Land Use and Operational Controls in the Planned Development

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One of the most fascinating aspects of home ownership in the 1960's was the emergence of the planned development. Such developments include the condominium, the planned residential development, and similar relatively complex developments which utilize (1) a home owners' association, (2) covenants, conditions, and restrictions, and (3) substantial common areas.

In the planned development the home owners' association is used as an administrative, legislative, and quasi-judicial body and, as such, manages and is responsible for substantial property rights of

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the owners within the development. It manages the upkeep and maintenance of the improvements and common areas, administers the ground rules for use of the recreational facilities, makes assessments on owners, and, where necessary, metes out private quasi-judicial decisions regarding alleged violations of the deed restrictions. In carrying out a broad gamut of such activities, the role of the home owners' association is as a private government for its members.

The covenants, conditions, and restrictions (CC&Rs) set forth the rules governing land usage and establishing operational guidelines for the common interests of the owners of condominiums, homes, or lots within the *restricted* area (planned development). The CC&Rs became increasingly sophisticated during the 1960's. Undoubtedly contributing factors to the development of the CC&Rs during that period were: (1) changes in the laws of many states setting forth the statutory schemes for planned developments, (2) increasing involvement of professional land developers, (3) the increasing size of the various projects, and (4) the availability of federally insured permanent home financing for such developments.

The third element occurring in the various types of developments is the *common area*. *Common area* refers to the real property interests which are owned by all of the property owners within the project, *i.e.*, each owner would own an undivided interest in the portion of the real property within the project which is owned in common by all of the owners. In a technical sense, real property owned by the home owners' association is not *common area* since the home owner does not own a direct interest in the property. His right to use the association's property arises through his membership in the association rather than through direct ownership in the property.

The purpose of this article will be to take a current look at the planned development with a particular focus upon: (1) the historical development of land-use controls and their application to planned developments; (2) the internal organization and operation of the home owners' association; and (3) legal considerations in establishing effective and viable covenants, conditions, and restrictions.

I

Historical Development of Land-Use Controls and Their Application to the Planned Development

History. To understand the developments of the 1960's pertaining to planned developments and, in particular, to the development of the home owners' association and the covenants, conditions, and restrictions, it is important to review briefly a history of land-use controls prior to 1960. Historically, the land developer utilized two principal means of control: (1) the right of entry for condition broken or a possibility of reverter (either being sometimes referred to as "conditions subsequent")[1] and (2) covenants running with the land and equitable servitudes.

The "right of entry for condition broken" created in the grantor the right to enter upon the property of the grantee and terminate the interest of the grantee in the property in the event that a specified condition embodied in the deed was breached.[2] At common law, the grantor was required to enter upon the property, thereby electing to exercise his right to recover possession; however, in California actual entry is not necessary. Here, the grantor is required only to bring an action to recover possession and to compel a reconveyance.[3]

A "possibility of reverter" varies only in its operation. There, the happening of the condition automatically terminates the estate of the grantee in the property.[4] Thus, the grantor has no election; if the condition in the deed is breached, title to the property automatically revests in the grantor.

Rights of entry and possibilities of reverter might be triggered by any number of conditions. Seemingly, however, they could fall into two categories. First, there might be a condition subsequent which did not relate in any manner to the surrounding property, *e.g.*, that the property would be used only for a charitable foundation or that it never would be used for the sale of alcoholic beverages. The purpose of such provisions is not to protect the

1. Restatement of Property, § 24 (1936). The term "condition subsequent" denotes that part of the language of a conveyance, by virtue of which upon the occurrence of a stated event the conveyor, or his successor in interest, has the power to terminate the interest which has been created subject to the condition subsequent, but which will continue until this power is exercised.
2. Restatement of Property, § 155 (1936). Power of Termination.
3. Firth v. Los Angeles Pacific Land Co., 28 Cal. App. 399, 404, 152 P. 935, 937 (1915).
4. Dabney v. Edwards, 5 Cal. 2d 1, 53 P.2d 962 (1935).

economic interest of the developer in the remainder of his property but, rather, is to satisfy a personal motive of the grantor.

Secondly, there are those conditions which are created for the purpose of protecting the value of the developer's interest in the project during the time that he is disposing of the parcels or units he owns in the development. Normally, such conditions would describe the limited use to which the property can be subjected and would impose certain architectural standards, minimum lot sizes, and set-back requirements. Similar provisions have been held enforceable by a California court.[5] Since such conditions are for the benefit of the grantor, it has been held in California that they may be created only in the grantor.[6]

Suppose, however, that the grantor wishes to convey his right to enforce conditions subsequent to other grantees in the development. Although rights of entry are alienable in California,[7] it is difficult to visualize the utility of alienating the right of entry to the real parties in interest (the grantees of other parcels or units in the development). Suppose that the grantees desired to exercise a right of entry and to cause a forfeiture. How would the election be made? How would title to the forfeited property vest? Since there does not seem to be any satisfactory answers to those questions, it would appear that the statutory provision authorizing the alienation of a right of entry for condition broken does not apply to a condition subsequent created by the developer for his own protection while selling lots or parcels in subdivided property. Thus, it is only the developer (grantor) who may enforce a condition subsequent under the circumstances described.

A related problem pertains to the time in which the condition subsequent can be enforced. In cases where the condition subsequent was created to protect the developer while he is disposing of his property interests, the California courts have held that the conditions may only be enforced while the developer owns property in the development.[8] The policy relied upon by the courts in

5. Strong v. Shatto, 45 Cal. App. 29, 187 P. 159 (1919).
6. Parry v. Berkeley Hall School Foundation, 10 Cal. 2d 422, 74 P.2d 738 (1937).
7. CAL. CIV. CODE § 1046 (West 1954).
8. Firth v. Marovich, 160 Cal. 257, 260, 116 P. 729, 731 (1911); Kent v. Koch, 166 Cal. App. 2d 579, 333 P.2d 411, 414 (1958); Atkins v. Anderson,

those cases is that the grantee should not forfeit or be required to divest himself of his property in favor of the grantor unless it appears that the grantor (developer) suffered or will suffer serious economic detriment or damage by reason of such breach.

Rights of entry and possibilities of reverter are fraught with problems, some of which are discussed above. Additionally, equitable servitudes, being enforced by injunctive relief on the application of either the developer or a grantee,[9] seem to provide a much more palatable remedy to the court than the prospect of a forfeiture under a condition subsequent. Thus, it is no surprise that in the modern-day art of land-use controls, conditions subsequent seem to be forgotten.[10]

The related land-use controls of "covenants running with the land" and "equitable servitudes" were the second category of controls utilized by the developer prior to 1960. They form the real basis for modern-day land-use and operational controls.

The normal "covenant" is a promissory obligation arising from the agreement between contracting parties and, as a general rule, is not enforceable by or against any successor in interest to any party, since there is no privity of contract. Although such covenants are enforceable between the grantor and the grantee, historically covenants were enforceable only against such successors if they constituted "covenants running with the land," *i.e.*, by definition, they must have directly benefited the property[11] and have been made expressly enforceable against successors in interest of the grantees.[12] Thus, if the particular covenant "burdened" rather than "benefited" the property, it was not enforceable as a covenant by or against successors in interest to any original grantee.[13]

Because "covenants running with the land" were so limited in effect, the courts of equity undertook to enforce negative covenants

139 Cal. App. 2d 918, 294 P.2d 727 (1956); Townsend v. Allen, 114 Cal. App. 2d 291, 250 P.2d 292 (1952); Gattian v. Coleman, 86 Cal. App. 2d 266, 194 P.2d 728 (1948); Young v. Cramer, 38 Cal. App. 2d 64, 100 P.2d 523 (1940).

9. *Infra* at 33.

10. A review of the CC&Rs of the many developments discussed in this article (in particular, the Planned Residential Development [PRDs] and the Planned Unit Developments [PUDS] where such conditions historically might have been used) fail to make mention of any conditions subsequent.

11. CAL. CIV. CODE §§ 1460, 1462 (West 1954).

12. Cases cited note 8, *supra*.

13. Marra v. Aetna Constr. Co., 15 Cal. 2d 375, 378, 101 P.2d 490, 492 (1940).

or covenants which burdened (rather than benefited) the property under the theory of "equitable servitudes." Enforcement was based on the theory that if any successor in interest to the original grantee acquired the property with actual or constructive knowledge of the restrictions, he was bound by the provisions.[14]

The equitable servitude can pertain to (1) any aspect of land-use control and (2) the imposition of operational controls of the common area interests. Its theory is sufficiently broad to provide the basis for enforcement of the broad spectrum of modern-day land controls. Equally important to the development is the fact that equitable servitudes can be enforced either by the developer (while he owns an interest in the development) or by the original grantees or their successors or agents—the basis for establishing such rights in the home owners' association.

Modern Application Generally. The adoption of the condominium statutes in the various states[15] generally constituted the beginning of land-use and operational controls managed through an active, regularly functioning home owners' association. Subsequently, local governments adopted statutes and ordinances applying similar principles to the newly emerging concepts of the planned residential development (PRD), and the federal government became involved in insuring permanent loans on various types of planned developments.

With the advent of the statutory condominium in California in 1963,[16] the home owners' association as an active instrument of government was born. Condominiums introduced, among other things, the concept of the *common area* as a substantial part of the property interest which the home owner was acquiring.[17] Since the *common area* as conceived included not only the physical structures of the residential units, but also much of the land and (possibly) the recreational facilities within the project,[18] the home

14. Bryan v. Grosse, 155 Cal. 132, 99 P. 499 (1909); Wayt v. Patee, 205 Cal. 46, 269 P. 660 (1928).
15. The condominium as a concept was introduced into the continental United States in the early 1960's, but had been utilized in Puerto Rico and Hawaii prior to that time. PRACTICING LAW INSTITUTE, COOPERATIVES AND CONDOMINIUMS N4-2327 (1969).
16. CAL. CIV. CODE §§ 1350 *et seq* (West Supp. 1971).
17. CAL. CIV. CODE § 783 (West Supp. 1971).
18. As was noted previously, if property such as the recreational facili-

owner was now confronted with the problems of actively managing extensive physical improvements and property rights. For this purpose, the home owners' association was utilized.

As land-planning techniques in relation to the planned development became more sophisticated, land planners conceived that land use and design might better be served by planning devices other than the traditional subdivision. The concept of the planned residential development was an outgrowth of such thinking. The PRD, while avoiding the standard-lot concept, adopts the idea of the common area permanently dedicated to the recreation, open space, or other common interests of the home owner within the development. Because lot sizes do not follow the traditional dimensions or design of typical subdivisions, the zoning authorities require that substantial portions of the development be permanently dedicated to recreation and open space.[19] The technique used to obtain such dedication is the negative easement, *i.e.*, all of the uses of the particular recreational or open-space areas are conveyed to the local government except those uses expressly authorized by the governmental authority.

The concepts heretofore created and defined under state law are being carried over to federally insured housing projects. And because the Federal Housing Administration (FHA) is involved as the insurer, it is applying its own regulations to planned developments. Two important FHA programs which are involved directly with land-use and operational controls are: (1) condominium multi-family housing insured under Title II, Section 234, of the National Housing Act,[20] and (2) single-family residences insured under Title II, Section 203 (b), of the National Housing Act.[21] This article

ties is owned by the homeowners' association, technically it is not a part of the common area in which each home owner owns an undivided interest. His right to use such property would be through his membership in the homeowners' association.

19. For a typical ordinance, see San Diego County, Cal., Ordinance No. 1402 (new series, *as amended* May 1, 1971). The purpose of the Planned Residential Development is

> . . . to permit greater flexibility and, consequently, more creative and imaginative designs for the development of such residential areas than generally is possible under conventional governing regulations. It is further intended to promote economical and efficient use of the land while providing a harmonious variety of housing choices, a higher level of urban amenities, and preservation of natural and scenic qualities of open spaces.

(Preamble to the above cited ordinance).

20. Title II, § 234 of the National Housing Act of 1934, *as amended* 12 U.S.C. § 1715(y) (1964).

21. Title II, § 203(b) of the National Housing Act of 1934, *as amended* 12 U.S.C. § 1709(i) (1954).

will be concerned with single-family housing insured under Section 203 (b) only to the extent that it involves a planned unit development (PUD).

The various concepts of planned developments mentioned above, though similar in many ways, are sufficiently different that their respective definitions and comparisons are necessary.

Condominium. A condominium, like the PRD and PUD, involves the ownership of interests in real property. It is unique, however, because one of the property interests which the unit owner acquires is the air space within the confines of his specifically described unit.[22] The air space is described by reference to the interior surfaces of the bearing walls of the specific unit; thus, the bearing walls and structure surrounding the air space are part of the common area within the condominium project.[23] Additionally, the unit owner will own an undivided interest in the common areas[24] and a membership in any home owners' association.[25] He also may have exclusive or nonexclusive easements to a patio, parking garage, or parking space. By definition, his estate in the condominium may be in perpetuity, for life or for a period of years.[26]

Planned Residential Development. A PRD is a planned development in which the developer and zoning authority establish a specific development plan for the use of the property. The sole use prescribed by statute is residential housing (with certain specified complementary and incidental uses also permitted).[27] Since lot sizes and dimensions do not comply with standard subdivision requirements[28] and since there are the requirements of open-space and recreational easements to which portions of the property

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22. A PRD, by definition (see note 19, *supra*), may include a condominium, but in actual practice in California, condominiums are not included within the typical PRDs. See a discussion of the problem, *supra*, at 36.

23. CAL. CIV. CODE § 1353(a) (West Supp. 1971).

24. CAL. CIV. CODE §§ 1353, 1354 (West Supp. 1971).

25. CAL. CIV. CODE § 1355(a) (West Supp. 1971); Title 10, CAL. ADMIN. CODE, § 2792.8 (1966).

26. CAL. CIV. CODE § 783 (West Supp. 1971).

27. See note 19, *supra*.

28. On cluster housing in a PRD it is possible that individual lots may be as small as the property lying immediately below the home owner's residence; or it may also include his patio. Because of the small lot size, such a development is sometimes referred to as a "postage stamp" subdivision.

will be permanently committed, the typical ordinance[29] requires the developer to file (1) tentative and final subdivision maps setting forth the development plan and (2) an application for a special use permit. In that manner, the zoning authority has complete control over the development after the subdivision map is approved.

Theoretically, single-family housing, as well as cluster housing and condominiums, may be constructed in a PRD.[30] However, since condominiums are governed in California by statute,[31] the main thrust of locally sponsored PRD statutes is to the planned development where the home purchaser acquires fee simple title to a parcel of property on which his residence is constructed (or is to be constructed) and to an undivided interest in the common area. He does not acquire any rights in the air space.

Planned Unit Development. A PUD is a residential development insured under the FHA 203(b) program[32] composed of detached single-family, semi-detached, and row dwellings, or a combination of these concepts, with privately owned common property "as an essential or major element of the development."[33] Because the FHA insures condominium housing under a separate program,[34] condominiums are necessarily excluded from the PUD program. Thus, essential elements of PUD are that: (1) the home owner acquires fee simple title to the property underlying his home (his fee title frequently is to a larger parcel) and (2) he acquires no rights in any air space.

The PUD program can be utilized with a typical subdivision where specified lots are committed to recreation and open area. However, since the goals and concepts of the PRD and the PUD are so similar, it is much better planning (if a sound working relationship can be obtained with the local zoning authority) to utilize the PRD program when the developer anticipates that his financing will be obtained under the PUD program.

II

THE HOMEOWNERS' ASSOCIATION

The relatively recent emergence of the home owners' association

29. See note 19, *supra*.
30. *Id.*
31. CAL. CIV. CODE §§ 1350 *et seq.* (West Supp. 1971).
32. See note 21, *supra*.
33. FEDERAL HOUSING ADMINISTRATION, PLANNED UNIT DEVELOPMENT PROCESSING GUIDE, FHA G 4000.4A, at 1 (1970); FEDERAL HOUSING ADMINISTRATION, LAND PLANNING BULLETIN 6, at 17 (1970).
34. See note 23, *supra*.

as the accepted means of managing the planned development has focused attention on the internal organization and operation of the association. Part II of this article will review briefly (a) considerations in electing the form of the entity and (b) tax considerations affecting the operation of the association.

Considerations in Electing the Form of Entity. A review of planned developments will show that both nonprofit corporations and unincorporated associations are utilized as the legal entity for home owners' associations. There are both tax and non tax considerations that bear on the choice of legal entity.

"Tax Considerations"—If the entity is to be a dormant organization, merely holding title to common areas, and does not engage in any activities which may constitute rendering services to its members, then the type of entity is not important from a tax point of view, simply because it is not going to be engaged in a trade or business. By definition, the planned development contains substantial common areas which will necessarily involve the association in the maintenance and repairs of the common areas and the management of recreational facilities, if any. It is probable that the Internal Revenue Service will determine that the home owners' association in the planned development is engaged in a trade or business. Thus, the entity will be required to file an income tax return either as a partnership, an association taxable as a corporation or a corporation (depending on the facts).

No home owners' association has been found where a partnership was utilized as the association entity. Assuming that a partnership has been created, however, there should be no unusual tax problems since the partnership is a reporting entity and any income or loss will be reported by the partners individually.

The more difficult tax problem arises if the organization is deemed an association taxable as a corporation or is, in fact, incorporated and deemed to be engaged in a trade or business by virtue of the services in which it is engaged.

In summarizing the tax effects of using the typical unincorporated association or nonprofit corporation, it would seem that for tax purposes, the Internal Revenue Service would find that a "corporation" was involved. Thus, unless there are other compelling

reasons to use the unincorporated association, the nonprofit corporation would seem better suited to the planned development.

Probably the most important distinguishing feature between the types of entities is the extent to which directors and members of the association may be liable for its contracts and torts.

In respect to contracts, owners, as members of a nonprofit corporation, enjoy personal limited liability analogous to the shareholder in the corporation for profit. Similarly, the members of the board of directors or the corporate officers would not be personally liable for the corporation's debts.

Individual members of an unincorporated association may be liable for the performance of its contracts. A member of an association is personally liable on contracts to which he actually or constructively consents or which he authorizes or ratifies.[35] Contract liability of members may be limited by agreement with creditors or by statute, such as in California where members are not personally liable for debts incurred in connection with buildings used for association purposes.[36] Some other states limit condominium owners' liability. Massachuesetts limits liability for both contracts and torts to a pro rata share.[37] Florida eliminates personal liability for the condominium association debts.[38] It should be remembered that with regard to contract liabilities, each member, through maintenance assessments, will be liable to the association for his individual share.

The matter of tort liability is more complex, and the responsibility for such torts will depend on (a) the degree of culpability and (b) the nature of the tort. The same issues may be involved in determining whether public liability insurance is available for individual members, members of the board of directors and members of the nonprofit corporation or unincorporated association.

Most tort liabilities are insurable, and thus the primary concern to the member of the association is the adequacy of the association's insurance coverage. However, certain tort liabilities associated with the ownership of land may not be readily insurable. In particular, liabilities for such matters as encroachments, lateral

35. Security First Nat'l Bank of Los Angeles v. Cooper, 62 Cal. App. 2d 653, 145 P.2d 722 (1944).

36. CAL. CORP. CODE § 21100 referring to associations in general. California's Condominium Act provides that labor and material liens must be consented to (absent emergency repairs) and such liens are limited to a pro rata share. CAL. CIV. CODE § 1357 (West Supp. 1971).

37. MASS. GEN. LAWS ANN. ch. 183A, § 13 (West Supp. 1971).

38. FLA. STAT. ANN. 711.18(1) (Harrison, West 1969).

and subjacent support, flooding or surface water and nuisance may create liability exposure to the association (regardless of which type of entity is used) and to the members of the board of directors of an unincorporated association.

A second important factor bearing on the choice of entities pertains to the applicable body of laws. In most jurisdictions, there exists well-defined bodies of law regarding the rights, duties and powers of corporate directors, officers and members. The existence of such laws in respect to nonprofit corporations is conducive to the orderly functioning of the home owners' association.

Since the management function of the nonprofit corporation is normally carried out by home owners (members of the board of directors) with little or no legal experience, the use of the corporate structure with its limited liability and definite rules and procedures clearly appears to be the logical choice of entities for the home owners' association.

Tax Considerations Affecting the Operation of the Association. Assuming (for purposes of this article) that the organization is either an association taxable as a corporation or is, in fact, incorporated, the tax decisions the home owners' association will be called upon to make include the following:

1. What revenues will constitute income?
2. What expenses are allowable as deductions?
3. Is the association entitled to depreciation and, if so, what is its depreciable property?
4. Are services rendered on behalf of the members to be treated as dividends taxable to them but not deductible by the corporation?

1. In addition to the obvious income that the organization may receive from recreational activities such as charging rent for the use of facilities or providing services for a fee, such as lifeguards, entertainment, etc., it would appear that the dues charged to its members or shareholders may be taxable income. The Internal Revenue Service takes the position that such dues collected in excess of amounts actually spent would not constitute taxable income if credited to the following year's assessment.[39] Therefore, it would seem that if the association sought to accumulate dues for purposes of reserves, such accumulations would be taxable income

39. Rev. Rul. 70-604, 1970, INT. REV. BULL. No. 50, at 6.

to the organization in the year received. Furthermore, the corporation will have taxable income in those years in which the dues received by it are spent on capital items that must be depreciated or amortized over a number of years.

2. If you have taxable income, what expenses can be deducted therefrom? If a deduction is allowed to the corporation for expenses incurred in connection with the repairs and maintenance of the structures, are we then converting what might otherwise be considered a personal nondeductible expense into a deductible expense? Such would not seem to be the case; the nondeductible expense would fall on the co-owner to the extent of his dues, which in turn are used by the corporation for expenses which would be personal to the co-owner. The corporation is engaged in a trade or business, so as to it, such expenses are ordinary and necessary in order to "earn" the dues it collects from its members.

On the other hand, taxes and interest would be deductible by the co-owners, if it was their obligation as co-owners of the property rather than owners of capital shares. However, to the extent the association or corporation is the fee owner of the common areas, taxes or interest applicable to those common areas would not be deductible by the owners of units. The Internal Revenue Service treats owners of condominium units the same as owners of cooperative shares, thereby allowing each owner of a unit to deduct his pro rata share of taxes and interest assessed on his interest in the property, and which he pays each year.[40]

3. A major question involves depreciation of the real estate improvement. If the corporation is deemed to be engaged in a trade or business, is it entitled to a deduction for depreciation of the real estate improvement? It would appear that such a deduction should be allowable to the extent that such improvements are being used in carrying on such trade or business and to the extent that the corporation has a depreciable basis. Therefore, it would seem extremely important that at the inception of the development, the actual cost or a reasonable value be allocated from each unit to the improvements which are to be owned by the managing corporation. Such amount would then have to be allocated between depreciable and nondepreciable assets. On that basis, the corporation being engaged in a trade or business and having depreciable assets on which it has a depreciable basis, would be entitled to a deduction for the depreciation.

4. Are the services rendered by the association taxable as divi-

40. Rev. Rul. 64-31, 1961-1 Cum. Bull. 300.

dends to the member-owners? The corporation normally will render maintenance repairs and other services to its members. Such services are not rendered gratuitously; rather, they are rendered in consideration of the owners' dues or assessments. Thus, they normally should not be deemed to be dividends unless the relative cost or value thereof is substantially in excess of the pro rata assessments to the recipient co-owner.

III

LEGAL CONSIDERATIONS IN ESTABLISHING EFFECTIVE AND VIABLE COVENANTS, CONDITIONS AND RESTRICTIONS

In establishing and operating the planned development, particular attention should be focused on certain areas. To a large extent, the discussion will apply to the covenants, conditions and restrictions, although other regulatory documents also may be involved. The particular areas of concern will be: (1) annexation in the incremental development, (2) architectural control, (3) enforcement procedures, (4) damage and destruction, (5) condemnation and (6) obsolescence and termination.

Annexation in the Incremental Development. Suppose that a developer who owns a large tract of property has contemplated constructing a planned development on the tract and has determined for some reason that it must be developed incrementally (or in phases). There are a number of reasons for his decision. He may want to test the market before making a commitment of the full tract. Or he may realize that the market that exists may be able to absorb only a certain number of units or lots at one time. Or the developer may not have sufficient working capital to develop the property in any other manner than in phases.

Besides the practical problems just discussed, a number of very complex legal problems are present. To illustrate, suppose that Phase II of a development is annexed to Phase I. Depending on how the annexation is consummated, the following rights of the home owner in one or both phases may be affected: voting rights in the home owners' association, rights in the recreational facilities, rights to use the common area and obligations to share in the expenses to maintain it, share of "common area" ownership, voting

rights upon the destruction of a portion of the improvements in the development, and others.

"The Regulators' Views." Both the Real Estate Commissioner of the State of California and the FHA have established certain ground rules for any annexation or series of annexations. Of course, the FHA regulations will be applicable only if federally insured financing is involved. However, its regulations should be reviewed because they are a positive step in determining a reasonable formula for annexation.

Three aspects of the problem of annexation will be reviewed: (1) the law generally regarding annexation; (2) special legal and planning considerations in the first phase; and (3) special legal and planning considerations in later stages.

In regard to rules of annexation generally, the Real Estate Commissioner provides in his regulations[41] that annexation will not be deemed reasonable if the documentation supporting the planned development contains:

> (3) provisions authorizing annexation of any other property to the subdivision, which may substantially increase assessments or substantially increase the burden upon community property and/or facilities, unless:
>
> (a) the procedure for annexation is reasonable and is detailed in the original filing;[42] or (b) If the procedure for annexation is not detailed, provision is made for approval of the annexation by at least two-thirds majority of the voting power, excluding voting power of the subdivider; . . .

The FHA has set forth a more meaningful approach to the matter of annexation.[43] After establishing the general requirements regarding the first phase of any incremental development,[44] the FHA requires that a general plan of the entire development be submitted to the FHA, along with the detailed documentation on the first phase. The plan should contain:

> a. a general indication of the size and location of additional development stages and proposed land uses in each;
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> b. the approximate size and location of common properties proposed for each stage;
>
> c. the general nature of proposed common facilities and improvements; and

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41. Title 10 CAL. ADMIN. CODE § 2792.10(3) (1966).

42. Undoubtedly, in California, a developer should attempt to obtain some determination from the Real Estate Commissioner at the time of his initial filing as to whether the plan of annexation is sufficiently detailed and is reasonable.

43. FEDERAL HOUSING ADMINISTRATION, PLANNED UNIT DEVELOPMENT PROCESSING GUIDE, FHA G 4000.4A, at 7-8 (1970).

44. Discussed *infra* at 43.

d. a statement that the proposed additions, if made, will become subject to assessments for their just share of association expenses.

In complying with both of the regulatory bodies, it is critical to obtain a plan with sufficient detail to satisfy both the Real Estate Commissioner and the FHA. Yet, there must be sufficient latitude that the developer can make reasonable adjustments as he proceeds so that he does not jeopardize his right to annexation. Annexation might be jeopardized if the approval of the home owners is required.

Independent of the legal requirements generally for annexation, there are certain specific requirements for the initial phase of the planned development. Unlike the ordinary subdivision, the planned development involves substantial common areas, most likely including substantial recreational facilities. Thus, approval of any plan must involve a determination of the feasibility of the common areas and recreational facilities in each phase.

In conjunction with the initial planning, the FHA has indicated that various goals must be met in planning for the incremental development.

> The original planned unit need be only large enough to be a complete and independent unit in itself. This means it must be feasible to market the home sites and to operate the common facilities of the home owners' association successfully, even if no other land development is added to it.[45]

Thus, the common areas, including the recreational facilities, contemplated for the first phase of the development must be self sufficient. That is, if the development went no further than the first phase, the home owners' association must derive sufficent income from assessments (at acceptable rates) to support financially the management and operation of all common areas and recreational facilities which are then a part of the project.

The FHA also has established its general rules regarding annexation at later stages. Keep in mind that the general plan does not bind the developer to annexation of the proposed additions unless annexation is expressly required by the planned development documentation.[46] Thus, if annexation is not required, the developer

45. FEDERAL HOUSING ADMINISTRATION, LAND PLANNING BULLETIN 6 at 21.
46. See note 43, *supra*, at 8.

will have an option to annex to existing phases or to commence a new planned development at any phase after the first increment. The option may be important, particularly if circumstances change, difficulties are encountered with the regulatory agencies, or the developer merely changes his mind regarding the overall plan.

If annexation is sought at later stages, the FHA provides that any detailed plans for the area must be in conformance with the general plan submitted previously. In addition, all legal documents at all stages must have set forth the legal basis on which such annexation can be made without the home owners' consent.[47]

In summarizing the economic effects of acceptable annexation, there are two sides to the coin. First, the development must be sufficiently independent at each stage so that (economically) it can stand by itself. Secondly, no subsequent annexation can have any adverse economic effects on the home owners in the earlier phases.

Methods of Annexation. To best illustrate *annexation* and a number of related (collateral) problems, three actual condominium plans will be reviewed.

PLAN ONE. The plan of annexation used by developers in the San Diego County area is typified by the plan of Rancho Bernardo, a development of AVCO Community Developers, Inc.

Westwood Townhouses Unit No. 2 is a condominium development within Rancho Bernardo. In conjunction with his ownership of the condominium unit, each home owner obtains a membership in Westwood Townhouses Management Corporation No. Two. That corporation manages the common areas (independent of The Westwood Club recreational facilities discussed below) within the particular phase—a specific increment or parcel subject to a single condominium plan.[48] Under the overall plan of Rancho Bernardo, Westwood Townhouses Unit No. 2 is but one phase of a number of similar phases which are or will be subject to separate condominium plans or other devices for a planned development.

At the same time, each condominium owner also is a member of The Westwood Club,[49] a nonprofit corporation which owns and manages the recreational facilities for a general area (covering a number of phases or increments of the overall development). Thus, The Westwood Club serves a number of different condominiums

47. *Id.*
48. See Declaration of Restrictions recorded in the Office of the County Recorder of San Diego County, California, on June 17, 1971, as Document No. 128516.
49. *Id.* at 6.

or other forms (phases) of residential development in its immediate vicinity within the Rancho Bernardo community.

The distinction between the corporations regarding their respective memberships and activities is significant. The Management Corporation's jurisdiction is over local matters. It manages the common area and limited recreational facilities within the single condominium development. In that respect, it maintains the physical area, makes necessary repairs, determines rights in the event of damage to a unit or units, etc., for the home owners within the limited area subject to the single condominium plan. Nothing within the scope of its activities would require any involvement of financial or personal support from without the limited area.

On the other hand, The Westwood Club derives its support from a number of surrounding developments within the Rancho Bernardo community. Such support is necessary in order to finance the operation of extensive facilities of the Club, and no single phase of the development could support it.

The ownership of the recreation facilities by The Westwood Club also is significant. If the Club merely managed the facilities while the home owners owned it, each home owner would own an undivided interest in the common facilities. The resolution of that particular problem is discussed in PLANS TWO and THREE.[50] In the present situation, however, The Westwood Club owns the real property on which the recreation facilities are constructed. Thus, it is sufficient that each home owner within each phase receive a membership (such membership being appurtenant to his unit). As each phase is constructed, new memberships are issued, and the relative share which each existing member has in the corporation decreases.

A related problem of real concern to the developer is the commitment of property and financial resources to construct and operate a recreational facility which is intended to serve a number of phases or increments in the area. The developer may not want to commit all of the property contemplated for the recreational *common area* at the time that the first phase is commenced. Additionally, he may not want or be able to post a financial bond regarding

50. *Infra* at 46 and 48.

the operation of such facilities.[51] As was stated earlier, the regulatory agencies also will be concerned that any plan for common area facilities does not unduly burden the individual home owners.[52]

Of course, if a large recreational facility is needed to sell any part of the project or for some other compelling reason, the developer may be required for economic reasons to make an early commitment of land and financial resources. Otherwise, he should avoid committing property to the common area which is not needed at that particular time. By an early commitment, he is taking at least three risks: his plans will change, his financial burden will unduly hamper or damage him, and the obligation to bond the improvements and their operation will hinder his ability to finance his operation.

There is the related problem regarding the representations the developer can make to prospective buyers regarding his plans for additional common facilities. The Real Estate Commissioner's Regulations state that no commitment can be made to the public or to prospective buyers if the facilities have not been completed unless the completion is bonded or unless the Commissioner has approved of some other device to assure completion.[53]

Assuming that the developer would like to avoid an early commitment to construct and maintain a large recreational facility, perhaps he can work out a plan to add recreational facilities to an increasing common area as each phase or increment is annexed.

PLAN TWO. The condominium, Wintergarden Greens, involved in PLAN TWO will be constructed in three phases, totalling 240 units. However, all of the property was committed at the commencement of the first phase to a specific (single) condominium plan covering all three phases. Each fourplex building (4 condominium units) has its own common area (a portion of Common Area A) in which the owners within the respective fourplex are entitled to restricted use. The restricted area consists of: (1) the physical structure of the single building, (2) the property on which the building is constructed, and (3) a limited amount of land immediately surrounding the building. The recreational lots are designated as Common Area B and will be owned in undivided interests by all of the unit owners in the three phases. Thus, each unit owner owns an undivided one-fourth interest in the common area involving his building (a portion of Common Area

51. Title 10, CAL. ADMIN. CODE § 2992.9 (1966).
52. See note 41 and note 43 *supra*.
53. Title 10, CAL. ADMIN. CODE § 2799.1 (1965).

A) and an undivided 1/204 interest in Common Area B. A nonexclusive easement for ingress, egress and support is provided throughout Common Area A for all of the home owners.[54]

The unique feature about Wintergarden Greens is that the recreational lots are owned in undivided interests and committed to the entire project at its very commencement. For that reason, the Real Estate Commissioner of the State of California has required that the portions of undivided interests which are attributable to the phases which have not yet commenced must be conveyed to a title company to be held as security in an irrevocable trust for the unit holders of the subsequent phases.[55] The title company will convey the undivided interests in Common Area B attributable to Phase 2 to the developer at the commencement of Phase 2, and so forth.

By following PLAN TWO, the developer really is not involved with annexation, since there is a total commitment of all property to the plan at the inception. Under those circumstances, however, there is no latitude to change the project in subsequent phases. Additionally, the procedure regarding the trust seems unduly complicated.

A closer view of the trust described above is necessary. The condominium plan for the three phases establishes a maximum number of condominium units (204) which can be established in the development. When a home owner purchases his unit, he also acquires an undivided 1/204 interest in the recreational common area. If, after three years, the development of either Phase 2 or 3 has not been completed, each then existing owner will receive an additional undivided interest in the recreational common area based on his proportionate share of then unconveyed interests in such property.[56]

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54. See Declaration of Restrictions recorded in the Office of the County Recorder of San Diego County, California, on October 6, 1971, as Document No. 229652.

55. Unpublished Trust Agreement of First American Title Company utilized in Wintergarden Greens Condominium. The deed conveying said undivided interests to the trust will be recorded in the Office of the County Recorder of San Diego County, California, at the time of the conveyance of the first condominium unit to a home owner.

56. A form trust agreement (not formally published) of the Real Estate Commissioner of the State of California would require all home owners

Rather than utilize a trust agreement (involving undivided interests in the recreational lots), it would seem that it is sufficient to convey the recreational lots to a nonprofit corporation. Membership in the corporation would be appurtenant to each of the units sold in the three phases—the concept of The Westwood Club in PLAN ONE above and of the recreational facilities in PLAN THREE below. Under those circumstances, apparently the complicated trust procedure would not be necessary.

PLAN THREE involves Broadmore Exclusives,[57] an FHA condominium development in Orange County, California. It is unique because it involves (1) annexation, (2) one home owners' association which (among other things) owns the recreational lot, and (3) undivided interests in the common areas. Because the recreational property is owned by the home owners' association, no trust agreement (as described in PLAN TWO) is required and the initial commitment described in PLAN TWO is not present.

The second important aspect of the Plan is the manner in which the common areas are treated. Each home owner acquires undivided interests in the common areas within his own phase only. Yet there is no separate home owners' association to represent the individual phase, as is the pattern of the developments following PLAN ONE. The declaration of restrictions provides the formula (based on the ratio of the appraised value of the single unit to the aggregate appraised value of all of the units within the single phase) establishing the percentage of the unit owner's interest in the common area. The declaration further provides that the ownership interest of the individual owner in his common area can never decrease, a factor important to lenders, who take as a portion of their security the undivided interest of the unit owner in the common area.

The declaration goes on to explain the effects of annexation. Although the home owner's share of the common area is constant, he bears an ever decreasing share of income, expenses, and voting rights as new phases are annexed onto existing phases. Secondly, each new unit owner acquires a membership in the home

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to obtain additional undivided interests in Phases 2 and/or 3 if those phases were not "annexed" to Phase 1 at the end of three years. The plan of development under those circumstances obviously contemplated an incremented development by annexation rather than a total commitment at the inception of the development.

57. See, Declaration of Restrictions recorded in the Office of the County Recorder of Orange County, California on October 27, 1971, Book 9865, p. 195, Doc. No. 26841.

owners' association and a consequent right to use the recreational area. Thus, the formula is established for annexation within a single home owners' association where the recreational facilities are utilized by all phases, and there is a change in the attributes of common ownership (except that the share of ownership in the common areas is a constant factor).

Architectural Controls. In the planned development, one of the most critical features is architectural control. The types of controls will vary depending on the nature of the development. In the planned residential development (PRD) which envisions an individual purchaser erecting a house upon a lot purchased from the subdivider, the developer will be principally concerned with the exterior of the structures on the lot and their height and physical location on the lot. In the condominium, the structure generally already is built when the home owner acquires his unit; thus, the principal concern of the condominium developer (regarding architectural control) will be to maintain the basic exterior structure of all of the condominiums in the development.

Cases dealing with architectural controls of a planned development date back approximately 40 years, when restricted developments became popular. More recently the upsurge in condominium developments, which by necessity utilize architectural controls, has renewed interest in the legal effects of the controls and presented unique problems in the condominium field. The same principles apply to all planned developments.

Basically, the architectural control restrictions are committed by the subdivider or condominium developer within the recorded declaration of covenants, conditions and restrictions. Normally, at the inception of the project, the developer (directly or indirectly) will retain some control over the architecture of the project. As units or lots within the development are sold, however, control will be turned over to the home owners' association (or possibly to an architectural committee or art jury appointed by the association's Board of Directors).

Membership on the committee or jury may not necessarily be limited to owners within the development. Frequently, membership will include the developer until he has disposed of all of his

interests in the area. Or it may include outside consultants or architects.[58]

There are many architectural details that may be (and frequently are) covered within the scope of architectural controls, but basically they all seek to maintain the subdivision architectural design in the manner envisioned and developed by the original subdivider. At first, the courts were reluctant to decree more than a very limited effect to such restrictions for the reason that such restrictions affected the free use of the land; the policy of the courts was to promote alienability. As a result, restraints or restrictions put upon the land were construed strictly against the developer by the courts. Today, the trend is changing due to the fact that the unrestricted use of real estate has led to an uncontrolled growth and a blight, particularly in the larger developments. And perhaps, also, courts are influenced by the ecological and aesthetic value trends of today's society regarding abuse of the land.

A study of architectural controls will involve an analysis and review of (1) the establishment and the nature of the controls, (2) methods of enforcing the provisions regarding architectural controls and (3) possible defenses that may be used against architectural restrictions.

The Establishment and Nature of Architectural Controls. The types of architectural controls will vary in two major respects. The first determining factor is the nature of the development. The second factor is the manner in which the developer elects (through the Declaration of Restrictions) to implement the controls.

First, as indicated, the controls will vary, depending on the nature of the development, *i.e.,* is it a condominium, PRD or PUD? Is the construction of the improvements completed before the initial sale to an individual owner? In respect to a PRD, if the construction is to be completed after the sale of the lot, who furnishes the plans and is responsible for the construction? Answers to those questions will dictate the nature of the requisite restrictions.

Second, the developer may elect to follow one of several patterns in establishing architectural controls. They may be set forth in a general manner or they may be very detailed. Preferably both should be (but frequently are not) used. Certainly, a gen-

58. It is well established that the developer does not (as a matter of law) retain any control after he has disposed of all of his interests within the development. Kent v. Koch, 166 Cal. App. 2d 579; 333 P.2d 411 (1958).

eral goal supplemented by a specific and detailed plan will most adequately inform the purchaser immediately of the nature of the project and what he can continue to expect. Additionally, such a plan would greatly enhance the chance of obtaining specific performance of an affirmative injunction to obtain compliance with the restrictions.

Examples of general (not specific) controls are *ranch motif*, *old spanish pueblo*, or *modern*. The developer also might make reference to surrounding developments or to the nature of the topography. Although such general references may provide a flexibility, it is arguable that they (standing alone) are too vague and arbitrary for effective enforcement and that to enforce them would lead to confusion and disputes.

Superimposed on the scheme of architectural controls is the matter of who (or what body) will be the enforcing agency. Three possibilities exist: the developer, the home owners individually, and the home owners' association. Generally, in the planned development, the individual home owner is given no direct right of enforcement; his right is to act through the home owners' association in bringing about the necessary compliance.

An example of an extremely comprehensive architectural restriction in a planned residential development is Sea Ranch located north of San Francisco in Sonoma County.[59] Sea Ranch restrictions provide that all work shall be first approved by the design committee, both in the preliminary and working drawing stage. A sampling of the various restrictions in the Sea Ranch development affecting architectural facets of the development are as follows:

Residential Use Single Family	Each lot shall be use exclusively for residential purposes and only one residence may be built upon such lot, except that two residences may be constructed on a lot of 3 or more acres if the structures are designed as a single visual element and are not more than 250 feet apart.
Maintenance	The land and all improvements shall be maintained by the owner in good condition and repair.

59. Office of County Recorder
County of Sonoma
May 10, 1965, Book 2127, at 238.

Trees	Only those trees and shrubs which are indigenous may exceed a height of 8 feet.
Signs	No signs shall be permitted except residential identification signs up to 3 square feet in area and certain other temporary signs of limited size.
Subdivision Map	All improvements shall comply with the setback, height and other requirements indicated on the subdivision map.
Height Limit	The maximum height for all structures between Highway #1 and the ocean coastline shall be 24 feet, unless designated otherwise on the recorded tract map.
Reflective Finishes Prohibited	No reflective finishes shall be used on exterior surfaces with the exception of hardware items.
Exterior Colors	The colors of all exterior surfaces shall be shades of grey or brown of values between black and white or shades of grey-greens or brown-greens of values between black and medium.
Tar & Gravel Roofs Prohibited	Tar and gravel shall not be used as a finished roofing material, except on flat-roofed carports as approved by the Design Committee.
Fence Material	All fences, screens, and similar exterior structures shall be constructed solely of wood, except for nails, bolts, and other hardware. Retaining walls, animal enclosures, and tennis court fencing may be of other approved materials.
Parking	At least two parking spaces shall be provided for each residential lot.

Of course, Sea Ranch is an example of a very exclusive area where the developer is attempting to maintain the beauty of the coastline of the area where it is located. Usual land restrictions are not as comprehensive, but they do present the same legal problems of reasonableness, validity and enforcement.

A more typical provision of architectural restriction for a single family subdivision development is set forth below.

Single Family Subdivision—Hidden Valley[60]

ARTICLE VII—ARCHITECTURAL CONTROL

No building, fence, wall or other structure of landscaping shall be commenced, erected or maintained upon the properties, nor shall any exterior addition to or change or alteration therein or change in the exterior appearance thereof or change in landscaping be made until the plans and specifications showing the nature, kind,

60. Declaration of Covenants, Conditions and Restrictions for Hidden Valley, recorded, Office of County Recorder, County of San Diego, Page 157305, July 20, 1971.

> shape, height, materials, and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Board or by an architectural committee composed of three (3) or more representatives (who are not required to be members of the Association) appointed as provided in the By-Laws of the Association. The Association may, in its sole discretion, require a reasonable fee for review of said plans and specifications.
>
> *Section 1.* Plans and specifications for final approval shall include the following:
>
> A. Complete plans and specifications sufficient to secure a building permit in the City of San Diego, including a plot plan showing lot and block and placing of residences, garage, outbuildings and walls or fences.
>
> B. Front elevations and both side elevations, or front elevation and one side elevation and rear elevation of building, [plus] elevations of walls and fences.
>
> C. A perspective drawing if deemed necessary by the Committee to interpret adequately the exterior design.
>
> D. Data as to materials, color and texture of all exteriors including roof coverings, fences and walls.
>
> E. One set of blueprints shall be left with the Architect or Architectural Committee until construction is completed.
>
> F. No hedge, fence, walls, railing, or other structure over 36 inches in height shall be permitted in front of any front setback line unless approved by the Architectural Committee and same shall be placed at least three (3) feet back of the front property line and said hedge, fence, wall, railing or other structure.
>
> Should the Committee fail to approve or disapprove such plans and specifications and location within thirty (30) days after submission of the plans to them, then such approval will not be required, but all other conditions and restrictions herein contained shall remain in force.
>
> *Section 2. Submittal.* Preliminary plans may first be submitted for preliminary approval.

As with most types of land-use restrictions, certain basic requirements must be met to have legally enforceable restrictions. First, the purchaser must have knowledge of the restrictions. This is accomplished by setting forth in the declaration of restrictions the provision for architectural standards and the formation of an architectural committee. If the prospective purchaser does not have actual knowledge, he is presumed to have constructive notice of the recorded restriction. Secondly, the restrictions must not be too vague, indefinite or arbitrary. The question of vagueness and of reasonableness is constantly alleged by the party seeking to breach an architectural restriction, forcing the court to make a final determination.

Usually, the restriction must be made expressly for the benefit of the other lots or units in tract, and the restriction must be uniform as to each lot so as to show that the plan is common to all lot owners. It must also be shown that the restrictions are incidental to ownership of the subject property.[61]

There are various general points which must be considered in utilizing architectural restriction from both a legal and practical viewpoint. As discussed earlier, the architectural controls that the owners association or committee will be enforcing should be reasonable and definite, so as to provide the owner of the subject lot or condominium with a reasonable understanding of what he is or is not allowed to erect or submit to the architectural committee. Such a test fairly serves as a guideline for the development, the architectural committee and the prospective owner.

The committee must exercise good faith and objectivity in reviewing the proposed construction. The choice should not be arbitrary or capricious. For example, in a recent Colorado case, the lot owner failed to seek approval from the architectural control committee to place a 30-year-old Spanish home in a subdivision which was predominately of a ranch style with a brick construction and asphalt shingles. This failure to seek approval was in breach of the restrictive covenants placed on the subdivision by the developer. The Spanish house had stucco exterior with a red tile roof. It is not stated in the case whether there were definite, specific designs set forth in the architectural control restrictions, but the Spanish-style house did not violate those specific restrictions which were contained in the protective covenants. The trial court granted an injunction to prevent the lot owner from erecting the building in the subdivision. Since two of the three members of the committee would have voted to disapprove the proposed building, the trial court found that this building would not be in harmony with the surrounding neighborhood and would have lowered property values in the area. The Supreme Court affirmed, saying that a judgment of the disapproval of the plans by the architectural control committee is reasonable and made in good faith and in harmony with the purposes declared in the covenants.[62]

Of course, it would be impossible to cover all types of architectural considerations in any legal document, and this factor combined with the inherent problem of accurately describing a rea-

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61. Werner v. Graham, 181 Cal. 174, 183 P. 945 (1919).
62. Rhue v. Cheyenne Homes Inc., 168 Colo. 6, 449 P.2d 361 (1969).

sonable restriction will prevent any ironclad rules from being formulated for any particular planned development. There will always exist disputes between owners' associations and proposed architectural plans. Thus, it is most important to set forth proper guidelines and an objective nondiscretionary method of review.

In order to provide validity to declared standards of architectural control, positive enforcement procedures must be made available to the owners and/or architectural committee. Enforcement is discussed elsewhere. The same legal considerations generally apply to the enforcement of architectural restrictions.

Generally the architectural committee's right to approve of the proposed plans is a type of self-help enforcement and obviously the most practical. In the case of an owner who builds without or contrary to approval, the type of relief which may be sought by the association includes injunctive action to enforce removal of the violation or action for damages. The last would be the least desirable due to the difficulty in ascertaining damages to the adjoining landowners' value in their land.

A developer loses all direct control over the development when he sells all of his property within the project. He may preserve indirect control over architectural improvements and/or additions by appointing an architect to the architectural committee, although unless he had land in the vicinity of the development, he would have no reason to do so.

In a 1960 California case, the developer who had disposed of all the parcels in the development subsequently approved proposed plans for a new structure. The architectural committee had made a determination that the plans were not acceptable, and the court granted plaintiff association's motion for an injunction prohibiting the erection of the proposed structure.[63]

Assuming that the architectural standards are set forth in the declaration of restrictions, may the board of directors of the home owners' association (or an appointed architectural committee) change the original architectural standards? In a 1950 California case decided in the federal court,[64] the court held that a restriction

63. Bramwell v. Kuhle, 183 Cal. App. 2d 767, 6 Cal. Rptr. 839 (1960).
64. Huntington Palisades Property Owners Corp. Ltd., v. Metropolitan

requiring that (1) at least $8,000.00 be expended for a construction of a residential unit and (2) the unit contain at least 500 square feet of floor space, could not be altered by the board of directors approximately 19 years later to require any proposed units to have at least 1900 square feet, and eliminate the cost requirements.

In the case, the court noted that the language in the Articles of Incorporation stated that the corporation had among its purposes and duties "the *enforcement* of all of said restrictions."[65] Since it did not expressly grant to the corporation any power to alter or amend the restrictions, the court refused to uphold the amendment.

The court's opinion did not consider the question of whether the board of directors had the general power to revise the building restrictions. It based its decision on the fact that the terms of the original restrictions did not empower the board to make such substantive changes. Thus, it placed the board in a supervisory position, without any broad policy-making powers.

Suppose that the declaration of restrictions had provided that the architectural control provisions could be altered or amended. The power to make the changes at random would probably be considered an unreasonable restraint because it would hamper the orderly development of the land and create too much confusion for both the present owners and prospective purchasers in the development. However, some consideration for changing conditions might be incorporated into the declaration.

Suppose, further, that the declaration of restrictions provided that the home owners (by a vote of not less than 75% of the owners) could amend the restrictions without limitation. Although it might be argued that such a large majority of the home owners should be able to amend the architectural control provisions and control the destinies of the project, to do so without complying with a predetermined test with which all of the property owners had notice could deprive a nonconsenting owner of a property right. In the absence of a contractual provision which would put the owners on notice of any reasonable test, the principles of the prior case would seem to apply.

Methods of Enforcing Architectural Control. There appears to be no case where a court has passed directly on the question as to whether or not architectural controls and committee approval are valid restrictions in connection with the development and the use

Fin. Corp. of California, 180 F.2d 132 (9th Cir. 1950), *cert. denied,* 339 U.S. 980 (1950).

65. *Id.* at 135. (Emphasis added).

of the land. The courts have generally regarded these types of restrictions as valid restraints, as long as they are reasonable. The typical condominium plan is in accord with sound public policy and fulfills a distinct social need, requiring the owner to give up some of the freedoms he would otherwise enjoy.

In many cases upholding architectural restrictions, the courts stress the point that the purchasers of land subject themselves at the outset to these restrictions willingly, with the expectation that the restrictions will be complied with by others in the development and that said restrictions are a significant inducement of purchase and a source of enjoyment and satisfaction. The courts in effect are creating an intangible asset in the subject property, an asset to be protected and valued.

As noted earlier, the courts have been more prone recently to uphold restrictions of all types on property. The court in a recent California case went so far as to uphold an implied restriction.[66] There, the declaration of restrictions declared that no dwelling was to exceed one story in height. Plaintiff, who was seeking an injunction against defendant to prevent him from building a room on top of his garage, contended that the restriction was intended to preserve the views of adjoining home owners. Defendant contended that the restriction was too vague and that if it was to be given effect, it should only restrict the erection of multiple dwellings or apartments. The court found that there was an implied restriction regarding the protection of view sites and granted relief. The court stated that from the language used, the topography of the finished ground elevations and the general physical appearance of the land, a height restriction was intended in the subdivision to provide views to the various owners.

In a similar case, the court held valid a restriction requiring the construction of only "first-class residence buildings."[67] The defendant in that case attempted to build a house using materials approximately 10 years old (apparently lumber from a deserted shipyard). This was an obvious abuse of the restriction. The phrase "first-class residence building" is very broad and an exam-

66. King v. Kugler, 197 Cal. App. 2d 651, 17 Cal. Rptr. 504 (1961).
67. Harrison v. Frye, 148 Cal. App. 2d 626, 307 P.2d 76 (1957).

ple of poor draftsmanship and probably would not stand up to a less flagrant set of facts.

In jurisdictions where the legislature has adopted condominium legislation, there are provisions expressly requiring the formation and recordation of restrictions in the condominium development. In California, Civil Code §1355 specifically provides that the restrictions shall be enforceable as equitable servitudes where reasonable, and shall inure to and bind all owners of condominiums in the project. While the section does not specifically authorize architectural restrictions, there appears no language to the contrary nor reason to prohibit these types of restrictions from being implemented.

California Civil Code §1359 provides for a liberal construction of any deed, declaration or plan for a condominium project (contra to many earlier cases concerning land use restrictions). Thus, it is apparent that the legislature, as well as the courts, has recognized the need and desirability of the condominium concept of land development. The legislature also has recognized that a liberal construction of the land-use restrictions is critical to the creation and long-term operation of the development.

Defenses. Because the manner of enforcing deed restrictions is equitable in nature, the various defenses also are based on equitable doctrines. Various defenses which arise frequently in the litigation of architectural control restrictions are: (1) the doctrine of changing conditions and (2) waiver and estoppel.

Suppose that a landowner wishes to construct an improvement which does not conform to the architectural provisions in the declaration of restrictions. If the surrounding geographic area has so changed, there may be little value in enforcing the particular restrictions in regard to his development. Thus, he will argue that he should not be bound by the early architectural restrictions where circumstances have so changed in the neighborhood that it would be inequitable to enforce the particular restrictions against him. The theory usually is described as the "doctrine of changing conditions".[68] It also would appear that the conditions referred to are not limited to those existing within the immediate development but would include conditions in the immediate surrounding areas.[69]

It is interesting to note the effect of zoning changes upon the

68. Wolff v. Fallon, 44 Cal. 2d 695, 284 P.2d 802 (1955).

69. Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782 (1931); Hirsch v. Hancock, 173 Cal. App. 2d 745, 343 P.2d 959 (1959); Wedum-Aldahl Co. v. Miller, 18 Cal. App. 2d 745, 64 P.2d 762 (1937).

doctrine. In the case of *Key v. McCabe,*[70] twenty plaintiff lot owners sought to enforce a restriction imposed at the inception of the development (19 years earlier) which limited the property to residential, agricultural or horticultural uses. All of the lots in the tract were improved with single family residences except defendant's lot and two others. In 1957, the City of La Habra annexed the subject land and zoned it "C-2 Commercial Zone". The Supreme Court reversed the Court of Appeals, stating that the restriction should be terminated, basing its decision, in part, on the fact that the property had been rezoned.

Thus, it can be seen that the developers, homeowners and to a lesser extent, condominium purchasers, cannot be assured that the land use restrictions as they originally are imposed will be binding in future years.

A second frequent defense is waiver and estoppel. Where there is evidence of continuing violations of the restrictions or no enforcement of the controls as required, a court of equity will not enforce the restriction. The theory is based on the fact that the association has waived the restriction (by allowing prior breaches to exist) and the home owner is entitled to rely on that waiver. Thus, the association is estopped to enforce the restriction.[71]

The converse position regarding waiver and estoppel was taken in the *Huntington Palisades* case discussed earlier.[72] There the home owners' association argued that because the amendment increasing the minimum square footage had been in effect for three years and had been unopposed by the contesting owner during that time (even though he had knowledge of it), he should be estopped to deny the validity of the amendment. The association also pointed out that during the three-year period, other owners had applied for architectural approval of plans and were required to adhere to the amended provision, a fact of which plaintiff-owner had knowledge. Nevertheless, the court held that the amendment was invalid and estoppel was not available as a defense. The court stated that in order for estoppel to apply, the party against whom it is sought must have induced the other party to take action or

70. 54 Cal. 2d 736, 8 Cal. Rptr. 425, 356 P.2d 169 (1960).
71. Fontana Farms v. Criss, 77 Cal. App. 2d 190, 174 P.2d 890 (1946).
72. See note 64 *supra*.

allow action to be taken consistent with the other party's consent or nonprotest. Here, there was only silent acquiescence, which is not sufficient for estoppel. The court also cited other cases which require a certain degree of turpitude on behalf of the party sought to be estopped.

Enforcement Procedures. The association is charged with the task of enforcing the CC&Rs and managing the planned development pursuant to the provisions of the CC&Rs and the rules and regulations promulgated thereunder. Generally, it is the board of directors of the association that is entrusted with the responsibility of seeing that the home owners comply with the declaration and the rules and regulations of the association.

Noncompliance may take the form of failure on the part of the owner to pay his regular maintenance assessments or may result in the owner's violation or breach of the declaration such as violation of architectural controls or use restrictions. Breaches of the declaration or rules and regulations can be categorized in the general sense into those breaches which constitute monetary violations and those which do not.

The most common monetary problem in the planned development arises from the failure of individual unit owners to pay their monthly maintenance assessment. Condominium legislation and the CC&Rs of most planned developments provide that each owner is responsible for his proportionate share of the association's expenses in managing and maintaining the common area.[73] When an owner does not pay, the association may resort to non-legal pressures such as keeping other owners informed of the delinquency through association circulations or denying the delinquent owner use of recreational facilities during delinquency. The latter remedy must be provided for in the declaration as it restricts a property right, namely, the respective owner's nonexclusive right to use the common area.

In addition, the association generally has two types of legal remedies. First, the association may file a simple lawsuit based on the debt of the unit owner to the association and then pursue this remedy by court action. After judgment is obtained the association may levy on the assets of the owner. Most condominium statutes provide, however, for a more efficient remedy. They allow the association to record a lien on the defaulting unit owner's condominium for the amount of any unpaid mainte-

73. *See, e.g.*, CAL. CIV. CODE § 1355(e)(1) (West Supp. 1971).

nance assessments.[74] Generally, these provisions provide for the inclusion of costs and attorney's fees within the lien.

In its mildest form, the lien serves as an encumbrance on the property which will have to be paid upon the sale of the condominium. If nonpayment persists, the lien may be foreclosed judicially.[75] Some states provide for the nonjudicial foreclosure sale upon default under a deed of trust or mortgage, and developers have attempted to apply the same legal principles to the foreclosure of an assessment lien.[76] The advantages of limiting the time and expense involved in a nonjudicial foreclosure are obvious. However, in California, where the nonjudicial foreclosure of a deed of trust or mortgage is authorized, it is very rarely used since the leading title companies in California have taken the position that the operative sections of the condominium legislation are not sufficient to give the association a nonjudicial power of sale; thus, they will not insure title to a condominium obtained in a nonjudicial foreclosure sale.[77] The practical effect is to severely hamper the usefulness of this remedy.

The statutory lien typified by California Civil Code § 1356 applies only to condominiums and would not apply to other types of planned developments. Thus, the legal basis for the lien utilized in PRDs and PUDs must be determined. The California Civil Code provides that a special lien may be created by contract as the security for the performance of a particular act or obligation.[78] Therefore, it would seem that any lien as is contemplated in the PRD or the PUD is authorized in California. Since nonpossessory liens did not exist at common law, statutory authority for the lien probably is necessary in other jurisdictions.[79]

Many associations have attempted to reduce other violations of the covenants, conditions and restrictions or rules and regulations into monetary terms so that they may be enforced in the

74. *See, e.g.*, CAL. CIV. CODE § 1356 (West Supp. 1971).
75. *Id.*
76. *Id.*
77. From discussions with Title Insurance & Trust Company, Security Title Company and First American Title Company in San Diego, California.
78. CAL. CIV. CODE § 2881 (West 1954).
79. 31 Cal. Jur. 2d, *Liens* § 36 (1956).

same manner as maintenance assessments. Such violations commonly include damage or destruction of portions of the common area by unit owners or their guests which can be repaired by the association and billed to the responsible owner. In addition, certain minor infractions of the rules and regulations can be the basis for imposition of certain fines. There may be some doubt as to the ability of the association to use the lien method to enforce these additional monetary violations.

The more difficult area of enforcement is that area involved with violations that are nonmonetary. Examples of these types of violations include activities carried on which constitute a nuisance, violations of the CC&Rs regarding restrictions on use, violations of architectural controls, exterior alterations, maintenance of pets, and the parking of boats, trailers or other objects on the common area. To correct this type of violation, the association may resort to the use of self-help. Boats, trailers, and other objects can be towed off the common area and stored at the owner's expense. Pets running loose on the common area can be caught and kept at the owner's expense until claimed. Exterior storage areas can be dismantled and removed. The association can repaint the exterior of a unit or remove objectionable objects from balconies or other exposed areas. Self-help however, has the built-in limitation of not being enforceable over the objections of the unit owner involved.

As discussed earlier in this article, injunctive relief is the judicial tool which is used to enforce the nonmonetary violation of the covenants, conditions and restrictions. The injunction may be in the negative or affirmative form. That is, the association may seek to enjoin the unit owner from carrying on a particular type of activity or it may affirmatively require the removal of objects or structures and compliance with the covenants, conditions and restrictions. In enforcing the covenants, conditions and restrictions, the association is faced with the equitable defenses of waiver and laches. In addition, the unit owner may question the reasonableness of the particular provision involved.

In enforcing the provisions of the declaration and rules and regulations, the association is faced with the practical considerations of the expense involved. That is, do the economics (in light of amount and likelihood of recovery) justify the association in pursuing its legal remedies to the fullest? Most financial matters concern amounts which would normally not justify the filing of a lawsuit even considering the provisions contained in most declarations and related statutes for the allowance of attorneys' fees

and costs.[80] In addition, the enforcement of nonmonetary violations may not be justifiable if they were decided purely on economic considerations.

The association, unlike the normal business client, cannot be entirely motivated by economic or business considerations. The association is charged with the responsibility of maintaining the overall continuity of the development and with enforcing the covenants, conditions and restrictions. As an example, if the association fails to collect assessments or enforce use or architectural provisions which benefit the development, the advantage of planned development can be lost.

Damage and Destruction. The problems of damage and destruction and the related area of insurance are among the most significant, yet least considered concerns of the condominium or other planned development. The responsibility of repairing and maintaining the development is usually that of the home owners' association. This duty may arise from ownership of certain facilities within the development or in the authority delegated to the association in respect to the common areas owned directly by the homeowners found in the enabling covenants, conditions and restrictions.

The role of the association differs from that of a home owner. The home owner, subject to the requirements of his mortgagee, determines the amount of his insurance coverage and decides whether or not to rebuild in the event of casualty loss. The association, on the other hand, is entrusted with the responsibility of maintaining the common facilities, and in a condominium project, with the task of issuing and restoring individual living units, as well. Thus, the association, in obtaining insurance coverage, must be concerned with the interests of individual unit owners and mortgagees as well as that of the association.

Logically, the association's duty of carrying a master insurance policy would replace the need for individual unit owners to do so. However, many enabling statutes require that the individual unit owners be able to obtain their own policies.[81] This permissible

80. *See, e.g.*, CAL. CIV. CODE § 1356 (West Supp. 1971).
81. For example, New York provides that the Association may provide insurance ". . . without prejudice to the right of each unit owner to insure

attitude toward duplication of coverage seems to be justified to protect the owner's right to contract for his own insurance.

The practical effect of over-insurance seems to defeat the advantages of the association having a master policy. Additionally, questions arise concerning the application of standard insurance clauses such as "no other insurance",[82] "subrogation"[83] or "proration."[84] The association should be careful to eliminate such clauses in its master policy.

Given insurance and a casualty loss, should the association commence to repair the damage? Many statutes provide for mandatory obligation on the part of the association to repair if the damage does not exceed a certain percentage of the value of the improvements.[85] The wisdom of this is subject to question. Assume, for instance, that one building in a multi-building garden-type condominium project burns down, and the association and the owners of the destroyed units do not want to rebuild. Can the association buy out those unit owners and put in additional recreational facilities or parking areas? If the development is obsolete and after a partial destruction, the overwhelming majority of the unit owners do not wish to rebuild, can the development be terminated? The use of a percentage formula would not allow this flexibility.

A better method and more common practice is to provide for the restoration of damage where insurance proceeds are adequate or nearly adequate unless the association votes not to repair.[86] Or, if

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his own unit for his own benefit." N.Y. Sess. Laws 1964, ch. 82, § 339-bb (March 2, 1964). For a similar provision see Hawaii Laws 1963, Act 101, § 24.

82. It is arguable that such a clause in a master policy may be violated when a unit owner purchases his own policy.

83. Because of the interdependence of condominium units an owner may well be responsible for damage to other units and common areas. Thus, in order not to defeat the purpose for insurance, the declaration should require a waiver of subrogation in the master policy.

84. The possibility of the insurance carrier's prevailing on the question of prorating the loss between the master policy and unit policy, negates any advantages of insurance. See Ehrenzweig & Ehrenzweig, *Apportionment of Losses Between "Blanket" and "Specific" Insurance Policies*, 43 COLUM. L. REV. 825 (1943).

85. *See, e.g.*, ARK. STAT. 1947 ANN. § 50-1021 (1971); KY. REV. STAT. ANN. § 381.890 (Baldwin 1960).

86. Such a provision would read as follows: In the event of a total or partial destruction of the improvements in the Project, and if the available proceeds of the insurance carried pursuant to provisions of this Declaration are sufficient to cover eighty-five percent (85%) of the cost of repair or reconstruction, the same shall be promptly repaired and rebuilt unless, within ninety (90) days from the date of such destruction, seventy-five percent (75%) or more of the Owners present and entitled

insurance is inadequate, the project will not be restored unless a specified majority of unit owners votes to do so.[87] It is suggested that availability of replacement reserves should be added to the available insurance to determine what funds are available for restoration.

Who should vote on the issue of restoration? It would seem that in order to maintain the overall development, the franchise should be given to all unit owners rather than just to those whose units are damaged. This may result in a decision of the association to rebuild with the damaged owners opposed to restoration. The course of action seems logical, however, as the future of the entire development cannot be left to the decision of only the affected owners. On the other hand, suppose that the damaged owners desire restoration and the association does not? If the entire development is not terminated, has the association exercised a form of private eminent domain?

An owner in a planned development subjects himself to the collective decisions of a majority of the owners. As such, he may find himself assessed for a swimming pool he voted against, or he may not get the pool where a mere majority opposed its addition. However, should the owner run the risk of loss of his property rights by the will of a majority of his fellow owners?

It is suggested that the declaration provide for the approval of damaged owners if a decision is sought to continue the overall project but eliminate the particular damaged units. A decision to terminate the entire development need not and should not require unanimous approval.

What if insurance proceeds and available reserves are not adequate to restore the damaged area? Who pays for the additional cost of replacement? It is arguable that the damaged owners should bear the burden since they receive the direct benefit. However, because of the undue hardship which might result and the

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to vote, in person or by proxy, at a duly constituted meeting, determine that such reconstruction shall not take place.

87. As part of the above clause, this language could be added: If the insurance proceeds are less than eighty-five percent (85%) of the cost of reconstruction, reconstruction may nevertheless take place if, within ninety (90) days from the date of destruction, a majority of the Owners elect to rebuild.

overall benefit to the association from complete restoration, it is conceivable that the cost should be spread among all owners. This type of self-insurance levels out the financial exposure of owners from the association's lack of adequate insurance.[88]

Assuming the proceeds are available to rebuild and the unit mortgagees are agreeable to restoration, a question arises on how the funds should be disbursed. A common practice among condominium associations when sizable losses are involved is to provide for payment of insurance proceeds to a trustee for disbursement during reconstruction. This practice provides an additional safeguard for the owner as well as his mortgagee. Often the primary lender for the development is named as the trustee in the declaration of covenants, conditions and restrictions. In California this practice is frowned upon by the Department of Real Estate, since it binds the association to the trustee designated by the developer.[89] The trustee to be used can (and probably should) be designated by the association.

PRDs and PUDs face the same general problems regarding damage, destruction and insurance as a condominium association. In certain developments, the association may not be required to carry insurance on individual units, and to that extent the problems of double insurance coverage may be avoided. However, the association will face the same problems regarding the decision of whether or not to restore damaged property where such property involves the common facilities or where there is a cluster development. In a planned cluster development with separate living units and ownership, should the decision to rebuild be left solely to the affected owners? One prominent developer in Southern California provides in his standard declaration of covenants, conditions and restrictions that the decision to rebuild after a casualty loss should be left to a specified majority of the owners within the unit or units affected.[90]

Although such a solution may avoid a possible inequitable result to a particular unit owner, it can destroy the overall conti-

88. Often undercoverage results from the decision of the Association not to assume the cost of full replacement coverage and to spread any excess loss among all owners.

89. CAL. ADMIN. CODE § 2792.8(16) (1966). This section limits the duration of contracts entered into by the Developer for the Association and appears to be the authority behind the Department's reluctance to allow a trustee to be named in the CC&Rs.

90. McKeon. See Declarations for Mission La Vega, recorded in the Office of the Recorder for San Diego County, California on February 9, 1971, as document No. 24900.

nuity of the development itself and thus seriously affect the benefits derived by home owners through the use of planned developments.

Condemnation. In drafting covenants, conditions and restrictions for a new condominium or other planned development, the problems of condemnation and obsolescence may not be considered, let alone provided for, adequately. The problems of age and changing conditions may be difficult to envision in the realm of the present. However, by viewing developments which are 20 to 30 years old, it is easy to realize the importance that provisions regarding condemnation and obsolescence will have in the maturing years of a project.

In the unlikely case of the condemning of an entire condominium project, the need for adequate provisions of the declaration is lessened since the individual owners would receive compensation for their individual units and compensation through their percentage ownership of the common area. They also would receive a pro rata share of the cash proceeds to the home owners' association from the condemnation, assuming that the association's assets are not distributable to a charity or social welfare orgnization.

In other planned developments, the owner would likewise receive compensation for his unit and property condemned and would receive compensation for the taking of the common area through payment to the owners' association. Similarly, in the case of a minor partial taking such as for certain utility easements or the minor widening of streets, the pro rata award to owners or the association should not create any significant problems.

The real problem area involves the partial taking of a project in which the taking includes individual units as well as portions of the common area. As an example, in a multi-building condominium project or a planned-unit (cluster) development, it is conceivable that several units along with a portion of the common area may be condemned.

The first problem somewhat akin to that of the condemnation of leasehold property is that of allocation of the award between the individual unit owners and the association or the unit owners in general. The unit owner will be compensated for only one of his

incidents of ownership; that is, in a condominium development, he will be compensated for his ownership of the condominium unit itself. In the case of a planned development, his ownership is of the unit, together with the real property on which that unit rests. However, in either case, the owner is not compensated for his undivided ownership of the common area or for his membership (ownership) in the association. In both cases the owner is indirectly compensated; a portion of the award (made in reference to the taking of the common area) will be paid to the association. In that manner, the value of his membership interest in the association is correspondingly increased. However, the owner no longer has a real interest. That is, he no longer lives in the project and is now left with a somewhat nonalienable undivided interest in real property or a membership in a corporation. In addition, the owner probably is not relieved of his liability to continue to pay maintenance assessments to the association because of the ownership in the common area of his membership (ownership) in the corporation. It is suggested that in such a case, the declaration should provide for the buying out of the undivided interest or stock ownership from such an owner for an amount related in some manner to the portion of the award paid to the association.

Obsolescence and Termination. The question of obsolescence is one area of the overall question of the ability to terminate a project. This is primarily a concern of a condominium association with the unit owner's fractional interest in the common area. The normal remedy available to a co-owner of real property when desiring to terminate an interest in real property is through the judicial partition of that interest with other owners. Condominium statutes generally provide for the suspension of any right of the condominium owners to partition their ownership during a specified period or periods of time and upon certain conditions.[91] As previously discussed, one occasion upon which a partition may be had is in the event of a decision to terminate after damage or destruction.[92] If the right to partition were not restricted, the condominium ownership would not be a workable form of property ownership, as an individual unit owner could force dissolution of the entire project.

Under most statutes, it is apparent that, absent damage or de-

91. *See, e.g.*, CAL. CIV. CODE § 1354 (West Supp. 1971); FEDERAL HOUSING ADMINISTRATION MODEL STAT., § 6(c); WISC. STAT. ANN. § 230.75(3) (West Supp. 1971).
92. *See, e.g.*, CAL. CIV. PRO. CODE § 752b (West Supp. 1971).

struction or unanimous consent of all property owners, it may be difficult, if not impossible, to terminate a project. Under California law, a project may not be partitioned in the absence of damages or destruction or provisions contained in the CC&Rs governing partition unless the project has been in existence more than fifty years, is obsolete and uneconomic, and more than fifty percent of the owners (in interest in the common area) are opposed to restoring or repairing of the project.[93] The importance of adequately providing for the ability to terminate a project can clearly be seen from the provisions of the California law.

A desire to prematurely terminate a project may take place for a variety of reasons. First, the surrounding neighborhood area may have changed over a period of years so that the property is not conducive to continued residential use, or such continued use may not be feasible because of the high cost involved in restoring and repairing the existing condominium structures, or because of the fact that the property may be more economically put to other uses, e.g., commercial or industrial improvements. A desire of termination might result from a fortuitous event such as a discovery of oil or other minerals on the property, or simply a desire on the part of a majority of the unit owners to rebuild and upgrade the project. Obviously, any decision to terminate, regardless of the reason, should not be left to the whims of a scant majority of the property owners. However, it would seem reasonable to provide in condominium declarations that a large majority, perhaps 80 to 90 percent of the unit owners, could affirmatively vote to terminate the project. Such a provision also could provide for payment to any dissenting owners of the fair market value of their property. The ability to provide for such termination, of course, is controlled by the enabling condominium statute of the particular jurisdiction involved. However, many statutes say little or nothing on the subject of obsolescence or termination.

93. *Id.*