Preface

Common interest communities in North Carolina have become the primary means of residential and recreational development in North Carolina over the past sixty years. The majority of North Carolinians that own their homes live in some form of common interest community. Because of their increasing popularity and use, these forms of development are regulated at every level of government. This book is intended to cover the basics of the laws applicable to common interest communities — from their planning and formation — through their operational phase with independent boards and community managers. This book is also designed to cover both planned communities and condominiums, inclusive of some of the major local regulations in the most populated areas of North Carolina.

The book also delves into some of the more “exotic” forms of common interest communities such as time shares and “dockominiums.” Most associations have professional management out of necessity and the important nature of the relationship between the association and the manager is addressed in this book as well. In many situations, an area of association operations is covered adequately in North Carolina by statute or case law. In others, there are blanks which need to be filled in with case law from other jurisdictions. In these situations, I have tried to include any case law from other jurisdictions which may be persuasive on issues unaddressed in North Carolina.

I have been fortunate to have had the guidance of a number of people professionally, including Henry W. Jones, Jr. and Hope Derby Carmichael, whom I have practiced with since my career began. I have been fortunate to have learned from those who have been involved in this practice area from North Carolina’s passage of the Condominium Act through the Planned Community Act and up to today. I want to thank Jake Gold and other staff members from the Community Association Institute for reviewing portions of Chapter 19 with respect to community managers. I am also appreciative of Hope Carmichael, Christopher Behm and Christine Goebel who provided valuable insight on Chapters 14, 17 and 21 respectively. I also want to thank my assistant, Victoria Mastroianni, for implementing some of my changes to earlier drafts of certain Chapters. I also am grateful to my parents, Linda and Gerald Edlin, for providing me with my formal education and their love and support in every aspect of my life. Last and certainly not least, I want to thank my wife, Missy, and our son, Scott, for having the patience to endure what has been relatively long project and for being such strong supporters of this endeavor. As with any project of this magnitude, it is not perfect and there are bound to be
mistakes in the book. These mistakes are mine and mine alone. I would welcome any constructive feedback or ideas for any future editions.

The trend with the legislature has been to limit the powers of common interest communities in North Carolina. While certainly statutory checks on some enforcement powers are appropriate (and in fact already exist), the fact is North Carolina’s municipalities and counties have systematically and expressly transferred heretofore governmental functions to these associations over a period of decades. The legislature has left the foreclosure provisions in the PCA and Condominium Act largely intact so associations have the resources to fund the operations that are in most cases today imposed on them by federal, state and local governments. Consequently, absent major and widespread structural changes in the way in which property is developed, it would appear that common interest communities are here to stay for the foreseeable future.

The laws relating to common interest communities are constantly changing in North Carolina. As this book goes to press, it is a misdemeanor in North Carolina for one to practice cosmetic art such as manicures without a license; however, community managers may collect millions of dollars in assessments from owners under threat of foreclosure without any license or oversight from any regulatory body. In the years to come, I anticipate the legislature eventually passing laws to regulate and license community managers in the State. When this happens, I hope to be able to update this book with the new licensing law. In this author’s opinion, such legislation is inevitable since community management is likely the only remaining industry in North Carolina where people who handle tens of millions of dollars of other people’s money, need not be licensed.

Legislation is introduced on almost a monthly basis, primarily geared towards addressing the perceived need for further owner safeguards. As I write this preface, there are almost a dozen pieces of legislation that relate to common interest communities under consideration by the legislature. One bill, House Bill 331, would clarify a number of issues related to the collection of assessments and foreclosure of liens to collect such assessments. In short, because of the overwhelming popularity of common interest communities, the laws relating to common interest communities will remain in a state of flux for the foreseeable future. As a result, updates of the book in the future will likely be necessary. Although this book is intended to be used by judges, lawyers and other government agencies, I hope that residential developers, managers and board members will find it useful too. Unfortunately, because of the volume of case law and statutes which now apply to common interest communities in North Carolina, most associations will find it necessary to seek counsel on many aspects of association operations. Nevertheless, I hope this book
will prove to be a convenient resource for board members as a starting point to find basic statutes and cases on point to their specific situation.

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1

Brief History of Restrictive Covenants and Common Interest Communities

§ 1.01. Common Interest Communities in the United States

Common interest communities today are everywhere. They are ubiquitous. They are in urban settings, rural settings, and perhaps most frequently, in suburbia. These creations exist in developments with small starter homes and condominiums, to sprawling estate homes worth millions of dollars. In the United States today, there are essentially three main types of common interest communities: planned communities, condominiums and cooperatives. In addition to these “main” types of common interest communities, there are also fringe “communities” such as time shares in resort areas, and even “dockominiums” in waterfront developments. The term “common interest” community encompasses all of these forms of development. For the past half century, common interest communities have become the primary means of residential and recreational development in the United States. In North Carolina, most common interest communities are embodied in one of four forms — the planned community, the condominium, time shares and marina developments which are inclusive of the “dockominium” form of ownership. The most prevalent and consistent forms of common interest communities throughout North Carolina are the planned community and the condominium. For the purpose of this book, I define a “planned community” the way the North Carolina legislature has:

…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…1

For purpose of this book, I define a “condominium” the way the North Carolina legislature has:

… real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real estate is

1 N.C.G.S. § 47F-1-103.
not a condominium unless the undivided interests in the common elements are vested in the unit owners…²

Throughout this book, for ease of reference when I refer to a “common interest community” or a “community association” I intend to include condominiums, planned communities and cooperatives. Most often, the term “homeowners association” is used when one refers to a planned community. Unless obvious from the context, when I reference a “homeowners association” in this book, I intend to refer to not only “planned communities” as such term is defined in Chapter 47F of the General Statutes, but also communities that may not necessarily meet the strict definition of a “planned community” in Chapter 47F, however, nevertheless are a “common interest community” in the sense that its members pay assessments to maintain property that is not necessarily their property.

The general idea behind all modern day common interest communities is that portions of the development (lots or units) are owned in the name of one or more persons or entities, however, all owners, share in the expenses of a portion of the development which is either jointly owned in some capacity by all the owners in the development or the association. The names of these types of communities are diverse across the country. In North Carolina, they tend to be called “homeowners associations” or “condominium associations” but may also be referred to as “property owners associations” or some similar iteration of the

² N.C.G.S. § 47C-1-103.
name.3 All “planned communities” are homeowners associations in North Carolina, however, not all homeowners associations are “planned communities.” Further, not all subdivisions are homeowners associations or planned communities.4 The means and methods by which the above concept is carried out differs based on whether the development is a condominium or a community with single family detached or attached homes — however, the concept is generally the same. There is some measure of shared sacrifice on the part of all owners in the development for the betterment, preservation, maintenance, use and enjoyment of “common areas” or “common elements” shared by all owners. In the case of townhomes, there is also shared sacrifice by all owners in favor of maintaining not only common areas, but the exterior of townhomes owned by other owners. Other common characteristics of common interest communities include restrictions governing and limiting the use of property within the community; private governing bodies (usually a board of directors) that make decisions with respect to the use and maintenance of the shared property; enforcement of use restrictions and a fairly homogenous demographic of

3 Less popular in North Carolina and elsewhere, is the “cooperative apartment” or “cooperative association” in which the stockholder possesses both stock and a lease, and the relationship between the tenant-shareholder and the owner-cooperative is largely determined by the certificate of incorporation, stock offering prospectus, the stock subscription agreement, and the proprietary lease. 15 Am.Jur.2d Condominiums and Cooperative Apartments 23 (1964); See also Sanders v. Tropicana, 31 N.C. App. 276, 281-82, 229 S.E.2d 304, 307-08 (1976). The Sanders case addressed a change to leasing restrictions in a 22-unit apartment complex in Charlotte owned by a cooperative corporation. The Court of Appeals decision in Sanders contains a good description of the history and shortcomings of the “cooperative apartment”: “Cooperative apartments flourished following both world wars for both economic and social reasons. They provided a ready means for an equity investment since a mortgage could be obtained more readily by the cooperative and then each tenant-shareholder was assessed a pro rata share of the mortgage payments, taxes, and maintenance costs … One disadvantage of the cooperative apartment, which may explain the more popular current use of the condominium form of apartment ownership, is that each tenant-shareholder is dependent upon the financial condition of the others. The failure of one to pay his proportionate share of the mortgage payment results in a default that must be cured by the other tenants if foreclosure on the whole property is to be avoided. Because of this characteristic many cooperative apartments failed during the great depression of the 1930’s.” Sanders at 280, 229 S.E.2d 304, 307 citing Berger, Condominium: Shelter on a Statutory Foundation, 63 Columbia L.Rev. 987, 993 (1963); Note, Cooperative Apartment Housing, 61 Harv.L.Rev. 1407 (1948). While the Condominium Act contains no definition of a “cooperative” the PCA does and defines it as “real estate owned by a corporation, trust, trustee, partnership, or unincorporated association, where the governing instruments of that organization provide that each of the organization’s members, partners, stockholders, or beneficiaries is entitled to exclusive occupancy of a designated portion of that real estate.” See N.C.G.S. § 47F-1-103 (8). Cooperatives have waned in popularity over the last half century in favor of the more conventional condominium form of ownership.

4 N.C.G.S. § 160A-376 (a) defines “subdivision” as “all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions when any one or more of those divisions is created for the purpose of sale or building development (whether immediate or future) and shall include all divisions of land involving the dedication of a new street or a change in existing streets.” Under this definition a subdivision may or may not include some form of homeowners association or planned community since this definition is substantially broader than the concept of a homeowners association or a planned community.
members by virtue of the restrictions and planning mechanisms put in place by the developer.

“Planned communities,” “homeowners associations,” “common interest communities,” “planned unit developments,” “common interest developments,” “condominiums,” “cooperatives” and “condominiums” or some form thereof have been around for centuries. In the United States, condominiums and townhome associations are the oldest forms of common interest communities. Multi-use quasi “condominium-like” dwellings were around in the United States prior to the Civil War as evidenced by case law from various jurisdictions which illustrate respect for multi-ownership interests in a single building. In *Rhodes, Pegram & Co. v. McCormick*, 4 Iowa 368, 371 (1857), the Supreme Court of Iowa was faced with whether a judgment creditor could execute on a judgment by levying on a three story building that was used by several different entities and people other than just the judgment debtor. In explaining the facts, the Supreme Court of Iowa indicated:

From this report, it appears that the half lot is 30 feet wide, by one hundred and 40 feet deep; that thereon is a three story building, thirty feet wide and 64 feet deep, which was erected in 1850 … that the lower stories were occupied by [McCormick] as a place of business, until the year previous to the 10th of November, 1856; that … McCormick finished the upper stories in part, and moved into them in December 1852, and has continued to occupy the same for a dwelling from that time; that each upper story has five rooms finished, suitable for a dwelling; that for one year after the house was finished, one of the rooms on the second floor, was occupied and used as a physician’s office; that for two years, another room on the same floor, was occupied and used as an attorney’s office; that still a third room was occupied for about 21 months, by certain attorneys and bankers; that the third story was all in one room until in 1854, and for one year immediately after the erection of the house, was occupied and used as a printing office. They further find, that the yearly rent of the cellar and first floor, is $800; that the second and third are occupied by said McCormick and family, and one Crabb and family, and are worth $300 per year; that there are no other buildings on said lot…

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5 See Hyatt, Wayne, *Condominium and Homeowner Association Practice: Community Association Law*, § 1.05 (a) (3rd Ed.) for a more detailed history of developments with the concept of shared responsibility for common area including the *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (1848) case in England; See also Rohan & Reskin, *Condominium Law and Practice*, § 2.01 (1987) indicating that by the Middle Ages separate ownership of floors and rooms was common in various parts of Europe and goes as far back as the 12th century in the case of German cities.

6 McCormick, 370-71
Chapter 1: Brief History of Restrictive Covenants and Common Interest Communities

In other words, this was a three story building, built in 1850 with the judgment debtor living on the upper floor and a physician, lawyer and banker occupying other rooms. When the judgment creditor obtained his judgment against McCormick (the man occupying the upper floor) the question arose whether the entire building could be sold to satisfy the judgment. The Supreme Court determined that only a portion of the building was exempt from the judgment creditor’s execution. The Supreme Court respected the nature of “ownership” of the separate floors in the building. In so holding, the Supreme Court of Iowa noted,

> It is not very unusual, certainly, for one person to own the soil and the first floor of a building, and another the second, and perhaps the third floor of the same building. So, one may own the soil, and other parties each own the different floors; and instances have doubtless occurred, where the owners of the soil had leased or conveyed to another, the right to build the first story and occupy the same, and by agreement acquired the right to build on the same walls other stories, to be owned and occupied by himself.\(^7\)

The Supreme Court explained what the purchaser would acquire when the floors “owned” by the judgment debtor were sold:

> The purchaser under the execution acquires the right to the possession of the first floor and cellar, and every part of each, which right is to continue so long as the same is tenantable. He may rent it, and in every respect use and enjoy it as his own property, having regard to the rights of the persons owning and occupying the remaining portion of the building. He has a right to protect his walls; to make all necessary repairs; and to all needful means of access to his said premises. The owner or occupant of the upper stories is to be in no manner disturbed in the possession of said premises; has a right to pass and repass by the ordinary and constructed passage or stairway, so as to enjoy and use said homestead; but must do nothing to endanger the property of the purchaser under the execution, nor to unnecessarily impair his rights.\(^8\)

This is one of the earliest courts in the United States to recognize that the floors in a single building could be legally recognizable separate pieces of property all entitled to their own rights. Note that the Iowa Supreme Court identified several important concepts which are common in condominium living today with respect to unit owners’ rights: (1) the unit owner has a right to use and enjoy his unit;  

\(^7\) Id. at 375  
\(^8\) Id. at 375-76.