

AMENDING YOUR DOCUMENTS?

Well Maybe.....

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On August 18, 2006, the North Carolina Supreme Court handed down a decision striking down an amendment to restrictive covenants in a community which amendment authorized assessments which had not previously been authorized by the original restrictive covenants. The decision stemmed from litigation instituted by lot owners in The Ledges of Hidden Hills subdivision in Henderson County. The Supreme Court's ruling generally provides that homeowners associations do not have unlimited rights to amend their legal documents and amendments will be judged by a test of "reasonableness" to determine if they are valid. More specifically, the Supreme Court decision means that amendments creating new assessments obligations which were not covered in the original restrictive covenants will be deemed invalid.

The initial declaration for The Ledges, did not contain any provision for the collection of assessments. The declaration did provide that it could be "released, changed, modified or amended by majority vote of the then property owners within this Subdivision." However, the deeds from the developer to the lot owners contained language that stated that the new owners automatically would become members of the homeowners association and, further, the deeds stated that the new owners agreed to pay pro-rata charges and assessments which would be levied by the homeowners association when so formed. Although the community followed the amendment procedures in the declaration to amend their declaration to contain broader assessment powers, the Supreme Court reversed the trial court and Court of Appeals rulings upholding the amendment and found the amendment invalid. The Supreme Court held that because the plaintiff's had purchased lots in a small residential neighborhood with public roads, no common areas, and no amenities, it was unreasonable for the declaration to be amended to include broad assessment provisions granting the power to collect assessments for expenditures not contemplated in the initial declaration.

The case means that amendments generally will be judged by a "reasonableness" standard to determine if they are enforceable, and further deems amendments which add new assessments not previously contemplated in the original restrictive covenants, invalid. Therefore, even if the restrictive covenants allow for amendments with less than a unanimous vote of the membership, if the amendment

seeks to add a new assessment obligation for a homeowner (for example, a “user fee” for use of common area amenities, etc.), the amendment would require unanimous approval of the membership. If the amendment is not adding a new assessment obligation, the test to determine the validity of the amendment would be one of reasonableness, with reasonableness determined based on the language of the declaration, deeds, and plats and other circumstances unique to the community.

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