

# Community Trends®



## LEGISLATIVE UPDATE

**CHRISTINE F. LI, ESQ., CCAL**  
PARTNER, GREENBAUM, ROWE, SMITH & DAVIS LLP.  
LEGISLATIVE ACTION COMMITTEE CHAIR

Dealing with construction defects in planned residential communities has legal ramifications and complications due to the common improvements, operations, and plan of ownership which distinguish these communities. The individual home is required, under the New Home Warranty and Builders' Registration Act, to be enrolled in a new home warranty program. Accordingly, the pursuit of any defects within the home will be by the individual owner against the developer and possibly require the filing of a claim with the warranty plan in which the home has been enrolled.

The governing board of a community association is generally empowered to pursue the claims affecting the common elements of a condominium, or the common property of a community consisting of subdivided lots. Common features and amenities, such as recreational facilities and drainage basins, are scrutinized in either form of homeownership. Within a condominium, components, such as the roof and common building systems, are evaluated by the community association and its engineering professionals.

I am quick to say that I do not recall any bills which the Legislative Action Committee has reviewed in the recent past that directly address the rights of community associations when faced with construction defects; however, several bills have been proposed in response to problems experienced by community associations when market conditions or other circumstances have delayed the full buildout of a condominium or community after some of the homes have been sold and occupied by individual homeowners.

The focus of the bills is not the construction defect itself and potential redress of the community association, but rather when the community association may pursue construction defect claims and the rights and remedies afforded to the association at such time.

Under the New Jersey Condominium Act (the "Condominium Act") and the Planned Real Estate

***"Another bill that is intended to protect purchasers in planned communities relative to the completion of construction and potential defects is S1638."***

Development Full Disclosure Act ("PREDFDA"), once 75% of the units have been conveyed, the developer is required to surrender control of the board to owners, other than the developer. Only then will the owners have full authority to make decisions that bind the community association. Owners do have the right to elect representatives to the board when 25% and 50% of the units have been conveyed, but the owners will not gain control of a majority of the positions on the board until 75% of the units have been conveyed.

The transition and ultimate surrender of control of the board to owners sometimes become problematic when the

## **LEGISLATIVE UPDATE...**from page 1.

community has a protracted buildout period. During the time when construction continues or units are offered for sale by the developer in the ordinary course of business, the developer has the right to hold a majority of the positions on the board and generally dictate the decisions of the board.

Bills have been introduced to limit the period of time in which the developer may retain control of the board. A3646/S863 was introduced on April 16, 2016, as an amendment to the provisions governing the current gradual turnover of positions on the board under PREDFDA. As a response to extended periods of control by the developer, even though the developer may still have active construction plans or offer units for sale in the ordinary course of business, the bill gives unit owners other than the developer the right to elect all of the members of the governing board upon the conveyance of 75% of the units "within a single condominium structure, or two years after the substantial completion of a single condominium structure, whichever occurs first."

While the amendatory language may be seen to address the frustration of homeowners as the developer continues to control the board while building or offering homes, it is an example of why the approach of "one size fits all" cannot be employed when drafting legislation, especially when it is to amend existing laws such as the Condominium Act and PREDFDA. A simple (and, admittedly, extreme) example of the untoward consequences of legislation, such as this, would be its application to a condominium proposed to consist of 100 townhouse-style condominium buildings, with each building to contain four units. Would this mean that: (1) if one building of four units was completed and three of the units (i.e., 75% of the units) were conveyed, and (2) due to circumstances beyond the control of the developer (e.g., an unforeseeable environmental condition) the construction of the second building did not begin until more than two years later, the developer should be required to surrender control of the board when it has 99 more buildings to construct? The negative impact upon the existing homeowners and the viability of the development is obvious.

Another bill that is intended to protect purchasers in planned communities relative to the completion of construction and potential defects is S1638. This bill was introduced on February 16, 2016. The bill amends PREDFDA by giving the Department of Community Affairs the power to adopt, amend, or repeal such rules and regulations as are reasonably necessary for the enforcement of the provisions of PREDFDA. The rules may compensate purchasers for failure of a developer to perform in accordance with the terms of any contract or public statement "including, without limitation, failure of the registrant to satisfactorily complete all promised common elements, such as streets, drainage, and recreational facilities,...provisions establishing a transition procedure to ensure that associations that are no longer under the control of the developer have the benefit of an engineering survey of all common elements provided by the developer, have all necessary corrections made by the developer, and have a full financial accounting of association activities during the period of developer control provided by the developer; provisions authorizing board members elected by the unit owners prior to transition to represent the interests of the unit owners when such interests are adverse to those of the developer and to delegate such authority to committees of unit owners..."

Subject to certain limitations, the bill also allows claims to be filed under the New Home Warranty and Builders' Registration Act by the association, members of the board who are elected by the unit owners, or a committee appointed by such members, and by an owner or a group of owners of units whose unit(s) are affected by the claims. The scope of the bill is broad and the remedies available to the association require clarification.

Bills intended to protect the interests of homeowners, including the manner in which construction defects are to be addressed, must be drafted so as to anticipate the adverse consequences of empowering multiple parties to take disparate and, potentially, conflicting action.

I will keep you posted on the status of these bills and others as they come before the LAC. See you in September! ■