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Wise v. Harrington Grove Community Association, Inc.: A Pickwickian Critique

Patrick K. Hetrick
Campbell University School of Law

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ARTICLES

WISE v. HARRINGTON GROVE COMMUNITY ASSOCIATION, INC.: A PICKWICKIAN CRITIQUE

The North Carolina Planned Community Act Revisited

PATRICK K. HETRICK*

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* Professor of Law, Norman Adrian Wiggins School of Law, Campbell University. The author gratefully acknowledges the help of two research assistants: Manley Andrew "Drew" Lucas and Meredith Rochelle Roberts.

I. INTRODUCTION

A. *A Picwickian Construction*

Several years ago, I purchased a century-old set of novels by Charles Dickens. Although antiques, the burgundy colored imitation leather volumes are not rare first editions and cost only $4.00 each. They are, however, packed full of delightful literary treasures. In *The Pickwick Papers*,[1] for example, the first reported meeting of the Pickwick Club includes an accusation by Mr. Pickwick that another member of the club, "smarting under the censure which had been heaped upon his own feeble attempts at rivalry," was behaving in a "vile and calumnious manner."[2] The minutes of the club then reflect the following exchange:

> Mr. Blotton (of Aldgate) rose to order. Did the honourable Pickwickian allude to him? (Cries of "Order," "Chair," "Yes," "No," "Go on," "Leave off," etc.)
>
> Mr. Pickwick would not put up to be put down by clamour. He *had* alluded to the honourable gentleman. (Great excitement.)
>
> Mr. Blotton would only say then, that he repelled the hon. gent.'s false and scurrilous accusation, with profound contempt. (Great cheering.) The hon. gent. was a humbug. (Immense confusion, and loud cries of "Chair," and "Order.")
>
> Mr. A. Snodgrass rose to order. He threw himself upon the chair. (Hear.) He wished to know whether this disgraceful contest between two members of the club should be allowed to continue. (Hear, hear.)
>
> The Chairman was quite sure the hon. Pickwickian would withdraw the expression he had just made use of.
>
> Mr. Blotton, with all possible respect for the chair, was quite sure he would not.
>
> The Chairman felt it was his imperative duty to demand of the honourable gentleman, whether he had used the expression which had just escaped him in a common sense.

1. CHARLES DICKENS, THE POSTHUMOUS PAPERS OF THE PICKWICK CLUB (Hazell, Watson & Viney 1900) (1836).
2. *Id.* at 16.

> Mr. Blotton had no hesitation in saying that he had not - he had used the word in its Pickwickian sense. (Hear, hear.) He was bound to acknowledge that, personally, he entertained the highest regard and esteem for the honourable gentleman; he had merely considered him a humbug in a Pickwickian point of view. (Hear, hear.)
>
> Mr. Pickwick felt much gratified by the fair, candid, and full explanation of his honourable friend. He begged it to be at once understood, that his own observations had been merely intended to bear a Pickwickian construction. (Cheers.)[3]

The above quoted passage came to mind for several reasons as I pondered how to analyze and evaluate *Wise v. Harrington Grove Community Association, Inc.*,[4] a truly landmark decision by the North Carolina Supreme Court, its first stab at the North Carolina PCA.[5] First, was that *honourable* appellate body interpreting that Act by drawing upon Pickwickian jurisprudence? (Hear, hear.) Second, since I have the highest regard and esteem for the *honourable* members of the Court, shouldn't any criticisms that I now make of that decision be considered merely a Pickwickian point of view? (Cheers.)

In this article, I will examine various aspects of the *Wise* decision, including the approach of the North Carolina Supreme Court to both the common law of covenants and the PCA itself. I will also evaluate the impact of a recent amendment to the PCA, and revisit and reflect on selected legal issues raised by the passage of the PCA now that five years have elapsed since its effective date. While the article focuses specifically on the North Carolina PCA, it is important to keep in mind that a "planned community" is but one form of real estate development and governance that is now popularly denominated "common-interest communities."[6]

B. *"Planned Community" and "Common-Interest Community" Defined*

"Common-interest communities" are residential real estate developments in which a homeowners' association or some other entity operates in many respects as a private government by enforcing rules and regulations of the development, collecting annual and sometimes

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3. *Id.* at 16-18.

4. *Wise*, 357 N.C. 396, 584 S.E.2d 731 (2003).

5. N.C. GEN. STAT. § 47F (1999). For ease of discussion, the Planned Community Act will often be referred to as the "PCA" in this article.

6. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6 (2000). Some authors and real estate attorneys also refer to this generic category as "common interest developments."

special assessments, and managing the common areas.[7] This general term therefore encompasses a "planned community," a condominium, and a cooperative form of real estate development. Other terms such as "common interest development" or "planned unit development" may also be used to describe a planned community.

The law of common interest communities has now been addressed in several uniform laws and the new Restatement of Property. North Carolina's PCA is based on the Uniform Planned Community Act (UPCA).[8] The National Conference of Commissioners on State Laws has for all practical purposes reduced the national importance of the UPCA with the approval in 1982 of the Uniform Common Interest Ownership Act (UCIOA).[9] The UCIOA combines coverage of three existing uniform acts: The Uniform Planned Community Act, the Uniform Condominium Act, and the Model Real Estate Cooperative Act. Another influential organization, The American Law Institute, completed its Third Restatement of Property, Servitudes in 2000.[10]

The UPCA and the UCIOA have many similarities. Research on any specific issue of statutory interpretation should therefore include an investigation of appellate court decisions from jurisdictions that have adopted either uniform act.[11] In addition, the wording of portions of the Uniform Condominium Act sometimes parallels language in the UPCA and UCIOA.

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7. The Restatement of Property defines the term as follows:

(1) A "common-interest community" is a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal

(a) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or

(b) to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood.

RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 (2000).

8. 7B U.L.A. 1 (1980).

9. 7 U.L.A. 471 (amended 1994)(2002).

10. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6 (2000). This Restatement also deals extensively with a restatement of the law dealing with covenants and restrictions in general.

11. Alaska, Colorado, Connecticut, Minnesota, Nevada, West Virginia and Vermont have adopted versions of the original or amended UCIOA. Arizona, North Carolina, Oregon and Pennsylvania have adopted versions of the PCA.

C. *The Broader Significance of Wise*

Wise presents a perfect fact situation for analyzing and confronting a very crucial specific issue, the retroactive provisions of the PCA. Of much more importance, however, is the way in which the case reflects the court's narrow approach and judicial philosophy when interpreting the Act. In light of a recent amendment to the Act by the General Assembly,[12] it is this bigger picture or issue of attitude toward the Act that has potentially long lasting and adverse ramifications to real property lawyers representing homeowner associations, developers and homeowners in planned communities. In addition, any restrictive interpretation of the Planned Community Act may result in a ripple effect on future interpretations of the North Carolina Condominium Act.[13] The North Carolina Condominium Act, except for one *per curiam* decision,[14] has never been interpreted in any meaningful way by the North Carolina Supreme Court.

The facts of *Wise v. Harrington Grove* are typical of one major category of disputes between property owners in a planned community and the homeowners association.[15] In *Wise*, homeowners in a planned community, prior to closing on the property, prudently sought and obtained the approval of the association's architectural control committee (ACC) to construct an in-ground swimming pool.[16] One week after closing, the homeowners commenced construction of the pool, and the construction project included a retaining wall.[17] The wall's height, which varied from eleven to twenty-seven inches, might have looked like the Great Wall of China to your average ant, but it was a far cry from an imposing structure scarring the landscape. The responses of the ACC and homeowners association board are summarized by the Supreme Court as follows:

> [A]fter learning of the retaining wall, the ACC revoked its earlier approval and retroactively denied plaintiffs' request for approval of the pool construction as to the retaining wall. By letter dated 13 May 1999, defendant alerted plaintiffs that the ACC had proposed the levy-

12. *See infra*, p. 160.

13. N.C. GEN. STAT. § 47C (1999). There are numerous instances where PCA provisions are substantially identical to counterpart provisions in the North Carolina Condominium Act; indeed, the organization and language of Chapter 47C served as a model for Chapter 47F. The Condominium Act contains more substantial consumer protections.

14. Richland Run Homeowners Ass'n, Inc. v. CHC Durham Corp., 346 N.C. 170, 484 S.E.2d 527 (1997).

15. *See Wise*, 357 N.C. 396, 584 S.E.2d 731.

16. *Id.* at 398, 584 S.E.2d at 734.

17. *Id.*

ing of a fine against plaintiffs for violation of the covenants found in the declaration. On 7 July 1999, defendant's board met to consider the fine and heard presentations from plaintiffs and the ACC. After the board meeting, defendant asserted that the wall was constructed without the required ACC approval and imposed a fine.[18]

When one reads the condensed facts as reported in the appellate court decision, there is a longing to have Paul Harvey tell "the rest of story." Why couldn't the homeowners association have worked in some way with the newcomers, and vice versa? Was the wall that obnoxious? Presumably, plans for its construction were not disclosed on the pool construction proposal originally submitted to the ACC. Was this "much ado about nothing," or were there legitimate community and policy concerns that dictated a hard line by the ACC and association on this matter? Let's assume, for now, that the toe-stubbing retaining wall was not a monumental deviation from either the ACC rules or the private restrictions themselves. Let's also assume that a homeowners association does not have the authority to fine violators under either the covenants and governing documents of the planned community or some statutory source such as the Planned Community Act.

II. THE PLANNED COMMUNITY ACT

A. *The Common Law Baggage We Carry With Us*

The flexibility of the common law of property in terms of its ability to adapt to contemporary real estate legal scenarios is nothing less than amazing. At the same time, however, the tendency of lawyers, judges and academics to deal with complex modern real estate developments with nothing but the common law of property as a tool is analogous to the difficult proverbial job of trying to fit a square peg into a round hole. The common law baggage that we carry with us, therefore, is that package of law now known generically in the Restatement of Property as "servitudes," but known to most of us yet as the study of covenants running with the land at law and equitable servitudes. Without help from the legislature in the form of planned community/common-interest community legislation, property developers are stuck with the traditional rules and remedies of the common law.

18. *Id.* One difference between the operation of private governments/planned communities, and public local governments is what can best be described as the propensity of the former to engage in the "hair-trigger" fining of homeowners for violations of rules and restrictions. Cities and counties, by contrast, usually engage in an extended process of notices before proceeding with enforcement of ordinances.

What are the traditional remedies of a homeowners association for a violation of a private restriction on land? That association, assuming it has standing, or any other plaintiff suing to enforce a violated restriction can seek a legal or equitable remedy. The remedy at law can be an injunction or damages; the equitable remedy is almost always an injunction. It is rare that a plaintiff seeking to enforce a covenant will seek damages as a remedy. Damages in this factual context are difficult to prove and inadequate as an ultimate remedy. This is the case because the violation of a covenant is traditionally allowed to continue with the benefited property owners theoretically compensated for their economic loss. Reported appellate court decisions awarding damages - or even discussing them at all - are the exception, not the rule.[19]

The enforcement of restrictions in equity is by far the most common method of enforcement, but it is often fraught with expense, delay, and uncertainty. Seeking an injunction in equity to prevent or cure a restriction violation subjects the plaintiff to many but not all of the rules and defenses of equity.[20] These defenses include changed circumstances, waiver, laches and estoppel. While it is true that the defendant often has a heavy burden of proof in establishing one of the traditional equitable defenses, injunctions are nonetheless not everyday events in traditional common law homeowners association govern-

19. *See, e.g.*, Womack v. Ward, 186 S.W.2d 619 (Tenn. Ct. App. 1944) (involving what the court termed a "restrictive agreement" to create a joint driveway. One of the parties then constructed a minor encroachment in the driveway. The Court found that no actual damages resulted from the breach and awarded the plaintiff $10.00 in nominal damages.) Siegel v. Lyle, CV9705720875, 2000 Conn. Super. LEXIS 864 (granting injunctive relief to require compliance with covenants but denying money damages to former homeowners in the development who claimed that their home sold for a lower sales price because of defendant's violations of covenants).

20. *See, e.g.*, Persimmon Hill First Homes Ass'n v. Lonsdale, 75 P.3d 278 (Kan. Ct. App. 2003). The trial court denied an injunction to enforce an equitable restriction on the theory that there was no evidence that a nonconforming fence was decreasing property values in the development. The Court of Appeals of Kansas reversed, reasoning in part as follows:

> Enforceability is based on the equitable principle of notice, whereby a person who takes land with notice of a restriction upon it will not be permitted to act in violation of that restriction. Persons who take real property with notice will not be permitted to act in violation thereof, and may be enjoined in equity.

Id. at 281 (citations omitted). After discussing traditional equitable defenses to the enforceability of restrictive covenants, the Court adds, "[d]espite a plethora of cases discussing injunctive relief for violation of restrictive covenants, we are unaware of any expressed requirement of an independent showing of irreparable injury in this context." *Id.* at 282 .

ance. As a practical matter, a person violating a private restriction has the advantage, especially if he or she is willing to retain an attorney. You pay your own attorney fees in North Carolina in the absence of an applicable statute altering that rule, so, until the advent of the PCA, the homeowners association had to be willing to put its litigation money where its enforcement mouth was.

B. Runyon v. Paley: *A Judicial Treatise on the Common Law*

One cannot understand the need for uniform legislation dealing with common interest communities without a review of the common law of covenants and servitudes. Louis Meyer, one of the most talented Supreme Court justices and legal scholars in North Carolina history, authored *Runyon v. Paley*,[21] a superbly drafted modern landmark decision on the common law of covenants running with the land at law and equitable servitudes.[22] *Runyon* was decided in 1992, seven years prior to the enactment of the PCA and eleven years prior to *Wise*. To me, the opinion symbolizes the complications, inadequacies and shortcomings of the common law of covenants and restrictions, at least from the point of view of the person seeking to enforce them. In *Runyon*, Justice Meyer methodically dissects that common law. After reading what the plaintiffs had to go through to enforce a very basic restriction on land against a defendant who purchased with full notice, one gains an appreciation of the need for a clear, statute-based source of authority for covenants and restrictions on land.

Runyon is helpful because its facts are so basic. There is no subdivision *per se*. There is no homeowners association. There is no extensive and separate declaration of restrictive covenants.[23] Instead, we have Mrs. Gaskins living on her land on scenic Ocracoke Island and conveying away lots to various purchasers.[24] Some of the purchasers took title with no restrictions and constructed single-family residences on them. Obviously concerned about preserving the single-family residential character of her neighborhood, Mrs. Gaskins inserted a simple

21. *Runyon*, 331 N.C. 293, 416 S.E.2d 177 (1992).

22. *Runyon* has found its way into leading law school casebooks, including the following: A. JAMES CASNER ET AL., CASES AND TEXT ON PROPERTY 962 (5th ed. 2004); JESSIE DUKEMINIER & JAMES E. KRIER, PROPERTY 863 (5th ed. 2002); GRANT S. NELSON, ET AL., CONTEMPORARY PROPERTY 625 (2d ed. 2002).

23. Mrs. Gaskins' little development would not qualify as a "planned community" under the PCA for several reasons: the development was less than 20 lots and there were no common areas for which individual lot owners could be assessed for maintenance and upkeep. *See* N.C. GEN. STAT. § 47F-1-103 (1999). Thus, if a similar fact situation arose today, *Runyon* and the common law would govern.

24. *Runyon*, 331 N.C. at 296, 416 S.E.2d at 181.

but clear set of restrictions in the deed of the lot in question.[25] That lot was located across the road from Mrs. Gaskins' home.[26] Soon after that deed was executed, Mrs. Gaskins died and her daughter, Mrs. Williams, became owner of the Gaskins' retained land and residence.[27] Years later, defendants acquired the restricted lot - indeed the only restricted lot in the immediate area - with full notice of the restrictions, formed a partnership with a real estate developer, and began constructing condominium units on the lot in direct violation of the express terms of the restrictions.[28] Plaintiffs, Mrs. Williams and other neighbors, the Runyons,[29] brought suit to enjoin that construction.

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25. The covenants/restrictions were very basic but adequately written and, in my opinion, clear. They are set forth in a 1960 deed to a predecessor in title to the defendants:

> But this land is being conveyed subject to certain restrictions as to the use thereof, running with said land by whomsoever owned, until removed as herein set out; said restrictions, which are expressly assented to by [the Brughs], in accepting this deed, are as follows:
> (1) Said lot shall be used for residential purposes and not for business, manufacturing, commercial or apartment house purposes; provided, however, this restriction shall not apply to churches or to the office of a professional man which is located in his residence, and
> (2) Not more than two residences and such outbuildings as are appurtenant thereto, shall be erected or allowed to remain on said lot. This restriction shall be in full force and effect until such time as adjacent or nearby properties are turned to commercial use, in which case the restrictions herein set out will no longer apply. The word 'nearby' shall, for all intents and purposes, be construed to mean within 450 feet thereof.

Id. at 297, 416 S.E.2d at 181. The habendum clause then adds, in part, "[b]ut subject always to the restrictions as to use hereinabove set out." *Id.*

26. *Id.* at 298, 416 S.E.2d at 181.

27. *Id.*

28. *Id.* at 298, 416 S.E.2d at 181. One would assume that the defendant who purchased the lot paid a far market value that reflected the residential restrictions in the chain of title. Unrestricted land on this scenic island would have commanded a significantly higher purchase price.

29. The Runyons' claim of a right to enforce presented a more challenging issue. The Runyons had originally owned the lot in question. On the day before the lot was conveyed to defendants' predecessor in title with new residential restrictions placed on it, the Runyons had swapped the lot for a nearby lot and an easement. As to the Runyons' right to enforce, the Supreme Court agrees with the Court of Appeals and Superior Court. Justice Meyer's opinion notes, in part:

> [W]e conclude that plaintiffs Runyon have failed to show that the original covenanting parties intended that they be permitted to enforce the covenants either in a personal capacity or as owners of any land they now own. The Runyons were not parties to the covenants, and neither they nor their property are mentioned, either explicitly or implicitly, as intended beneficiaries in the deed creating the covenants or in any other instrument in

Incredibly, the trial court granted defendants' motion to dismiss, and more incredibly, the Court of Appeals affirmed.[30] For Mrs. Williams, the Supreme Court reversed the decision of the Court of Appeals.[31]

So, to place my spin on this scenario, we have a simple fact situation in which a successor in interest to the original covenantee now owns the retained and benefited land and seeks to enforce a restriction. Through *mesne* conveyances, the defendant is the successor in interest to the original covenantor. The defendant took title to the burdened lot with notice of the restriction but had the advantage of several centuries of confusing and often inconsistent court decisions dealing with the enforceability of covenants at law and in equity. It takes a very learned and scholarly North Carolina Supreme Court justice fifteen carefully crafted pages to attempt to straighten things out. It also takes both plaintiffs and defendants on a needless journey through three levels of the court system and many thousands of dollars in legal fees.

In the process of meticulously setting forth the requirements of the common law, Justice Meyer, perhaps unintentionally, exposes a tedious and tired system of judge-made common law confusion that has frustrated real property lawyers for years. With apologies to Shakespeare: "How like the prodigal doth she return, with over-

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> the public records pertaining to defendants' property. Although they own property closely situated to defendants', in an area which was primarily residential at the time the restrictive covenants were created, they did not acquire their property as part of a plan or scheme to develop the area as residential property. In fact, they acquired their property free of any restrictions as to the use of their property. Finally, the Runyons purchased their property prior to the creation of the restrictive covenants at issue here, and thus they cannot be said to be successors in interest to any property retained by the covenantee that was intended to be benefitted by the covenants.

Runyon, 331 N.C. at 312, 416 S.E.2d at 190.

30. Runyon v. Paley, 103 N.C. App. 208, 405 S.E.2d 216 (1991), *rev'd*, 331 N.C. 293, 416 S.E.2d 177 (1992). Judge Greene dissented. I write "incredibly" with reference to Mrs. Williams only, because, with reference to her claim, the rationale of the Court of Appeals that this was a purely personal covenant enforceable only by the original covenantee, Mrs. Gaskins, ignores the express language used. This allows purchasers of property with full advance notice of an obligation that they should be required to live by, to evade that obligation on some distorted technicality of the common law. As with many modern court decisions, the Court of Appeals decision is contrary to the spirit of *Spencer's Case*.

31. *Runyon*, 331 N.C. at 316, 416 S.E.2d at 192. The Supreme Court affirmed the decision of the Court of Appeals as to the other plaintiffs, the Runyons. This portion of the decision represents a very strict view of the enforcement of covenants and has been subject to criticism.

weather'd ribs and ragged sails. Lean rent and beggar'd by the strumpet wind!"[32]

Following the traditional order of analysis, Justice Meyer first discusses the enforceability of covenants "at law" and follows that with an analysis "in equity." This traditional dual analysis that Justice Meyer is required by judicial duty to follow adds unnecessarily to the confusion surrounding the law of covenants and restrictions. In hornbook fashion, he patiently teaches the reader that "real covenants at law" must touch and concern land, must involve the appropriate privity of estate - both horizontal and vertical - and must have been intended to run with the land.[33] Here, it should be added that "the law" of covenants and restrictions and their enforceability is easy to state. Any first year law student can confidently spit out the black letter list of requirements from *Spencer's Case*[34] as he or she embarks on answering a final examination question on covenants. As is so often the case in legal disputes, however, it is the application of that law to the facts, not the regurgitation of the rules themselves that has tormented lawyers, judges and law students for centuries. In too many covenants cases, legal analysis departs from the basic and equitable merits of the controversy with the rules for enforcement becoming ends in themselves.

When I observe that "the law" of covenants is easy to state, I should quickly add that some of the definitions of the elements in the legal formula for enforcement are confusing. Take the "touch and concern" requirement.[35] Citing a famous landmark court decision,[36] and then referring to the most famous treatise on covenants,[37] Justice Meyer makes what is perhaps the understatement of the entire opinion when he observes that "the touch and concern requirement is not capable of being reduced to an absolute test or precise definition."[38]

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32. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act 2, sc. 6.

33. *Runyon*, 331 N.C. at 299-300, 416 S.E.2d at 183. There is also a "notice" requirement, discussed later in the opinion and assumed at this point.

34. 77 Eng. Rep. 72 (K.B. 1583). *Spencer's Case* is famous or infamous for establishing the requirements for the running of the burden of a covenant with the land. *Runyon*, on the other hand, deals primarily with whether the benefit runs to a successor in interest to the original covenantee.

35. Please.

36. Neponsit Prop. Owners Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 795-96 (N.Y. 1938). This case used to be included in most first year property law casebooks.

37. CHARLES CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 96 (2d ed. 1947).

38. *Runyon*, 331 N.C. at 300, 416 S.E.2d at 183.

He continues his discussion of the "touch and concern" requirement, in part, as follows:

> For a covenant to touch and concern the land, it is not necessary that the covenant have a physical effect on the land. It is sufficient that the covenant have some economic impact on the parties' ownership rights by, for example, enhancing the value of the dominant estate and decreasing the value of the servient estate. It is essential, however, that the covenant in some way affect the legal rights of the covenanting parties as landowners. Where the burdens and benefits created by the covenant are of such a nature that they may exist independently from the parties' ownership interest in land, the covenant does not touch and concern the land and will not run with the land.[39]

If transplanted to the factual setting of a modern, complex planned community or common interest community of any form - so long as they are clothed with sweeping and substantial statutory authority - the "touch and concern" requirement should become irrelevant. This ought to be the case because the primary authority for enforcement has become a statutory one, and this ought to be the case even though many covenants and restrictions in a planned community do indeed "touch and concern" and therefore would comply with the common law requirement. It is also likely, however, that any number of rules and regulations in a planned community do not *per se* "touch and concern."[40]

Other factors embedded firmly in the touch and concern requirement are flawed when applied to many contemporary planned community fact situations. For example, although this was not the case in the facts of *Runyon*, it is possible that the value of the burdened land is materially enhanced by the existence of a comprehensive set of covenants and restrictions in a planned community/common interest development setting. Covenants in these scenarios are good things from an economic impact perspective. North Carolina case law, clinging tenaciously to outmoded common law concepts, stereotypes covenants and restrictions as bad things that diminish the unfettered use of land. To cite another example, Justice Meyer's discussion of "touch and concern" above emphasizes "It is essential, however, that the covenant in some way affect the legal rights of the covenanting parties as land-

39. *Id.* (citations omitted).

40. Later in this article, I will propose a new nomenclature to replace the "covenants at law" and "equitable servitudes" terminology. I will suggest that all covenants, restrictions, rules and regulations be denominated "quasi-public ordinances" (QPOs) where they are based primarily on statutory authority. *See infra*, p. 157.

owners."[41] It would be more accurate, in the context of a planned community, however, to observe that the primary focus should be on the legal rights of the affected parties as citizen members of the planned community as much as in their capacity as landowners.

Although ancient in origin and subject to different interpretations in some jurisdictions, the general "privity of estate" requirements of the common law of covenants will always be present in a planned community/common interest development setting and therefore need not be discussed in an enforcement action by a homeowners association against a homeowner.[42] Remember, the primary source of a homeowner's rights vis-a-vis the association is statute-based. The Restatement (Third) of Property - Servitudes dispenses with the horizontal privity requirement.[43]

Concerning the "intent" requirement for covenants to run with the land at law, the defendants in *Runyon* argued that, because the covenant language employed by the original covenantee, Mrs. Gaskins, did not *expressly* specify that persons other than the covenantee had a right to enforce or that the covenant was *expressly* for the benefit of other land in the area, the benefit of the covenant was merely personal to Mrs. Gaskins. Therefore, it was not enforceable by her daughter, her successor in interest and current owner of some of the land Mrs. Gaskins originally retained.[44] Justice Meyer wisely rejected this weak argument.[45] But whatever the common law rule, the "intent" element will always be present in a planned community created pursuant to the statutory authority of Chapter 47F of the General Statutes. In addition, the creation documents establishing the planned community will without exception include extensive language making it clear that the restrictions are not merely personal to the initial covenantors and covenantees.

But wait, there's more! After the dust settles on a meticulous discussion of the law of "covenants at law," the Supreme Court in *Runyon* concludes that Mrs. Williams, the successor in interest to the retained/benefited land of the original covenantee, can enforce the covenants "at law," but the Runyons, the parties involved in the "land swap" on the day before the covenants were originally placed on the defendants' burdened lot, could not enforce for several reasons including a lack of

41. *Runyon*, 331 N.C. at 300, 416 S.E.2d at 183.

42. Even that rare combination of entrepreneur and scoundrel, the successful adverse possessor, will be subject to the statute-based association authority.

43. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.4 (2000).

44. *Runyon*, 331 N.C. at 304, 416 S.E.2d at 185.

45. *Id.* at 304-305, 416 S.E.2d at 185.

horizontal privity. This requires the Supreme Court to explore the enforceability of the restrictions "in equity," a route that all courts must take if they are to properly analyze a covenant enforcement issue within the confines of the common law. The Runyons could not enforce the covenants at law, but could they in equity? This requires that Justice Meyer once again explore elements of touch and concern, privity, intent, and notice.

The landmark case dealing with equitable servitudes was decided in 1848. In *Tulk v. Moxhay*[46] the Court of Chancery dealt with a fact situation comparable to the facts in *Runyon*. In *Tulk*, a purchaser of land, with actual knowledge that it was restricted to use as a small garden and park[47] for the benefit of surrounding residences, made known his intent to construct buildings on the park grounds and thereby totally disregard the restrictions. The defendant was armed with the knowledge that the covenant was not enforceable against him at law. After asserting the jurisdiction of his court, the Lord Chancellor found that where an "equity" was attached to the property, "no one purchasing with notice of that equity can stand in a different situation from that of the party from whom he purchased."[48] Therefore, the Court of Chancery will enforce the covenant in equity against a party who purchased with notice.[49] The Lord Chancellor also engaged in a bit of law and economics when he observed:

> Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.[50]

There is a crisp simplicity to maxims of equity and basic equitable concepts. We all know, for example, that he or she "who seeks equity must do equity."[51] Likewise, a person seeking equity had better come to the Chancellor with "clean hands."[52] The holding in *Tulk* is refresh-

46. 41 Eng. Rep. 1143 (Ch. 1848).

47. The language of the case is more quaint and describes the restricted land as "'Leicester Square [g]arden or [p]leasure [g]round, with the equestrian statue then standing in the centre thereof, and the iron railing and stone work round the same . . . .'" *Tulk*, 41 Eng. Rep. at 1144.

48. *Id.*

49. *Id.*

50. *Id.*

51. There are thousands and thousands of sources for these maxims. I found mine in an old law student guide to law school: A POCKET REMINDER FOR STUDENTS OF THE LAW 15 (W.H. Lowdermilk & Co. 1905).

52. *Id.*

ing in its unembellished discussion and application of foundational equitable concepts of notice and fairness. But while the genesis of equitable servitudes theory is launched in England as a sleek new schooner, it soon accumulates the barnacles of subsequent English and American court decisions. These barnacles complicate, qualify and often confuse, as well as reveal themselves in Justice Meyer's excellent discussion of requirements for the enforcement of restrictions in equity.

The law-equity analysis became confusing because, as all first-year property law students understand, the rules of equity are "more relaxed" than they are at law. (Beyond that level of understanding, my law students then quickly fall by the wayside. They are not alone.) But what exactly does "more relaxed" mean? Justice Meyer opens his discussion of equitable servitudes by observing: "With regard to plaintiffs Runyon, we must go further because, in certain circumstances, a party unable to enforce a restrictive covenant as a real covenant running with the land may nevertheless be able to enforce the covenant as an equitable servitude."[53] At this point in his decision, some of his observations contribute to the bewilderment of this area of law. For example, he observes: "To enforce a restriction in equity, it is immaterial that the covenant does not run with the land or that privity of estate is absent."[54] That statement might be clarified: To enforce a restriction in equity, it is immaterial that the covenant does not run with the land [at law] or that [horizontal] privity of estate is absent.

To make matters worse, or at least to accurately portray the medieval muddle of covenants and servitudes, Justice Meyer relates that the "touch and concern" requirement is different in equity than it is at law. He explains by way of introduction of this point: "Unlike with real covenants, however, it is not always necessary to show that both the burden and the benefit touch and concern land."[55] He then discusses this point rather extensively, but the added discussion only demonstrates why a modern residential real estate development requires a statutory rather than a common law foundation for authority to enforce covenants and restrictions. The confusion generated by this area of law is not limited to law students and lawyers. It can baffle those of us who study and teach covenants and restrictions. In this regard Justice Meyer writes:

> We recognize that at least one scholar has suggested that our courts will not permit the covenantee to enforce a restrictive covenant, at law

53. *Runyon*, 331 N.C. at 309, 416 S.E.2d at 188.
54. *Id.* (citations omitted).
55. *Id.* at 310, 416 S.E.2d at 189.

> or in equity, against the covenantor's successor in interest unless the covenantee is able to demonstrate that the benefit of the covenant touches and concerns land owned by him and is not personal to him. *See* Stoebuck, 52 Wash. L. Rev. 861, 902 (interpreting *Stegall*). We do not agree that *Stegall* or any other opinion of this Court set forth such a requirement.[56]

The reference is to yet another landmark North Carolina decision dealing with covenants and restrictions, *Stegall v. Housing Authority*,[57] and I must confess that I had arrived at an interpretation of *Stegall* consistent with Professor Stoebuck's analysis and was presumably teaching "bad law" until the clarification (or some might deem "revision") by Justice Meyer in *Runyon*.

Enough about comparing equity with law on the enforceability of covenants issue. Even with the relaxed, albeit confusing rules of equity, the Supreme Court in *Runyon* concludes that the Runyons are not entitled to enforce the covenants as equitable servitudes. Remember, the Runyons obtained their lot, an unrestricted lot, from Mrs. Gaskins, the original covenantee, on the day before she sold the lot to the defendants' predecessor in title with express restrictions. Justice Meyer concludes, therefore, that there is no evidence in the chain of title to the burdened lot to lead defendants to conclude that the Runyons were beneficiaries of the restrictions.[58] Therefore only Mrs. Williams, the successor in interest to the covenantee's retained and benefited land, has standing to enforce the restrictions in equity.[59]

The best lesson we can glean from *Runyon* is that the common law of covenants at law and restrictions in equity is in need of serious repair or replacement. To some, Justice Meyer's treatise might be viewed as an exhaustive last judicial gasp of traditional covenants and restrictions law. It is ill equipped to serve the needs of homeowners associations and homeowners in a modern, complex subdivision that is closer to a government operating under statutory authority rather than a neighborhood operating on common law principles. Hence the need for uniform laws such as the Planned Community Act.

The latest Restatement of Property[60] (the "Restatement") simply refers to all private-law devices that create interests running with the

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56. *Id.* at 311, 416 S.E.2d at 189, n.3.

57. *Stegall*, 278 N.C. 95, 178 S.E.2d 824 (1971).

58. *Runyon*, 331 N.C. at 315, 416 S.E.2d at 192. ("The Runyons have not made a sufficient showing so as to charge defendants with notice of the existence of any restriction that may have inured or was intended to inure to their benefit.").

59. *Id.*

60. RESTATEMENT (THIRD) OF PROP.: SERVITUDES (2000).

land as "covenants running with the land," and no longer distinguishes between or uses the terms "real covenant" and "equitable servitude." An Introductory Note explains "the differences between covenants that historically could be enforced at law and those enforceable in equity, which gave rise to the terminology, have all but disappeared in modern law."[61] The extent to which the state appellate courts will embrace this clarification of the law remains to be seen.

C. *Relationship of the PCA to the Common Law*

The issue that must be addressed by modern appellate courts is the precise relationship between uniform acts like the PCA and the traditional law of covenants at law and restrictions in equity. In my opinion, it is now incorrect to negotiate through a two-tiered - common law and then statutory - analysis insofar as the power of the association to enforce covenants, restrictions, rules and regulations. To say that a covenant can run with the land only if both *Runyon v. Paley* and Chapter 47F of the General Statutes are complied with is to render passage of the PCA's powers of the association provisions almost meaningless. This is not to say that contemporary requirements of real property law can be totally ignored. For example, purchasers of land must have notice of the rules they are to comply with and the methods and procedures under which those rules might change.

It is not clear what the North Carolina Supreme Court will do with planned communities created after the effective date of the PCA. By way of *dictum* near the end of the *Wise* decision, Justice Martin notes:

> The PCA applies in its entirety to all homeowners associations formed on or after 1 January 1999. Any person purchasing real estate in such a planned community can reasonably be charged with constructive notice of the PCA and the powers it confers upon their homeowners association . . . Automatic application of PCA provisions to homeowners associations created on or after 1 January 1999 may therefore be viewed as consistent with the reasonable legal expectations of buyers purchasing homes in planned communities created after that date.[62]

Therefore, it is possible the Court will emphasize statutory authority over common law history in future disputes that do not involve the retroactivity issue. Earlier in the opinion, however, the Court notes that it rejects "defendant's more expansive interpretation" of the Act, albeit on the issue of retroactivity.[63]

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61. *Id.* at § 1.4.
62. *Wise*, 357 N.C. at 407-08, 584 S.E.2d at 740 (citations omitted).
63. *Id.* at 402, 584 S.E.2d at 737.

The Restatement describes "three strands of law" as coming together to govern residential common-interest communities. These strands are: "the law of servitudes; the law governing the forms of ownership used in the community; and the law governing the vehicle used in the community for management of commonly held property or provision of services."[64] It then emphasizes the significance of servitudes in this triumvirate:

> Servitudes underlie all common-interest communities, regardless of the ownership and organizational forms used. They provide the mechanism by which the obligations to share financial responsibility for common property and services and to submit to the management and enforcement powers of the community association are imposed on present and future owners of the property in the community.[65]

At the risk of being branded a property law heretic I must ask: Why provide a renaissance to what has been a confusing and misused term by stating, in essence, that modern common-interest communities must remain in the bramble-filled thicket of covenants law? In this twenty-first century of extensive, sweeping residential real property developments managed chiefly by the equivalent of private governments, the truth is that comprehensive statutory authority such as what can be found in the North Carolina Planned Community Act forms the primary foundation for the governance of common-interest communities. To be fair, the Restatement does go on to describe community associations as *sui generis* and like local governments. It also recognizes that the law in this area "[H]as only recently received recognition as a separate body of law."[66]

D. Quasi-Public Ordinances (QPOs)

Perhaps it is better to adopt new nomenclature. I suggest that the rules, regulations, covenants, restrictions, servitudes, conditions and whatever other limits that exist on private real property ownership in statute-based planned communities and common interest developments be called "quasi-public ordinances" ("QPOs"). Although created by private developers of land and ultimately enforced by private homeowners associations, QPOs are "quasi-public" because the authority for their creation and enforcement is primarily statute-based, not common law based. They are appropriately called QPOs because they are enforced by *de facto* "governments;" private governments that in

64. Restatement (Third) of Prop.: Servitudes § 6 (2000).
65. *Id.*
66. *Id.*

important respects are independent and powerful, private governments that bear the imprimatur of the state legislature.

I assume therefore that the homeowners association, the entity most often seeking enforcement of a covenant/rule/regulation/restriction in a planned community must show that the:

1. development is any form of common interest community created based on a statutory foundation of authority;
2. quasi-public ordinance (QPO) was duly enacted;
3. association's method of enforcement of the QPO is within its statutory power;
4. defendant as a lot or unit owner is subject to the QPO in question; and
5. defendant had record notice of the original planned community governance documents prior to purchasing the lot or unit and actual notice of any amendments to rules and regulations.

This does not mean that the right to enforce QPOs is cut and dried. In truth, a new jurisprudence of common interest communities must be developed to reflect the statutory foundation that now exists for covenants and restrictions imposed within the regime of a planned community. This jurisprudence should borrow by analogy from local government law. Planned communities/private governments must also find their niche in constitutional law. Largely outmoded common law notions of "touch and concern," "in esse," and the various "privities" of estate should be supplanted as appropriate by theories of reasonableness, procedural due process, equal protection, and basic constitutional freedoms. The Bill of Rights should not end at the entrance to the private community.

An overlay of public policy analysis is particularly appropriate in planned community legal controversies when one considers the significant quasi-governmental functions and powers of the homeowners association. Consideration of general notions of "public policy" in actions involving the enforcement of covenants and restrictions is nothing new. For example, an early North Carolina covenants decision involved whether a covenant to repair a drainage canal easement bound a subsequent purchaser of burdened land.[67] One requirement for enforcement noted by the North Carolina Supreme Court is that the covenant must be consistent with public policy.[68]

67. Norfleet v. Cromwell, 64 N.C. 1 (1870).

68. *Id.* at 10.

E. *The Power to Fine for Violations and Retroactivity*

In *Wise* the homeowners who constructed the pool and retaining wall went on the legal offensive and sought a declaratory judgment "that defendant's attempt to levy a fine against plaintiff was *ultra vires* and void."[69] The trial court disagreed with the plaintiffs, rejected their motion for partial summary judgment, and found that the defendant homeowners association was authorized to levy a fine. This authorization came from the retroactive reach of the "powers" section of the PCA.[70] Since the common law of covenants at law and equitable servitudes clearly would not support the authority to levy a fine absent express authority in the covenants and governing documents of the planned community, the only possible source of the power of an "old" planned community (i.e., a pre-1999 planned community) to fine was the retroactive reach, if any, of N.C. Gen. Stat. § 47F-3-102, the section in the Planned Community Act enumerating the powers of the association.

The Court of Appeals affirmed the trial court's ruling, adopting a straightforward, literal interpretation of N.C. Gen. Stat. § 47F-3-102.[71] There was a dissent by Judge Wynn, who emphasized the "subject to" language in the statute, an interpretation that appealed to the Supreme Court when it reversed the Court of Appeals and found in favor of the homeowners.[72]

While the case can be viewed as touching upon a number of issues and sub-issues, the simple, central issue posed in the case from my biased perspective is whether the retroactive powers of the homeowners association provisions of N.C. Gen. Stat. § 47F-3-102 should be interpreted as intended by both the drafters of the Uniform Planned Community Act and those who adapted that Act to what became the North Carolina Planned Community Act (PCA). The retroactivity issue involved the specific question of whether a homeowner in a pre-1999 planned community could be fined for actions taken after the effective date of the PCA when the original governing documents of that homeowner's planned community did not specifically authorize a fine.

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69. *Wise*, 357 N.C. at 398, 584 S.E.2d at 734.

70. N.C. GEN. STAT. § 47F-3-102 (2003).

71. Wise v. Harrington Grove Cmty. Ass'n, 151 N.C. App. 344, 566 S.E.2d 499 (2002).

72. *Id.* at 354, 566 S.E.2d at 505 (Wynn, J., dissenting).

F. *Critique of Wise*

The Supreme Court seems to say that N.C. Gen. Stat. § 47F-3-102 retroactively confers the power to fine only if the pre-1999 planned community's governing documents already give it the authority to fine. Viewed this way, the *Wise* decision appears to adopt an interpretation of N.C. Gen. Stat. § 47F-3-102 that renders its retroactivity provisions meaningless. Of course, a pre-1999 planned community with the specific power to fine has the power to fine. That planned community's homeowners association does not need a retroactive grant of powers. The obvious purpose of N.C. Gen. Stat. § 47F-3-102 was to beef up and clarify the powers of a planned community homeowners association, including a retroactive reach to pre-1999 planned communities as to many of those powers.

Not only does the Court's analysis, interpretation and conclusion concerning N.C. Gen. Stat. § 47F-3-102 miss the mark, but its general common law approach and "free use of land" prejudice diminishes and dilutes the effectiveness of the PCA as an effective statutory mechanism for dealing with complex modern real estate developments, communities far more sophisticated in legal framework than those quaint villages that existed at common law. In an earlier article outlining the effect of the PCA, I made the following observations concerning the general impact of the new legislation:

> The General Assembly has made possible a statutory metamorphosis of the North Carolina law of planned communities. It has converted a confusing and restrictive menagerie of appellate court decisions interpreting sometimes difficult and complex common law real property concepts into a detailed, clear code and enabling act for what the author believes may be best described as statutorily authorized private neighborhood governments, homeowner associations with many of the functions of a local municipality. By enacting a clear statutory foundation, the General Assembly has given identity to an entity that has suffered from a serious legal identity crisis.[73]

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73. Patrick K. Hetrick, *Of "Private Governments" And The Regulation Of Neighborhoods: The North Carolina Planned Community Act*, 22 CAMPBELL L. REV. 1, 2 (1999). For a comprehensive article from the only other state to adopt a version of the Uniform Planned Community Act, see Jan Z. Krasnowiecki, *The Pennsylvania Uniform Planned Community Act*, 106 Dick. L. Rev. 463 (2002). The author's thesis is that the Act, as modified in Pennsylvania, "is an aberration and should be repealed and replaced with a less complicated and more practically oriented law." *Id.* at 480. At footnote 43, she observes, in part: "In 1994, the National Conference replaced the Uniform Planned Community Act with a Uniform Common Interest Ownership Act, 7 U.L.A. 471 (1994), which was designed to fold all types of common interest community development under one act."

The *Wise* retroactive powers issue resulted in an amendment to the PCA while the case was pending before the Supreme Court.[74] That amendment failed to clarify the retroactivity issue. Therefore, in 2004, the General Assembly once again amended the statute to make it clear that certain subsections are retroactive.[75] N.C. Gen. Stat. § 47F-1-102(c) now reads:

> (c) Notwithstanding the provisions of subsection (a) of this section, G.S. 47F-3-102 (1) through (6) and (11) through (17) (Powers of owners' association), G.S. 47F-3-107(a), (b), and (c) (Upkeep of planned community; responsibility and assessments for damages), G.S. 47F-3-115 (Assessments for common expenses), and G.S. 47F-3-116 (Lien for assessments), apply to all planned communities created in this State before January 1, 1999, UNLESS THE ARTICLES OF INCORPORATION OR THE DECLARATION EXPRESSLY PROVIDES TO THE CONTRARY. These sections apply only with respect to events and circumstances occurring on or after January 1, 1999, and do not invalidate existing provisions of the declaration, bylaws, or plats and plans of those planned communities. G.S. 47F-1-103 (Definitions) also applies to all planned communities created in this State before January 1, 1999, to the extent necessary in construing any of the preceding sections.[76]

Former subsection (c) was revised and moved to subsection (e). S.B. 1167 also added the "unless the articles of incorporation or the declaration expressly provides to the contrary" language to N.C. Gen. Stat. § 47F-3-102 and eliminates the controversial "subject to" language that dominated the rationale of the *Wise v. Harrington Grove* decision.

The 2004 amendment of the PCA by the General Assembly is, in essence, a reversal of the Supreme Court's narrow interpretation of the

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74. In 2002, N.C. GEN. STAT. § 47F-1-102 was amended. Former subsection (c) was revised and moved to subsection (e). The new subsection (c) reads:

> (c) Notwithstanding the provisions of subsection (a) of this section, G.S. 47F-3-102(1) through (6) and (11) through (17) (Powers of owners' association), G.S. 47F-3-107(a), (b), and (c) (Upkeep of planned community; responsibility and assessments for damages), G.S. 47F-3-115 (Assessments for common expenses), and G.S. 47F-3-116 (Lien for assessments), apply to all planned communities created in this State before January 1, 1999. These sections apply only with respect to events and circumstances occurring on or after January 1, 1999, and do not invalidate existing provisions of the declaration, bylaws, or plats and plans of those planned communities. G.S. 47F-1-103 (Definitions) also applies to all planned communities created in this State before January 1, 1999, to the extent necessary in construing any of the preceding sections.

75. 2004 N.C. S.B. 1167.

76. (emphasis added).

retroactivity issue related to certain subsections of N.C. Gen. Stat. § 47F-3-102.

G. *The Uniform Act and Incomplete Draftsmanship*

While it is safe to assert that both the authors of the Uniform Planned Community Act and the North Carolina version of that act envisioned a conceptual breakthrough - i.e., an independent statutory source of authority and rationale for the planned community framework - it is equally safe to say by hindsight at least that the draftsmanship employed did not emphasize enough the paradigm shift in legal analysis and approach that would be required of the courts if they were to accurately capture the spirit of the new legislation. Put another way, if support for private governments was to shift from the common law to statutory authority, then the drafters of the Act should have been more clear and precise in preparing appellate courts for the task of the proper interpretation of the Act.

I added by way of footnote an ancient maxim that "The law performs miserably when it is vague and uncertain."[77] I also referred to an article by leading national experts in the area of planned community law in which the authors observe that a "clear message running throughout discussions of community association law" is "that community associations have an identity crisis."[78]

We should not let the "uniform" designation and the impressive credentials of the authors of uniform acts mislead us into thinking that all statutes in a uniform act are perfect or, for that matter, even adequate.[79] There is a pragmatic policy of "trying to please everyone" in uniform act draftsmanship, and this something for everyone approach may encourage vagueness, incompleteness or silence on key issues.

The North Carolina version of the PCA should have contained a "liberal construction" direction to the courts in order to avoid the vagueness and uncertainty in the Act. The Restatement of Property appropriately recognizes common-interest communities as providing "a socially valuable means of providing housing opportunities" and adds: "The law should facilitate the operation of common-interest com-

77. *"Misera est servitus ubi jus est vagum et incertum." See,* Dr. J. Stanley McQuade, *Ancient Legal Maxims And Modern Human Rights,* 18 CAMPBELL L. REV. 75, 117 (1996).

78. *See* Hetrick, *supra* note 74, at 2, (citing Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis Of Community Associations: In Search Of The Appropriate Analogy,* 27 REAL PROP. PROB. & TR. J. 589, 592 (1993)).

79. There is no such thing as a perfect statute.

munities [at] the same time as it protects their long-term attractiveness by protecting legitimate expectations of their members."[80]

There are of course numerous examples of "liberal construction" statutes in state and federal legislation. Subsections (1) and (2) of N.C. Gen. Stat. § 25-1-102, for example, dealing with Chapter 25 of the Uniform Commercial Code, provide clear guidelines for interpretation of that legislation as follows:

> (1) This chapter shall be liberally construed and applied to promote its underlying purposes and policies.
>
> (2) Underlying purposes and policies of this chapter are to simplify, clarify and modernize the law governing commercial transactions; to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
>
> (3) To make uniform the law among the various jurisdictions.[81]

N.C. Gen. Stat. § 1-264, dealing with the Declaratory Judgments Act, an act based on a uniform act,[82] is titled "Liberal construction and administration" and reads as follows: "This Article is declared to be remedial, its purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered."[83]

The drafters of the "Real Property Marketable Title Act," Chapter 47B of the General Statutes, did a masterful job of laying the groundwork for future interpretations of that act. The opening statute, N.C. Gen. Stat. § 47B-1, titled "Declaration of policy and statement of purpose," reads as follows:

> It is hereby declared as a matter of public policy by the General Assembly of the State of North Carolina that:
>
> (1) Land is a basic resource of the people of the State of North Carolina and should be made freely alienable and marketable so far as is practicable.
>
> (2) Nonpossessory interests in real property, obsolete restrictions and technical defects in titles which have been placed on the real property records at remote times in the past often constitute unreasonable restraints on the alienation and marketability of real property.

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80. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6 (2000).

81. N.C. GEN. STAT. § 25-1-102(1)&(2).

82. According to the "Historical And Statutory Notes," the North Carolina Declaratory Judgments Act is based on § 12 of the Uniform Declaratory Judgments Act (1922).

83. N.C. GEN. STAT. § 1-264 (2003).

(3) Such interests and defects are prolific producers of litigation to clear and quiet titles which cause delays in real property transactions and fetter the marketability of real property.

(4) Real property transfers should be possible with economy and expediency. The status and security of recorded real property titles should be determinable from an examination of recent records only.

It is the purpose of the General Assembly of the State of North Carolina to provide that if a person claims title to real property under a chain of record title for 30 years, and no other person has filed a notice of any claim of interest in the real property during the 30-year period, then all conflicting claims based upon any title transaction prior to the 30-year period shall be extinguished.[84]

The final statute in the Marketable Title Act, N.C. Gen. Stat. § 47B-9, completes the Act with a "liberal construction" provision.[85] To borrow several famous lines from Whittier: "For of all sad words of tongue or pen, The saddest are these: 'It might have been!'"[86] The Planned Community Act does not contain a "liberal construction" provision, and the North Carolina Supreme Court has christened the Act with a tentative approach, one attributable in part to a lack of complete and precise guidance from the drafters of the Act. The cure is simple: The Act should be amended with a provision setting forth its purposes, with language clearly indicating that it supersedes the patchwork legal quilt of the common law of covenants and restrictions, and with liberal construction language. A suggested draft is as follows:

Liberal Construction

1. This Chapter is declared to be remedial in nature and shall be liberally construed and applied to promote its underlying purposes and policies.
2. This Chapter shall be construed to provide a statutory justification for the enforcement of covenants, restrictions, rules and regulations of a planned community independent of the common law of covenants at law and restrictions in equity.
3. The underlying purposes and policies of this Chapter are:
   a. to simplify, clarify and modernize the law governing the creation, governance and termination of planned communities;
   b. to provide the homeowner associations of planned communities with statutory powers and authority independent of the common law source of any such authority;

84. N.C. GEN. STAT. § 47B-1 (2003).
85. N.C. GEN. STAT. § 47B-9 (2003).
86. John Greenleaf Whittier, *Maud Muller*, line 105.

c. to provide homeowners in planned communities with adequate due process protections and consumer rights; and

d. to enhance the marketability of real property in planned communities.

A critic of this idea might accurately point out that the North Carolina Condominium Act, based on the Uniform Condominium Act (1980), contains no "liberal construction" statute or language clearly emphasizing that it supersedes the common law. Perhaps liberal construction is unnecessary in a condominium act because it is so clear that the status of a modern condominium rests on a statutory and not a common law foundation. In other words, when an appellate court encounters a condominium dispute, members of that court view it as just that. Their mindset is not enmeshed in whether the common law of property supports the condominium format of ownership. They open the statute book, not the history book. Even though the condominium has ancient roots, it is in fact a distinct captive of contemporary statutory law. Therefore, the court faced with a fight between unit owner and unit owners association discerns that it has a "condominium act" problem, not a common law of property problem. Shift the scenario to planned communities and the *Wise v. Harrington Grove* decision - especially the beginning of the court's analysis - and you can observe the court stereotyping the dispute as a common law property problem, with the PCA seen as a statute in derogation of that history and therefore a statute to be narrowly construed.[87]

In summary of this point, the appellate courts of North Carolina and the real property lawyers who must deal with the PCA on a daily basis deserved more guidance from the drafters of the Act. They did not get it. A confusion in interpretation and general approach to the Act has already begun. The PCA should be amended to hammer home for all that, like the North Carolina Condominium Act, the PCA is meant to be a free standing source of authority for private community governance.[88]

H. Actions Against the Association

What happens when the association itself is derelict in one or more of its obligations under the governing documents of the planned community or under the PCA itself? The Act provides, "Except as provided in G.S. 47F-3-16, in an action to enforce provisions of the articles of incorporation, the declaration, bylaws, or duly adopted rules or reg-

87. *See Wise*, 357 N.C. 396, 584 S.E.2d 731.

88. It might also be prudent to add a similar provision to the condominium act.

ulations, the court may award reasonable attorneys' fees to the prevailing party if recovery of attorneys' fees is allowed in the declaration."[89] This statute is a significantly watered down version of its counterparts in both the Uniform Planned Community Act[90] and the North Carolina Condominium Act.[91] The Official Comments in the Uniform PCA and the North Carolina Condominium Act are almost identical and therefore only one needs to be set forth:

> This section [G.S. 47C-4-117] provides a general cause of action or claim for relief for failure to comply with the Act by either a declarant or any other person subject to the Act's provisions. Such persons might include unit owners, persons exercising a declarant's rights of appointment pursuant to Section 3-103(d), or the association itself. A claim for appropriate relief might include damages, injunctive relief, specific performance, rescission or reconveyance if appropriate under the law of the state, or any other remedy normally available under state law. The section specifically refers to "any person or class of persons" to indicate that any relief available under the state class action statute would be available in circumstances where a failure to comply with this Act has occurred. This section specifically permits punitive damages to be awarded in the case of willful failure to comply with the Act and also permits attorney's fees to be awarded in the discretion of the court to any party that prevails in an action.[92]

In contrast, the watered down PCA statute, N.C. Gen. Stat. 47F-3-120, contains no helpful official comment and will serve as the catalyst for future enforcement issues rather than as a statute helpful to a plaintiff seeking to enforce the PCA. It goes without saying that attorneys representing developers will make it abundantly clear when drafting the governing documents that attorney fees are not authorized. In the alternative, the drafters may specifically allow attorney fees to the

89. N.C. GEN. STAT. § 47F-3-120 (2003).

90. The Uniform Planned Community Act, N.C. GEN. STAT. § 47F-4-117 (2003) provides:

> If a declarant or any other person subject to this Act fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney's fees.

91. The Condominium Act, N.C. GEN. STAT. § 47C-4-117 (2003) provides:

> If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by that failure has a claim for appropriate relief. The court may award reasonable attorney's fees to the prevailing party.

92. N.C. GEN. STAT. § 47C-4-117 (2003).

developer or association in the event that either qualifies as a prevailing party, but not authorize attorney fees to homeowners if they are the prevailing party. The inadequately drafted G.S. 47F-3-120 does not appear to prohibit lopsided attorney fees provisions.

What about the potential liability of the association in its capacity as a nonprofit corporation under Chapter 55A of the General Statutes? There are very few cases dealing with the responsibilities and liabilities of a homeowners association in its capacity as a non-profit corporation. Perhaps the most interesting example is *Mitchell v. LaFlamme*, a 2000 Court of Appeals of Texas decision.[93] *Mitchell* involved a townhouse development governed by traditional covenants and restrictions.[94] No planned community act or related legislation was involved.[95] The development was not a condominium because the common areas were owned by the association and not the unit owners.[96] The plaintiffs owned individual townhouses in the development.[97] The common areas of the development were maintained by the owners association comprised of all townhouse owners who supported the association by monthly assessments.[98] Problems arose in the development because the association stopped caring for the common areas[99] and stopped maintaining the exteriors of the townhouses.[100] When notified of the obvious problems by one of the townhouse owners, the association made no response.[101]

After finding that the Association failed to comply with the covenants and bylaws, the jury awarded substantial damages and attorneys' fees to the plaintiff townhouse owners.[102] In spite of the

93. Mitchell v. LaFlamme, 60 S.W.3d 123 (Tex. App. 2000).

94. *Id.* at 128.

95. *See generally id.*

96. *Id.* at 128-29.

97. *Id.* at 126.

98. *Id.*

99. "[The association] closed the swimming pool permanently; driveways and roads had large potholes; instead of fixing the paving, the Association filled the holes with shell; wires hung from electrical boxes; the topsoil was never leveled to prevent draining into the town-homes; and it failed to plant grass." *Id.*

100. "Even simple things, like cleaning out the gutters, were left undone. The lack of maintenance caused many problems to the Owners' townhouses. For example, their townhouses developed extensive leaking in the roofs and walls, pooling of water around the home, flooding, and rotting to walls, doors, and window frames. In Mrs. Pierre's townhome, kitchen walls rotted to such an extent that she could see outside if she opened a kitchen cabinet door. The flooding and leaking caused damage to the interior walls, ceilings, and floors of the Owners' townhomes." *Id.* at 126-27.

101. *Id.* at 127.

102. *Id.*

egregious nature of the dereliction of duty by the association and its officers, the trial court entered a judgment notwithstanding the verdict, disallowing attorneys' fees and limited the damage awards to interior townhouse damage and loss of use only.[103]

The trial court's rationale was that "the Owners did not sue in a derivative suit on behalf of the Association."[104] On appeal, the defendant Association and other appellees followed up on this argument, asserting that the Association's status as a non-profit corporation required that a suit complaining about the Association's noncompliance with the declaration of covenants, conditions and restrictions must be brought under the *ultra vires* provision of the Texas Non-Profit Corporation Act.[105] The court then quoted a portion of the *ultra vires* statutory provision allowing a lawsuit "[in] a proceeding by the corporation whether acting directly or through a receiver, trustee, or other legal representative, or through members in a representative suit, against the incumbent or former officers or directors of the corporation for exceeding their authority."[106]

The argument of the Association and other appellees was that the townhouse owners were required to bring a representative suit on behalf of the Association for damages to the common areas and exteriors.[107] The Texas Court of Appeals found this argument unpersuasive, stating, "However, we can find no case law, and Appellees cite none, that the failure to maintain exteriors and common areas constitutes an *ultra vires* act by a homeowners' association."[108] The Association and other appellees next argued that an individual townhouse owner "cannot personally recover damages for a wrong done solely to the corporation, even though the owner may be injured by that wrong."[109] Since the common areas were owned by the Association and any damages to those areas were therefore damages suffered by the Association, the court found this argument by the Association to be persuasive.[110]

Next, the court rejected the townhouse owners' argument "that they also had an individual contract or property right in the common areas for which they could sue for damages."[111] The court reasoned

103. *Id.*
104. *Id.*
105. *Id.* at 128.
106. *Id.* (citing TEX. REV. CIV. STAT. ANN. § 1396 - 2.03 (Vernon 1997 & Supp. 2000)).
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*

that the declaration of covenants, conditions and restrictions "does not grant the Owners the right to sue for damages for the common areas, but only the right to sue to enforce the declaration's provisions."[112] The court found cases cited by the townhouse owners in which injured shareholders could sue for damages inapplicable.[113] The court also noted that the jury found against the townhouse owners in their claim against the Association for breach of fiduciary duties.[114] The court summarized, "We thus hold that recovery for damages done the common areas belong solely to the Association, and to sue for those damages, the Owners were required to bring a representative suit on behalf of the corporation."[115]

Next, the court reached what should perhaps have been an easier issue but which the court characterizes as "a more difficult issue", whether the townhouse owners can sue for the damages to the exteriors of their units which they own in fee simple and which the Association was required by the declaration to maintain.[116] The court successfully evades any appropriate analysis of this important issue, because it found no evidence in the record reflecting that the townhouse owners had individually incurred specific damages because of the exteriors of their townhouses.[117]

I. Constitutional Issues and Retroactivity

It is now clear that the General Assembly intends that the powers section of the PCA retroactively arm homeowners associations of pre-1999 planned communities with powers that those bodies did not have prior to the enactment of the PCA, unless their governing documents provided clear authority. The next question goes to the constitutionality of this retroactivity. When one discusses this issue with lawyers willing to offer a general guess as to possible constitutional problems, words like "*ex post facto*," "impairment of the obligation of contracts," and "due process" commonly come up. Some add that the PCA appears, in part, to be a delegation of governmental authority to private entities and they wonder about the practical, legal and constitutional ramifications of that delegation.

Students of the history of the American Revolution and the development of the United States Constitution are familiar with the pro-

112. *Id.* at 129.
113. *Id.*
114. *See id.* at 129 n.2.
115. *Id.* at 129.
116. *Id.*
117. *Id.*

scription against enactment of *ex post facto* laws by the federal or state governments.[118] Article I, Section 16 of the Constitution of North Carolina also prohibits the enactment of ex post facto laws.[119] It is clear, however, that both the federal and state constitutional prohibitions are applicable to criminal and not civil matters.[120] Therefore, while the retroactive arming of a private homeowners association with powers it did not originally have appeals to a layman's sense of uncalled for "after the fact" interference by the General Assembly with private real property relationships, it is by no stretch of the imagination an unconstitutional *ex post facto* law.

If the casual observer thinks "*ex post facto*" first, his or her second thought often gravitates to whether the retroactive provisions of the PCA impair the obligation of contracts entered into prior to the enactment of that legislation. What is the "obligation of a contract"? Black's Law Dictionary sets forth a helpful and telling definition as follows:

> **Obligation of a contract.** That which the law in force when contract is made obliges parties to do or not to do, and the remedy and legal means to carry it into effect. The "obligation of a contract" is the duty of performance. The term includes everything within the obligatory scope of the contract, and it includes the means of enforcement.[121]

A telling definition, indeed, because it twice reveals that the obligation of a contract includes enforcement. As with the prohibition of *ex post facto* laws, the United States Constitution prohibits the impairment of the obligation of contracts by both the federal and state governments.[122] But when does a law impair the obligation of contracts in a constitutional sense? At what point does interference with contractual obligations rise to a level that runs afoul of constitutional law?

State constitutional law has often been neglected and indeed avoided by lawyers, law professors and appellate courts. Of course, a North Carolina appellate court decision that can be considered in any specific way "on point" to a retroactive conferring of homeowners

118. U.S. CONST. art. I, §§ 9-10.

119. N.C. CONST. art. I, § 16 ("Retrospective laws, punishing acts before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted. No law taxing retrospectively sales, purchases, or other acts previously done shall be enacted").

120. *See, e.g.*, Carpenter v. Pennsylvania, 58 U.S.(16 How.) 456 (1854); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); Stanback v. Citizens Nat'l Bank, 197 N.C. 292, 148 S.E. 313 (1929); State v. Bell, 61 N.C. (Phil Law) 76 (1867).

121. BLACK'S LAW DICTIONARY 970-71 (5th ed. 1979).

122. U.S. CONST. art. I, § 10.

association powers does not exist, but there are many decisions with widely varying fact situations dealing with the impairment issue. In *Piedmont Memorial Hospital, Inc. v. Guilford County*,[123] the court notes, in part, "It is a generally accepted principle of statutory construction that there is no constitutional limitation upon legislative power to enact retroactive laws which do not impair the obligation of contracts or disturb vested rights . . . ."[124] This cursory explanation also appears in several earlier North Carolina appellate court decisions, including *Stanback v. Citizens' National Bank of Raleigh*,[125] where the court explains the term "vested rights" as follows:

> The term "vested rights" relates to property rights and "a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws does not constitute a vested right. Contingent rights arising prior to the enactment of a statute, and inchoate rights which have not been acted on are subject to legislative control."[126] "The power that authorizes or proposes to give, may always revoke before an interest is perfected in the donee."[127]

To complicate matters, the history of federal law on the impairment of the obligation of contracts issue is like your favorite stock: up again, down again, confused, inconsistent and less than helpful for our PCA retroactivity fact situation.

A careful reading of *Wise* suggests that the Supreme Court justices were upset about the concept of wholesale retroactivity of important powers provisions in the PCA.[128] However, the time was not ripe for a meaningful discussion of constitutional problems with retroactivity. The justices might have pictured themselves as purchasers in a pre-1999 planned community. As such, they would be home or lot purchasers who purchased assuming a specific and limited private governance system based on property law and binding contract. Covenants and restrictions are by definition based on a binding contract at their commencement. While this scenario would have clearly rubbed the court wrong, there was no need in *Wise* to reach specific constitutional issues. While both contract obligations and vested property rights may arguably be "impaired" beyond constitutional

123. *Piedmont Mem'l Hosp., Inc.*, 221 N.C. 308, 20 S.E.2d 332 (1942) (involving whether taxes levied on a private hospital's property were proper).

124. *Id.* at 311, 20 S.E.2d at 334 (citations omitted).

125. *Stanback*, 197 N.C. 292, 148 S.E. 313 (1929) (upholding the validity of retroactive legislation affecting voluntary trusts).

126. *Id.* at 292, 148 S.E. at 315 (quoting 12 C.J. 955).

127. *Id.* (quoting Anderson v. Wilkins 142 N.C. 154, 55 S.E. 272 (1906)).

128. *See generally Wise*, 357 N.C. 396, 584 S.E.2d 731 (2003).

standards by significant changes in powers and remedies conferred by the General Assembly on these pre-1999 private homeowners associations, it is my theory that the *Wise* justices[129] brooded over the retroactivity issue after studying the appellate briefs, waiting for a judicial hunch.[130] I believe that the ultimate decision in *Wise* is based on a deep and perhaps subconscious "hunch" by the justices that retroactivity is an anathema to the spirit of the common law of property and our free society. They accordingly limited the concept, and ultimately rejected it in terms of the power to fine.

J. One Size Doesn't Fit All Planned Communities

In what can perhaps be best summarized as "a tale of two planned communities," at least insofar as the PCA is concerned, consider the following:

"Homeplace Acres"

"Homeplace Acres" is one of thousands of developments in North Carolina that can be described best as "a couple of dozen homes and a private road." This is not to denigrate these developments. They are often well landscaped and comfortable mini-subdivisions. Indeed, they are the vehicles that provide affordable and comfortable housing to the vast majority of home buyers. The declaration of covenants and restrictions for Homeplace Acres is understandably rudimentary, with the usual single-family home restrictions and little else, although there is a necessary provision requiring that all lot owners in the development contribute to road maintenance and to the upkeep of several shrub and flower beds and a sign at the development's entrance. Annual assessments in Homeplace Acres are in most cases modest.

Homeplace Acres is a "planned community,"[131] whether its residents want it to be or not; but, for all practical purposes, it is served better by either the traditional law of covenants and restrictions or, better yet, by a greatly simplified and downsized "mini-PCA." Homeplace Acres is not well served by a sweeping Planned Community Act designed primarily for complex modern developments that amount to substantial private governments. It is unlikely that the Homeplace Acres lot owners will make any serious attempt to create or

129. No pun intended.

130. See J. STANLEY MCQUADE, JURISFICTION 157-61 (The Harrison Company 1982) (reprinting with permission; Judge Joseph C. Hutchinson, *The Judgment Intuitive: The Function of The "Hunch" In Judicial Decision*, 14 CORNELL LAW QUARTERLY 274 (1929)).

131. N.C. GEN. STAT. § 47F-1-103(23) (1999).

maintain a nonprofit corporation as required by the PCA.[132] It is equally unlikely that they will be regularly seeking legal advice concerning the implications and ramifications of the PCA as it applies to their very adequate but unsophisticated legal governance framework.

In contrast to the PCA, the Uniform Common Interest Ownership Act (UCIOA) has an exception for developments that limit annual assessments to $300 per year. These developments can, by express provision in their declaration, opt in for coverage by the UCIOA.[133] While the common law of covenants and restrictions may be confusing and difficult to apply in specific controversies, the extensive provisions of the PCA constitute an equally poor fit for the Homeplace Acres-type subdivision. It is as if there is only one cow in the pasture, but the farmer for some reason has dumped the entire hay wagon load in front of that solitary bovine.

While I hesitate to suggest more legislation, a simplified "mini-PCA" and an exemption from coverage by the existing PCA for small developments would benefit subdivisions such as Homeplace Acres. Both the proponents of the PCA and the General Assembly have neglected these more modest developments. To be blunt, one statutory size doesn't fit all residential subdivisions. A no-more-than-several-pages, user-friendly "mini-PCA" should be considered. In addition, it would be helpful to the average practitioner if the Real Property Section of the North Carolina Bar Association or some other leader in continuing legal education undertook to provide a basic and very simple set of model documents for Homeplace Acres-type developments. A continuing legal education program with practical forms, including a declaration and suggested covenants, would be most helpful.

"Sweet Auburn Acres"

"Sweet Auburn Acres"[134] represents the growing trend in upscale residential land development: the substantial, several-thousand-acre, private enclave. Our Sweet Auburn Acres involves a multi-million dollar investment in advance of the first lot sale and includes numerous amenities, often including the following: gated entrance with security, private roads, gardens and nature preserves, one or more lakes, 36

132. N.C. GEN. STAT. § 47F-3-101 (1999) (requiring that every lot owners association created after the effective date of the PCA be organized as a nonprofit corporation).

133. UNIF. COMMON INTEREST OWNERSHIP ACT § 1-203 (amended 1994).

134. Inspired, but only in part, by Oliver Goldsmith, *The Deserted Village*, *in* THE TOP 500 POEMS 341 (William Harmon ed., Columbia University Press 1992).

hole golf course designed by Pat Hetrick,[135] 50,000 square foot, grandiose clubhouse (containing a ballroom, fitness center with indoor pool, snack bar, restaurant) and outdoor pools, eight tennis courts (four clay), and several nature/jogging trails.[136] Sweet Auburn Acres requires a full-time professional management and many staff members, including maintenance and security personnel. By any definition, Sweet Auburn Acres is a substantial business organization.

Because this private government is supported in large part by annual assessments of the lot owners, it is a "planned community" for purposes of the PCA. It will have been created through a sophisticated set of documents, and it will have a law firm retained to assure compliance with laws and assure that the lot owners comply with the rules and regulations of the planned community. Sweet Auburn Acres is the type of complex modern real estate development that needs the support and stability of a statutory framework. The developer and investors in Sweet Auburn Acres can ill afford to be overly dependent on the whims and caprices of the common law of covenants and restrictions. The PCA was in truth designed much more to accommodate Sweet Auburn Acres than Homeplace Acres, and it is important that appellate courts recognize that the private governments in these developments require the support of a statute-based source of authority.

III. THE IDEAL ROLE OF THE ATTORNEY IN PCA CLOSINGS

Within the two past years, I have been a client in two residential real estate purchases and one refinancing. In all three closings, the

135. I couldn't resist.

136. *See, e.g.*, the following summary from a sales brochure for "Anderson Creek Club" in Spring Lake, North Carolina:

> Living and playing at Anderson Creek Club is just like vacationing in your own backyard! Noted by *The Fayetteville Observer* as "the region's largest and most extravagant development," Anderson Creek Club's homesites are flanked by lush fairway views of our Five-Star Davis Love III championship golf course and complimented by a grandly appointed clubhouse. The natural beauty of Anderson Creek Club's 1,700 acres of mature pine forests surrounds twelve ponds for canoeing, paddle-boating and fishing, with picturesque waterfalls, tennis, pool and spa. [Sales and Marketing Brochure, Anderson Creek Club (copy in author's files).]

Likewise, the well-known "Governors Club" development near Chapel Hill boasts a "27-hole championship golf course designed by Jack Nicklaus" and "1,600 acres of lush hardwood forest, beautiful lakes and breathtaking views." [Letter to the author from Governors Club Realty, dated August 18, 2004 (letter in author's files).]

See http://www.planned-communities.com (last visited Aug. 16, 2004) for additional examples of Sweet Auburn Acres developments. Disclaimer: None of the golf courses in any of these planned communities were designed by Pat Hetrick

attorneys did a masterful job. Even though I teach real estate law,[137] they took the time to methodically outline key points in the financing documents. Moreover, they took special care to assist my wife, a layperson, in her understanding of what seemed like a myriad of forms, disclosures, and documents in need of signatures. In light of the current custom and standard of care in North Carolina real estate closings, they earned an "A" from this professor.

That being said, my experience as a client in residential real estate closings leads me and others to ask the question that is getting timeworn in this state: What is the proper role of a closing attorney in residential closings?[138] A recent inquiry from Robert Morgan, one of the most respected attorneys and public servants in North Carolina, reads, in part, as follows:

> I have a question for your consideration . . . to mull over and give me your opinion sometime. We are now in the process of doing some title work for a lady . . . who is buying a house being built in the City of Raleigh. It is in one of these planned unit developments. The original restrictions in that subdivision are 90 pages long and they have been amended since then to add 21 pages. Do you think that as a lawyer we have a responsibility to review those restrictions and advise her that she may be assessed for police protection (this is security protection) or new construction of streets, or recreational facilities or whatever they might provide? It appears to me that a lawyer should advise a prospective buyer who is his client of such things or the real estate agent representing the buyer of the property should be obligated to do it. Have you heard anything of such obligations?[139]

137. Or, perhaps, because I teach real estate law in a law school, they thought I might need some practical advice concerning how a real estate closing works.

138. Evidence of this topic's timelessness is the excellent discussion of the attorney's role by Professor Dale A. Whitman in two articles in the 1971 North Carolina Law Review. *See* Dale A. Whitman, *Transferring North Carolina Real Estate Part I: How the Present System Functions*, 49 N.C. L. REV. 413 (1971) and *Transferring North Carolina Real Estate Part II: Roles, Ethics, and Reform*, *Id.* at 593. Although Whitman writes during an era of $20,000 homes, bar minimum fee schedules, and numerous other things that have gone by the wayside, there are many points in his articles that remain timely and valid observations even today of the North Carolina system of transferring real estate. This author is led, therefore, to observe a timeworn maxim: "The more things change, the more they stay the same." Professor Whitman is considered by many in legal education today to be the leading national expert on real property law. Although factually dated in numerous respects, his 1971 articles are nonetheless worthy of review by any person or committee studying the present situation in North Carolina.

139. Letter from attorney and former United States Senator Robert B. Morgan to Patrick K. Hetrick, Professor of Law, Campbell University (November 18, 2004) (on file with author).

The role of an attorney in any residential real estate transaction depends upon how we go about defining the nature of the attorney's responsibility to his or her client.[140] "Responsibility" can be discussed from many perspectives, including the following: First, what is acceptable, ethical and required under the rules of professional responsibility?[141] Second, what is current custom and practice in the legal community? Third, what would the closing attorney's responsibility be in an ideal world? Finally, what are the economic implications of expanding or contracting the attorney's role? This topic has relevance to our PCA discussion, because one of the author's views is that, except for the closing itself, residential consumers are largely abandoned in the residential real estate transaction. These consumers often have no idea of the restrictions on their lives that come with planned community living.

In most instances, many closing tasks can be and are delegated, but ultimate responsibility for the client's welfare in the transaction rests with the closing attorney. Historically, however, responsibility has been narrowed and refined by the limited nature of the attorney's duties owed to a purchaser of real estate. Indeed, the attorney's duties seem to have become diluted by custom in North Carolina to the following functions in residential transactions: the title search and report to the title insurance company, paper shuffling and signatures on numerous forms at the closing, preparing an accurate closing statement, proper handling of funds, explanation of the key closing and financing documents, and post closing functions including recordation. The reader, especially if he or she is a practicing real estate lawyer, will take offense with the word "diluted," for the above list of functions demands know-how and hard work to properly prepare, con-

140. "Residential" closings must be carefully distinguished from "commercial" ones. In commercial closings both seller and purchaser are frequently represented by their own attorney and the scope of that representation and the services rendered often go substantially beyond the role of the attorney in the residential closing. Also, closing fees are significantly higher in commercial closings.

141. As of the time of this writing, several proposed ethics opinions are pending. *See, e.g.* N.C. State Bar, Proposed Formal Ethics Op. 10 (2004) (dealing with the professional relationship between the buyer's attorney and the seller) and N.C. State Bar, Proposed Formal Ethics Op. 12 (2004) (dealing with the proper supervision of paralegals). *See also,* N.C. CODE OF PROF'L RESPONSIBILITY 100 (1977); N.C. RULES OF PROF'L CONDUCT R. 210 (1997); N.C. RULES OF PROF'L CONDUCT R. 40, 41, 66 (1989); N.C. RULES OF PROF'L CONDUCT R. 44 (1988); N.C. RULES OF PROF'L CONDUCT RR. 82 and 86 (1990); Franklin E. Martin, *Professionalism*, 26 REAL PROP. 1 (December 2004) (published by the Real Property Section of the North Carolina Bar Association), and Chris Burti, *Two Real Property Ethics Opinions Proposed for 2004*, CAMPBELL L. OBSERVER, Dec. 2004, at 1.

duct and follow through on the closing. To say that the role has become diluted is not the same thing as saying that the functions performed by the closing attorney are not important ones.

We must face facts, however. The attorney's role is that of a "closer" who carefully complies with a "closing package" or "closing instructions." The transaction is not the purchase; it is the closing of the purchase and sale. For the most part, the closing attorney is there at the point of the client's exit from the home purchase process, and closing attorneys seem to do a superb job of shepherding the purchaser through the final part of the home purchase journey. But other than this service at the point of exit, the client in a residential closing is for the most part not served (or not even a client) from the point of his or her entrance into the residential real estate purchase process and through important stages in the interim period between contract of purchase and closing.[142] This is the way real estate agents want it. "The surest way to screw up any residential home sale is to have a lawyer involved in it from the start."[143] Furthermore, the standard sales contract forms are for the most part Realtor® driven,[144] while the deed of trust and related financing forms are lender driven (and dictated in large part by the apparent requirements of HUD and the secondary mortgage market). One recent commentator on contract law

142. Judging from the voluminous mortgage documents - the legalese flotsam and jetsam of overcautious scriveners - in use by many lenders that are required to use national standard forms, mortgages bloated with page after page of unnecessary terms, compliance with the closing instructions appears to take place with robot-like efficiency without any assessment of the potential impact of one-sided loan documents on the borrower.

143. The author has heard variations of this saying so many times that a source can only be attributed to the sentiments of most real estate agents. The saying probably first appeared as graffiti in ancient Rome.

144. Because of problems with inspection and repair issues, the *Offer to Purchase and Contract*, Standard Form 2-T, jointly approved by the North Carolina Bar Association and the North Carolina Association of Realtors®, dated 7/04, http://www.ncrealtors.org/legal/sampleforms/sf-2t-new.pdf (last visited Mar. 31, 2005), has been revised in a way that should help both sellers and buyers (and real estate agents forced to deal with these problems as *de facto* attorneys). Two alternatives concerning inspection and repair are on this revised form. A revolutionary new alternative, "Alternative Two," allows a buyer to pay a specified sum to the seller for the option to terminate for any reason or no reason at all by a specified date. If the buyer terminates under this alternative, the seller keeps the "option money" but not the "earnest money." This revision evidences an ongoing effort to create a functional, fair form that can serve both sellers and buyers. The author contends that these forms are Realtor® driven because, as a practical matter, a standard form that is not considered Realtor®-friendly will not be used by real estate agents.

in general hits the nail on the head when he compares consumer contracts with business-to-business contracts. He notes:

> The most notable difference between consumer contracts and business-to-business contracts is that consumer contracts are virtually never negotiated. They appear on forms prepared by the business generally in its role of seller, and are offered to the consumer on a take-it-or-leave-it basis; in other words, they are contracts of adhesion.[145]

The author of the Introductory Note to the Restatement Chapter 6, Common-Interest Communities, observes:

> Buyers of residential property, particularly first-time buyers in common-interest communities, tend to focus on price, location, schools, and physical characteristics of the property, rather than on the details of the documents that impose servitudes on the property and create the governing association. Even if the buyer carefully reads the documents, however, there is usually no realistic opportunity to negotiate changes.[146]

While a residential real estate sales transaction is often between one layperson and another, the forms utilized are largely generated by the needs or perceived needs of the "businesses" of real estate brokerage and lending. The only portions of the contract that are usually negotiated are the fill-in-the-blank portions, including amount of earnest money, closing date, and, of course, price. Historically, in North Carolina and in many other jurisdictions, the closing attorney has no proactive role in the residential sales contract negotiation process.

The lawyer's limited role in the closing process itself has prompted some paralegals, lenders, members of the public, and real estate agents - not to mention a federal government agency - after observing what is being done at the typical residential closing, to question why sellers and purchasers of real estate need a lawyer at the closing.[147] The legal profession can and has pulled up the drawbridge and aimed the cross-bows in the direction of the invaders. What has not been done, however, is an objective search for the answer to the obvious question: Are the critics correct? Moreover, have attorneys nar-

145. Edward Rubin, *Why Law Schools Do Not Teach Contracts and What Socioeconomics Can Do About It*, 41 SAN DIEGO L. REV. 55, 69 (2004) (footnote omitted). Rubin does add "[c]ontracts of adhesion are not necessarily inefficient or unfair. It is true that consumers generally cannot negotiate the terms of a contract, but they cannot redesign a car or a television either." *Id.* at 70.

146. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6 Introductory Note (2000).

147. *See* Whitman's comments of 35 years ago, *supra* note 139, at 417 ("Some attorneys already fear that unless present practices are reformed the public will find an alternative to the lawyer's role in real estate transfers." (footnote omitted.)).

rowed their role in the residential real estate sales transaction to the point where they are no longer necessary?

A recent North Carolina Court of Appeals decision, *Bolton v. Crone*,[148] sheds limited light on the closing attorney's role in the process and at least provides a springboard for discussion and debate. *Bolton* involved a legal malpractice action brought by a purchaser of real property against his closing attorney.[149] The case was easily resolved in favor of the closing attorney because of the expiration of the statute of limitations,[150] but the facts of the case, at least as alleged by the plaintiff, provide one snapshot of what might be expected of the closing attorney by the purchaser. The allegations of the plaintiff's complaint were:

> [Plaintiff] retained defendants for legal services in connection with his purchase of land . . . . Plaintiff gave a copy of the purchase contract to defendant . . . and communicated to him plaintiff's intent to use the land as a commercial site for automobile sales. Defendant . . . failed to advise plaintiff before the closing of the real estate transaction . . . that the subject land was restricted to residential use only.[151]

The contract to purchase the tract of land stated that the purchaser's intended use was for an automobile sales lot, and the contract was conditioned on the purchaser's ability to do so.[152]

After the real estate closing, plaintiff received several notices of the existence of residential restrictions from owners of neighboring property, and some of those neighbors commenced a legal action against him to enforce the covenants. Several years later, plaintiff commenced the malpractice action alleging that the closing attorney "had been negligent in failing fully to advise him of the existence and significance of the restrictive covenants, including his ability to withdraw from the contract."[153]

Assuming that the allegations in the purchaser's complaint are true, and assuming, arguendo, that the statute of limitations had not expired in the *Bolton* case, what are the duties of a closing attorney in this scenario? I would prefer not to discuss these duties within the negative context of the "m" word, because a malpractice discussion can trivialize the issue of a closing attorney's obligations to a client to a

148. Bolton v. Crone, 162 N.C. App. 171, 589 S.E.2d 915 (2004).

149. *Id.* at 172, 589 S.E.2d at 915.

150. N.C. GEN. STAT. § 1-15(c) (2001).

151. *Bolton*, 162 N.C. App. at 172, 589 S.E.2d at 915.

152. Plaintiff-Appellant's Brief at 2, Bolton v. Crone, 162 N.C. App. 171, 589 S.E.2d 915 (2004) (No. COA 03-319).

153. *Id.* at 3.

determination of the lowest common denominator of minimal acceptable professional service. Clearly, a closing attorney in the *Bolton* scenario should advise his purchaser-client, "I have reviewed the purchase contract and it looks like you should look elsewhere to open an automobile sales lot. There are residential restrictive covenants on the land that appear to be valid. Do you want me to look into this matter in more detail?"[154] A closing attorney who does not see this as an important duty is not representing the purchaser in any meaningful way and is little more than a middleman/woman pushing papers at the end of the purchase process.

Bolton provides an analogy, albeit imperfect, for addressing the questions in Senator Morgan's recent letter to me.[155] If an attorney is providing full representation to a residential purchaser of real estate, then he or she has an obligation to fully inform the client of the sweeping powers and negative implications of planned communities (or condominium developments). Just as the attorney at a closing carefully reviews the key terms of the mortgage and note, he or she has an obligation, at least in my opinion, to also carefully review the key terms of the private governance documents of the planned community. Ideally, this legal advice to the client should be given well in advance of the real estate closing. The exit interview, so to speak, is a bit late to be raising the implications of a purchase in a development that is operated by a powerful private government with statutory authorization.

The average layperson who attempts unaided by professional help to review the often extensive documentation of a planned community will receive a cryptic message at best as to the true nature of that layperson's future relationship with the homeowners association/private government. He or she will need specific legal advice to help decipher what will understandably appear to most laypersons to be a compendium of legalese and gobbledygook, and this legal advice must come from an attorney, not the real estate broker.[156] In this regard,

154. Looking into the matter in more detail might require an additional attorney fee. If the attorney made further investigation, he or she would discover that the residential restrictive covenants are apparently valid and that the neighbors are intent on enforcing them.

155. In *Bolton*, the harm to the purchaser was substantial: He could not use the land for commercial purposes because of residential-only restrictions. In the typical planned community scenario, the purchaser can use the unit purchased for his or her intended purpose, but ownership comes with many strings attached.

156. It is suggested that the compendium be made more consumer-friendly by the publication of a plain-English summary sheet pointing the prospective purchaser to key issues. This will also be of benefit to the developer and the homeowners

things get complicated when the closing attorney in fact represents the developer.

Key points of discussion between attorney and client should include the following:

1. Liens & fines
2. Legal fees
3. Expansion
4. Current management contracts
5. The likelihood of dues increases at higher rates than annual inflation
6. The possibility of special assessments
7. Voting rights and the fact of developer control in new projects
8. The possibility that promised improvements (swimming pool, tennis courts, etc.) might not be constructed

The advice need not be limited to doom and gloom. There are many advantages to living in a properly developed and governed planned community. Some of the most desirable residential developments in North Carolina are planned communities. Planned communities tend to be better investments in terms of property values. To some extent, planned communities can be described as quasi-democracies.

One response that I receive from practicing lawyers when suggesting that purchasers be fully advised and even warned about the implications of purchasing a home in a planned community is that, since most desirable residential developments are by definition "planned communities," the consumer has little choice. Put another way, even if a potential purchaser finds major disadvantages to the governance structure and rules of a planned community, his or her only choice is to go down the suburban road several miles to the next planned community. There is some merit to this response. Common interest communities of all forms are "coercive" in nature.[157] Each one requires that its residents live by an extensive set of private rules, private taxation, and private enforcement of remedies. If a purchaser has no bargaining power in terms of the existing private governance frame-

association. Prospects who then agree to become a citizen in the jurisdiction of the private government will be happier if they are adequately informed in advance.

157. Armand Arabian, *Condos, Cats, and CC&Rs: Invasion of the Castle Common*, 23 PEPP. L. REV. 1 (1995); Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA L. REV. 1519 (1982). The North Carolina Planned Community Act can be regarded as particularly coercive because of the General Assembly's elimination of important consumer protections found in the Uniform Planned Community Act and in the initial draft of the North Carolina Planned Community Act bill.

work of the planned community, and if a purchaser's only viable choices must come from a menu with nothing but planned communities on it, then why bother scaring the purchaser about the unpleasant possibilities of living in a planned community?

While the observation has some validity and merit, several responses would seem appropriate. First, comparing subdivisions in which to live is not necessarily a choice between Twiddledeedee and Twiddledeedum. Some planned community developments have more even-handed governance and rule structures than others. Some are healthier financially than others. Second, the consumer does have some choice in locating unrestricted land or land in a development that is not a planned community. Third, a purchaser of a condominium unit in North Carolina has a greater package of consumer rights than a purchaser of a unit in a planned community. In short, choices exist.

Moreover, even assuming that the purchaser has no choice because of the proliferation of planned communities in modern residential real estate development, an attorney advising the purchaser should nonetheless let that purchaser know what he or she is about to get into because it is the right thing to do. Attorneys who fully inform prospective purchasers are not "deal-spoilers;" rather, they are engaging in the traditional role of adviser to a person about to make what might be the most significant financial investment of his or her life.[158]

While on this topic of the attorney's role in the residential transaction, I can't resist adding a few more cents worth of professorial advice. The real estate bar has for the most part abdicated its leadership in the residential closing process. It is time for practicing real estate lawyers to quit worrying about whether a particular broker or bank will continue to refer clients for closings. Frankly, the current fees charged for closings appear to be loss leaders in many firms. I propose that individual attorneys take the offensive in a number of ways. Here are some possibilities:

1. *E-mails and newsletters*. The existing client base should be periodically educated on the importance of any residential home purchase. Clients should be strongly encouraged to seek legal advice

158. *See* Whitman, *supra* note 139, at 593 (noting that "prevailing practices in the transfer of North Carolina real estate are seriously deficient in their substantive protection of the buyer"). *See Id.* at 595 ("In reality, the lawyer makes only a meager contribution to the advisory function in most transactions . . . Of all the functions in the transaction, it is the function of giving competent advice which is most likely to go unfilled.").

before signing any offer to purchase real estate. Clients should receive updates on legislation such as the Planned Community Act.

2. *Newspaper articles and advertisements*. Attorneys should take the offensive and assume a leadership role in the residential closing area by expressing their views in newspaper articles and advertisements. Some of these articles and advertisements might chronicle the disastrous results of recent real estate transactions where the purchasers signed the standard form offer to purchase and contract without legal advice and then encountered significant financial problems. The public needs to be educated.

3. *Public Relations and the Organized Bar*. The organized bar needs to embark on a public relations and education campaign that is less concerned with hurting the feelings of the vested interests in the residential real estate business (i.e., lenders, real estate brokers, real estate developers and, perhaps, the title insurance industry) and more concerned with regaining leadership in the closing process. This is easier said than done.

4. *Communications to Lenders and Real Estate Brokers*. The truly bold - and some would say "reckless"- attorney could also make direct contact with lenders and brokers in his or her area explaining a vision for an expanded and more meaningful role of the residential closing attorney. That might be unpopular, but the result of the current popularity contest is that closing lawyers have sold their souls to the vested interests out of fear of losing future referrals.

IV. Summary and Conclusions

In this article, I have sought to use two landmark North Carolina Supreme Court decisions, *Wise v. Harrington Grove Community Ass'n* and *Runyon v. Paley* as springboards for a discussion of the common law of covenants and restrictions and the North Carolina Planned Community Act. As should be obvious by now, I am very opinionated about this topic and will briefly review my thoughts.

In my opinion, the "be-all and the end-all" of the PCA is to provide a strong and specific statutory enablement for sophisticated modern forms of real estate development that were previously very inadequately governed by the narrow confines of the common law of covenants at law and equitable restrictions. The concept of statutory enablement is made clear from the very start by the drafters of the Uniform Planned Community Act.[159] A special subcommittee report of the A.B.A. Real Property Section also highlights this aspect of the

159. Unif. Planned Cmty Act, Prefatory Note 1 (1980).

uniform act.[160] Referring to the Uniform Planned Community Act (UPCA), the "Conclusions and Recommendations" of this 1980 A.B.A. report recommended support by the American Bar Association of the UPCA for a number of reasons. One that is particularly appropriate in terms of shedding light on the *Wise v. Harrington Grove* decision is the following recommendation:

> 2. UPCA will do much to rationalize an important area of the law presently dominated by common-law distinctions that honor form over substance. The validity of planned community housing regimes should not depend upon compliance with the ancient rules governing equitable servitudes, privity of estate and covenants that "touch and concern" land, or the rule of the *Neponsit* case. These rules should be replaced by statutory standards geared to current needs of community association operations which leave the draftsman free to structure the legal forms to fit those needs, instead of compromising them in order to comply with ancient doctrine.[161]

The A.B.A. report concludes that the UPCA "will provide a dramatic improvement to the fabric of the law governing community association housing regimes," and that it "will make orderly what is at present a confusing patchwork of law."[162] The report also notes that the financing of planned community developments will be facilitated by the "statutory approval" of the planned community concept.[163] The idea that a statutory foundation replaces the common law is reinforced in a number of comments to the Uniform Planned Community Act. For example:

> 7. This section [1-102] does not permit a pre-existing planned community to elect to come entirely within the provisions of the Act, disregarding old law. However, the owners of a pre-existing planned community may elect to terminate the planned community under pre-existing law and create a new planned community which would be subject to all the provisions of this Act.[164]

The notion here is that of a uniform statutory framework replacing the common law. The idea is that the rights and responsibilities of members of a planned community, their developer and homeowners

160. Norman Geis, *Codifying The Law of Homeowner Associations: The Uniform Planned Community Act*, 15 A.B.A. REAL PROP. PROB. & TR. J. 854 (Winter 1980). This article constitutes a report by a Special Subcommittee of the A.B.A. Committee on Condominiums, Cooperatives and Homeowner Associations on the Uniform Planned Community Act.

161. *Id.* at 870 (citations omitted).

162. *Id.*

163. *Id.*

164. UNIF. PLANNED CMTY. ACT. § 1-102 cmt. 7 (1980).

association are to be governed and resolved by the Act first, and not by the Act as some sort of backstop against the patchwork quilt of common law cases.

The retroactivity issue is also clear insofar as the drafters of the Uniform Act and the proponents of the North Carolina version of that Act were concerned. They intended that certain portions of the Act apply automatically to pre-act planned communities,[165] and they understood that potential legal issues might arise by making the UPCA retroactive.[166] They conclude that the philosophy adopted by the UPCA "[r]eflects a desire to maximize the uniform applicability of the Act to all planned communities in the enacting state, while avoiding the difficulties raised by automatic application of the entire Act to pre-existing planned communities."[167] In another comment, they report that "[c]ertain provisions of the Act automatically apply to 'old' planned communities, but only prospectively, and only in a manner which does not invalidate provisions of planned community declarations and bylaws valid under "old" law."[168]

Examples in the official comment to UPCA § 1-102 reinforce the intent of the drafters with regard to coverage of pre-Act planned communities. The first paragraph of Example 2[169] reads:

> Under subsection (b)[of § 1-102], Section 3-118 (Association Records) automatically applies to "old" planned communities. As a result, a unit owners' association of an "old" planned community must maintain certain financial records, and all the records of the association "shall be made reasonably available for examination by any unit owner and his authorized agents", even if the "old" law did not require that

165. UNIF. PLANNED CMTY. ACT. § 1-102 cmt. 1 (1980) (dealing with retroactivity part) observes:

> Two conflicting policies are proposed when considering the applicability of this Act to "old" and "new" planned communities located in the enacting state. On the one hand, it is desirable, for reasons of uniformity, for the Act to apply to all planned communities located in a particular state, regardless of whether the planned community was created before or after adoption of the Act in that state. No state has previously enacted comprehensive legislation dealing with planned communities. . . .

166. *Id.* (dealing with the possible constitutional implication) On the other hand, to make all provisions of the Act automatically apply to "old" planned communities might violate the constitutional prohibition of impairment of contracts. In addition, aside from the constitutional issue, automatic applicability of the entire Act almost certainly would unduly alter the legitimate expectations of some present unit owners and declarants.

167. *Id.*

168. *Id.* cmt. 3.

169. *Id.* exp 2.

records be kept, or access provided. *If the declaration or bylaws, however, provided that unit owners could not inspect the records of the association without permission of the president of the association, the restriction in the declaration would continue to be valid and enforceable.*[170]

In summary, specified provisions of the UPCA were intended to apply to "old" (pre-UPCA) planned communities as to fact situations arising after the effective date of enactment of the UPCA, but, if the pre-Act planned community had an express provision to the contrary in a governing document, that provision would prevail over retroactive application of the UPCA.

It is my view that the attitude of appellate courts toward private restrictions on land should change to a realistic, accepting approach to enforcement. Because of a reluctance by appellate courts to change their approach in this area of property law, the common law of covenants and restrictions does not adequately accommodate modern, complex private government situations that exist in many planned communities/common interest developments.

The drafters of the Uniform Planned Community Act (UPCA) dropped the ball in a number of important respects. They should have anticipated future hotly contested retroactivity issues and carefully clarified both language in and comments to the UPCA. In addition, they should have added a "liberal construction" provision to the Act and done more to clarify the relationship between the statutory authority for covenants, restrictions, rules and regulations and the existing maze of common law requirements for enforcement. Finally, they should have considered a greatly simplified "mini-PCA" for the numerous small, unsophisticated planned communities that exist.

In terms of future interpretations of common interest community legislation, a new jurisprudence will of course develop. This jurisprudence should emphasize the statutory authority for the enforcement of covenants, restrictions, rules and regulations pursuant to uniform act legislation such as the PCA. Covenants, restrictions, rules and regulations created pursuant to a statute-based common interest development such as the Planned Community Act should be denominated "quasi-public ordinances" ("QPOs") to emphasize the fact that they are in fact the laws of a private government that has been given sweeping authority by enabling legislation. Property owners should be protected from the enforcement of arbitrary QPOs by a judicial gloss that will be a necessary part of statutory construction of uniform act legislation like the Planned Community Act.

170. *Id.* (emphasis added).

Attorneys handling residential real estate closings should be willing to go the extra mile by taking steps to fully inform the purchaser of the implications of becoming a citizen in a statute-based private government. Attorneys who draft planned community documents for new developments should reflect on any provisions that might detract from the creation of a healthy community of neighbors and - hopefully - friends. Excessive documentation, legalese and gobbledegook inhibit a sense of community. Full disclosure of the pluses and minuses of planned community living should be given to each prospective purchaser prior to the signing of a binding sales contract.

Developers and homeowners associations should facilitate the education of prospective purchasers by placing the full text of covenants, restrictions, rules and regulations on a website along with helpful study aids to assist prospective purchasers in making an informed decision. Full disclosure to prospective purchasers will go a long way to lessen hard feelings and misunderstandings after the purchaser becomes a citizen of the planned community.

The Real Property Section of the North Carolina Bar Association, advocates for consumers, and the North Carolina Attorney General's office should monitor and respond to significant abuses, if any, by homeowner's associations insofar as the power to fine, attorney's fees, and possible foreclosure of a homeowner's property are concerned. Industry groups and associations should also be sensitive to a potential for abuse of power in private governments.

Finally, the General Assembly should add the original consumer protections from the Uniform Planned Community Act to the North Carolina PCA. The rights of homeowner citizens living in North Carolina's planned communities should be both strengthened and clarified.