

The Last Redoubt: Owners' Association Standing And "Pre-Litigation Requirements" in North Carolina

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I. INTRODUCTION

"Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *American Woodland Indus., Inc. v. Tolson*, 155 N.C. App. 624, 626, 574 S.E.2d 55, 57 (2002) (citations omitted), *cert. denied*, 357 N.C. 61, 579 S.E.2d 283 (2003). "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Street v. Smart Corp.*, 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003) (internal quotation marks omitted). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Estate of Apple v. Commer. Courier Express, Inc.*, 168 N.C. App. 175, 176, 607 S.E.2d 14, 16 (2005) (citations omitted), *disc. rev. denied*, 359 N.C. 632, 613 S.E.2d 688, 2005 N.C. LEXIS 514 (May 4, 2005).

As discussed further herein, standing for an owners' association¹ to participate as a named party in litigation in North Carolina typically can be derived from² one or more of three sources: 1) statutory standing; 2) common law standing; and/or 3) contractual standing.

¹ While this paper focuses exclusively upon associations formed pursuant to The North Carolina Planned Community Act, Chapter 47F of the North Carolina General Statutes, this author shall use the generic term "owners' associations" to refer to the governing entities of such planned developments.

² Or, phrased alternatively, a lack of required standing can be due to an absence of at least one of these three types of standing.

II. STATUTORY AND COMMON LAW STANDING

The North Planned Community Act, which is codified at Chapter 47F of the North Carolina General Statutes (hereinafter “NCPCA”), applies to all planned communities created within North Carolina on or after January 1, 1999 unless they contain fewer than twenty (20) lots or in which all lots are restricted exclusively to nonresidential purposes. N.C. Gen. Stat. §47F-1-102(a) and (b).

The NCPCA, is based, in part, upon the Uniform Planned Community Act approved by the National Conference of Commissioners on Uniform State Laws in 1980 (hereinafter “UPCA”). See N.C. Gen. Stat. §47F-1-101, Comment 1 (“This Act is based, in part, on the provisions of the Uniform Planned Community Act”); Patrick K. Hetrick and James B. McLaughlin, Jr., *Webster’s Real Estate Law in North Carolina* (hereinafter “*Webster’s*”), at §30A-5 (5th ed. 1998) (describing the UPCA as the “starting point and source for many of the provisions of the North Carolina Planned Community Act”). Unlike the UPCA, however, which contains extensive Official Comments edited by the National Conference of Commissioners explaining and interpreting its uniform provisions, the NCPCA incorporates very few comments to assist in its interpretation. See N.C. Gen. Stat. §47F-1-101, Cmt. 1 (“the Official Comments to the Uniform Act have not been included”). Nonetheless, where the NCPCA has adopted similar provisions to the UPCA, the provisions of the UPCA and the Official Comments thereto offer very instructive insight into the proper interpretation of the NCPCA in the absence of explicit guidance from our Legislature. *Webster’s*, supra, at §30A-5 (“these [Uniform] comments may be extremely helpful to efforts at interpreting the North Carolina PCA”).

Specifically, N.C. Gen. Stat. § 47F-3-102(4) grants planned community associations the right to: “[i]nstitute, defend, or intervene in litigation or administrative proceedings on matters

affecting the planned community.” (emphasis added). While the NCPCA Comments to §47F-3-102 do not address subsection (4) thereof, the Official Comments to UPCA §3-102 state that **“This Act makes clear that the association can sue or defend suits even though the suit may involve only units as to which the association itself has no ownership interest.”** UPCA §3-102, Cmt. 3 (bold emphasis added). Therefore, this statute, read in conjunction with other pertinent sections of the North Carolina Planned Community Act and the Uniform Planned Community Act, arguably gives an unequivocal right to a North Carolina planned community association to bring suit regarding matters that affect the planned community it represents, even if it does not actually own the portions of the planned community at issue in such a lawsuit.

However, in *Creek Pointe Homeowner’s Ass’n, Inc. v. Happ*, 146 N.C. App. 159, 552 S.E.2d 220 (2001), *review denied*, 356 N.C. 161, 568 S.E.2d 191 (2002) (“*Creek Pointe*”), our Court of Appeals stated that N.C. Gen. Stat. § 47F-3-102(4) did not itself confer standing upon a homeowners’ association to bring a claim on behalf of its individual members. Rather, the *Creek Pointe* Court interpreted N.C. Gen. Stat. § 47F-3-102(4) as merely “reiterating the common law rule that, when otherwise proper, a homeowner’s association may participate in a lawsuit.” *Creek Pointe*, 146 N.C. App. at 164, 552 S.E.2d at 224. The common law rule referred to in *Creek Pointe* originated from *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 97 S. Ct. 2434 (1977). The Supreme Court of the United States ruled in *Hunt* that, for an association to have standing to bring a claim on behalf of its individual members, the following requirements must be met: “(a) [the association’s] members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of the individual members in the lawsuit.” *Hunt* at 343, 97 S.Ct. at 2441, 53 L.Ed.2d at 394.

Our Supreme Court first adopted the *Hunt* requirements for associational standing in *River Birch Assoc. v. Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990). *River Birch* involved the dismissal by the trial court, for lack of standing, of claims for fraud and unfair and deceptive trade practices brought by a homeowners association against a developer arising out of the developer's refusal to convey a three-acre, undeveloped recreational area to the association to hold as common area. 326 N.C. at 103, 388 S.E.2d at 539.³ The Homeowners Association's claims for fraud and unfair trade practices were held to have failed to meet the third prong of this *Hunt* test. In affirming, the Supreme Court stated:

There was no allegation by the Homeowners Association that representations regarding the three-acre parcel were made to each of its members. Nor is there any suggestion that River Birch made such representations to Homeowners Association members who purchased town homes on the secondary market. Thus, we cannot conclude that the damage claims are common to the entire membership of the Homeowners Association.

Id. at 130, 388 S.E.2d at 555.

Later, the majority opinion in *Creek Pointe* made reference to N.C. Gen. Stat. § 47F-1-108, which states, in pertinent part: “The principles of law and equity as well as other North Carolina statutes...supplement the provisions of this Chapter, except to the extent inconsistent with this Chapter. When these principles or statutes are inconsistent or conflict with this Chapter, the provisions of this Chapter will control.” The *Creek Pointe* majority found:

nothing in the NCPCA that is inconsistent with our common and statutory law regarding issues of jurisdiction and standing. Therefore, we hold that the NCPCA does not automatically confer standing upon homeowners' associations in every case, and that questions of standing should be resolved by our courts in the

³ *River Birch* was heard by the Supreme Court of North Carolina prior to a determination by the Court of Appeals by motion made *ex mero motu* pursuant to N.C.G.S. § 7A-31(a) and Rule 15(e)(2) of the Rules of Appellate Procedure to hear the case, since the case also involved interpretations of zoning ordinances at issue between the developer-plaintiff and the City of Raleigh, a co-defendant with River Birch Homeowners Association, Inc.

context of the specific factual circumstances presented and with reference to the 'principles of law and equity as well as other North Carolina statutes' that supplement the NCPCA.

146 N.C. App. at 164, 552 S.E.2d at 224-25.

In *Creek Pointe*, the plaintiffs, including Creek Pointe Homeowners' Association, Inc.,⁴ each brought claims in their Complaint for injunctive relief, compensatory and punitive damages, and costs and attorneys' fees pursuant to N.C. Gen. Stat. §47F-3-115 related to a fence that Richard Happ (defendant), a resident of the Creek Pointe subdivision, placed across Deep Creek Road, in Creek Pointe. 146 N.C. App. at 161, 552 S.E.2d at 222-23. The Court of Appeals **reversed** the trial court's order dismissing **all** claims asserted by the Creek Pointe Homeowners' Association, stating "we reverse the trial court's ruling that the Creek Pointe Homeowner's Association lacks standing to participate in this action, **and hold that the association has standing to pursue claims alleging injury to the association itself.**" *Creek Pointe, supra*, at 169, 552 S.E.2d at 227 (bold emphasis added). It further stated:

We find nothing in the NCPCA that is inconsistent with our common and statutory law regarding issues of jurisdiction and standing. Therefore, we hold that the NCPCA does not automatically confer standing upon homeowners' associations in every case, and that questions of standing should be resolved by our courts in the context of the specific factual circumstances presented and with reference to the "principles of law and equity as well as other North Carolina statutes" that supplement the NCPCA. Accordingly, we will examine the case *sub judice* in this manner.

.....

An association may have standing to bring suit either as a plaintiff, to redress injury to the organization itself, or as a representative of injured members of the organization. The leading case on the authority of an association to bring suit on behalf of its members is *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977).

⁴ The other party plaintiff was an owner of a lot contiguous to Happ's lot.

....

Whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.

.....

An organization generally lacks standing to sue for money damages on behalf of its members if the damage claims are not common to the entire membership, nor shared equally, so that the fact and extent of injury would require individualized proof. *Warth v. Seldin*, 422 U.S. 490, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). "Where an association seeks to recover damages on behalf of its members, the extent of injury to individual members and the burden of supervising the distribution of any recovery mitigates against finding standing in the association." *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (citing *Hunt* for its holding that homeowners' association lacked standing where it sought money damages for some of its members). "Indeed, "damages claims usually require significant individual participation, which fatally undercuts a request for associational standing." *Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc.*, 280 F.3d 278, 284 (2002). In the case *sub judice*, any monetary damages owed to plaintiffs would call for "individualized proof," and would not necessarily be common to all. The financial impact of the fence upon various members of the association could vary from significant to minimal. Therefore, we find that the participation of individual homeowners is necessary to the suit.

....

To bring suit on its own behalf, an association need only meet the "irreducible constitutional minimum" of a sufficient stake in a justiciable case or controversy. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) (the "irreducible constitutional minimum" of [***19] Article III of the U.S. Constitution requires plaintiff who wishes to pursue claim in federal court to demonstrate (1) injury in fact, (2) causal relationship between injury and conduct complained of, and (3) likelihood that injury would be redressed by favorable verdict);

Transcontinental Gas Pipe Line, 132 N.C. App. 237, 511 S.E.2d 671, (reiterating holding of *Lujan* in concurring opinion).

In the instant case, the Declaration of Covenants, Conditions, and Restrictions, and the By-laws of the association, state that the association has a duty to maintain the private roads within Creek Pointe. Clearly, the presence of a fence across one of the subdivision's roads injures the association in its ability to carry out this duty. The injury is causally connected to the defendant's alleged behavior, and likely would be redressed by a favorable verdict in this action. Therefore, we hold that on the facts of this case, the association had standing to bring this suit on its own behalf.

Id. at 164-69, 552 S.E.2d at 224-227 (bold emphasis added). Thus, both the *River Birch* and *Creek Point* courts differentiated between direct and representative standing, finding standing for the owners' association for all claims brought on its *own* behalf, but finding no standing for the owners' association for claims seeking monetary damages brought *on behalf of its members* in a representational capacity.

III. CONTRACTUAL STANDING: PRE-LITIGATION REQUIREMENTS IN PLANNED COMMUNITY GOVERNING DOCUMENTS.

Redoubts were a common component of the military strategies of most European empires during the colonial era, and consisted of “an enclosed defensive emplacement outside a larger fort, usually relying on earthworks, though others [we]re constructed of stone or brick.” *See* <http://en.wikipedia.org/wiki/Redoubt>, last accessed November 14, 2011. In simple terms, the “redoubt” was the last line of defense erected by defenders to rebuff invading forces before they reached the outer walls of a main fort, inside of which often lay the true objects of the defenders' protection. As seen above, owners' associations in North Carolina can sometimes overcome the common law associational standing requirements discussed in *River Birch* and *Creek Point*. Yet, in addition to common- and statutory-law standing, as further discussed above, North Carolina courts hold that “contract provisions may also prescribe whether a court possesses subject matter

jurisdiction.” See, e.g., *The Peninsula Property Owners Association, Inc. v. Crescent Resources, LLC*, 171 N.C. App. 89, 614 S.E.2d 351, *disc. rev. denied*, 360 N.C. 177, 626 S.E.2d 648 (2005) (“*Peninsula*”); *Queen's Gap Community Ass'n, Inc. v. McNamee*, 2011 WL 4431716, 2011 NCBC 36 (N.C. Super., Sep 23, 2011) (unpublished) (“*Queen's Gap*”). Thus, although an owners’ association may initially satisfy the common law associational standing requirements discussed in *River Birch* and *Creek Point*, it may still succumb to the last “redoubt” to prevent owners associations’ legal standing in litigation – “pre-litigation requirement” provisions incorporated into an association’s governing documents. *Peninsula, supra*, at 92, 614 S.E.2d at 353; *Queen's Gap, supra*, at *2.

A. *Peninsula*

In *Peninsula*, Crescent Resources, LLC (“Crescent”), a subsidiary of Duke Power Company, developed "the Peninsula," a planned residential community on Lake Norman near Charlotte, North Carolina, beginning in 1989. Crescent sold over nine hundred lots in the Peninsula between 1990 and January, 1999. As part of the development, Crescent established the The Peninsula Property Owners Association, Inc. (“PPOA”) as a North Carolina non-profit corporation. Crescent appointed the original members of the Board of the PPOA ("the Board") and maintained majority control of the Board until January, 1999. The Declaration of Covenants, Conditions, and Restrictions ("the Declaration") and the Bylaws of the PPOA ("Bylaws") were created by Crescent, as Declarant. Both the Declaration and the Bylaws contained the following provision:

the affirmative vote of no less than two-thirds (2/3) of all votes entitled to be cast by the Master Association Members shall be required in order for the Master Association to (1) file a complaint, on account of an act or omission of Declarant, with any governmental agency which has regulatory or judicial authority

over the Project or any part thereof; or (2) assert a claim against or sue Declarant.

In addition, the Declaration and the Bylaws granted authority to the Board to contract with third parties to install infrastructure for the Peninsula, including streets, sewers, sidewalks, the golf course, the clubhouse, parking lots, and street lights. The Board entered into a lease agreement with Duke Power to install and maintain decorative brass street light poles and fixtures. The PPOA made lease payments to Duke Power from annual dues collected from the homeowners.

When Crescent relinquished control of the Board in January, 1999, the PPOA's members "discovered" the lease agreement between the PPOA and Duke Power. The Board decided to buy the street light equipment from Duke Power for \$1,200,000.00, instead of completing the remaining lease payments totaling \$1,500,000.00.

On 1 September 2000, the PPOA and one of its members filed a complaint in Mecklenburg County Superior Court against Crescent, and sought certification of the matter as a class action. The PPOA made no attempt to secure a vote of two-thirds of its members prior to instituting this action. The complaint alleged constructive fraud, unfair and deceptive trade practices, and violation of the Interstate Land Sales Full Disclosure Act. The trial court entered an order denying the request for class certification on 26 October 2001. The PPOA subsequently filed a voluntary dismissal without prejudice.

On 30 October 2002, the PPOA filed a second action in Mecklenburg County Superior Court. As with the earlier suit, the PPOA did not attempt to garner the required two-thirds vote under the Bylaws and the Declaration. The PPOA asserted claims of constructive fraud and

unfair and deceptive trade practices. These causes of action were alleged on behalf of the PPOA itself, rather than individual homeowners.

Crescent answered the second lawsuit and argued, in part, that the PPOA lacked standing to assert its claims. Following discovery by both parties, Crescent filed a motion for summary judgment claiming, among other legal arguments, that the PPOA did not have the authority or standing to assert its claims. The trial court ruled that the PPOA did "not have standing to file and prosecute this action", and granted Crescent's motion.

On appeal to the North Carolina Court of Appeals, the issue was "whether the trial court erred in ruling the PPOA lacked standing and authority to assert its claims against Crescent." 171 N.C. App. at 92, 614 S.E.2d at 353. The PPOA argued "the extra majority approval by its members is 'in violation to the stated public policy to allow entities free access to the courts,' and asserted the two-thirds vote requirement 'directly inhibits [the PPOA's] ability to recover from [Crescent] for its fraudulent actions by restricting [the PPOA's] access to the court system.'" *Id.* at 94, 614 S.E.2d at 354.

In response, the Court of Appeals found:

The two-thirds vote provision in the Bylaws and the Declaration does not eliminate the PPOA's right to file a legal action. Both the PPOA and its members enjoy the unlimited ability to file causes of action against Crescent, subject to the required approval by its members. The two-thirds voting provision merely requires the PPOA to garner extra-majority approval from its members before instituting legal action. Crescent does not control the required two-thirds majority vote to sue. Crescent owned only two of the nine hundred lots within the Peninsula at the time the PPOA filed its complaint, less than one-percent of the voting rights.

Id. at 95, 614 S.E.2d at 355. It also stated:

The two-thirds provision does not limit Crescent's liability to the PPOA for *any* alleged wrongdoing. Rather, the PPOA must obtain the required approval from its membership prior to commencing an

action against Crescent for alleged wrongdoings. In addition, the PPOA's individual members are not covered by the two-thirds provision and are not without legal recourse against Crescent.

Id. Furthermore, the Court of Appeals went to great length to find:

[C]ontractual provisions agreed to by members of the PPOA may provide procedural prerequisites or contractually limit the time, place, or manner for asserting claims.

....

Crescent began developing the Peninsula in 1989 and established the PPOA in 1990. The Bylaws were adopted in July 1990. The Declaration was made and entered into in September 1990. Crescent began selling residential lots later that year. In connection with each sale of real property by Crescent to homeowners, the contracts included an express acknowledgment by the homeowners that they "read, understood, and agreed to" terms of the Declaration. Crescent also required prospective lot owners to sign a separate acknowledgment that they had read and understood a copy of the PPOA's previous year's budget, which included lease payments for the street lights.

The PPOA's members also received ample opportunity to review the two-thirds voting requirement in the Declaration and the Bylaws prior to purchasing real property within the Peninsula. Both the Declaration and the Bylaws include provisions permitting review and inspection of the PPOA's books, records, and papers during "reasonable business hours." All members were further provided access to all financial records pertaining to the PPOA's operating budget, including the lease payments to Duke Power, which were provided every year during annual meetings. In addition, all prospective purchasers and lot owners were provided record notice, as both the Bylaws and the Declaration were filed with and are available in the county register of deeds office.

Id. at 96-97, 614 S.E.2d at 355-56 (citations omitted). Based upon its analysis, the Court of Appeals ruled that "the two-thirds voting provision and the applicable statutory and case law shows the voting requirement is valid and enforceable." *Id.* at 95, 614 S.E.2d at 355. Accordingly, it held that "[t]he PPOA never attempted to obtain nor received the required approval by its members to institute this action. The trial court properly dismissed the PPOA's

complaint for lack of subject matter jurisdiction. The trial court's order is affirmed.” *Id.* at 97, 614 S.E.2d at 357.

B. *Queen’s Gap*

The North Carolina Business Court was also recently asked to consider pre-litigation voting provision requirements in the context of owners’ associations in *Queens Gap, supra*. Plaintiff Queen's Gap Community Association, Inc. (the “Association”) was a non-profit corporation and association of lot owners for the residential planned community development known as Queen's Gap, located principally in Rutherford County, North Carolina. Defendant Devin F. McCarthy (“D.McCarthy”) was the initial developer and owner of Queen's Gap, and served continuously as a director of the Association from October 26, 2006 to August 14, 2010 (“Developer Control Period”). Defendants D.F. McCarthy Investments XVIII, LLC (“McCarthy Investments”) and Queen's Gap Holding Company, LLC (“Queen's Gap Holdings”) were Ohio limited liability companies and were alleged to be the alter ego and mere instrumentality of Defendants D. McCarthy and Janis L. McCarthy (“J. McCarthy”—wife of D. McCarthy). Defendant Michael P. McNamee (“McNamee”) was a practicing attorney and resident of the State of Ohio. McNamee represented Defendant D. McCarthy, and served continuously as a director and officer of the Association through the Developer Control Period. Defendant Scott Barfield (“Barfield”) was a North Carolina resident who served continuously as a director and officer for the Association through the Developer Control Period.

According to the Association, Queen’s Gap was proposed by the Defendants to be “a luxury subdivision which would provide amenities including an equestrian center, luxury spa, a Jack Nicklaus Signature 18-hole [G]olf [c]ourse, an Outfitter’s Lodge located off-site on the Broad River, a Wellness Center, a Grand Clubhouse as well as other amenities.” Verified

Complaint, 2011 NCBC 36, at ¶25 (accessible at <http://www.ncbusinesscourt.net/publicaccess/lookupcase/10CVS1430>). The Queen's Gap development was to include "three separate Phases with two guarded clubhouses and to encompass roughly 3,350 acres." *Id.* When the proposed infrastructure and amenities failed to materialize, purportedly due to a series of complex transactions whereby the Defendants sought to divest themselves of their developers' obligations, the Association filed a lawsuit alleging that Defendants were liable to the Association for breaches of fiduciary duties, conversion, unjust enrichment, unfair and deceptive trade practices, and civil conspiracy. *Id.* at 1-33. After the case was removed to the North Carolina Business Court, the Defendants filed Motions to Dismiss, arguing that the Association lacked standing to bring its action and, therefore, that the Business Court did not have subject matter jurisdiction because: (1) the Association did not satisfy the pre-litigation requirements included in its Master Declaration of Covenants, Conditions, and Restrictions, and its own Bylaws, and (2) the Association could not satisfy all three common-law prerequisites for an association to sue in a representative capacity. *Queen's Gap, supra*, at *1.

The Queen's Gap "Master Declaration" provided that "[n]o judicial or administrative proceeding shall be commenced or prosecuted by the Association unless approved by a vote of (75%) of the Members." *Id.* at *2 (citations omitted). The Business Court further found that:

The governing documents also create two classes of voting membership, Class I and Class II. Class I membership is held by each lot owner within Queen's Gap, while Class II membership is held by the Declarant, Devonshire Land Development, LLC, and its wholly owned affiliate, Queen's Gap Mountain, LLC. Class II membership continues until either 90% of the lots within the development are sold, or December 31, 2015, whichever is the first to occur.

Prior to the end of Class II membership, the selection of directors to sit on the Association's Board of Directors is made solely by the Declarant, and any director may be replaced by the Declarant at its

discretion. After the termination of Class II membership, the Association is to hold its first annual meeting during which Class I members may select new directors. Prior to the first meeting of the members, ‘no special meeting may be called by the Members.’

Id. at *3 (citations omitted).

In response to the Defendants’ motion to dismiss, the Association first argued that it had the statutory right to institute litigation on matters affecting the Queen's Gap Community Association in accordance with the provisions of N.C. Gen.Stat. § 47F–3–102(4). *Id.* However, the Business Court held that: “Plaintiff conveniently ignores the clear language of the statute: ‘*Unless the articles of incorporation or the declaration expressly provides to the contrary*’ (emphasis added), the association may: ... (4)[i]nstitute, defend, or intervene in litigation or administrative proceedings on matters affecting the planned community....” *Id.* (quoting N.C. Gen.Stat. § 47F–3–102(4) (2010)). *Id.*

Next, the Association argued that it had standing, since “its Board of Directors authorized this lawsuit.” *Id.* at *3. The Business Court, however, found that:

Plaintiff's authorization of this lawsuit was ineffective for several reasons: *First*, Plaintiff's Bylaws provide that the affairs of the Association are to be governed by the Board of Directors; *second*, the terms of the Master Declaration specifically address the powers of directors and limits the authority of members to commence or prosecute a judicial or administrative proceeding, except in actions brought by the Association to obtain injunctive relief to enforce the provisions of the Declaration; *third*, the individuals who attempted to authorize this action were not members of Plaintiff's Board of Directors; and *fourth*, the alleged 75% membership litigation approval occurred during a “special meeting” of the Association.

Plaintiff has not alleged in its Complaint, or asserted otherwise, that, as of the date this action was brought, the Association's Class II membership had ceased and been converted to Class I membership. Thus, the Declarant holds the sole power to select and remove directors.

Plaintiff has also failed to demonstrate that the individuals who attempted to approve this action were Directors selected by the

Declarant. To the contrary, Declarant's representative at the “special meeting” voted on Declarant's behalf against all of the purported Directors who Plaintiff claims authorized this litigation. Accordingly, the Association members' attempt to replace the existing Directors was ineffective. As a result, this action was not properly authorized by the Association's Board of Directors.

Plaintiff's alleged authorization was also ineffective because it was obtained at a “special meeting.” Under the Association's Bylaws, special meetings are prohibited until after the Association has held its first annual meeting. There is no evidence before the Court that an annual meeting ever occurred prior to the filing of this lawsuit.

Id. at **3-4 (emphasis in original) (citations omitted).

Finally, the Association requested that the Business Court “find the 75% membership litigation approval requirement void under law.” *Id.* at *3. The Court, however, found “that this type of requirement is ‘common’ and does not, in violation of law, ‘**eliminate the [Association's] right to file a legal action.**” *Id.* at *4 (emphasis in original) (*quoting Peninsula, supra*, at 95, 614 S.E. 2d at 355). Furthermore, the Business Court noted that “Plaintiff admits that, contrary to its Declaration, it ‘did not obtain a 75% vote of [the Association's] membership [to] authorize the current litigation.’” *Id.* at *4 (citations omitted). Accordingly, the Business Court concluded “the litigation approval requirement to be valid . . . [and] Plaintiff lacks standing in this action to bring its claims before the Court. This Court, therefore, lacks subject matter jurisdiction to hear the claims.” *Id.* Based thereupon, the Business Court held that “Defendants' motion to dismiss for lack of subject matter jurisdiction is **GRANTED** on the grounds that Plaintiff does not have standing in this action to bring its claims against Defendants.” *Id.* (emphasis in original).

IV. ANALYSIS

A. Statutory and Common Law Standing for Owners' Associations.

For the same reasons stated in Judge Walker’s dissent in *Creek Pointe*, in this author’s opinion, the majority of the *Creek Pointe* court was incorrect in concluding that N.C. Gen. Stat. § 47F-3-102(4) did not itself confer standing upon an owners’ association to bring a claim on behalf of its individual members but, rather, merely “reiterate[ed] the common law rule that, when otherwise proper, a homeowner’s association may participate in a lawsuit.”

First, N.C. Gen. Stat. § 47F-1-108 states that when the principles of law or equity, or other North Carolina statutes, conflict with the provisions of the NCPCA, the provisions of the NCPCA will control. The majority opinion in *Creek Pointe* searched for inconsistencies between the NCPCA and the principles of law and equity or other North Carolina statutes, and not inconsistencies between the principles of law and equity and other North Carolina statutes and the NCPCA— a subtle, but important, difference. Because the majority analyzed whether N.C. Gen. Stat. § 47F-3-102(4) was inconsistent with the common law rules regarding associational standing, it correctly concluded that the standing provision from the NCPCA was not inconsistent with the common law or other statutory rules of associational standing. The *Creek Pointe* Court’s conclusion is correct, but the analysis was not.

A general statute will almost always be consistent with a stricter statute since it does not have as many requirements. As the majority opined in *Creek Pointe*, a statute that is less strict than a common law rule will tend to be a general reiteration of the common law rule, leaving an analysis under the common law rule necessary. However, a statute will *always* be inconsistent with a *less strict* statute precisely because of what makes it more strict – additional requirements. N.C. Gen. Stat. § 47F-3-102(4) has essentially only one standing requirement: that the controversy “affect[] the planned community.” Thus, N.C. Gen. Stat. § 47F-3-102(4) is far less strict than the common law requirements for non-homeowner association standing which North

Carolina appellate courts have sometimes adopted, from United States Supreme Court opinions, in cases such as *River Birch* and *Creek Pointe*. Because of their additional requirements, these common law requirements for associational standing are thus inconsistent with those from the NCPCA. Therefore, N.C. Gen. Stat. § 47F-1-108 requires that § 47F-3-102(4) must control. A proper analysis of N.C. Gen. Stat. §§ 47F-1-108 and 47F-3-102(4) yields the conclusion that the NCPCA, and *not* general common law associational standing requirements, *should* apply to govern standing for owners' associations.

The North Carolina common law rule of associational standing, as first described in *River Birch*, is nonetheless improperly applied to homeowners' associations. The opinion from *River Birch* states that: "where an association seeks to recover damages on behalf of its members, the extent of injury to the individual members and the burden of supervising the distribution of any recovery militates against finding standing in the association." *River Birch* at 130, 388 S.E.2d at 555. The *River Birch* Court's concern, the difference in extent of injury between individuals, has often been found to violate the third *Hunt* requirement: neither the claim asserted, nor relief requested, requires the participation of the individual members in the lawsuit. The *River Birch* Court stated that an association's claim for damages to its individual members will usually involve "damages claims [that are] not common to the entire membership, nor shared by all in equal degree." *River Birch*, at 130, 388 S.E.2d at 555 (*quoting Warth v. Seldin*, 422 U.S. 490, 515, 95 S. Ct. 2197, 2214 (1975)).

However, for the following reasons, the language from *River Birch* regarding an associational claim for damages does not properly apply to North Carolina owners' associations. First and foremost, the two United States Supreme Court cases that form the foundation of North Carolina case law regarding common law associational standing, *Hunt* and *Warth*, did not, in any

way, involve owners' associations. The pertinent associations at issue in *Warth* were: 1) a not-for-profit corporation comprised of taxpayers from a neighboring city, allegedly harmed because of the town's allegedly unconstitutional zoning ordinances ("Association One"); 2) an Association comprised of residential construction entities from the same neighboring city, comprised of many different homebuilding companies, allegedly harmed by way of lost profits due to their inability to construct housing for low to moderate income families in the town ("Association Two"); and, 3) a not-for-profit corporation comprised of various organizations with a general interest in housing problems ("Association Three"). Likewise, the association at issue in *Hunt* was a quasi-state-run association comprised of representatives from various apple growers in the State of Washington, harmed by a North Carolina statute regulating the placement of grading stickers on imported apples.

The types of associations involved in *Warth* and *Hunt* strongly suggest that the rules from these cases should not apply to owners' associations. The significant characteristics of the associations from *Warth* and *Hunt* are not shared by owners' associations. First, in *Warth*, Association Two did not allege any injury to itself. *Warth*, 422 U.S. at 515, 95 S.Ct. at 2214. Second, the *Warth* Court ruled that Association Two did not have standing to pursue the claims for damages to their individual members because the injuries to each homebuilder member of Association Two were "not common to the entire membership" and were "peculiar to the individual concerned, and both the fact and extent of injury would require individualized proof." 422 U.S. at 515-16, 95 S.Ct. at 2214. These statements from the *Warth* Court's discussion of Association Two were first applied to owners' associations in North Carolina in *River Birch*. However, the major differences between Association Two and owners' associations leave the application of *Warth* to owners' associations improper.

In *Warth*, Association Two was an association “embracing” various business entities engaged in residential construction. 422 U.S. at 490, 95 S.Ct. at 2201. There was no evidence showing Association Two had any control over its members, nor any interest in the individual members’ businesses. Similarly, there was no allegation of harm to any common property or any other membership interest in which Association Two had any stake. In fact, there are no mentions in the *Warth* opinion of *any* property interest or responsibility to any such interest of its members held by Association Two. Likewise, there is no mention of Association Two’s duty to protect its members’ interests or any means by which it was authorized to do so. Association Two was merely an associational “face” for a group of distinct residential construction firms. The builders shared nothing in common besides the desire to build housing for low- or middle-income persons, and an alleged harm resulting from an inability to do so.

Owners’ associations, on the other hand, operate much differently. First, owners’ associations are a creation of, and are governed by, statute. The NCPA authorizes, applies to, and controls owners’ associations for planned communities in North Carolina. *See* N.C. Gen. Stat. §47F-1-101 *et. seq.* Furthermore, owners’ associations are comprised of members who share, at a minimum, this in common: 1) each member pays dues to the association; 2) individual members are bound by provisions of their associations’ articles of incorporation, declarations, and by-laws, which give the associations a wide array of control over the associations’ members and their member’s property interests; and, 3) owners’ associations hold an interest in the property of their members – they are typically charged with maintaining many elements of their members’ premises and, oftentimes, own and unilaterally control property within their development known as common elements.

The language from *Warth*, quoted in *River Birch*, describing the characteristics of Association Two, is misapplied to owners' associations in North Carolina. The *Warth* Court stated that Association Two did not have standing to bring claims on behalf of its individual members because the damages to the various members were peculiar to them and not common to the entire membership. 422 U.S. at 515-16, 95 S.Ct. at 2214. The *River Birch* Court, and other courts after it, have quoted this language when ruling upon the issue whether a owners' association has standing to bring claims on behalf of its individual members. *See, e.g., Creek Pointe*. However, the application of the language regarding associational standing from *Warth* to owners' associations is improper for two reasons.

1. The *Warth* Court could not locate any Injury on the Part of Association Two.

As mentioned previously, Association Two held no interest in the construction entities that comprised its membership. Similarly, there was no record of Association Two ever acting on behalf of its individual members in any way until its attempt to intervene in the *Warth* litigation. The United States Supreme Court did not find an injury to the Association itself, and Association Two asserted no such injury. 422 U.S. at 511, 95 S.Ct. at 2211. There was no applicable statute conferring standing upon Association Two, unlike, arguably, the NCPA, so the *Warth* Court endeavored to find standing for Association Two by way of representing its members for their individual harm. *Id.* The only evidence of injury to the individual members was Association Two's general assertion that, because of certain allegedly discriminatory zoning ordinances, its members could not build certain types of homes and, as a result, suffered damages of \$750,000. *Id.* at 514-15, 95 S.Ct. at 2213. However, because the purported harm to Association Two's individual members was not illustrated by any evidence, the Court made the often quoted, but misapplied, statement:

in the circumstances of this case, the damages claims are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of the injury would require individualized proof.

Id. at 515-16, 95 S.Ct. at 2214. The *Warth* Court’s statement regarding the necessity of individualized proof is directed at basic elements of a claim for damages – not merely the extent of the damages. The *Warth* Court could not begin to determine the extent of any member’s damages because there were no descriptions of damages for each individual member, and no data or other evidence to back up the assertion that the zoning ordinances actually caused any damages to any of its members.

2. The *Warth* Court’s Standing Analysis Concerned only U.S. Constitution, Article III Principles for Standing.

Since Association Two had no interest in any of the allegedly damaged businesses, and since there was no statute conferring standing upon it, the *Warth* Court properly analyzed whether Association Two otherwise satisfied general U.S. Const. Art.. 3, § 2, Clause 1 “Case or Controversy” requirements for common law standing. 422 U.S. at 511, 95 S.Ct. at 2211-12. Although the *Warth* Court ruled that Association Two could not bring claims on behalf of its individual members for damages with language that implicated a violation of the third *Hunt* criterion, the fundamental cause for the lack of standing was a failure to meet basic, constitutional justiciability requirements. *Id.* at 516, 95 S.Ct. at 2214.

Just like Association Two from *Warth*, the association at issue in *Hunt* was also very different from a North Carolina owners’ association. The Washington State Apple Advertising Commission at issue in *Hunt* (“the Commission”) was a quasi-governmental association, comprised of representatives from various apple producers in the State of Washington, which challenged a North Carolina statute which required, *inter alia*, that all closed containers of apples

sold, offered for sale, or shipped into the State to bear “no grade other than the applicable U.S. grade or standard.” *Hunt, supra*, at 335, 97 S. Ct. at 2437. A three-judge Federal District Court invalidated the statute insofar as it prohibited the display of Washington State apple grades on the ground that it unconstitutionally discriminated against interstate commerce. *Id.*

On appeal, North Carolina challenged whether the Commission had standing to bring the action. *Id.* at 336, 97 S. Ct. at 2438. North Carolina argued that “the Commission cannot rely on the injuries which the statute allegedly inflicts individually or collectively on Washington apple growers and dealers in order to confer standing on itself.” *Id.* at 342, 97 S. Ct. at 2440-41. Furthermore, North Carolina argued that “[t]hose growers and dealers . . . are under no disability which prevent them from coming forward to protect their own rights if they are, in fact, injured by the statute’s operation.” *Id.*

The United States Supreme Court ultimately held that “[u]nder the circumstances presented here, it would exalt form over substance to differentiate between the Washington Commission and a traditional trade association representing the individual growers and dealers who collectively form its constituency,” the latter of which the Court found would have sufficient standing. *Id.* at 345, 97 S. Ct. at 2442 (underline emphasis added). The Supreme Court thus stated: “We therefore agree with the District Court that the Commission has standing to bring this action in a representational capacity.” *Id.* Furthermore, and importantly, in determining whether there was sufficient evidence that the Association had met the prerequisite \$10,000-in-controversy requirement then in existence, the Supreme Court also held that “the record demonstrates that the growers and dealers have suffered and will continue to suffer losses of various types” and that it was precluded from saying “to a legal certainty” that “such losses and expenses will not, over time, if they have not done so already, amount to the requisite

\$10,000 for at least some of the individual growers and dealers.” *Id.* at 347-48, 97 S. Ct. at 2443-44 (underline emphasis added). Thus, although the *Hunt* Court explicitly recognized that the Commission’s members probably sustained “various” losses, and that only “some of the individual growers and dealers” had probably suffered the requisite damages, thereby acknowledging that the Commission’s members had suffered differing degrees of monetary damages, the *Hunt* Court nonetheless found sufficient standing for the Commission.

Given the substantial differences between the various Associations at issue in *Warth* and *Hunt*, and the typical owners’ association governing planned developments in North Carolina, the *Creek Pointe* court’s majority was misguided in relying upon *Warth* and *Hunt* in finding that general common law associational standing requirements, and not the NCPCA,⁵ *should* apply to govern standing for owners’ associations. As argued by Judge Walker in his dissent in *Creek Pointe*, the statute does and *should* “abrogate the common law by advancing ‘a new right upon homeowners’ associations’ to representative standing.” In his eloquent dissent, Judge Walker further explained:

the language of N.C. Gen. Stat. § 47F-3-102(4) must be considered in conjunction with the overall scheme of planned communities and the objectives of the NCPCA. Admittedly, the statute does not automatically confer representative standing upon a homeowners’ association in every case.⁶ Nevertheless, I construe the NCPCA to allow a homeowners’ association, **both as a real party in interest and in a representative capacity**, to pursue litigation in matters affecting the common areas within the planned community; provided such actions are consistent with its declaration, articles of incorporation and bylaws.

⁵ To the extent that the NCPCA had not yet been adopted as of the date of the Supreme Court of North Carolina’s opinion in *River Birch* in 1990, the same criticism cannot be levied at that Court.

⁶ “For example, a homeowners’ association would not have representative standing to initiate litigation on behalf of a lot owner whose sole cause of action is one for the breach of a contract with a builder.” *Creek Pointe, supra*, at 170, 552 S.E.2d at 228 (Walker, J., dissenting).

Creek Pointe, supra, at 170, 552 S.E.2d at 228 (Walker, J., dissenting) (emphasis added). Unfortunately, despite the opportunity to do so afforded by Judge Walker's dissent at the Court of Appeals, the North Carolina Supreme Court failed to further weigh in on the issue by declining to accept discretionary review in *Creek Pointe*. 356 N.C. 161, 568 S.E.2d 191 (2002). Thus, the Supreme Court of North Carolina missed an appropriate opportunity to clarify the extent to which the arguably-broader standing provisions of the subsequently-adopted NCPA might modify its common law analysis of owners associations' standing in the earlier *River Birch* case. So, the current state of the law in North Carolina remains that owners' associations' standing is subject to the three (3)-part *Hunt* associational standing test despite the apparently-broader NCPA provisions relative to standing.

B. Contractual Standing.

Regardless of the substantive, and spirited, debate concerning the status of common law and statutory standing for owners' associations in North Carolina, the effect of contractual standing for owners' associations in North Carolina is far less unsettled, and remains the last, yet-to-be-unshakeable redoubt against owners' association standing in North Carolina. The author recently viewed a posting from a consumer on an electronic message board concerning North Carolina real property sales which stated, in substance, that "You've got more protection in North Carolina when you buy a used car than when you buy a house." Whether that is ultimately true or not, the rule of *caveat emptor* ("buyer beware") nonetheless prevails in North Carolina when it comes to the effect of "pre-litigation requirements" which may be "buried" in the governing documents of owners' associations across the Old North State. As reflected in the *Peninsula* and *Queen's Gap* court opinions, North Carolina's courts have little sympathy for owners' associations who may be seeking to enforce legal rights on behalf of the associations or

their members in the face of such “pre-litigation requirements”, no matter how onerous or one-sided in the protection of the declarant or developer they may be. Like many provisions in the NCPCA which the North Carolina General Assembly has seen fit to make subject to alteration or “opt-out” by the governing documents of a particular planned community, the power of owners’ associations in North Carolina to “[i]nstitute, defend, or intervene in litigation or administrative proceedings on matters affecting the planned community...” is expressly made subject to the exception that “[u]nless the articles of incorporation or the declaration expressly provides to the contrary.” See N.C. Gen.Stat. § 47F-3-102(4) (2010) (emphasis added); *Queen’s Gap* at *3. By way of contrast, the UPCA makes this statutory standing only “subject to the provisions of the *declaration*”, thus providing one less place (i.e., the owners association’s article of incorporation) in North Carolina for potential purchasers to have to research concerning “pre-litigation” requirements prior to purchasing within a planned community. See UPCA §3-102(a) (emphasis added).

Equally as important, UPCA §3-102(a) also has another significant caveat, in that it enumerates standing provisions “[e]xcept as provided in subsection (b)”, which subsection further provides that “[t]he declaration may *not* impose limitations on the power of the association to deal with a declarant which are more restrictive than the limitations imposed on the power of the association to deal with other persons.” (emphasis added). The NCPCA, however, *omits* subsection (b) *entirely*, thus creating the opportunity for the last redoubt to associational standing (at least in an unequal proportion versus a declarant) of the types ultimately upheld in *Peninsula* and *Queen’s Gap*. No explanation for this glaring omission is provided in the NCPCA comments, but the author surmises that it ultimately results from the power of the developers’ and builders’ lobbies in Raleigh.

Furthermore, the North Carolina courts asked to address the issue have uniformly refused to abrogate “pre-litigation requirements” in planned community governing documents, no matter how tilted they may appear to be in favor of immunizing the drafters of such documents from legal liability, even when they may still be in control of the community and thus able to effectively quell all dissent. Instead, our courts have adopted the attitude “that this type of requirement is ‘common’” and that “the planned community’s “members . . . receive[] ample opportunity to review the voting requirement[s] . . . prior to purchasing real property” through “record notice” in that the documents may be “available in the county register of deeds office” prior to such purchases. *Queen’s Gap, supra*, at *4; *Peninsula, supra*, at 96-97, 614 S.E.2d at 355-56 (citations omitted). Although particularly brutal to unwary consumers and their owners’ associations, this judicial attitude is, unfortunately, at least intellectually consistent with North Carolina’s courts’ attitude that real property buyers, and the owners’ associations of which they ultimately become members, need to ferret out and be aware, in advance, of the potential practical bars to owners’ associations’ standing to litigating claims against developers and/or declarants which may be lurking in their governing documents. Regardless, where present, “pre-litigation requirements” in planned community governing documents constitute the last, often-impenetrable, redoubt against owners’ association legal standing in North Carolina.