Kenton L. Kuehnle
Allen Kuehnle Stovall & Neuman LLP
Columbus, Ohio

Ohio's Planned Community Act, Chapter 5312

I. Basics

A. Applies to all planned communities in state

By the enactment of Amended Substitute Senate Bill 187, the 128th Ohio General Assembly established the Ohio Planned Community Law (referred to herein as the "Planned Community Act") applicable to all "planned communities" in Ohio, whether such communities were established before or after the enactment of the legislation. RC 5312.02(A) provides that: "[a]ny planned community in this state is subject to this chapter."

B. Definition of Planned Community

The definition of a "planned community" [§5312.01(M)] is any community comprised of 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; [§5312.01(M)(1)]

Occasionally, associations are created for the purpose of the enforcement of restrictions, without any obligation to pay assessments for the maintenance of any common elements. While such associations will be empowered to do numerous things under the statute, RC 5312.12(C)(1) provides that: "[t]he board may not charge assessments for common expenses unless the declaration provides for or contemplates the charging of such assessments." The purpose of this provision is to avoid an owner being subjected to assessments in a project where such collections were not contemplated at the time such owner purchased his lot. Notwithstanding that protection, and although the owner may have assumed that the documents creating the various obligations could not be changed without his consent, the declaration can now be amended with a 75% vote, unless otherwise specified in the declaration. [§5312.05(A)(1)]

Also, although the documents may not contemplate the charging of assessments, note that §5312.06(B)(3) requires the Association to maintain Directors and Officers liability insurance. The question naturally arises as to how the board will pay for such insurance if it is restricted from charging assessments.

(2) That owners or the owners association holds or leases property or facilities for the benefit of the owners; [5312.01(M)(2)] Note that the property does not need to be owned by the association. Frequently, entry features, roadways, ponds and other common elements which are maintained by the association, are located on owners' individual lots rather then conveyed, as separate tax parcels, to an association.

(3) That owners support by membership or fees, property or facilities for all owners to use. [§5312.01(M)(3)]

A condominium property as defined in section 5311.01 of the Revised Code is not a "planned community." [§5312.01(M)]

Note that communities which have restrictions which are enforceable by the owners, and do not contemplate the creation of an association, and have no property to support or fees to be charged, would not qualify as a "Planned Community."

There are a number of observations that can be made regarding planned communities from this section of the code. First of all, note that the variety of ways that a planned community can arise. The historical method for the creation of covenants which would govern a subdivision would be by the conveyance of the lots to a trustee or "straw man" and back with the covenants (sometimes referred to as "covenants, conditions and restrictions", or "CCRs" in one of the deeds, thus inserting them in the chain of title to all of the lots.

With the advent of condominiums, attorneys became comfortable with creating restrictions by "declarations" even though there was no statutory authorization for the recorder to accept such instruments for recordation. [See *Ohio Real Estate* Law Kuehnle & Levey, §7:9 for a table of documents the recorder is authorized to accept for recordation.] After the enactment of the Planned Community Act, the correct method of creating a planned community is by the recordation of a Declaration. [§5312.02]

Interestingly, the statute contains a definition of "Lot" which excludes property which is not occupied or intended to be occupied by a dwelling unit (excluding commercial projects and, because it refers to a

tract of land which has a separate tax parcel occupied by "a" [singular] "unit", could be interpreted to exclude communities where owners have multiple units on each lot) and "is formed when a larger parcel of land is subdivided pursuant to Chapter 711 of the Revised Code" [§5312.01(J)] which will exclude projects which have been formed out of lots in excess of 5 acres which were exempt from the subdivision under the definition of "subdivision" under RC 711.01.

II Documentation

A. Declaration

After the effective date of the Planned Community Act, no planned community can be established unless a declaration and set of bylaws is recorded in the counties in which the property is located. [§5312.02(A)] Apparently, deed covenants can no longer be used for the creation of subdivision restrictions which subject lots and owners to the characteristics which define a planned community under the statute.

There is a statutory laundry list of items which are to be included in the declaration and bylaws. §5312.02(B). There are, however, occasional items mentioned in the statute which, apparently, must be in the declaration in order to be enforceable, and caution should be taken to make sure they are in the declaration rather than in the Bylaws. For instance, any maintenance obligations which the declarant wants to assign to a party that is different from those assignments set forth in RC 5312.08(A) should be in the declaration because the statute permits deviation only where "otherwise provided in the declaration." See, also, the provisions of RC 5312.10(A)(1) which permit deviations where the same are "otherwise provided in the declaration."

For planned communities already in existence on the effective date of the statute, nothing in the Planned Community Act will be interpreted as invalidating any provision of a documents then governing the planned community. [§5312.02(C)]

2. Bylaws

Previously, Home Owners' Associations would have a recorded set of CCR's and Articles of Incorporation filed with the Secretary of State, but the Code of Regulations (By-Laws) would not be recorded. Now, like condominiums, the By-laws must be recorded with the Declaration.

The statute requires that the board of directors of a planned community in existence on the effective date of the statute, record a copy of the bylaws within 180 days after the effective date of the statute,

[§5312.02(D)(1)] and if such an association (in existence on the effective date of the statute) adopts bylaws after the effective date of the statute, the board is required to record them within 90 days after the date of adoption. [§5312.02(D)(2)] No previously established planned community is required to adopt bylaws, [§5312.02(D)(4)] but no civil action may be commenced against any person based upon any provision of the bylaws until the same are recorded. [§5312.02(D)(5)]

Corporations created under Chapter 1702 (the Ohio statute dealing with corporations not-for-profit) provides that if the incorporators do not duly adopt a code of regulations within 90 days after incorporation, the By-Laws must be adopted by a majority vote of the members. Lawyers will be faced with the task, 1st, of finding the By-Laws (which may have been lost years ago by the developer, and may reside on word processing equipment or files only recoverable with operating systems outdated by two generations. Secondly, if the attorney finds something which purports to be a set of By-Laws from ancient days, but there is no evidence that the set was adopted within 90 days of incorporation, the attorney may have to decide whether to run with it or start over.

Since the recorder frowns on documents which are not notarized, the attorney will need to prepare a certificate for someone to sign, attesting that this is, indeed, the By-Laws for the association.

Planned communities that amend their bylaws (which, according to a statutory reference dealing with planned communities in existence on the effective date of the statute, may be done by the board of directors, although such a course of action would be suspect if the bylaws require amendment by other procedures) must be recorded within 60 days after adoption. [§5312.02(D)(3)] There appears to be no sanction for a new planned community failing to record an amendment within such 60 day period since the prohibition against enforcement by civil action prior to such recordation, found in §5312.02(D)(5) is only applicable to planned communities which are in existence on the original effective date of the statute.

3. <u>Amendments</u>

Another interesting feature of the statute is that amendments to the declaration and bylaws require the consent of 75% of the owners, "unless otherwise specified in the declaration or bylaws." [§5312.05(A)] Unlike the condominium statute [§5311.05] the draftsperson may reduce the required percentage below the 75% level by putting a lower percentage in the original declaration or bylaws. Another anomaly is the fact that the requirement is stated in terms of "owners", without reference to the numbers of lots involved. Accordingly, ten persons who own one, single

unit as tenants-in-common could, theoretically, outvote 9 owners who own one lot each. The alternative would be to interpret the definition of "Owner" in §5312.01(K), a person who owns a lot", to mean that only people who owned a full lot (without fractional interests) could qualify as "members" and have a vote.

4. Articles of Incorporation

Another item to be included in the documentation of a planned community will be the articles of incorporation of the association. A planned community created after the effective date of the Planned Community Act will be required to be incorporated, no later than the date that the first lot is sold to a *bona fide* purchaser for value, as a corporation not-for-profit under Chapter 1702 of the Ohio Revised Code. [§5312.03(B)] For planned communities in existence prior to the effective date of the Act, note that §5312.06(D)(18)(b) authorizes an owners association, through its board of directors, to exercise powers that are necessary to incorporate the owners association as a nonprofit corporation, an authorization which is not necessary for an association created after the effective date of the act, since they will already be required to be incorporated.

For sample Planned Community documents see *Ohio Real Estate Law* Kuehnle & Levey, §56:112 Declaration of Covenants for Planned Community; §56:112.30 ByLaws for Planned Community Home Owners' Association; and §56:112.60 Articles of Incorporation for Planned Community Home Owners' Association

III Common Elements

"Common elements" is defined by RC 5312.01(C) as any property which a planned community's: "owners' association holds in fee or has use of pursuant to a lease or easement." A question may arise with respect to property for which the association has a repair responsibility but in which is has no right to use by lease or easement. The community might qualify as a "planned community" under the definitions of RC 5312.01(M)(1) or (3), but find itself without statutory authority [§5312.08(A)] to maintain such facilities which it does not own or have lease or easement rights to use, having, instead, to rely upon the authority of its constituent documents to raise funds to maintain such facilities. The drafting tip would be to make sure that the Association is given easement rights to "use" all facilities for which it is given maintenance, repair or replacement obligations.

Limited common elements are those common elements which the declaration designates as reserved for use by a certain lot or lots, to the exclusion of other lots. [§5312.01(I)]

Other than defining limited common elements, there are no specific provisions dealing with rights and obligations concerning the same, except for a prohibition against conveying a fee or security interest in any such limited common elements without the approval of all owners of the lots to which such limited common element is allocated.

The association is charged with the obligation of insuring common elements, without any distinction between common elements and limited common elements, [§5312.06(B)(1)] and, unless otherwise provided in the declaration, maintaining the limited common elements. [§5312.08(A)] Drafting Tip: Make sure that any obligations to maintain the limited common elements by any party other than the association are contained in the declaration.

IV. Planned Communities – Association – Board

1. Authority of Board

The Board of a planned community will exercise all power and authority of the owners' association. The board shall be made up of only members and their spouses or, if a unit is owned by someone other than an individual, any principal, member, partner, director, officer, trustee or employee of the owner. [§5312.03(A)(1)]

2. Declarant Control

The declarant is authorized to control the association (by appointment and removal of members of the board) for the period specified in the declaration, and such control may exerted until all lots have been transferred to owners. [§5312.03(A)(1)] Note that the definition of "declarant" found in RC 5312.01(G) is the owner who records the declaration. If a planned community is formed by covenants in recorded deeds (which could only happen with respect to planned communities created prior to the effective date of the Planned Community Act, since after such effective date, the only manner of creating a planned community would be by the filing of a declaration) [§5312.02(A)], then, arguably, there would be no declarant to exert such control. However, the original covenants permitting a non-declarant to exert such control would be effective without statutory blessing because §5312.15 gives precedence to the governing documents and because §5312.02(C) provides that nothing in the Planned Community Act invalidates any provision of a document that governs a planned community if that

provision was in the document at the original effective date of the act. Note that the statutory provision for the termination of developer control has no component requiring such transfer to be to a *bona fide* party who is not affiliated to the original declarant, so any transfer of all remaining, unsold lots, including a bulk transfer to a successor declarant or a transfer pursuant to a sheriff's deed, could terminate the period of the declarant's control of the board.

3. Election of Officers

The board "shall" elect, from among the members of the board, officers of the association including a president, secretary, treasurer, and other officers as the board may designate. [§5312.04(A)] Apparently, the board does not have the discretion to combine any two of the three named offices, nor decide not to have a treasurer in a planned community which exists only to enforce rules, and has no dues to collect. Additionally, the board has the authority, but is not required, to fill vacancies in the board "for the unexpired portion of any term." [§5312.04(B)] (Does the board have the authority to appoint someone to fill the vacancy until the next annual meeting?)

4. Control of Board Meetings

Sure to incite the wrath of some, the statute provides that "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." [§5312.04(F)]

V. Enforcement

1. Lien Rights

Owners have been found to be free from the enforcement of rules and regulations where such rule making authority is not referenced in the covenants or articles of incorporation or contained in recorded by-laws (which, prior to the enactment of the Planned Community Act [R.C. Chapter 5312] was rarely done) duly adopted by the association in accordance with Ohio's not-for-profit corporation statute, Chapter 1702. [See October Hill Camplot Owners' Association v. Kitchen, 2007-Ohio-4299 (8th District, Cuyahoga County, 2007)]

Of particular interest is the provision, found in many covenants prior to the effective date of the Planned Community Act, that the unpaid assessments (which have been upheld as the personal obligation of the owner [See Lake Seneca Property Owners v. Royer, 2008-Ohio-2087 (6th District, Lucas County, 2008)]) constitute a "lien" upon the property,

and/or that the association may file a "certificate of lien" without the benefit of having to go to court to obtain a judgment which, when certified in the county in which the property is located, becomes a lien on the property.

In Ohio, the recording of an instrument does not constitute notice unless its recording is provided for by statute. [See Stanton v. Schmidt, 45 Ohio App 203, 186 N.E. 851 (2nd District, Franklin County 1931)] While the recordation of a condominium "certificate of lien" is specifically authorized by statute, [§5311.18(A)(3)] no such statutory authority existed, until September 10, 2010, for the recorder to accept a "certificate of lien" for a home owners' association. Accordingly, it has been suggested that the mere recording of a certificate of lien by a home owners' association (while probably having the desired effect of getting the purchaser and title company to address the payment of the delinquencies at the next closing) did not provide constructive notice to a subsequent purchaser. Additionally, the filing of such a certificate, which is not authorized by Ohio law, could subject the association to liability for "slander-of-title". If the home owners' association maintains common areas over which the home owners have easement rights, and if such easement rights are subject to suspension or termination while the home owner is delinquent, the association occasionally considered, as an alternative, filing an affidavit under §5301.252, putting people on notice of "the happening of any condition or event that may create or terminate an estate or interest." [§5301.252(B)(3)]

The Planned Community Act has settled this question by providing authority for the Association to file a lien, and to include attorneys' fees. [§5312.12] The Act provides that such lien is junior in priority to the lien of first mortgages, but unlike the condominium statute, [See §5311.18(B)(1)] the first mortgage must be recorded prior to the filing of the certificate of lien in order to achieve its priority. [§5312.12(B)(4)] Note the strange language that starts by saying that the lien is prior to any lien subsequently arising, and then excepts the mortgage recorded prior to the recordation of the lien.

2. <u>Requirement of Joinder</u>

As with the condominium statute, the holder of any lien who commences an action to foreclose the lien, must join the association. [§5312.12(C)(1)] This is bound to cause the title companies trouble. We know, when the legal description says it's a condominium, that there is an association that must be joined. When the description is "Lot 1", it may not be evident that there is an association

3. <u>Due Process</u>

Also, the home owners' association is now required to comply with due process requirements (notice, opportunity for a hearing, etc.) prior to imposing a charge for damages or an enforcement assessment. [§5312.11(C)]

For additional material on the new Planned Community Act, see *Ohio Real Estate Law,* Kuehnle & Levey, 2011 Edition, Chapter 28.