the property is a planned community.

"Declarant control" means the period of time in which the declarant controls the owners association by appointing or electing the members of the association's board of directors.

"Declaration" means an instrument a property owner executes and records to declare that the property is a planned community subject to the provisions of the act.

"Dwelling unit" mans a detached building or the portion of a building that is designed and intended for use and occupancy for single-family or household residential purposes.

"Limited common element" means a common element that a declaration designates as reserved for use by a certain lot or lots, to the exclusion of other lots.

"Lot" means parcel or tract of land that is formed when a larger parcel of land is subdivided pursuant to the Platting Law, and as a result has a separate parcel number assigned by the county auditor, and is occupied or intended to be occupied by a dwelling unit.

"Owner" means a person who owns a lot in a planned community. "Owner" does not include any person that has an interest in a lot solely as security for an obligation.

"Owners association" means an organization that is comprised of owners of lots in a planned community and that is responsible for the administrative governance, maintenance, and upkeep of the planned community.

COMMENT

Planned communities that have independently chosen to record a declaration before the effective date of the act apparently are not required to adhere to the provisions of the act respecting elements that must be included in the bylaws and declaration.

HISTORY

ACTION	DATE
Introduced	10-15-09
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