

CLIENT BULLETIN

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**Ohio's New "Planned Community Law" Applies to
Subdivisions with Owners Associations**

During the past 40 to 50 years, new subdivisions, especially in suburban areas, have been developed with entrance features, landscaped areas, and other amenities, and sometimes infrastructure features such as drainage ditches and ponds, which are owned by a homeowners association (HOA). The declaration of protective covenants/deed restrictions generally provides that all lot owners are members of the HOA and pay dues/assessments to the HOA so that the HOA has the funds necessary to maintain the common property and do other things the HOA is to do pursuant to the declaration/deed restrictions. The authority and the responsibilities of the HOA are as provided in the declaration/deed restrictions and there have been no laws specifically dealing with HOAs and their operation. Although it has been a common practice of HOAs, when a homeowner fails to pay dues and assessments, to record in the Recorder's Office a lien in the amount of the delinquent dues and assessments and sometimes for the collection costs, including attorney fees, there are no statutes providing for recording of such type of liens.

On September 10, 2010, a new chapter of the Ohio Revised Code (5312), known as the Ohio Planned Community Law, becomes effective and regulates all "planned community" and their "owners association." Any subdivision with a declaration/deed restrictions that make lot owners a member of an HOA, or that has an HOA that owns or leases property or facilities for the benefit of the HOA members, or that has an HOA supported by dues or assessments against owners is a "planned community" under new Ohio Rev. Code Chapter 5312. It is specifically provided that a condominium property is not a "planned community" subject to Ohio Rev. Code Chapter 5312 (a condominium property is subject to Ohio Rev. Code Chapter 5311, Ohio's Condominium Act).

New Ohio Rev. Code Chapter 5312 is modeled after, and is very similar to, the Condominium Act in its requirements for an owners association, the rights and responsibilities of owners associations, governance of owner associations and procedures for dues/assessments and liens. It places a number of affirmative duties on owners associations (HOAs) that are in existence as of September 10, 2010, including a requirement of recording the HOA's bylaws/code of regulations, and any future amendments, in the Recorder's Office of the applicable county, requirements to maintain certain types of insurance coverage, requirements as to books and records to be maintained, and a requirement that there be an annual budget. It also sets forth dues/assessment and lien procedures.

We have decades of experience with real property, the Condominium Act, condominium associations, and HOAs and can advise your HOA regarding the new law and complying with it. Please feel free to contact Steve Martin (smartin@mmpdlaw.com) or Jim Dietz (jdietz@mmpdlaw.com) (740-363-1313) if we can be of assistance.

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“Transfer Fee Covenants” Invalidated in Ohio as of September 13, 2010

A “transfer fee covenant” is a provision included by a property owner, usually a developer, in a declaration/deed restrictions, but sometimes simply as a provision in a deed to a purchaser that requires upon any future transfer (i.e., sale) of that property the developer (or other named person) has to be paid a fee by virtue of the fact that the property has been transferred. Such “transfer fee covenant” thus becomes a “covenant running with the land” and encumbers title to the property forever (or for any lesser period stated in the transfer fee covenant).

Although, to date, transfer fee covenants have been little used in Ohio, the General Assembly has acted to prospectively invalidate them. Effective on September 13, 2010, new Ohio Rev. Code § 5301.57 defines “transfer fee covenant” and provides that any transfer fee covenant recorded on or after September 13, 2010 “does not run with title to real property” and is not binding or enforceable against any subsequent owner, purchaser or mortgagee (hence, the developer or other party named as the payee of the transfer fee cannot sue either the transferee or the transferor on a contract theory as the legislature has essentially made a transfer fee covenant an illegal contract). Because of constitutional constraints on laws impairing contracts and retroactive laws, the General Assembly could not invalidate transfer fee covenants recorded before the September 13, 2010 effective date of Ohio Rev. Code § 5301.57. The fact that the General Assembly has legislatively invalidated transfer fee covenants recorded on or after September 13, 2010 could be construed by a court as limiting the court’s ability to judicially invalidate pre-September 13, 2010 transfer fee covenants on public policy grounds (the premise being that had the General Assembly wanted to, on public policy grounds, invalidate transfer fee covenants recorded prior to September 13, 2010, the General Assembly would have acted sooner). Unquestionably, when purchasing a property subject to a declaration of protective covenants/deed restrictions, the actual document needs to be obtained and reviewed, preferably by an attorney.

Oil and Gas Leases, Pipeline Agreements Given “Super Priority”

Senate Bill 165 enacted Ohio Rev. Code § 1509.31(D), effective June 30, 2010, gives “super priority” to certain recorded instruments related to the production, transport, or sale of oil or natural gas. Ohio Rev. Code § 1509.31(D) now provides that oil and gas leases, pipeline agreements and other instruments related to the production, transport or sale of oil or natural gas have priority over all liens, claims or encumbrances on property (other than the lien of real property taxes and assessments of taxing authorities), even mortgages recorded prior to such oil or gas lease, pipeline agreement, or other oil or gas instrument.

However, Ohio Rev. Code § 1509.31(D) does not negate or affect the existing statutory procedures for terminating an oil or natural gas lease on the basis of non-production.

****NOTICE****

This bulletin provides general information and is not legal advice. Please contact us if you need legal advice.

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