HOT TOPICS – AMENDMENTS TO CONDOMINIUM AND PLANNED COMMUNITY DECLARATIONS

By

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Amendments to Declarations of Condominium and Declarations of Planned Community are governed by the enabling statutes, specifically Section 3219 of the Uniform Condominium Act (68 PS Section 3101 et seq.) ("UCA") and Section 5219 of the Uniform Planned Community Act (68 PS Section 5101 et seq) ("UPCA"). These materials will review current topics involving such amendments.

A. Corrective Amendments and the Impact of the *Belleville* Decision.

The decision of the Commonwealth Court in *Belleville v. David Cutler Group and Malvern Hunt Homeowners Association*, 118 A.3d 1184 (2015) has had a significant impact on the evaluation of corrective amendments to condominium and planned community declarations.

Both the UCA and the UPCA allow Association Boards to adopt amendments to the Declaration without unit owner approval when the amendment will be corrective in nature. This right is found at Section 3219(f) and Section 5219(f) respectively. Although the format is somewhat different in the two statutes, the content is essentially the same. The UCA refers to these types of amendments as "corrective amendments", while the UPCA refers to them as "technical corrections". For ease of reference, Sections 3219 (f) and 5219 (f) are reproduced in the Appendix to these materials.

To summarize the requirements for a corrective amendment under the statutes:

1. The amendment must be necessary in the judgment of the Board to do any of the following:

   a. cure any ambiguity;

   b. correct or supplement any provision of the Declaration that is defective, missing or inconsistent with any other provision of the declaration or with the Act;

   c. conform to the requirements of any agency or entity that has established national or regional standards with respect to loans secured by mortgages (such as Fannie Mae); or

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d. comply with any applicable statute, regulation, code or ordinance, or to make reasonable accommodation for handicapped persons.

2. If the above applies, then the Board may adopt a corrective amendment upon receipt of an opinion from independent legal counsel to the effect that the proposed amendment is permitted by the terms of the statute.

There are two basic requirements: first, is there an issue with the Declaration that falls within the categories of errors that can be remedied by corrective amendment; and second, has the Board received an opinion from independent legal counsel to that effect.

In ***Belleville***, a planned community was created with three sub- communities: The Reserve, containing 101minimum maintenance single-family lots; The Chase, containing 95 townhouses; and The Ridings, containing 83 standard single-family lots. Under the terms of the recorded Declaration, only owners in The Reserve and The Chase were members of the Association. Owners in The Ridings did not receive Association services, and their only financial obligation was a payment of $1000 to the Association at the time of closing on the lot.

The developer, however, had apparently prepared an alternate Declaration which, in addition to the $1000 payment at closing, required owners in The Ridings to pay annual assessments to the Association which were 20% of the assessments paid by the owners in The Reserve and The Chase. The Bellevilles, purchasers of a home in The Ridings, received a copy of this alternate unrecorded Declaration when they purchased their home. Following their purchase, the Bellevilles paid annual assessments to the Association, one assumes after having received an invoice for assessments.

Two and a half years after the Declaration was recorded, the developer recorded a First Amendment. The First Amendment added the provision requiring owners in The Ridings to pay an annual 20% assessment, and made another change to the Declaration allowing different levels of assessments to be made against the other sections of the community. No unit owners in any section were notified about the First Amendment, or provided with a copy of the First Amendment.

Four years later, after the owners were in control of the Association, the Association recorded a Second Amendment for the stated purpose of curing an ambiguity relating to a budget shortfall. Nine months after that, the Association recorded a Third Amendment, again to cure any ambiguity, this time relating to the collection of late fees, interest, and attorney's fees for nonpayment of annual assessments.

For 2008, the Bellevilles received a notice of assessment that was structured differently than prior years. Under this notice, the Association charged different levels of assessments to

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owners of units in The Chase and The Reserve. The assessments charged to the Bellevilles, as the owner of a unit in The Ridings, was 20% of the highest assessment level. The Bellevilles challenged the different levels of assessments as not permitted under the Declaration. The Association cited to the First Amendment recorded by the developer, which was the first the Bellevilles were aware of that amendment.

The key issues discussed by the Commonwealth Court in the ***Belleville*** decision are:

1. Since the Bellevilles filed their Complaint five years after the First Amendment was recorded, was the complaint time-barred under Section 5219 (b) of the UPCA, which provides "no action to challenge the validity of an amendment adopted by the Association under this section may be brought more than one year after the amendment is recorded"?

2. Were the First Amendment and Third Amendment valid corrective amendments to the Declaration?

On the first point, the Court held that the Bellevilles' claim was not time-barred under Section 5219(b). The Association members had never received notice of or copies of the amendments at issue. The Court noted that if challenges in this situation were held to be time-barred, it would be an absurd result because Association members would have no recourse "unless they somehow discover, without the benefit of any notice or vote, that an amendment has been recorded and bring an action within one year of the recording of that amendment." The Court found that the General Assembly would not have intended such a result. As such, amendments adopted without notice to members do not receive the protection of the "statute of limitations" contained at Section 5219(b). It is presumed that if a similar case came before the Court under the Condominium Act, the outcome would be the same.

On the second point, the Court held that the First and Third Amendments were not valid corrective amendments to the Declaration. The Association took the position that the amendments clarified ambiguities and therefore fell within the parameters of Section 5219(f). Unfortunately, the Association's stated ambiguities related to inconsistencies between the recorded Declaration, and the unrecorded Declaration handed out to purchasers. As the Court stated: "external inconsistencies cannot make the Recorded Declaration ambiguous; such ambiguity must be contained within the document itself. Furthermore, we note that the First Amendment did more than simply bring the Recorded Declaration into line with the Unrecorded Declaration and Summary by imposing a 20% assessment. It also, for the first time, indicated that owners in The Chase and The Reserve could be charged differing assessments." In short, the Court held that the ambiguities/inconsistencies required for the application of Section 5219(f) were not present.

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In addition, the Court found that the Association had not satisfied the further requirement of Section 5219(f) that the Board obtain an opinion from independent legal counsel concerning the corrective amendment. For both the First Amendment and the Third Amendment, the legal opinion was given by the same attorney, or the same law firm, that drafted the amendment. The Court quoted the trial court's opinion, stating: "a single firm representing the Association, drafting the amendment and issuing the required opinion letter hardly results in the type of independent review contemplated by the Uniform Planned Community Act." The Court went on to state: "in the ordinary usage of the word independent, one would not consider an attorney and/or law firm already hired by a client to be independent, as they are clearly affiliated with and, to some extent, controlled by their client."

How does the decision of the Commonwealth Court in ***Belleville*** impact corrective amendments by the boards of condominium and planned community associations? There are four main takeaways from this decision:

1. The board should take care to retain truly independent legal counsel, who has not had a prior attorney-client relationship with the Association. When I provide an opinion concerning a corrective amendment, I include the following language in my opinion letter to address this issue:

> "This will confirm that prior to retention for purposes of this opinion, I have not represented the Association or the Executive Board, and I was not involved in any way with the preparation of the condominium/planned community documents. I also do not represent, and have not represented, the declarant in any capacity in connection with the condominium/planned community or otherwise."

2. If you are an attorney providing the independent legal opinion, the issues that you should be considering are whether the terms at issue within the document meet at least one of the statutory criteria for a corrective amendment. I include specific conclusions that identify provisions that are ambiguous, inconsistent, etc. in the opinion letter.

Sometimes an association asks the independent attorney to provide additional opinions on interpretation of declaration provisions. My position on these requests is that I have been retained as independent legal counsel on the issue of whether a corrective amendment is appropriate; if I am providing opinions on interpretation, the line between independent legal counsel and general representation of the Association becomes blurred. Given the language in the ***Belleville***, I do not advise that independent counsel provide opinions to a board on interpretation issues.

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3. If you are the attorney representing the Association reviewing the opinion of independent legal counsel, consider whether that opinion is properly based upon internal ambiguities, inconsistencies, etc. Remember that if the amendment does not meet the requirements of the statute, regardless of whether an independent legal opinion was obtained, the amendment will be able to be challenged if no notice was provided to Association members.

4. Finally, if the board is adopting a corrective amendment, a copy of the amendment should be provided to each unit owner. This will avoid the extended time period available to challenge the amendment that occurred in the ***Belleville*** case.

There are other interesting issues addressed in the ***Belleville*** case that are not discussed above, such as whether a unit owner's payment of assessments for seven years without challenging the assessments bars a challenge under the doctrine of laches (*Spoiler alert:* It doesn't). I recommend reading this case on your own.

B. The Requirement for Unanimous Consent of Members to an Amendment and Act 2016-21.

Section 3219 of the UCA, and Section 5219 of the UPCA, govern amendments to Declarations. Most amendments require the vote or agreement of unit owners to which at least 67% of the votes in the Association have been allocated (or a greater percentage if specified by the Declaration). There are exceptions to this general rule providing for a smaller (or no) member approval percentage, detailed in Sections 3219(a) and 5219(a). These sections further note that if all units are restricted exclusively to nonresidential use, the Declaration may specify a smaller number.

The UCA at Section 3219(d) and the UPCA at Section 5219(d) specify situations in which unanimous consent of the unit owners is required to adopt an amendment to the Declaration. Both sections contain the proviso "except to the extent expressly permitted or required by other provisions of this subpart…". The circumstances under which unanimous consent of members is required are amendments that:

1. Create or increase special declarant rights;

2. Alter the terms or provisions governing the completion or conveyance or lease of common facilities/elements;

3. Change the boundaries of any unit;

4. Change the common expense liability or voting strength in the association allocated to a unit;

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5. Change the uses to which a unit is restricted.

Additionally, amendment of reserved special declarant rights in the Declaration require the express written joinder of the declarant.

The unanimous consent requirement that can create problems for Associations is item 5 above – changing the uses to which a unit is restricted. While it is obvious that you would want unanimous approval to change the uses from residential to manufacturing, for example, the UCA and UPCA do not define the scope of a "change of use". The appellate case law in Pennsylvania dealing with the unanimous consent requirement is non-existent.

A recent amendment to the UCA and UCPA deals with this requirement in an area which is often the subject of amendments to Declarations. House Bill 1340, signed into law in April, 2016 as Act 2016-21, amends the UCA and UCPA to provide that the leasing of units does not constitute a "change of use" for a unit. If you are representing an Association seeking to restrict leasing of units, this law makes it clear that unanimous consent is not required for such amendment. A copy of House Bill 1340 is attached in the Appendix.

What about other amendments that might be construed as changing a unit owner's use of the unit? What if the Declaration is currently silent on the issue of smoking, but the Board wants to amend the Declaration to prohibit smoking within a unit? As noted above, Pennsylvania courts have not addressed the question of what constitutes a change of use. However, the decision of the Washington State Supreme Court in the case that triggered the proposal of House Bill 1340 is instructive.

In *Filmore LLLP v. Unit Owners Association of Centre Pointe Condominium,* 355 P.3d 1128 (WA 2015), the members of a residential condominium Association adopted an amendment to the Declaration the provided that not more than 30% of the total number of units could be leased. Prior to the amendment, the Declaration did not impose restrictions on leasing. The amendment was adopted by more than 67% of the owners, but less than 90% of the owners. The Washington Condominium Act required 90% of members to approve an amendment that may "change the uses to which any unit is restricted." A similar supermajority requirement was contained in the Declaration.

The Court found that the word "use" was not defined in the Condominium Act. However, the Court found that the Declaration did identify specific uses that came within the special supermajority voting requirement. With respect to leasing, the Court found that the positioning of the leasing restrictions within the Article identifying "permitted uses" indicated that "for the purposes of this Declaration, a provision on leasing is one restricting the "use" of a unit." Therefore, the Court concluded, even if leasing is not considered a use under the statute, the Declaration defined as such and therefore the supermajority requirement applied.

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Similar to Washington State, the word "use" is not defined in the UCA or UPCA. If you are representing a Board that is thinking about making changes to restrictions on uses, you might consider whether the Declaration currently defines what constitutes a change of use. If the Declaration does not do so, perhaps an amendment to include that definition (which would require 67% approval) would help to define which changes do or do not require unanimous approval. Of course, you do not want to recommend that the Board bypass unanimous approval if the proposed amendment clearly relates to a change of the principal use. However, the regulation of behaviors and activities relating to the principal use would not seem to rise to the level of impact requiring unanimous approval of members.

C. Recording Declaration Amendments – SB 1282.

Condominiums and planned communities often contain many units. When recording an amendment to a Declaration, for counties using the uniform parcel identifier (UPI) system, currently the UPI for each unit must be listed on the amendment, so that the Recorder can index the Amendment against each unit. In some counties, a fee is charged by the Recorder for each UPI, in addition to the recording fee for the document itself. For example, in Bucks County, the recording fee for a declaration amendment is $64.00, which includes one UPI. For each additional UPI, there is a $10.00 charge. This has made it costly for Associations to record amendments to their Declarations; for a 100 unit community (which is not an unusual size), this adds $1000 to the cost of recording.

In order to address this hardship on Associations, Senate Bill 1282 has been proposed to change this procedure. The version of SB 1282 current as of the date of preparation of these materials is included in the Appendix. This Bill was voted out of the House Urban Affairs Committee on September 21, 2016, and was previously voted out of the full Senate.

SB 1282, in its present form, requires counties that maintain a UPI system of indexing, to assign a master parcel number to each condominium, cooperative and planned community. When an amendment to a declaration is recorded, that amendment is to be indexed against the master parcel. SB 1282 further provides that if the County requires an amendment to be indexed against each unit, the Recorder's office may do so, but may not charge a fee for each UPI. However, if the Declarant or the Association requests indexing against each parcel, a fee may be charged. If this is signed into law, it will be a great benefit to associations amending their declaration, since it will reduce the cost of recording the amendment.

D. Declarant Amendments to Exercise Rights in a Flexible Community/Condominium – Changes to the Permit Extension Act.

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In 2010, Governor Rendell signed into law Act 46, which amended provisions of Pennsylvania's Fiscal Code. Included among the amendments were provisions which provided relief for property owners who had obtained permits and approvals, but who were not able to move forward in a timely manner due to the impacts of the "Great Recession." The definitions of "Approvals" and "Development" entitled to relief included references to the conversion and withdrawal of real estate in condominiums and planned communities. Under Act 2010-46, the extension period was defined as beginning after December 31, 2008 and ending before July 1, 2013.

In 2013, Act 54 was signed into law, which enacted the Development Permit Extension Act as a separate act outside the Fiscal Code. Act 2013-54 was substantially similar to the permit extension provisions of Act 2010-46, including the references to convertible and withdrawable real estate, but changed the end date of the extension period to July 1, 2016.

Under the UCA and UPCA, the Declarant can identify portions of the condominium/planned community property as convertible or withdrawable real estate. The Declarant can then reserve rights in the Declaration to create to Units and Limited Common Elements/Facilities within convertible real estate, and to withdraw withdrawable real estate, by recording an Amendment to the Declaration. Under the UCA and UPCA, the rights to convert and withdraw are subject to time limitations. Prior to the enactment of Act 2013-37 (effective July 2, 2013), the time limit was seven years after the Declaration was recorded. Act 2013-37 increased the time limitation to a maximum of 10 years after recording of the Declaration. (UCA Section 3206(2); UPCA Section 5206(2)).

On September 20, 2013, in an unreported opinion, the Commonwealth Court held that the Permit Extension Act did not extend the date by which a Declarant was entitled to convert or withdraw real estate in a planned community. The Court's reasoning was that the Permit Extension Act referred to "approval by a governmental agency", and since approval by governmental agency was not required to amend the Declaration to exercise the reserved rights to convert or withdraw, the Permit Extension Act does not apply. *Logan Greens Community Association, Inc. v. Church Reserve, LLC*, No. 1819 C.D. 2012, issued September 20, 2013.

In 2015, amendments to the Permit Extension Act were adopted to address this issue. Act 2015-31 revised the language of the definition of "Approval" to make it clear that the exercise of rights to convert or withdrawal real estate in condominiums or planned communities was its own category of approval, not within approvals requiring governmental agency approval. Additionally, Act 2015-31 clarified the application of the extension period, to provide:

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"Section 3. Existing approval.

(a) Automatic suspension. For an approval that is granted for or in effect between the beginning of the extension period and July 2, 2013, whether obtained before or after the beginning of the extension period, the running of the period of the approval shall be automatically suspended until July 2, 2016."

As a result of the Act 2015-31 amendments, the law is now clear that the time limit for amending a Declaration to exercise conversion or withdrawal rights was suspended for Declarants who fall into either of the categories below:

1. Declarants who had an existing right to convert or withdraw real estate in a condominium or planned community as of January 1, 2009; or

2. Declarants who recorded a Declaration containing a right to convert or withdraw real estate in a condominium or planned community between January 1, 2009 and July 2, 2013.

Example: On January 1, 2008, a Declarant recorded a Declaration of Condominium reserving conversion and withdrawal rights. On July 2, 2016, the Declarant still has nine years to record an amendment to the Declaration to exercise those rights (ten years provided under Act 2013-37, minus the one year that elapsed between the date the Declaration was recorded and the beginning of the extension period on January 1, 2009). ***Note:*** If the Declaration provided only seven years to exercise the rights, in conformity with the provisions of Section 3206 when the Declaration was recorded, Act 2013-37 gives the Declarant the unilateral right to amend the Declaration to conform the Declaration to the new 10 year time limitation.

Example: On January 1, 2012, a Declarant recorded a Declaration of Planned Community reserving conversion and withdrawal rights. On July 2, 2016, the Declarant has 10 years to record an amendment to the Declaration to exercise those rights. Since the Declaration was recorded during the extension period, no portion of the time limitation has begun to run. Again, as noted above, the Declarant has the unilateral right to amend the Declaration to conform the time periods for exercising conversion and withdrawal rights to the 10 year time period.

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E. Amendments to Declarations Recorded Prior to the adoption of the UCA or UPCA.

There are condominiums and planned communities in Pennsylvania that were created prior to the effective date of the UCA (10/30/1980) or UPCA (2/3/1997). What law applies when a declaration is amended after the adoption of the UCA/UPCA?

Our Superior Court recently dealt with this issue in *McLafferty v. Counsel for the Association of Owners of Condominium No. One, Inc.*, 2016 PA Super 208, decided on September 12, 2016. In *McLafferty*, a condominium was created in 1967 under the Unit Property Act by the recording of a Declaration. Neither the Unit Property Act, nor the Declaration, specified the number of votes required to amend the Declaration for anything other than changing the percentage interest assigned to each unit. A separate document, the Code of Regulations, provided for amendment by a majority of unit owners. The Code was recorded along with the Declaration to make up the governing documents of the condominium.

In 2013, the members of the condominium association adopted an Amended and Restated Declaration by a vote of 55%. This vote was challenged by several unit owners on a number of grounds, including a claim that a majority vote was not sufficient to adopt the amendment. The Association took the position that since the Declaration and Unit Property Act were silent on the percentage approval required, the Code provisions should be applied. The objectors claimed that the UCA requirements for amendment should be applied.

The Court cited to Section 3102 of the UCA, which provides that the UCA shall apply to condominiums created under the Unit Property Act when the UCA does not invalidate provisions in the governing documents of the condominium. The court found that since the Unit Property Act and the Declaration did not contain voting requirements applicable to the amendment, the UCA should be applied. The Court rejected the Association's contention that the amendment requirements found in the Code should be applied, finding that those requirements only applied to amendments to the Code, not to the Declaration.

While the outcome of this case may seem obvious based upon the language in the UCA, it does provide guidance in situations involving Unit Property Act condominiums. Specifically, if an amendment to a Declaration is proposed (other than an amendment changing percentage interests), the governing board must determine if the Declaration contains amendment requirements. If it does not, then the UCA applies, since the Court in *McLafferty* found that the Unit Property Act does not contain such requirements.

What was not addressed by the Court was the actual percentage vote required under the UCA to adopt the Amended and Restated Declaration. The objectors claimed that the amendments imposed significant additional restrictions on the use of their units, including

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restrictions on rentals. As a result, the objectors claimed that unanimous approval of the members was required under UCA Section 3219(d). The Court remanded the case to the Court of Common Pleas of Philadelphia County for further proceedings consistent with the decision. If rental restrictions are the only issue, the objectors may not pursue the matter further based upon the Act 2016-21 provisions that leasing is not a change of use (see Section B above). If, however, the objectors had raised other "change of use" issues, it will be interesting to see how those are dealt with from a voting requirement standpoint.

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