



December 18, 2015

To The Members of the South Carolina General Assembly:

On behalf of our fellow study committee members, enclosed please find the final report of the Study Committee on Homeowners Associations, which was established pursuant to Part 1B, § 117.135 of the 2015-2016 Appropriation Act.

This report is the result of three meetings held during the Fall of 2015. At those meetings, the study committee members received testimony, reviewed public input, studied compiled research documents, and discussed the issues required by the proviso.

We are most appreciative to all the persons who contributed to this effort. Our members' diverse backgrounds helped reveal the scope of concerns that property owners, board members, managers, developers, realtors, and others dealing with homeowners associations face. We hope our compiled findings and recommendations will be useful to the General Assembly as it considers legislation on this subject.

Respectfully submitted,

Senator Luke A. Rankin, District 33, Horry County, Chairman

Representative F. Michael "Mike" Sottile, District 112, Charleston County, Vice Chairman

**Note: This report, along with the study committee documents, may be found online at:
<http://www.scstatehouse.gov/CommitteeInfo/HomeownersAssociationStudyCommittee/HomeownersAssociationStudyCommittee.php>**

STUDY COMMITTEE ON HOMEOWNERS ASSOCIATIONS

LEGISLATIVE MEMBERS

(APPOINTED BY SENATOR LARRY A. MARTIN, CHAIRMAN, SC SENATE JUDICIARY COMMITTEE)

Senator Luke A. Rankin, District 33, Horry County, Chairman

Senator Kevin L. Johnson, District 36, Clarendon County

(APPOINTED BY REPRESENTATIVE WILLIAM E. "BILL" SANDIFER, CHAIRMAN, SC HOUSE LABOR, COMMERCE & INDUSTRY COMMITTEE)

Representative F. Michael "Mike" Sottile, District 112, Charleston County, Vice Chairman

Representative Mike Ryhall, District 56, Horry County

INTEREST REPRESENTING MEMBERS

(JOINTLY APPOINTED BY SENATOR L. MARTIN AND REPRESENTATIVE SANDIFER)

Ken Skelly, North Myrtle Beach SC

Maraide Sullivan, John Island, SC

Shane Ousey, Blythewood, SC

Three property owners who are members of a homeowners association due to owning property in the homeowners association and governed by a homeowners association board

Dick Unger, Columbia, SC - *Attorney who has represented homeowners associations and boards*

Shaun W. Cranford, Columbia, SC - *Attorney who has represented homeowners*

W. Press Courtney, Pawleys Island, SC - *Manager favoring certification or licensing*

Jud Smith, Columbia, SC - *Manager opposing certification or licensing*

Andy Lee, Seneca, SC - *Realtor*

William Harry Dill, Myrtle Beach, SC - *Home Builder*

Carri Grube Lybarker - *Administrator, South Carolina Department of Consumer Affairs*

Designee for Administrator Grube Lybarker

Martha "Marti" Phillips, Deputy Administrator, South Carolina Department of Consumer Affairs

Richele Taylor - *Director, South Carolina Department of Labor, Licensing and Regulation*

Designees for Director Taylor:

Dean Grigg, Deputy Director LLR, Professional Licensing

Rod Atkinson, Administrator of SC Real Estate Commission

STAFF

Paula G. Benson Senior Staff Attorney, SC Senate Judiciary Committee

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Benjamin Limbaugh Law Clerk, SC Senate Judiciary Committee

Claire Voegele Law Clerk, SC Senate Judiciary Committee

Lindsey Knipp Proofreader, SC Senate Judiciary Committee

AUTHORIZATION FOR STUDY COMMITTEE ON HOMEOWNERS ASSOCIATIONS

The Study Committee on Homeowners Associations was established pursuant to Part 1B, § 117.135 of the 2015-2016 Appropriation Act. This proviso created a committee of thirteen appointed members and two ex officio members to review laws, policies, practices, and procedures regarding homeowners associations in this State and other jurisdictions, and to make recommendations to the General Assembly regarding proposals for South Carolina's statutory law.

The study committee was charged to review information, including, but not limited to, case law, statutes, uniform laws, and other information from South Carolina and other jurisdictions concerning homeowners associations. Specifically, the study committee was authorized, but not limited to, reporting on the following issues:

- (1) disclosure of governing documents to prospective buyers;
- (2) education for homeowners and board members;
- (3) manager certification or licensing;
- (4) time period for developer control of an association; and
- (5) need for a comprehensive or uniform planned community act.

The study committee was directed to make a report of its recommendations to the General Assembly by December 31, 2015, at which time the study committee would be dissolved.

CHAIRMAN'S INTRODUCTION

As chairman of the Study Committee, I want to express my sincere appreciation to the committee members for an open exchange of ideas during our multiple discussions. We are grateful to Samuel F. Albergotti, Member of Jones, Spitz, Moorhead, Baird & Albergotti, PA, Anderson, SC; Lauren Ellison Fox, General Counsel, Marshland Communities, Charleston, SC; John T. Moore, General Counsel, South Carolina Bankers Association and Partner of Nelson Mullins Riley & Scarborough LLP, Columbia, SC; and Stephen A. Spitz, Of Counsel, Stevens & Lee, P.C., Charleston, SC, who appeared before us to present expert testimony, and for the public input received in over 200 correspondences and emails. All provided excellent information for the committee members to review. Thank you also to the staff for researching the issues and compiling the report.

Truly, the time has come for careful legislative consideration about the processes involving property owners, board members, managers, developers, realtors, and other parties that are subject to homeowners associations, property owners associations, condominium owners associations, horizontal property regimes, or similar organizations. We hope the findings and recommendations contained in this report will be beneficial when measures are introduced and debated in the General Assembly.

Respectfully submitted,

Luke A. Rankin
District 33, Horry County, Chairman
December 18, 2015

STUDY COMMITTEE FINDINGS AND RECOMMENDATIONS

I. Disclosure of Governing Documents to Prospective Buyers

Findings:

Article 1, Chapter 50 of Title 27 of the South Carolina Code of Laws provides for residential property disclosure statements from a property owner to the purchaser of the property, except in certain situations specified in Section 27-50-30.

Section 27-50-10(2) defines “disclosure statement” as a form required by the article and promulgated by the regulations of the South Carolina Real Estate Commission.

Pursuant to the authority of Article 1, Chapter 50 of Title 27, the South Carolina Real Estate Commission has developed a “Residential Property Condition Disclosure Statement” to be provided to a purchaser for any sale, exchange, installment land sale, and lease with an option to purchase contract except where the disclosure statement is not required or exempted by Section 27-50-30.

In addition to the “Residential Property Condition Disclosure Statement,” the South Carolina Real Estate Commission has developed a “Residential Property Condition Disclosure Statement Addendum” to be provided to a purchaser if the property is subject to a homeowners association, a property owners association, a condominium owners association, a horizontal property regime, or similar organizations subject to covenants, conditions, restrictions, bylaws, or rules (CCRB).

Section 27-50-30(10) provides that Article 1, Chapter 50 of Title 27 does not apply to transfers “involving the first sale of a dwelling never inhabited.”

Submitted by W. Press Courtney and Shaun W. Cranford with Senator Kevin L. Johnson concurring

Disclosure forms, as regulated by the Real Estate Commission, should be provided for all sales including new owners.

Submitted by William Harry Dill, Shane Ousey, Jud Smith, Dick Unger

There should be disclosure by the Seller. In addition to the present Real Estate Commission forms, the provisions of Section 27-30-100 of S. 860 should be followed.

Submitted by Carri Grube Lybarker (Department of Consumer Affairs)

Providing meaningful notice of the existence of a homeowners association (HOA) and a high level overview of aspects of the governing documents is essential to a prospective buyer’s capability in making an informed decision in purchasing the property. Such notice is also beneficial to the HOA as a homebuyers’ knowledge of the rules and covenants is needed to ensure compliance and a successfully functioning HOA.

Submitted by Senator Luke A. Rankin with Senator Kevin L. Johnson concurring

For property subject to a homeowners association, the Residential Property Condition Disclosure State Addendum needs to be provided to all buyers, including a first sale of a dwelling never inhabited.

Submitted by Ken Skelly

Unless they have been on a board or happen to have had previous involvement in an issue requiring them to study or apply governing documents, the majority of current owners and potential buyers of property in “common interest” communities have little knowledge or awareness of the extent to which some Declaration of Covenants, Conditions, and Restrictions (“CC&R’s”) control what they understandably consider their home and the very quality of their lives.

Submitted by Maraide Sullivan

I concur with all of the above, except comments regarding S. 860 because I would need to study it more to understand its full implication.

Recommendations:

Section 27-50-30 should be amended to provide that a disclosure statement concerning property subject to a homeowners association, a property owners association, a condominium owners association, a horizontal property regime, or similar organizations subject to covenants, conditions, restrictions, bylaws, or rules must be provided by an owner to any purchaser, including the first sale of a dwelling never inhabited. [In the example below, new language is indicated by underlining.]

“Section 27-50-30. (A) This article does not apply to transfers:

(1) pursuant to court order including transfers in administration of an estate, pursuant to a writ of execution, by foreclosure sale, by a trustee in bankruptcy, by a receiver, by eminent domain, and resulting from a decree for specific performance;

(2) to a mortgagee from the mortgagor or his successor in interest in a mortgage if the indebtedness is in default, by a trustee pursuant to a deed of trust or to a mortgagee pursuant to a mortgage if the indebtedness is in default, by a trustee under a mortgagee pursuant to a foreclosure sale, or by a mortgagee who has acquired the real property at a sale conducted pursuant to a judgment and order of foreclosure;

(3) by a fiduciary in the course of the administration of a decedent’s estate, guardianship, conservatorship, or trust;

(4) from one or more co-owners solely to one or more other co-owners;

(5) made solely to a spouse or a person or persons in the lineal line of consanguinity of one or more transferors;

(6) between spouses resulting from a divorce decree or support order or marital property distribution order;

(7) made by virtue of the record owner’s failure to pay federal, state, or local taxes;

(8) to or from the federal government;

(9) to the State, its agencies and departments, and its political subdivisions including school districts;

(10) involving the first sale of a dwelling never inhabited, except as provided in subsection (B);

(11) real property sold at public auction;

(12) to a residential trust;

(13) between parties when both parties agree in writing not to complete a disclosure statement;

(14) of a vacation time sharing plan as defined in Section 27-32-10(9); and

(15) of a vacation multiple ownership interest as described in Section 27-32-250.

(B) A disclosure statement developed by the commission for purchasers of property subject to a homeowners association, a property owners association, a condominium owners association, a horizontal property regime, or similar organizations subject to covenants, conditions, restrictions, bylaws, or rules must be provided by an owner to any purchaser, including the first sale of a dwelling never inhabited.

Submitted by W. Press Courtney and Shaun W. Cranford with Senator Kevin L. Johnson concurring

We support the use of current Real Estate Disclosure forms for all real estate transactions, including the purchase of new homes, in South Carolina

Submitted by William Harry Dill, Shane Ousey, Jud Smith, Dick Unger

Enact Section 27-30-100 of S. 860

“Section 27-30-100. A seller of a lot shall disclose to any prospective owner whether the lot to be sold is subject to governing documents. If so, the seller shall make such governing documents available to the prospective owner in a printed format or by electronic or other means including providing the prospective owner with the location where the governing documents can be downloaded from a website. Upon written request from a prospective owner, the seller shall make any such governing documents available to a prospective owner either during the due diligence period set forth in the sales contract or before the execution of a sales contract in the event such contract does not set forth a due diligence period. A seller is solely responsible for the costs of providing any such governing documents to a prospective owner. The association may establish and collect reasonable fees to offset the cost of either the production of or the providing of such records, or both, except that the association may not charge for the downloading of such documents from a website. This does not require an association to post any information, including governing documents, on a website. Nothing contained in this chapter causes the failure of a prospective owner to request governing documents, or after a written request is made, the failure of a seller to provide governing documents, in any way, to affect the enforceability of the governing documents or the obligation of any owner to comply with the governing documents.”

Submitted by Carri Grube Lybarker (Department of Consumer Affairs)

The current Real Estate Disclosure Form addendum pertaining to HOA should be used for all real estate transactions, including the purchase of “new” homes. Also, information on where the prospective buyer can obtain additional general information on HOAs should be added to this disclosure.

Submitted by Senator Luke A. Rankin and Senator Kevin L. Johnson concurring

I would support legislation to provide the disclosure statement to all buyers, including a first sale of a dwelling never inhabited that is subject to a homeowners association.

Submitted by Ken Skelly

The proper State agency should compile a pamphlet, understandable to the average South Carolinian with at least an Eighth Grade Education, that explains the importance of CC&R's, the fact that, while they seem to be just legal mumbo jumbo, they are actually real and important commitments that must be appreciated in order to avoid expensive and disappointing surprises. Decisions about what changes owners may make to and around their home, how much they must pay every month, whether they can use the amenities, and even park a vehicle in their own driveway are likely to be made by people that the owners may not even know. The pamphlet should be readily available to all, especially in sales offices and common interest communities.

The seller, whether developer, builder, or owner, must be required to make available to any *bona fide* prospective buyer (upon reasonable request and payment for costs of reproduction) current CC&R's, most recent financial statement, and a statement of current and reasonably anticipated monthly fees and any special assessments ("required disclosures").

Prior to closing of any sale, any information or materials that may be necessary to update the required disclosures must be provided by closing attorney to the buyer no later than the advice to buyer of the amount of funds that must be available for closing. In no case shall buyer have fewer than three (3) days to review required disclosures.

Submitted by Maraide Sullivan

I concur with remarks by Ms. Grube-Lybarker. Additionally, the "general information on HOAs" should be highlighted in some way as done with time share type purchases (large type in bold that includes number of days to review and cancel.)

I concur with remarks by Mr. Skelly. FAQ would be helpful as both a printed pamphlet and in an online format that could be easily found via a search at www.SC.gov.

In response to Mr. Skelly's suggestion that a buyer have no fewer than 3 days to review required disclosures, I would recommend 5 business days. Additionally, a buyer could date and sign when they received the information and date and sign again after their review and agreement.

II. Education for Homeowners and Board Members

Findings:

Education could benefit homeowners and board members by ensuring that they are aware of their responsibilities and duties. In providing additional insight about HOA processes, education might help HOAs to operate more smoothly.

Mandatory education would place additional obligations on board members and could deter homeowners from offering to serve as board members, thus causing burdens that hinder the operation of HOAs.

Submitted by W. Press Courtney and Shaun W. Cranford

Non-mandatory education provided by some entity in an online format would be beneficial for homeowners and Board Members.

Submitted by William Harry Dill, Shane Ousey, Jud Smith, Dick Unger

Education should be made available at no cost to the homeowners, board members, and realtors by the South Carolina Real Estate Commission. The courses offered by the Commission could be divided into two separate courses so that the homeowners' course could be more general and the board members' course could be more specific as to the duties and responsibilities of the boards and best practices of the boards. Both courses would be available to all, but the homeowners could choose to take only the homeowners' course. The most important thing is for the courses to be available to the public at no charge and be comprehensive enough to provide a good education for the homeowners and board members as to their obligations and rights in a planned community. These courses would be the homeowners' bill of rights and the courses could be revised as the rights and obligations of homeowners change through case law, without having to pass amendments to a codified "Bill of Rights." Also the website should contain links to further information on the web for homeowners.

Submitted by Carri Grube Lybarker (Department of Consumer Affairs) with Maraide Sullivan concurring

Ensuring homeowners and board members are aware of their rights and responsibilities under the association is imperative to the association operating as intended, for the mutual benefit of residents.

Submitted by Senator Luke A. Rankin

During the 2015 legislative session, I introduced S. 13 and served as chairman of the subcommittee that presented an amended S. 18 to the Senate Judiciary Committee. Both measures contained provisions for educating owners and board members about HOAs. S. 18 met opposition on the Senate floor. I hope education for owners and board members is a subject the General Assembly will be able to address.

Submitted by Ken Skelly

Although the homeowner pays everyone -- the seller, the lawyer, the HOA, and the property manager--it is the homeowner who is least able to obtain accurate, unbiased practical advice and information about his or her rights, duties, and obligations within a common interest community. The one best situated, although not always able or willing, to provide this information to the homeowner is the property manager. Usually selected by the developer of a project, the manager

owes that entity for the opportunity to earn the trust of the homeowners and be invited to remain after complete transition from developer to 100% homeowner control. However, the manager that wants to continue being selected by the developer for subsequent projects finds it difficult to encourage a homeowner to stand against the developer.

Education is already available. According to one source, “CAI (Community Associations Institute) webinars offer specialized, professional training without leaving your home or office. Conducted via internet and audio teleconference, the programs are hosted by industry experts to keep you up to date on the latest legislative activity, management trends, industry best practices and subjects of special interest to community managers and homeowners. More than 150 on- demand webinars are now available, and new live webinars are added every month.”

Board members are often difficult to convince whether to seek the position or obligate themselves to spend time or money to become educated.

Submitted by Maraide Sullivan

I concur with the findings of Mr. Dill, Mr. Ousey, Mr. Smith, and Mr. Unger. It could be recommended that all property management companies provide a link so that homeowners can choose to educate themselves. It could be recommended that those wishing to run for the Board be educated beforehand.

Recommendations:

While the Community Association Institute (CAI) and other private entities offer educational resources to homeowners and managers, state government cannot place the sole responsibility of educating homeowners and board members on a private entity. See, Article III, Section 1 of the South Carolina Constitution prohibiting the delegation of legislative authority, and *Eastern Federal Corp. v. Wasson*, 281 S.C. 450, 316 S.E.2d 373 (1984), in which the South Carolina Supreme Court held that a tax on admission to movies rated “X” by the Motion Picture Association of America, a private entity, was an unconstitutional delegation of legislative authority.

In order to provide accurate and readily available resources to educate homeowners, board members, and interested persons about the duties and responsibilities of property ownership in an HOA community, the General Assembly should authorize the Department of Labor, Licensing and Regulation (through its Real Estate Commission) and the Department of Consumer Affairs to seek reliable and unbiased information available from private entities (including attorneys and managers of differing perspectives) and provide for published and online documents and programs offering HOA education in the most efficient and cost effective manner possible, which may require separate productions for Board education than for potential purchasers and current owners.

Submitted by W. Press Courtney and Shaun W. Cranford with Maraide Sullivan concurring

We support, and stand ready to assist, with an online education platform that is available to board members and homeowners.

Submitted by William Harry Dill, Shane Ousey, Jud Smith, Dick Unger

Enact Section 27-30-80 of S. 860

“Section 27-30-80. (A) Beginning January 1, 2016, the commission shall offer an online instructional course covering the basics of owners’ association governance and the rights and responsibilities of owners. The online course is open to the public and may be taken by any interested person. The completion of the course is not a requirement to serve on the board of an association.

(B) The course must be offered at no charge.

(C) The course must include, but is not limited to, the following subjects:

- (1) the South Carolina Nonprofit Corporation Act, Section 33-31-101, et seq., and other state and federal laws concerning governance of owners associations;
- (2) ethical and fiduciary duties;
- (3) owner responsibilities to an association and to other owners;
- (4) board responsibilities to an association and its owners including, but not limited to, disclosure of association records;
- (5) declarant rights and funding;
- (6) insurance;
- (7) budgeting and reserves;
- (8) enforcement of governing documents;
- (9) collection practices and procedures; and
- (10) rights of owners as members of an association.”

Submitted by Carri Grube Lybarker (Department of Consumer Affairs) with Senator Kevin L. Johnson and Maraide Sullivan concurring

Basic principles of a HOA should be made available in a simple, easy to understand format for prospective homebuyers and homeowners. To that end, we would propose the following draft language for insertion in legislation:

“The Department of Consumer Affairs, in consultation with representatives of homeowners, homeowners associations, property managers, builders, real estate brokers, attorneys, and the Director of the Department of Labor, Licensing and Regulation shall develop a written pamphlet that explains the rights and responsibilities of homeowners living in a HOA pursuant to this Act. The Department of Consumer Affairs shall make the pamphlet readily available on its website and in writing, upon request. The availability of the brochure shall be delineated on the Residential Property Condition Disclosure Statement Addendum.”

Providing for more detailed, online videos available to homeowners and board members would also be beneficial.

Submitted by Senator Luke A. Rankin

The education provisions of S. 18 and S. 860 are substantially similar. I hope the General Assembly may address this topic in the upcoming 2016 session.

Submitted by Ken Skelly

Homeowners should have reasonable access to an organization such as Community Associations Institute (CAI) or a knowledgeable State agency to obtain unbiased, accurate information. Part of the manager's responsibility should include providing contact and access information to these sources. In addition, managers should provide opportunities to homeowners to attend webinars on various topics held for the purpose of educating willing homeowners. These are available at nominal cost to managers (and others) and could be made available to homeowners for a nominal charge or at no cost.

Webinars and in-person seminars should also be made available to board members. Associations or property managers should be encouraged or required to provide these benefits at a nominal or no cost to both board candidates and members.

Proof of completion of such webinars and seminars should be kept on file by the association, and disclosed to the homeowners casting ballots for board candidates.

Submitted by Representative F. Michael "Mike" Sottile

Education about belonging to an HOA and serving on an HOA board is beneficial to persons owning property in HOAs and potential buyers. I support offering the public free information about the HOA laws and obligations in South Carolina posted on the Department of Labor, Licensing and Regulation and Department of Consumer Affairs' websites.

Submitted by Maraide Sullivan

I concur with Mr. Skelly's above statement if the education is provided at www.SC.gov.

III. Manager Certification or Licensing

Findings:

HOA managers provide varying levels of service to boards and HOAs. The duties of managers may include providing accounting or, in some cases, human resources services. Managers may arrange for landscaping, property maintenance, and security services or offer advice to boards in the selection of (or seeking bids from) such providers. Managers often advise and assist boards in the areas of covenant enforcement and insurance procurement. The services provided by managers for smaller or even medium sized communities are usually not as extensive or complicated as those provided for large developments. The managers of larger HOAs may have significant responsibilities, analogous to the administrators for small municipalities.

State government currently regulates persons practicing in many areas somewhat similar to those handled by HOA managers, such as real estate agents and rental property managers. Licensing or certification of HOA managers could, in some cases, offer a means of ensuring that HOA managers have the qualifications and are accountable for their actions in managing a HOA.

Section 40-1-10(A) and (B) of the South Carolina Code of Laws provides guidance for when a profession may be licensed by the State:

“Section 40-1-10. (A) The right of a person to engage in a lawful profession, trade, or occupation of choice is clearly protected by both the Constitution of the United States and the Constitution of the State of South Carolina. The State cannot abridge this right except as a reasonable exercise of its police powers when it is clearly found that abridgement is necessary for the preservation of the health, safety, and welfare of the public.

(B) No statute or regulation may be imposed under this article upon a profession or occupation except for the exclusive purpose of protecting the public interest when the:

(1) unregulated practice of the profession or occupation can harm or endanger the health, safety, or welfare of the public and the potential for harm is recognizable and not remote or dependent upon tenuous argument;

(2) practice of the profession or occupation has inherent qualities peculiar to it that distinguish it from ordinary work or labor;

(3) practice of the profession or occupation requires specialized skill or training and the public needs and will benefit by assurances of initial and continuing professional and occupational ability; and

(4) public is not effectively protected by other means.”

State regulation through licensing or certification requires funding. Section 40-1-50(D) provides that boards be self-sustaining from the fees collected by those receiving licenses or certificates. Concern has been expressed about whether the manager or the HOA, and ultimately its homeowner members, will bear the cost for fees for licensure or certification.

Submitted by W. Press Courtney and Shaun W. Cranford

The Study Committee heard testimony advocating manager licensing. Members of the Study Committee voiced differing viewpoints concerning manager licensing.

Submitted by William Harry Dill, Shane Ousey, Jud Smith, Dick Unger

There is no need to require the certification or licensing of managers by the State. There was no clear evidence provided that licensure is either necessary or a requirement for good management or that bad management is a significant problem. There are numerous organizations which certify managers and numerous managers are already certified at no cost to the public or the homeowners. There was no evidence presented that proves that the certification or licensing of managers would protect the public or the homeowners. Neither North Carolina nor Georgia require licensing of managers and only a few states require licensing or certification of managers. There has been no testimony from LLR that licensing is necessary and there has been no discussion related to: the cost of implementation, structure, or reach of such a program. Nor has there been discussion on what the regulatory process would encompass or how it would “effectively” or “efficiently” stop the issues that have been discussed, most of which relate to boards, not managers. The legislation that has been proposed in the past to allow Consumer Affairs to “regulate” managers and boards has included a tax on each lot owner who owns a lot in a planned community with a homeowners association. Before any regulation is seriously considered or even recommended by the Study Committee, the depth, effect, cost, and, as important, the method for funding such a program needs much more analysis than what has occurred to date. These issues have been absent from the

discussion, which has rested more on “why not” than the actual effect of implementing such a program.

Submitted by Carri Grube Lybarker (Department of Consumer Affairs)

Management companies are entrusted with duties involving collection and maintenance of funds and securing contracts on behalf of the association.

Submitted by Senator Luke A. Rankin

This subject requires a balancing test in determining the definition of HOA managers that need regulation and the most cost effective manner for providing oversight.

Submitted by Ken Skelly

In its 2014 Fact Book, the CAI Foundation for Research stated: “The Community Associations Institute estimates that in 1970 there were 10,000 community associations nationwide. In 2014, there are 333,600 associations housing more than nearly 65 million Americans.”

Management of common interest community properties has become a specialized industry. Rarely are their energies spent in selling or buying property, as specialized and important as those disciplines are. States such as DE, GA, IL, VA and NV have recognized the important role that specialized, common interest community professionals play in the lives of a growing number of families, and require common interest community specific certification and/or licensing.

In SC, there were 6,675 Homeowner Associations with a population of approximately 1,330,000 in 2014. As is true of the rest of the US population, owners in South Carolina community associations are getting older. While larger communities are generally able to hire professional managers, many others self-manage or engage the services of someone claiming to be a ‘property manager.’

Property managers are responsible for collecting, handling, investing, and disbursing significant funds as a fiduciary for HOAs.

In SC, the Estimated Value of Homes in Associations in 2014 was \$99,000,000,000; the Estimated Annual Assessments were \$1,400,000,000, and the Estimated Annual Reserve Fund Contributions were \$440,000,000. Every month, these managers handle the fortunes of South Carolina’s planned community residents.

Submitted by Maraide Sullivan

Certification doesn’t make someone honest and could create an unnecessary layer of bureaucracy. Property managers already can boast of the education and training they have received.

Recommendations:

The Study Committee members expressed strong opinions in favor and in opposition of manager licensing and did not reach a consensus on this issue.

Submitted by W. Press Courtney and Shaun W. Cranford with Senator Kevin L. Johnson concurring

We support the need for manager licensing. Most HOA managers have control over large assets and amounts of monies. Further, managers are tasked with securing service providers, insurance contracts, document maintenance, and record production. An agency, preferably LLR, should be responsible for overseeing managers to protect the general public from unscrupulous actions or malpractice.

Submitted by William Harry Dill, Shane Ousey, Jud Smith, Dick Unger

The State should not certify or license managers of homeowners associations or establish another agency which certifies or licenses agents.

Submitted by Carri Grube Lybarker (Department of Consumer Affairs)

Oversight should be provided for management companies handling funds on behalf of the association or those engaging in duties where a fiduciary capacity should be clearly established, such as bidding contracts or otherwise securing services for the HOA. A bonding requirement should be implemented, coinciding with the funds maintained, ie: on a sliding scale.

Submitted by Senator Luke A. Rankin

I expect to hear further debate on this topic in the General Assembly. The primary concerns must be manager accountability and efforts to protect property owners.

Submitted by Ken Skelly

Certification by one or more recognized organizations, after training and testing, is necessary to protect homeowners from incapable, uninformed charlatans posing as property managers. Licensing by the State is necessary to protect homeowners from the truly larcenous, stupidly criminal or criminally stupid property manager.

Managers who work for HOA's and deal with so many people, young and old, who cannot be expected to understand complex governing documents and the many obligations of ownership and residence ought to be required to have the basic knowledge of the law, financial and common interest community management that is widely available. In its role of protector of all of its citizens,

especially those less equipped to care for themselves in complicated and important matters impacting their daily lives, the State government should assure this protection. Certification would guarantee that managers have attained some proficiency, while licensing would afford an enforcement mechanism to assure that proven bad actors would not continue to prey on the unsuspecting homeowner.

Submitted by Maraide Sullivan

Perhaps there should be some type of accountability or perhaps bonding requirement because of the amount of money these management companies oversee. Perhaps it should be recommended that a third party finance professional oversee/review the finances—someone who is not on staff with a property management company, but may already have some type of license with the state. I oppose creating a layer of state bureaucracy for licensing.

IV. Time Period for Developer Control of an Association

Findings:

A developer may wish to retain control of an HOA for community due to the developer: (1) having knowledge of the development process; (2) needing to be involved until profits are realized; and (3) maintaining a consistent vision for community integrity.

Submitted by W. Press Courtney and Shaun W. Cranford

Comprehensive planned community legislation which defines developer transition of control would be beneficial.

Submitted by William Harry Dill, Shane Ousey, Jud Smith, Dick Unger

There was very little evidence presented to the committee that indicates that developer control was detrimental to the homeowners. To the contrary, most evidence indicated that in order for the community to function properly during the build out, the developer should remain in control of the association to ensure proper enforcement of the community wide standards and maintenance of the common area. The developer has a fiduciary duty to complete and deliver the common elements in good working order with proper reserves for repairs and replacements and to do so, the developer must maintain control of the association. A large part of the Study Committee's discussions have been related to renegade boards and the fact that they do not fulfill their responsibility or over-estimate their authority. While allowing a developer to remain in control may serve the developer's purposes, to a similar end and more often than not, developer control serves the owners of the communities with higher standards of services, as a result of marketing concerns and the desire to deliver a well-run community to its potential purchasers. Communities that are not properly run are not marketable and often homeowners do not run them properly after the developer has relinquished control. The recourses that a disgruntled owner might have with a developer-appointed board are no different than those where a member-elected board is in place. Disclosure of records is no different, the responsibilities of the board members are no different and, as important, the rights and obligations of the owners are no different.

Submitted by Carri Grube Lybarker (Department of Consumer Affairs) with Maraide Sullivan concurring

At a certain point in time, the interests of the homeowner members of a homeowners association outweigh those of a builder. Therefore, the majority of control should be transferred to the association.

Submitted by Senator Luke A. Rankin

The Study Committee members engaged in a lively discussion on this topic. Obviously, communication between the developer and the property owners is important so that all understand the process and have information about expenses and reserves.

Submitted by Ken Skelly

Developers exercise control of associations necessarily and beneficially for a limited period of time to assure that they can complete the project and sell the units without interference by newly resident owners.

Most developers prefer to retain some form of control for as long as it takes for them to sell all the units in the project. Unfortunately, when the economy worsens, developers take far longer to sell units than anyone anticipated.

As developers, they direct the preparation of the CC&R's, and assure themselves of control over the association in various ways:

1. Developer names the initial board, and puts its employees on the board.
2. Developer names certain homeowners as an "Advisory Committee" or even to comprise a minority of the board.
3. Developer may give up its majority of the board, but retain a minority (or even just one) of the seats along with absolute veto power over actions of the board.
4. Developer gives up more than one seat, and absolute voting power, but retains the right to attend all meetings of the board, ostensibly to assist the board.
5. The mere presence of a developer representative at an association board meeting prevents any detailed, serious discussions in preparation for transition of defective construction, reserve shortfalls, or legal remedies that may be available to the association against a developer.
6. By controlling the association's budget, including both its operating and reserve budget, and the monthly fees owners must pay into the association, the developer maintains control over a key cost factor in a potential buyer's calculation as to whether to buy or not.
7. By subsidizing the association's budget as developer deems necessary, and providing that any such subsidy is to be deemed a "loan" to the association, developer can artificially maintain lower monthly fees than are realistic **and** threaten to call the "loan" and counter sue if the association asserts a significant claim against the developer at transition.

As a practical matter, by maintaining the resources available to the association at a low level, developer effectively prevents the association from retaining its own professional architects or engineers to conduct forensic inspections of the common facilities to assess whether it requires legal assistance upon transition just to enforce the requirement that developer turn over the property in proper working order.

Recommendations:

The Study Committee members expressed strong opinions in favor and in opposition of a time period for a developer to relinquish control over a HOA and did not reach a consensus on this issue.

Submitted by W. Press Courtney and Shaun W. Cranford

We support defined developer transition to owner control within a comprehensive planned community act as outlined below.

Submitted by William Harry Dill, Shane Ousey, Jud Smith, Dick Unger

Enact Section 27-30-170 of S. 860.

“Section 27-30-170. (A) The declarant right(s) must be clearly set forth in either the declaration or bylaws, or both.

(B) The declaration may provide for a period of declarant control of the association, during which period the declarant, or persons designated by the declarant, may appoint and remove the officers and members of the board.

(C) Any director elected by the owners may be removed from the board, with or without cause, by the affirmative vote of a majority of the votes of the association.

(D) Except as otherwise provided in the declaration or bylaws, after the declarant or developer has sold all the lots in the community, control of the association is automatically conveyed to the members of the association. Nothing in this section may be construed to prevent the declarant or developer from transferring control of the association to the members before the sale of all the lots.

(E) By the filing of a document with the recording office of deeds or by providing written notice to the board, the declarant or the association, when so empowered, may assign, either permanently or temporarily or in part or in whole, any or all of the rights and powers granted or arising from the declaration to one or more entities or persons without the consent of any owner. The declarant or the association, when so empowered, may delegate any of those powers and rights to the same extent as it may assign them without any recording or notice requirements.”

Submitted by Senator Kevin L. Johnson

At some point control, control must be transferred from the developer to the homeowners. I think more study and research should be conducted to determine at what point the transfer takes place.

Submitted by Carri Grube Lybarker (Department of Consumer Affairs) with Maraide Sullivan concurring

A threshold should be established for when control of a HOA is transferred to the association. It could be a stepped transition depending on the number of units remaining unsold, but a timeline for turnover is needed.

Submitted by Representative Mike Ryhall

I would like to see legislation address a specific time period for a developer to relinquish control over the development. In lieu of a specific time period for relinquishment, legislation should require a developer to communicate to potential buyers the developer's plan for turning the development over to property-owner control. That communication would give the buyer the ability to choose if he wished to buy from a developer who intended to maintain control until a certain number of lots were sold or other contingency in the process met.

Additionally I believe bonding of developers for turnover purposes should be required by counties when issuing permits.

Submitted by Ken Skelly

Developers must assist the manager in the development of a realistic operating and a reserve budget, even in advance of there being any owners put on the board.

No funds provided by developer to subsidize an association's budget shall be repayable by the association if the developer has controlled any aspect of the formulation or development of the budget.

Real control must begin to be assumed by homeowners as soon as at least half of the units are sold. At least three homeowners should be elected at that time. Upon the sale of 75% of the units, developer may retain no more than one seat on the board with the remaining seats being elected by homeowners, and developer shall have no right to veto any action by the board. Upon sale of 90% of the units, the developer shall have no right to attend any meeting of the board, unless invited by a majority to attend.

Notwithstanding any provision in the CC&R's to the contrary, the provisions I am recommending in this comment should apply. Otherwise, current projects will lose substantial value compared to projects begun and governed by the more enlightened law.

Submitted by Representative F. Michael "Mike" Sottile with Senator Luke A. Rankin concurring

In the information disclosed prior to purchase, HOA property owners need notice of the time when a developer will relinquish control over the HOA board.

Submitted by Maraide Sullivan

Given the significant concerns expressed by property owners across the state, it is recommended that more research be done, including comparison to what is working in other states.

V. **Need for a Comprehensive or Uniform Planned Community Act**

Findings:

The Study Committee members have received public input advising them to consider aspects of comprehensive and uniform laws.

Submitted by W. Press Courtney and Shaun W. Cranford with Senator Luke A. Rankin concurring

Comprehensive planned community legislation which defines developer transition of control would be beneficial.

Submitted by William Harry Dill, Shane Ousey, Jud Smith, Dick Unger

There is a need for a comprehensive act to apply to all associations in South Carolina. North Carolina has a limited, but more detailed comprehensive act and S. 860 provides a similar act for South Carolina. S. 860 clarifies the law applicable to homeowners associations and codifies many of the best practices for homeowners associations.

Submitted by Carri Grube Lybarker (Department of Consumer Affairs) with Senator Luke A. Rankin concurring

Several areas of need for regulation were identified during the study committee process in order to protect the interests of homeowners and associations. Also apparent is the different operating models of HOA, resources available, etc. Any comprehensive statute should establish baseline rights for homeowners applicable to all HOAs.

Submitted by Ken Skelly with Senator Luke A. Rankin concurring

South Carolina's laws (such as they exist) regarding Planned Communities are dispersed in two primary places: The Horizontal Property Act and the Non-Profit Act. However, homeowners associations are mentioned in more than a dozen other SC laws ranging all the way from the SC Alcoholic Beverage Control Act to the Uniform Arbitration Act.

It has been established that these planned communities are ubiquitous and are growing in popularity in our State, as well as nationwide.

Recommendations:

The Study Committee members have suggested several areas in which legislation could be beneficial. While comprehensive and uniform laws have been discussed, no single comprehensive or uniform law has been endorsed by a majority of the Study Committee members. The Study Committee members have urged that any laws passed be crafted to reflect South Carolina's specific needs.

Submitted by W. Press Courtney and Shaun W. Cranford with Senator Luke A. Rankin and Maraide Sullivan concurring

We support comprehensive legislation, based on the Uniform Common Interest Ownership Act and tailored for South Carolina. The Act should protect the interest of owners and their property rights.

- a. The Act should have definite developer transitions based on percentage of lots sold.
- b. The Act should provide specific open meeting requirements.
- c. The Act should provide specific internal due process procedures for boards and owners.
 - i. The Act should provide an opportunity for an owner to be heard prior to the implementation of certain fines or violations.
- d. The Act should provide specific lien language.
- e. The Act should provide for a super or priority lien to protect owners.
- f. The Act should provide specific document maintenance and document production for owners.
- g. The Act should provide optional training for board members and owners.
- h. The Act should provide specific notice requirements for meetings and hearings.

Submitted by William Harry Dill, Shane Ousey, Jud Smith, Dick Unger

Enact S. 860.

Statement Submitted By William Harry Dill, Shane Ousey, Jud Smith, Dick Unger

We oppose the adoption of any of the proposed HOA uniform acts and wish to submit our proposed Findings and Recommendations for consideration by the Study Committee. Historically our State has not adopted fully any of the uniform acts as written and it is my understanding not many states have adopted any of the proposed HOA uniform acts. Our State normally employs a consultant (law school professor) to review the uniform acts and give reporters comments as to the effect of the acts on existing laws of South Carolina and receives comments from the South Carolina Bar. Based on the comments, the legislature normally adopts some of the uninform act's provisions and modifies or deletes others. The Legislature should listen to the words of Professor Spitz and be very careful to adopt the correct laws for South Carolina, and not just blindly accept one or the other of the proposed HOA uniform acts. An act which is specifically designed to meet the needs of South Carolina's citizens is much better than adopting one of the proposed HOA uniform acts and S. 860 does just that.

The passage of one of the proposed HOA uniform acts is unnecessary in South Carolina, because S. 860 and the existing law in South Carolina are more than sufficient to resolve the concerns raised by the vocal minority at the meetings of the Study Committee and in the numerous hearings before the committee was formed, without unduly hampering the majority of the neighbors, through their association, from enforcing the rules and having the community that they bargained for when they purchased their home.

Submitted by Carri Grube Lybarker (Department of Consumer Affairs) with Senator Luke A. Rankin concurring

Topic areas of legislation should be similar to those included in the Uniform Common Interest Ownership Act, including establishing:

- requirements for holding and notice of meetings
- parameters for viewing/ copying HOA documents/ records
- internal dispute resolution process
- enforcement of the Act available through magistrate's court (external recourse)

Submitted by Ken Skelly with Maraide Sullivan concurring

Because of the commonality of issues facing these communities and their legislative bodies around the country, and the availability of often used and time-tested statutory approaches to these issues, adopting a comprehensive statute that incorporates South Carolina's unique approaches to specific issues within the parameters of an otherwise Uniform Common Interest Ownership Act is highly recommended as a necessary, but not sufficient, first step to offering South Carolina homeowners clarity and common sense in the law of planned communities.

Surely, South Carolina's various laws relating to Planned Communities can and should be included under one, Comprehensive Planned Community Act.

Submitted by Maraide Sullivan with Senator Kevin L. Johnson concurring

Given the significant concerns expressed by property owners across the state, it is recommended that more research be done, including comparison to other states.

VI. Additional Recommendations

Findings:

Other topics that have been recommended for consideration by the Study Committee and discussed by the Study Committee members include: (1) a bill of rights balanced with a bill of duties for HOA members (similar to how responsibilities and obligations were handled in the provisions of the Residential Landlord and Tenant Act, Title 27, Chapter 30 of the South Carolina Code of Laws); (2) an ombudsman office or program for HOA members; (3) payment priority vs. lien priority concerning collection of delinquent fees or assessments; (4) bonding provisions for (a) managers and/or (b) HOA infrastructure needs; (5) allowing use of solar panels in HOA communities; and (6) the best way to utilize the magistrates court in resolving disputes.

Submitted by William Harry Dill, Shane Ousey, Jud Smith, Dick Unger

Numerous governing documents of record lack the provisions which are necessary to clarify the rights and duties of the homeowners. Enactment of S. 860 would provide a uniform framework for all homeowners associations and would be beneficial to the homeowners.

Submitted by Ken Skelly with Maraide Sullivan concurring

As planned communities evolve, unanticipated issues will arise that require additional legislative attention.

Recommendations:

The Study Committee members did not reach a consensus on any these additional issues.

Submitted by William Harry Dill, Shane Ousey, Jud Smith, Dick Unger

Enact S. 860 which includes numerous other provisions for the good of the community, including, but not limited to:

“Section 27-30-40. An owners’ association shall be incorporated as a nonprofit corporation pursuant to the South Carolina Nonprofit Corporation Act of 1994, as amended, ‘Nonprofit Corporation Act’, Section 33-31-101, et seq. and all existing owners associations are subject to the provisions of the Nonprofit Corporation Act and this chapter. The membership of the association at times shall consist exclusively of all the property owners within the community. Any owners’ association formed before enactment of this chapter and not incorporated as provided in this chapter shall have one hundred eighty days to comply with the requirements of this section.”

“Section 27-30-60. Unless the articles of incorporation or the declaration expressly limits or provides to the contrary, the association, acting by and through its board, may:

(1) adopt and amend bylaws and rules and regulations related to the community and to the use of the lots and common areas contained therein, and remedies and penalties for noncompliance after written notice of such noncompliance is provided to an owner;

(2) adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from owners in accordance with such budgets;

(3) hire and discharge managing agents and other employees, agents, and independent contractors. Nothing shall prohibit an association from electing or appointing such persons or entities as an officer of the association as the board considers appropriate;

(4) institute, defend, or intervene in litigation or administrative proceedings on matters affecting the community;

(5) make contracts and incur liabilities;

(6) regulate the use, maintenance, repair, replacement, and modification of the common area;

(7) cause additional improvements to be made as a part of the common area;

(8) grant easements, leases, licenses, and concessions through or over the common area;

(9) impose and receive any payments, fees, or charges for the use, rental, or operation of the common area other than the limited common area and for services provided to owners;

(10) impose reasonable charges for late payments of assessments, not to exceed the greater of thirty dollars each month or ten percent of any assessment installment unpaid and, after notice, suspend privileges or services provided by the association, except rights of access to lots, including ingress and egress over the roads in the community, during any period that assessments or other amounts due and owing to the association remain unpaid after the due date established by the association;

(11) after written notice, impose reasonable fines, assessments for noncompliance or suspend privileges or services provided by the association, except rights of access to lots, including ingress and egress over the roads in the community, for reasonable time periods for violations of the governing documents;

(12) provide for the indemnification of and maintain liability insurance for its officers, board, directors, employees, and agents;

(13) assign its right to future income, including the right to receive common expenses assessments;

(14) exercise all other powers that may be exercised in this State by legal entities of the same type as the association; and

(15) exercise any other powers necessary and proper for the governance and operation of the association.”

“Section 27-30-70. (A) A meeting of the association must be held at least once a year. Special meetings of the association may be called by:

- (1) the president;
- (2) a majority of the board; or
- (3) owners having ten percent, or any lower percentage specified in the bylaws, of the votes of the association.

Not less than ten days nor more than sixty days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be hand delivered or sent prepaid by United States mail to the mailing address of each lot or to any other mailing address designated in writing by the owner, or at the sole option of the association, sent by electronic means, including by electronic mail over the Internet, to an electronic mailing address designated in writing by the owner as an address for required notice. The notice of any meeting shall state the time and place of the meeting. The notice of any special meeting shall state the purpose of the special meeting.

(B) Meetings of the board must be held as provided in the bylaws. The board may establish rules and procedures that provide owners with an opportunity to attend a portion of a board meeting and to speak to the board about their issues or concerns. An owner who wishes to have such an opportunity shall make such request in writing to the board and briefly set forth both the topic and purpose of the testimony. The board may place reasonable restrictions on including, but not limited to, the point in time in advance of a meeting that such written request must be made, the number of persons who may speak on each side of an issue, the time allotted to each owner who will speak, the number of times that an individual may have the opportunity to speak on a particular subject and prohibiting repetitive presentation of information.

(C) Meetings of the association and the board shall be conducted substantially in accordance with the most recent edition of Robert’s Rules of Order Newly Revised or such other procedures as the board may adopt.”

“Section 27-30-90. (A) The association shall keep financial records sufficiently detailed to enable the association to comply with this chapter. All financial and other records, including records of meetings of the association and board, must be made reasonably available for examination by any owner as required in the bylaws and this chapter. For the purposes of this section, ‘reasonably available’ means no more than once in any thirty-day period. If the bylaws do not specify particular records to be maintained, the association shall keep accurate records of all cash receipts and expenditures and all assets and liabilities. In addition to any specific information that is required by the bylaws to be assembled and reported to the owners at specified times, the association shall make an annual income and expense statement and balance sheet available to any owner, upon written request, at no charge and within seventy five days after the close of the fiscal year to which the information relates. Notwithstanding the bylaws, a more extensive compilation, review, or audit of the association’s books and records for the current or immediately preceding fiscal year may be required by a vote of the majority of the board or by the affirmative vote of a majority of the votes of the association.

(B) The association, upon written request, shall furnish to an owner a statement setting forth the amount of unpaid assessments and other charges against that owner’s lot. The statement must be furnished within ten business days after receipt of the request or such shorter period set out in the governing documents.

(C) The association may establish and collect reasonable fees to offset the cost of either the production of or the providing of such records and assessment status statements, or both, except that the association may not charge a fee for the downloading of such information from a website.”

“Section 27-30-130. (A) In the event that an owner neglects or fails to maintain his lot in conformity with the governing documents or otherwise fails to abide by or comply with the governing documents, the declarant or the association, when so empowered, may in addition to any other remedy, provide such maintenance or remedy such noncompliance. The declarant or the association, when so empowered, shall first give written notice to the owner of the specific items of maintenance or repair that the association intends to perform or of the actions to be taken by the association to remedy the noncompliance and the owner shall have the time set forth in said notice within which to perform such maintenance himself to remedy the noncompliance or to satisfy the association that the required maintenance, repair or compliance will be completed in a timely manner. The determination as to whether an owner has neglected or failed to maintain his lot in a manner consistent with other lots in the association or is in compliance with the governing documents must be made by the declarant or the association, when so empowered, in its sole discretion, or an entity authorized to do so by the declarant or the association, when so empowered.

(B) In the event the association performs such maintenance, repairs, replacements, or remedy for noncompliance, the costs of such maintenance, repairs, replacements, or remedy, together with all attorneys’ fees and costs of collecting from the owner the cost of such maintenance, replacements, or remedy may be added to and become a part of the assessment to which that lot is subject.

(C) In the event that the association determines that the need for maintenance, repairs, or replacements, which is the responsibility of the association, is caused through the willful or negligent act of an owner or the permittees of any owner, then the association may perform such maintenance, repairs, or replacements at the owner’s sole cost and expense, and all costs of the maintenance, repairs, or replacements, together with any fines or assessments for noncompliance levied by the association for such noncompliance and all attorneys’ fees and costs of the collection must be added to and become a part of the assessment to which the owner is subject and becomes a lien against the lot of the owner. Each owner is responsible for the actions of and the compliance with the governing documents by the permittees of that owner and further must be responsible for the payment of any fines or assessments levied for that noncompliance.

(D) The association also may elect to enforce the provisions of the governing documents by filing suit at law to recover monetary damages or in equity to enjoin any violation, or both.”

“Section 27-30-150. (A) In addition to the provisions of the governing documents, any assessment attributable to a lot shall constitute a lien on that lot and the personal obligation of the owner of the lot. The lien provided for in this section is of a continuous nature. Unless the governing documents provide otherwise, fees, charges, late charges, interests, attorney’s fees and costs, and other charges imposed pursuant to Sections 27-30-60, 27-30-120, 27-30-130, and 27-30-140 as well as any other sums due and payable to the association under the governing documents, the provisions of this chapter, or as the result of an arbitration, mediation, or judicial decision are subject to the lien pursuant to this section.

(B) A notice of lien may be filed by the association and shall set forth the name and address of the association, the name of the record owner of the lot at the time the notice of lien is filed, a description of the lot, and the amount of the lien claimed. For purposes of this section, the property address or tax map number shall constitute a sufficient description of the lot.

(C) Liens filed pursuant to this section:

(1) are absolutely privileged and cannot form the basis for a cause of action in libel or slander; and

(2) shall be filed by an attorney licensed to practice law in this State.

(D) A lien under this section is before all liens and encumbrances on a lot except:

(1) liens of a first mortgage on the lot recorded before the notice of lien created in this section is filed; and

(2) liens for real estate taxes and other governmental assessments and charges against the lot. This subsection does not affect the priority of mechanics' or materialmen's liens.

(E) The association is entitled to recover the reasonable attorneys' fees and costs it incurs in connection with the collection of the delinquent assessments, fines, and all other charges allowed by this chapter.

(F) The lien must be foreclosed in the same manner as mortgages pursuant to Title 29 and the Rules of Civil Procedure.

Pursuant to this section, the owner is the only necessary party in a foreclosure action and does not have a right of appraisal in connection with actions brought. The owner is considered to have waived his right to the homestead exemption as provided in Section 15-41-30 and any right of redemption under common law. All foreclosure actions and actions to enforce the governing documents provided for in this chapter or the governing documents may be brought in circuit court and may be referred to the Master in Equity or Special Referee in accordance with the Rules of Civil Procedure.

(G) The association, acting through its board and in the board's sole discretion, may agree to allow payment of an outstanding balance in installments. Neither the association nor the owner is obligated to offer or accept any proposed installment schedule. Reasonable administrative fees and costs for accepting and processing installments may be added to the outstanding balance and included in an installment payment schedule. Reasonable attorneys' fees may be added to the outstanding balance and included in an installment schedule.

(H) Where the holder of a first mortgage of record or other purchaser of a lot obtains title to the lot as a result of foreclosure of a first mortgage, the purchaser and its heirs, successors, and assigns are not liable for the assessments against the lot, which became due before the acquisition of title to the lot by the purchaser. The unpaid assessments are deemed to be common expenses collectible from all the owners, including the purchaser, its heirs, successors, and assigns. For purposes of this subsection, 'acquisition of title' means and refers to the date a deed conveying title is signed by the foreclosing judge or the time at which the rights of the parties are fixed following the foreclosure of a mortgage, whichever occurs first."

"Section 27-30-160.(A) Except in cases of amendments that may be executed by the declarant under the terms of the declaration, the declaration may be amended only by affirmative vote or written agreement signed by owners to which at least a majority of the votes of the association or written agreements signed by the owners to which a majority of the votes of the association are allocated, or any larger majority the declaration specifies or by the declarant if necessary for the exercise of any declarant right. The declaration may specify a smaller number only if all the lots are restricted exclusively to nonresidential use.

(B) Action to challenge the validity of an amendment adopted pursuant to this section may not be brought more than one year after the amendment is recorded.

(C) Every amendment to the declaration must be recorded in every county in which any portion of the community is located and is effective only upon recordation.

(D) Any amendment to the declaration passed pursuant to the provisions of this section or the procedures provided for in the declaration are presumed valid and enforceable.

(E) A declarant rights may not be amended, modified, changed, or waived without an amendment to the declaration signed by the declarant.

(F) Amendments to the declaration required by this chapter to be recorded by the association must be prepared, executed, recorded, and certified by an attorney licensed to practice law in this State."

Submitted by Representative Mike Ryhall with Senator Kevin L. Johnson and Senator Luke A. Rankin concurring

One of the biggest areas of concern we've heard is that property owners need an inexpensive way to have their complaints addressed. If the magistrates court system is not used to process those complaints, then establishing an ombudsman's office should be considered.

Submitted by Ken Skelly

S. 860 would establish the "South Carolina Homeowners Protection Act of 2015," but would more aptly be referred to as the "South Carolina Declarants' Protection Act of 2015."

As an example, a declarant, who has determined the CC&R's (governing documents of an association), selected the property manager, established (with the manager) the operating and reserves budgets, and the elements and total of fees/ assessments to each owner, is given the option of either paying the assessments for lots & units it still owns, or paying any shortfall in the common operating expenses and reserve budgets. [Section 27-30-140(G) of S. 860 would provide that: "The declarant may pay assessments for the lots owned by it or pay the current shortfall of the association's common expenses, including budgeted reserves. The declarant is not required to pay any portion of the shortfall of the association that arises from the failure of other lot owners to pay their assessments."]

The declarant-developer thus determines or at least strongly influences what the initial owners pay (and can keep it artificially minimal to enhance sales). By manipulating the budgets, providing services less expensively to the association, and paying any apparently minimal shortfall in the early phases, then switching to paying assessments on unsold lots/units as those diminish, the declarant can mortgage the association's future rendering it incapable of starting fresh after transition. The newly-constituted homeowner-controlled board is left with a Hobson's Choice.

A responsible board can begin by ordering an independent Reserve Study to determine its adequacy. Upon learning how bad a shape it's in, the board can substantially raise owners' monthly fees' to provide sufficient operating and reserve funds over an extended period, and assess owners significant amounts to hire forensic engineers/architects and legal counsel. They would be necessary in any effort to seek any payment from the declarant in order to place the association on a sound footing as declarant pursues other business opportunities.

On the other hand, a board that is as lacking as the declarant in its willingness or ability to serve the association as a fiduciary (as legally required) could refuse to take these actions, as difficult as they are necessary, and further condemn the association and its individual owners to a downward spiral. As budgets run shorter, necessary maintenance and repairs are ignored, the appearance and functioning of the community goes downhill, property values sink, units are vacated, foreclosed, and fall into non-merchantability, and real people (most of whom are senior citizens or young families) suffer financial crisis.

Rather than offer developers more protection than they've been able to secure for themselves, the law should protect homeowners from declarants willing to abandon and forget about communities they created, after squeezing the last dollar from them.

Other examples of this proposed legislation include Section 27-30-160, which would provide:

“(A) Except in cases of amendments that may be executed by the declarant under the terms of the declaration, the declaration may be amended only by affirmative vote or written agreement signed by owners to which at least a majority of the votes of the association or written agreements signed by the owners to which a majority of the votes of the association are allocated, or any larger majority the declaration specifies or by the declarant if necessary for the exercise of any declarant right. The declaration may specify a smaller number only if all the lots are restricted exclusively to nonresidential use.

(B) Action to challenge the validity of an amendment adopted pursuant to this section may not be brought more than one year after the amendment is recorded.

(C) Every amendment to the declaration must be recorded in every county in which any portion of the community is located and is effective only upon recordation.

(D) Any amendment to the declaration passed pursuant to the provisions of this section or the procedures provided for in the declaration are presumed valid and enforceable.

(E) A declarant rights may not be amended, modified, changed, or waived without an amendment to the declaration signed by the declarant.

(F) Amendments to the declaration required by this chapter to be recorded by the association must be prepared, executed, recorded, and certified by an attorney licensed to practice law in this State.”

Declarant, having begun the project by providing the declaration, may amend it under its terms. Otherwise, it could only be amended by a majority of owners, or even a super majority, if so established by the declarant. Any action to challenge an amendment's validity must be brought within one (1) year of its recording.

Most projects are not completed for several years. Declarant writes the declaration, can amend it, and prevent other amendments for years. Incredibly, just to make certain of declarant's permanent protection, the proposed law would assure that declarant's rights could never be changed without declarant's written approval.

One might think the declarant is at the mercy of dominant homeowners and needs protection from them.

Quite simply, the reverse is true.

The declarant control provision in Section 27-30-170 best exemplifies the true effect of S. 860. It would, in effect, remind declarants:

- To clearly set forth their rights in the declaration or bylaws, or both,
- To provide for whatever period of control they want,
- During the chosen period, declarant may, directly or indirectly, appoint, and remove officers and members of the association's board,
- Control would remain in declarant until all lots and units are sold, unless declarant desires otherwise.
- Declarant may assign or transfer its control and other rights without limitation or any owner's approval.

It would be difficult to imagine legislation with more protection for declarant's, and fewer for homeowners.

As one of the rare homeowner representatives on the HOA Study Committee, I strongly urge the Committee to reject S. 860, and specifically the provisions listed above, as viable “solutions.” Rather, select a somewhat modified comprehensive version of the UCOIA to recommend to the Legislature.

Upon implementation of whatever legislative action may result from this Committee’s efforts, interested State officials, whether or not formally involved in oversight, licensing or certification, might serve as a clearinghouse of information both from other states with a similar uniform approach and from homeowners and others whether pleased or displeased with the approach taken by the Legislature in 2016.

Those whose complaints resulted in the formation of this Study Committee should not have to await 2017 before significant legislative action is taken. Attributing further delay to the election year when so many have waited so long for real movement on these issues would be regrettable.

Submitted by Maraide Sullivan with Senator Luke A. Rankin concurring

A state agency needs to have jurisdiction as soon as possible, even if only temporarily (a couple of years) as more issues get sorted out. Homeowners would benefit by going to a local magistrate for some of their issues. Some of these issues need to be determined this session. This will give some relief and recourse to property owners.

Community associations in South Carolina impact over a third of the state’s population and involve over \$100 billion dollars in assets that are loosely managed with little accountability. These numbers will increase. Further study is needed to inform, protect and assure transparent and proper governance of these communities. A state agency needs to have jurisdiction and a longer term study group, or task force, needs to be established.