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The Perils of Primacy: Successor Liability for Lenders Turned Declarants in Louisiana Common Interest Communities

Christopher K. Odinet

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The Perils of Primacy: Successor Liability for Lenders Turned Declarants in Louisiana Common Interest Communities

Christopher K. Odinet*

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* Assistant Professor of Law, Southern University Law Center. B.A., Louisiana State University A. & M. 2007; J.D./G.D.C.L., Paul M. Hebert Law Center, Louisiana State University. The author thanks the editors of the *Louisiana Law Review* for their gracious invitation to participate in this Louisiana-themed issue, as well as Michael Rubin, James Stuckey, David Cromwell, Randy Roussel, and Professors Missy Lonegrass, Randy Trahan, Andi Carroll, John Lovett, and Dian Tooley-Knoblett for their invaluable comments and advice. Lastly, the author thanks Chancellor Pitcher of the Southern University Law Center for his continued support of faculty scholarship. The views and conclusions contained herein and any errors are the author's alone.

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INTRODUCTION

In surveying the landscape of American real estate, it is increasingly difficult—if not impossible—to find a development or community that is not part of or subject to a larger, comprehensive, and common-interest plan.¹ Whether one is strolling through the avenues of a mixed-use development after finishing dinner and a long day of shopping or driving down the manicured, tree-lined streets past rows of uniform, wrought-iron mailboxes in a residential neighborhood, careful planning and coordination went into making these developments possible.² And this careful planning and coordination were not merely the result of one-time efforts; rather, a complex and detailed legal regime underpins the entire development to ensure that the order, quality, and aesthetic of the project continue into the future.³

These types of developments, which have come to dominate nearly all real estate development in the United States, are known as “common interest communities.”⁴ The idea behind the common interest community concept is to create developments whereby the

1. See Patrick K. Hetrick, *Drafting Common Interest Community Documents: Minimalism in an Era of Micromanagement*, 30 CAMPBELL L. REV. 409 (2008); Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: “The State Will Make the Call”*, 30 VAL. U. L. REV. 509, 521 (1996); David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 763 (1995).

2. See Katharine Rosenberry, *The Application of the Federal and State Constitutions to Condominiums, Cooperatives and Planned Developments*, 19 REAL PROP. PROB. & TR. J. 1, 20 (1984); James W. Torke, *What Price Belonging: An Essay on Groups, Community, and the Constitution*, 24 IND. L. REV. 1 (1990); ROBERT JAY DILGER, NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE 62 (1992).

3. See EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 140 (1994); Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 23 (1989); Frank Michelman, *Universal Resident Suffrage: A Liberal Defense*, 130 U. PA. L. REV. 1581 (1982).

4. See Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303, 305 (1998).

owners or occupants share common responsibilities with regard to the upkeep, maintenance, and expenses of the development as a whole.⁵ Moreover, these developments are typically structured so as to ensure that a certain level of beauty, quality, and visual appeal is maintained even after the developer no longer owns any part of the community.⁶ Governance of the community is assumed by an association, the board of which is made up of the elected owners of the lots or units within the development.⁷ And, with the ability to charge each owner an annual assessment, the association is able to maintain funds for the repair, replacement, and enhancement of the community over time.⁸ The common interest community framework is seen in almost all forms of property-related projects, including condominium complexes, housing developments, vacation timeshares, and many mixed-use projects.⁹ Through this framework, the various owners/occupants of the development can enjoy amenities—such as a community park, tennis court, or swimming pool—that would otherwise be too expensive for any individual owner/occupant to afford on his or her own.¹⁰

The first common interest communities came into existence around the period from 1910 to 1935 in the form of simple homeowners'

5. See Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 698 (1993); Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41, 57 (1995).

6. See *Murphy v. Timber Trace Ass'n*, 779 S.W.2d 603, 608 (Mo. Ct. App. 1989) (holding in favor of a restrictive covenant because the court thought that “the public policy the Uniform Condominium Act [is] in favor of the social benefits of planned community developments”); Justin D. Cummins, *Recasting Fair Share: Toward Effective Housing Law and Principled Social Policy*, 14 LAW & INEQ. J. 339, 347–48 (1996) (showing that community associations can stabilize and mobilize social resources for advancement, but people in low-income, central-city communities are socially isolated from the community association); William C. Jensen & Cynthia L. McNeill, *Colorado Common Interest Ownership Act—How It Is Doing*, 25 COLO. LAW. 17, 17–18 (1996) (showing that the unit owner’s association is responsible for the “social cohesiveness of its owners”).

7. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.16 (2000); see also Susan F. French, *Making Common Interest Communities Work: The Next Step*, 37 URB. LAW. 359, 362 (2005).

8. See Paula Franzese, *Privatization and Its Discontents: Common Interest Communities and the Rise of Government for “the Nice”*, 37 URB. LAW. 335 (2005).

9. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6, introductory cmt. (2000); see also Hyatt, *supra* note 4.

10. See Todd Brower, *Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 204 (1992); *Government by the Nice, for the Nice*, ECONOMIST, July 25, 1992, at 25; see also SETHA LOW, *BEHIND THE GATES: LIFE, SECURITY, AND THE PURSUIT OF HAPPINESS IN FORTRESS AMERICA* 153–73 (2003).

associations.¹¹ In these early common interest communities, the various owners within a development, desiring to obtain large-scale common amenities, pooled together resources to erect and maintain these desired facilities and services.¹² Since then, the complexity of common interest communities has grown tremendously, particularly through the increasing emergence of mixed-use developments.¹³ Moreover, the associations that govern and maintain common interest communities have become involved in spheres beyond the mere physical or traditional boundaries of the development as they seek more and more to influence political decision-making at the local level, coordinate social activities for development occupants, and even undertake the privatization of certain public or municipal services.¹⁴

For example, the Reston Town Center common interest community in Virginia is composed of three separate sub-common interest communities: one for each of the industrial, business, and residential portions of the development.¹⁵ The business and the industrial centers are governed by their own non-profit associations, while the association that governs the residential portion is further divided into more sub-associations that cover cluster areas within the larger residential area.¹⁶ In order to coordinate all of these various developments, functions, and expenses, a joint association committee was established to manage the entire Reston Town Center community.¹⁷ This overseeing association manages everything from the development's coordinated transportation system to events and programs that support the arts and cultural aspects of the community.¹⁸ In essence, common interest communities have become major undertakings that take on many of the functions of government and tie

11. See MARC A. WEISS & JOHN W. WATTS, COMMUNITY BUILDERS AND COMMUNITY ASSOCIATIONS: THE ROLE OF REAL ESTATE DEVELOPERS IN PRIVATE RESIDENTIAL GOVERNANCE, in U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 97-99 (1989), available at http://www.globalurban.org/Community_Builders_and_Community_Associations.pdf [<http://perma.cc/4Z6E-N9XT>] (archived Mar. 10, 2014).

12. See *id.*

13. See Hyatt, *supra* note 4, at 321; Robert G. Natelson, *Condominiums, Reform, and the Unit Ownership Act*, 58 MONT. L. REV. 495, 500-01 (1997).

14. See Hyatt, *supra* note 4; JAMES HOWARD KUNTSLER, HOME FROM NOWHERE: REMAKING OUR EVERYDAY WORLD FOR THE 21ST CENTURY (1996).

15. See Hyatt, *supra* note 4, at 321.

16. *Id.*

17. *Id.* at 322.

18. *Id.*

together the interests of various private parties in order to achieve a larger, dynamic goal.¹⁹

But, as might be imagined, these complex and highly sophisticated developments do not come for free.²⁰ Real estate lending, which has for most of its history been tied to more traditional types of residential or commercial developments, has had to morph and evolve to fit the needs of the ambitious developers of these complex, common interest communities.²¹ On the one hand, these types of developments—particularly the more complex and multi-tiered ones—carry with them a great deal of risk because so much capital must be incorporated on the front end to construct the various common facilities and amenities that make the development economically viable.²² But on the other hand, the payoff from the creation of a unique and highly marketable development that can assure continued quality, aesthetic, and financial self-sufficiency can be substantial.²³

And like all lenders, a primary concern in assessing whether a loan for a common interest community has merit involves assessing what type of collateral is available to secure the debt.²⁴ Traditional types of collateral, such as the real estate underlying the project, the buildings and improvements to be erected on that land, as well as the equipment, materials, accounts, and various other assets of the borrower all serve

19. *Id.* See also Paula A. Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553 (2002); Paula A. Franzese, *Building Community in Common Interest Communities: The Promise of the Restatement (Third) of Servitudes*, 38 REAL PROP. PROB. & TR. J. 17, 19 (2003).

20. See generally David L. Callies, *Common Interest Communities: An Introduction*, 37 URB. LAW. 325 (2005); Julia Patterson Forrester & Jerome Michael Organ, *Promising to Be Prudent: A Private Law Approach to Mortgage Loan Regulation in Common interest communities*, 19 GEO. MASON L. REV. 739 (2012).

21. See generally GRANT S. NELSON ET AL., REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT: CASES AND MATERIALS (8th ed. 2009).

22. See Jenny Schuetz et al., *Neighborhood Effects of Concentrated Mortgage Foreclosures 2* (N.Y.U. Ctr. for Law & Econ. Research Paper Series, Working Paper No. 08-41, 2008), available at <http://ssrn.com/abstract=1270121>; G. THOMAS KINGSLEY ET AL., THE IMPACTS OF FORECLOSURES ON FAMILIES AND COMMUNITIES 13–21 (2009); FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT, at xv (2011), available at <http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf> [<http://perma.cc/Y7GY-CEG7>] (archived Mar. 10, 2014); Stewart E. Sterk, *Neponsit Property Owners’ Association v. Emigrant Industrial Savings Bank*, in PROPERTY STORIES 301, 308 (Gerald Korngold & Andrew P. Morriss eds., 2004).

23. See MCKENZIE, *supra* note 3, at 35; NELSON ET AL., *supra* note 21.

24. See generally Dean P. Wyman, *May I Have My Balance Please? Allocation of Payments in Bankruptcy Cases*, 100 COM. L.J. 132 (1995); OLIVER R. SIMS & FRANKLIN B. FIELDS, COMMERCIAL REAL ESTATE LENDING: RISK MITIGATION AND BANK SUPERVISION (2013).

as the backbone to any real estate financing.²⁵ However, common interest communities provide an additional and very unique type of asset—the declaration of covenants, conditions, and restrictions (“the declaration” or the “CCRs”).²⁶ This document lays out the legal regime that gives teeth and effects to the common interest community by ensuring that each owner is responsible for sharing in the costs of the community and that the quality and visual appeal of the development can be legally maintained.²⁷ For a significant period during the early part of the development’s life, it is the developer who exercises the powers under the declaration and thereby is able to control and govern the development to ensure his or her vision is upheld.²⁸

Importantly, these declarations serve as an ample form of collateral to guarantee that the lender, upon foreclosure, is able to continue to ensure that the asset maintains its quality and value until a third-party buyer can be procured.²⁹ As such, many lenders have come to require that the developer grant a security interest in the CCRs to secure the debt.³⁰ By doing so, the lender obtains a powerful tool that can help safeguard the property’s value if a default and subsequent foreclosure occurs.³¹ However, when developers default on real estate loans, it is typically preceded by other financial woes and troubles.³² And specifically, often times when a default occurs, many of the duties that the developer owed to the owners under the declaration have either gone unfulfilled or were breached due to lack of diligence or even malfeasance on the part of the distressed developer.³³

For example, Developer A obtains a loan from Realty Bank to construct a mixed-use development called Bluebell Lane, for which the bank takes a mortgage on the entire property. A comprehensive and complex declaration of CCRs is placed on the entire development in order to ensure that Developer A’s vision of a high-quality, aesthetically pleasing, and well-organized development—which will be comprised of offices, retail spaces, restaurants, shopping, and residential areas—will be created and maintained. In that vein, Realty Bank obtains a security interest in the CCRs as well.

25. See LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH (7th ed. 2008); NELSON ET AL., *supra* note 21.

26. See *infra* Part I.A–C and accompanying discussion.

27. See *infra* Part I.A–C.

28. See *infra* Part I.A–C; see also PATRICK H. ROHAN & MELVIN A. RESKIN, COOPERATIVE HOUSING LAW AND PRACTICE §§ 9.01, 9.02 (2001).

29. See *infra* Part I.A–C.

30. See *infra* Part I.A–C.

31. See *infra* Part I.A–C.

32. See Forrester & Organ, *supra* note 20.

33. See *infra* Parts III, IV.

Among other things, the declaration requires Developer A to erect a community pool and recreation center on the rooftop of the third floor of one of the buildings in the development. After building most of Bluebell Lane and selling or leasing out various portions of the development, it is discovered that the pool is leaking and has caused damage to the occupants of the lower floors of the building. Further, this has resulted in the various disgruntled residents having no place to swim or engage in community recreational activities. Shortly thereafter, there are accusations that Developer A has not properly accounted for the assessments paid to him under the declaration by the various owners. These travails ultimately culminate in the developer's default on the loan due to Realty Bank.

After failed negotiations, Realty Bank forecloses on Bluebell Lane and obtains ownership of the portions of the development that are still owned by Developer A and subject to the bank's mortgage at the time of the default. Also, Realty Bank forecloses on its security rights in the declaration and thereby steps into the developer's shoes as the new declarant. But after the foreclosure, the aggrieved owners are still seeking recourse for the developer's failure to construct the required improvements, as well as the property damage caused by the leaking pool and for the allegations of mismanagement of the community's common funds. All of these alleged breaches were made by the developer in and during his role as the declarant. Now that Realty Bank is the declarant, can the owners go against the bank for the developer's past misdeeds? If so, is the bank liable for all or only some of these bad acts? Does the developer remain liable for some portion regardless? And is there a limit on this successor liability for the bank? The answers to these questions can produce substantial effects for both the bank and the developer, as well as for the ability of the owners to obtain justice.

While many, if not all, of these questions have been addressed in the laws of most jurisdictions, Louisiana is not one of them.³⁴ How would a Louisiana court address the successor liability of Realty Bank? This question, as well as the nuanced issues of how (and if) such complex animals as common interest community declarations can be collateralized under Louisiana's security devices regime, has been given little to no treatment by commentators or the jurisprudence. To that end, this Article attempts to shed light on the complexities of common interest community declarations and the possibilities (as well as possible limitations) with regard to how they can be collateralized in Louisiana.³⁵ Part I gives an overview of common interest communities and the CCR declarations that form such an integral part of their

34. See *infra* Part III.A–C.

35. See *infra* Part II.A–C.

substance, as well as discusses the various privileges, advantages, and powers that they confer on the developer and, by extension, a foreclosing lender.³⁶ Part II explores the multifaceted nature of these types of legal instruments and analyzes how Louisiana's various security devices interface with CCR collateral.³⁷ Part III discusses the potential successor liability of lenders who foreclose on CCR declarations and considers how Louisiana courts might utilize various legal theories, doctrines, and related statutes to make the ultimate determination of successor liability.³⁸ Finally, Part IV critiques the application of these theories, doctrines, and piecemeal statutory constructs under existing state law and, in the alternative, advocates for the legislative adoption of a comprehensive and uniform statutory framework for all types of common interest communities in Louisiana that will lay to rest, in a fair and equitable way, the question of successor liability for lenders turned declarants.³⁹

I. DECLARATIONS AND REAL ESTATE

Because economic forces place great weight on the aesthetics and atmosphere of a community or project, developers are highly incentivized to ensure that their developments conform to standards of beauty, quality, and sophistication.⁴⁰ These factors are directly connected to the development's value, how people view the project, who chooses to live or work there, and even the level of safety and security that the area enjoys.⁴¹ Because of the intimate connection between the aesthetic and atmosphere of the place and its economic viability, developers often impose a comprehensive and complex set of rules and restrictions on the property to not only ensure that the development obtains the desired level of quality and beauty, but also that these conditions continue into the future.

This objective is accomplished chiefly through various legal institutions contained in a wide-ranging legal document called a

36. See *infra* Part I.

37. See *infra* Part II.

38. See *infra* Part III.

39. See *infra* Part IV.

40. See Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697 (2010).

41. See JILL GRANT, *PLANNING THE GOOD COMMUNITY: NEW URBANISM IN THEORY AND PRACTICE* 58 (2005); see also JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 75 (1961); ANDRES DUANY & ELIZABETH PLATER-ZYBERK, *TOWNS AND TOWN-MAKING PRINCIPLES* 9–11 (Alex Krieger & William Lennertz eds., 1991); ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* 80–81 (2000); George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC, Mar. 1982, at 29.

“declaration of covenants, conditions, and restrictions.”⁴² However, developers are not the only parties to a real estate development who recognize the importance of the declaration and its effects. Banks and other lenders who help make the deal happen also desire to ensure that the project is well regulated and coordinated.⁴³ Understanding how these declarations interface with the motivations of the lender are essential to understanding the long-term financing of many real estate developments across the country.⁴⁴

A. Micro-governments

At the heart of every comprehensive property declaration is the desire to create a community whereby its inhabitants can exercise control over their given environment.⁴⁵ Often times these take the form of homeowners’ associations whereby the individual owners of the parcels within the subdivision band together to create a form of local government to regulate and control the goings-on within that particular community.⁴⁶ Other times this system of community control takes place in a large condominium complex where the various owners of the units pool resources and elect leaders to administer the functions of government.⁴⁷ Still others involve a collection of commercial property owners within a given retail or office development who share in the responsibility of governing and maintaining their building or complex.⁴⁸ The residents or occupants of these developments can range from as few as ten to much larger developments that can dwarf the size

42. See Wiseman, *supra* note 40, at 711–13.

43. See generally Daniel E. Feder, *Should Loan-to-Value Ratio Restrictions Be Reimposed on National Banks’ Real Estate Lending Activities?*, 6 ANN. REV. BANKING L. 341 (1987); Scott A. Lindquist, *Real Estate Lending Regulations: The New Ball Game*, 7 PROB. & PROP. 11 (1993).

44. See NELSON ET AL., *supra* note 21.

45. See Mark A. Rogers, *Community Association Law: Administrative Law as a Solution by Analogy*, 53 EMORY L.J. 1457 (2004).

46. See DILGER, *supra* note 2, at 5; see also James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1138 (1998) (“In the largest United States metropolitan areas, a majority of all new housing sold is now in common interest communities.”); Rebecca J. Schwartz, *Public Gated Residential Communities: The Rosemont, Illinois, Approach and Its Constitutional Implications*, 29 URB. LAW. 123, 124–25 (1997) (“Long considered the domain of wealthy subdivisions on each coast, demand for gated communities . . . has increased dramatically since the early 1980s.”).

47. See U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, *RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM?* 1, 3–4 (1989).

48. See generally *id.*

of many small towns and villages.⁴⁹ And similar to local governments, they often stretch over a large geographic area.⁵⁰ Further, these governing associations not only regulate and control the property within a given development, but they are also given direct ownership over certain portions of the development to hold in favor of the owners—such as a community park or garden space.⁵¹

Further, much like municipal governments, associations will often provide various goods and services to the development such as ensuring the maintenance of roads and streets, as well as overseeing regular safety patrols.⁵² With many residential subdivisions, the services provided by the association can even include golf courses, swimming pools, and community centers.⁵³ And to pay for these government-like functions, the association has a quasi-taxing power, which allows it to charge assessments against each of the parcels or units within the development.⁵⁴ The pooling of these funds creates a common treasury from which monies can be drawn for both ordinary and extraordinary maintenance, repair, expenses, and special projects.⁵⁵ To those owners who refuse to pay, the association can place a property lien against their parcel and thereby cause issues of non-merchantable title, violations of existing loan agreements, and a weakening of the parcel's commercial viability.⁵⁶ Moreover, not all associations are created equal.⁵⁷ Some provide a higher or lower degree of quality and variety of services to their owners.⁵⁸ It is through this menu of services that various developments obtain their identities.⁵⁹

49. See Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1382 (1994).

50. See Paula A. Franzese, *Common Interest Communities: Standards of Review and Review of Standards*, 3 WASH. U. J.L. & POL'Y 663 (2000).

51. See Wiseman, *supra* note 40.

52. See Gillette, *supra* note 49, at 1382.

53. See *N. Palm Beach Cnty. Water Control Dist. v. Florida*, 604 So. 2d 440, 444 (Fla. 1992) (“The onsite roadway improvements include paving of the roadways, the striping, the signage, landscaping with the roadways, irrigation to maintain the landscaping and sodding, bridges, an overpass, culverts, street lighting, security gatehouses, and secondary drainage system consisting of storm drainage pipes, inlets, manholes and surface drainage.”).

54. See, e.g., *Westwood Homeowners Ass'n v. Lane County*, 847 P.2d 862, 865 (Or. Ct. App. 1993); *Bd. of Dirs. of Olde Salem Homeowners' Ass'n v. Sec'y of Veterans Affairs*, 589 N.E.2d 761, 766 (Ill. App. Ct. 1992); *Inwood North Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 636–37 (Tex. 1987); see also Wiseman, *supra* note 40.

55. See Rishikof & Wohl, *supra* note 1, at 518.

56. Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829 (2004).

57. Gillette, *supra* note 49, at 1388–90.

58. *Id.*

59. *Id.*

“Just as municipalities may distinguish themselves by offering superior schools, spacious parks, or proximity to workplaces, so may associations offer singular services such as security gateways, a golf course, or a ‘Caribbean Island’ motif.”⁶⁰ For instance, Louisiana’s more upper-end residential developments typically provide a sort of French country chateau region-type feel with the maintenance of artificial lakes, fountains, tree-lined avenues, and brick sidewalks handled by the association.⁶¹

Although the generally understood goal of community associations is to create and maintain the value of the development,⁶² various other, more nuanced purposes for these micro-governments have been expressed by property law scholars.⁶³ As an initial matter, associations are formed to provide a certain service or fulfill a certain goal.⁶⁴ Much like in the way local governments are valued for providing essential services to their citizenry, community associations are similarly desired due to their ability to provide certain services.⁶⁵ Further, commentators note that the quality of services provided by a local government typically are not directly aligned with the geographical boundary of the municipality.⁶⁶ Demand may be higher in one portion of the city, yet the services are diffused equally throughout.⁶⁷ Nor does the municipal system of service provide specially allocated services to those who are most in need of them.⁶⁸ Associations provide a type of solution to this

60. *Id.* at 1383.

61. *See, e.g.*, JR Ball, *We’re the Face of Poverty: This Is the Tale of Our Two Baton Rouges*, BATON ROUGE BUS. REP. (Nov. 14, 2011), available at <http://www.businessreport.com/article/20111114/BUSINESSREPORT0202/111119897> [<http://perma.cc/QPX6-3DPF>] (archived Mar. 10, 2014) (“That’s because readers of this publication tend to be business executives, tend to be in an upper-middle-income bracket or higher, tend to be white and tend to live in faux French Country homes, many along Highland Road and almost all well south of Florida Boulevard.”).

62. *See* Wiseman, *supra* note 40, at 699 (“The aesthetics and atmosphere of our neighborhoods and communities matter. In addition to their ability to raise or lower property values, they affect the ways we think and interact with each other, how our children play, how we choose to travel, and even crime rates.”).

63. *See* Gillette, *supra* note 49, at 1388–1406 (discussing of the public goods versus the civil community models of associations).

64. *Id.* at 1388 (“For those who consider a primary value of local governments to be their capacity to provide local public goods efficiently, the ability of residential associations to achieve that same objective underlies much of their appeal.”).

65. *Id.*

66. *Id.* (citing *An Analysis of Authorities: Traditional and Multicounty*, 71 MICH. L. REV. 1376, 1426–27 (1973); ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, METROPOLITAN ORGANIZATION: THE ALLEGHENY COUNTY CASE 86–88 (1992)).

67. *See* Gillette, *supra* note 49, 1387; *see also* JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 135–45 (1962).

68. *See* Gillette, *supra* note 49, 1389–90 (“Localities are bound by legal obligations of equal service and “public purpose” spending that are imposed to

problem of distribution.⁶⁹ Individuals who desire the same service or the same level and quality of a certain service can come together, pool resources, and create a system of private ordering that meets such specific goals.⁷⁰ “Individuals who, for instance, desire more police service than the average resident of the municipality may find it easier to coalesce in a section of the municipality and hire private security forces rather than lobby for more police service citywide.”⁷¹ By engaging in this form of micro-governance, the distribution of public services is more closely aligned with the supply and demand for such services, as those who most utilize and desire the public goods are responsible for paying for the cost.⁷²

In that same vein, the rules and restrictions that are imposed by the association—through the declaration—create a sense of homogeneity and consistency throughout the development.⁷³ And because of the intricate steps that are involved in changing the rules and restrictions of an association—as well as the way in which such covenants run with the land or units regardless of who is the owner—the CCRs create a system that prevents radical or sweeping changes in the nature and aesthetic of the development.⁷⁴

B. Declarations and Power

Aside from its many effects and purposes, community associations draw their power and authority from the comprehensive property declaration.⁷⁵ These typically rather large documents are comprised of a complex and detailed framework of servitudes and building

prevent invidious discrimination within the municipality or to preclude discrete groups from lobbying successfully for unique benefits. As one result of these doctrines, even where the effects of public provision coincide with local boundaries, localities cannot readily respond to differential demand by residents. Residents within the locality who would prefer to trade one service for another are unable to do so.”); *see also* HENRY J. RAIMONDO, *ECONOMICS OF STATE AND LOCAL GOVERNMENT* 77–79 (1992).

69. *See* Gillette, *supra* note 49, at 1390.

70. *Id.*

71. *Id.* at 1390–91.

72. *See* Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795, 814–23 (1987); *see also* Todd Sandler & John T. Tschirhart, *The Economic Theory of Clubs: An Evaluative Survey*, 18 J. ECON. LIT. 1481, 1482 (1980).

73. Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 907–09 (1988).

74. *See* Gillette, *supra* note 49, 1395–99.

75. *See* WAYNE S. HYATT, *CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: HOMEOWNER ASSOCIATION LAW* 24 (3d ed. 2000).

restrictions that are imposed collectively upon the entirety of the property within the development (be it all the land in the subdivision or all of the units and common areas within a condominium complex or office building/park).⁷⁶ Because the entire development is initially owned by the developer, the drafting of the declaration lies with his or her lawyers.⁷⁷ The goal is to provide a comprehensive set of rules and frameworks that will govern the development from its beginning stages of construction, through its development, during its early years of operation, and into the future.⁷⁸ As individual parcels or units are sold to third parties by the developer, the declaration's effects stay with the land regardless of in whose hands the unit or property ultimately ends up.⁷⁹

Importantly for the purposes of this Article, for most of the early years of a development's life, the association—through the careful drafting of the declaration—is controlled by the developer.⁸⁰ The developer decides if and when the declaration will be amended or enforced and whether additional requirements or assessments may be imposed.⁸¹ Then, once a certain percentage of the overall units or parcels within the development are sold to third parties, control over the declaration will be transferred from the developer to the individual owners who will then elect the board of directors themselves.⁸²

The powers that are granted by the declaration can be quite extensive.⁸³ “They typically purport to regulate such issues as

76. See Brian Jason Fleming, *Regulation of Political Signs in Private Homeowner Associations: A New Approach*, 59 VAND. L. REV. 571, 578–79 (2006).

77. See Robert G. Natelson, *Consent, Coercion, and “Reasonableness” in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L. J. 41, 47 (1990).

78. See Callies, *supra* note 20, at 325–26 (“A major user of such real covenants is the property developer of large residential communities who wishes to guarantee a certain measure of uniformity (or difference) in the houses that make up its projected residential community.”).

79. See *id.* at 326.

80. See Gerald E. Frug, *Cities and Homeowners Associations: A Reply*, 130 U PA. L. REV. 1589, 1592–96 (1982); see also Callies, *supra* note 20, at 326.

81. Natelson, *supra* note 77, at 47.

82. See Callies, *supra* note 20, at 326 (“Sometime following the selling of the last lot (or the construction of the last home if the developer is building them) the developer transfers the enforcement function to some sort of association of homeowners”); see also Wilbert Washington, II, *A Model Homeowners Association Declaration of Covenants, Conditions, and Restrictions*, 23 No. 4 PRAC. REAL EST. LAW. 23, 29–32 (2007).

83. See Wiseman, *supra* note 40, at 711–13 (“The homeowners moving to these communities, if seeking only an affordable living space, are likely vaguely aware that general zoning regulations of the municipality apply but may be surprised by the detailed set of additional rules that they encounter. To create this community, a developer (sometimes unbeknownst to the buyer), first bargains with the city or county government that has jurisdiction over the land, providing infrastructure and

architectural design, fencing, use of structures, use of common areas, and the subdivision of lots.⁸⁴ Often times these restrictions are far more strict and limiting than those that are imposed by the local government.⁸⁵ Such highly restrictive covenants include those that dictate the style of home, the color of exterior walls, the use of satellite televisions, the number of guests of an owner that may be present at any given time, the style of mailbox, and even the size and type of gardens and landscaping that are allowed.⁸⁶ By creating such a restrictive regime, these CCRs create a system that reduces “both the search costs involved in finding like-minded individuals and the risk of regret that would be suffered should one discover, after making an expensive home purchase, that the neighborhood is less hospitable than originally assumed.”⁸⁷

That is not to say that the micro-governments created by these declarations always accomplish their goals.⁸⁸ As stated above, typically the legal foundation of these heavy-handed limitations and restrictions

other amenities in exchange for approval. The developer then obtains approval of a plat and subdivision plan and drafts the private rules for the community, most of which are contained within the declaration of covenants, conditions, and restrictions, and then records the declaration prior to the sale of the first lot. The declaration is binding upon all current and future property owners as well as the property owners’ or homeowners’ association, which is the community’s governing body. Accompanying the covenants are the architectural or design review guidelines, which are also typically adopted by the developer and place additional restrictions on property use. Finally, bylaws are adopted by the association’s board of directors. These substantially affect residents’ rights, particularly by setting some of the procedures that the board must follow in modifying or enforcing rules. Combined, the architectural review guidelines, covenants, and bylaws form a complex set of limitations on individual uses of property and define the framework within which homeowners may influence those rules.”)

84. See Gillette, *supra* note 49, at 1384–85.

85. See, e.g., *Murphy v. Timber Trace Ass’n*, 779 S.W.2d 603, 607–08 (Mo. Ct. App. 1989).

86. See *Linn Valley Lakes Property Owners Ass’n v. Brockway*, 824 P.2d 948, 949 (Kan. 1992); *McGuire v. Bell*, 761 S.W.2d 904, 911 (Ark. 1988); *Miller v. First Colony Cmty. Servs. Ass’n*, No. 01-92-00132-CV, 1993 WL 331092, at *1 (Tex. App. Aug. 31, 1993); *West Hill Colony, Inc. v. Sauerwein*, 138 N.E.2d 403, 404 (Ohio Ct. App. 1956); *Cottrell v. Miskove*, 605 S.2d 572, 573–74 (Fla. Dist. App. 1992); *Forest Glen Cmty. Homeowners Ass’n v. Nolan*, 432 N.E.2d 636, 637–38 (Ill. App. Ct. 1982); see also Robert D. Brussack, *Group Homes, Families, and Meaning in the Law of Subdivision Covenants*, 16 GA. L. REV. 33, 46–48 (1981).

87. Gillette, *supra* note 49, at 1395 (citing EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* 104–09 (Oxford 1977)).

88. Brussack, *supra* note 86, at 34–40. See also Glen O. Robinson, *Explaining Contingent Rights: The Puzzle of “Obsolete” Covenants*, 91 COLUM. L. REV. 546 (1991); James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1, 7–16 (1989).

are based in the law of servitudes and building restrictions.⁸⁹ However, because of the many affirmative obligations imposed upon the parties, as well as the many regulations that do not technically “touch and concern” the land, declarations can sometimes exceed what is legally permissible.⁹⁰ These types of overreaching restrictions are particularly subject to attack due to the general public policy of keeping property in commerce and the more general property law directive that discourages unreasonable restrictions and restraints on real property.⁹¹ Nevertheless, the use of declarations has been prolific across the United States, and it is almost impossible to find a real estate development—residential, commercial, industrial, or otherwise—that does not have a comprehensive set of covenants, conditions, and restrictions imposed upon it.⁹²

C. Lending and Control

For all their merits and pitfalls, the types of developments discussed above would not be possible without the participation of many lenders and financiers who share the developer’s desire to not only see the project become successful but also profitable.⁹³ Real estate

89. See Gillette, *supra* note 49, at 1386–87; see also *Mountain Park Homeowners Ass’n v. Tydings*, 864 P.2d 392, 395 (Wash. Ct. App. 1993), *aff’d en banc*, 883 P.2d 1383 (Wash. 1994); *Lookout Mountain Paradise Hills Homeowners’ Ass’n v. Viewpoint Assocs.*, 867 P.2d 70, 74 (Colo. App. 1993).

90. Natelson, *supra* note 77, at 50–51; Uriel Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139 (1978). Although Louisiana commentators do not follow the covenants theory utilized at common law and have acknowledged that predial servitudes and building restrictions can be used to create both negative and affirmative obligations, which are deemed real rights, issues still arise as to whether comprehensive declarations nonetheless exceed what is allowable under the law. See A. N. YIANNOPOULOS, PROPERTY § 229, in 2 LOUISIANA CIVIL LAW TREATISE 449–54 (4th ed. 2001).

91. See Christopher K. Odinet, Comment, *Laying to Rest an Ancien Régime: Antiquated Institutions in Louisiana Civil Law and Their Incompatibility with Modern Public Policies*, 70 LA. L. REV. 1367 (2010); see also Sally Brown Richardson, *Nonuse and Easements: Creating a Pliability Regime of Private Eminent Domain*, 78 TENN. L. REV. 1 (2010); Winokur, *supra* note 88, at 7–16; *Ritchie v. Carriage Oaks Homeowners Ass’n*, 592 So. 2d 361 (Fla. Dist. Ct. App. 1992); *Woodcreek Ass’n v. Bingle*, 597 N.E.2d 1153, 1156 (Ohio. App. 1991); *Barber v. Dixon*, 302 S.E.2d 915, 916–17 (N.C. Ct. App. 1983); *Wisniewski v. Starr*, 393 So. 2d 488, 489 (Ala. 1980).

92. Steven Siegel, *The Public Role in Establishing Private Residential Communities: Towards a New Formulation of Local Government Land Use Policies that Eliminates the Legal Requirements to Privatize New Communities in the United States*, 38 URB. LAW. 859, 867 (2006).

93. See MICHAEL T. MADISON, JEFFRY R. DWYER, & STEVEN W. BENDER, 1 LAW OF REAL ESTATE FINANCING § 3:1 (2013) (“Unlike the stock market, the primary mortgage market is not a series of organized forums but a time-place continuum of

lenders range in size and scope depending on the market and the type of development.⁹⁴ For instance, life insurance companies are traditionally the leaders in providing permanent financing for shopping malls, apartment complexes, and office buildings.⁹⁵ Commercial banks, usually through a larger syndication with other lenders, and the collateral-mortgage-backed securities market provide the largest source of real estate financing in the country for short-term construction loans.⁹⁶ And real estate investment trusts (commonly called “REITs”)⁹⁷ are highly sought-after lenders—particularly for hard-pressed borrowers and those seeking secondary financing—because of their willingness to take risks and the meager amount of governmental regulation that restricts their activities.⁹⁸ And still there are other less traditional but still active real estate lenders such as private noninsured pension funds, governmental credit agencies, retirement and pension funds, certain corporations, and even individuals whose liability structure is well suited to long-term financing.⁹⁹

Regardless of the type of lender for a given development, the goal is the same: to ensure that the loan performs and is profitable.¹⁰⁰ This

interrelated lending points where bargains are struck by borrowers and lenders as to loan amounts and interest rates.”).

94. *Id.* (“The diversity within the mortgage market is reflected by preferences among lenders for mortgages for new versus old buildings; low-income versus luxury housing; urban versus rural real estate; private versus public ownership; improved versus unimproved land; general- versus special-purpose-use property (e.g., churches and bowling alleys), and so on.”).

95. *See id.* § 3:9.

96. *Id.* § 3:25. *See also* GERALD LINS, RITA KUMMER & THOMAS LEMKE, *MORTGAGE-BACKED SECURITIES: DEVELOPMENTS AND TRENDS IN THE SECONDARY MORTGAGE MARKET* (2012–2013 ed).

97. *See* 26 U.S.C. §§ 856–60 (2006).

98. *See* MADISON ET AL., *supra* note 93, § 3:26 (“REITs derive their existence from a 1960 amendment to the Code that permits these entities to pay out cash flow distributions to trust shareholders without the imposition of a corporate tax on the earnings of the trust. This singular benefit of avoiding the double-taxation disadvantage of corporate taxation is accomplished mechanically by allowing a qualified REIT to take a deduction for dividends paid (including capital gain dividends) in computing its taxable income. However, in contrast to a partnership, a Subchapter S corporation, and a limited-liability company, a REIT cannot pass through its tax losses to the equity owners (shareholders) who own the beneficial interests in the corporation or trust.”).

99. *Id.* § 3:27 (“Another important group of players are foreign investors Their ability to compete with U.S. investors has strengthened because of their access to lower cost capital, more favorable exchange rates, and more modest expectations as to rates of return.”).

100. *See* ALVIN ARNOLD, *REAL ESTATE INVESTOR’S DESKBOOK* § 1:8 (2013) (“Real estate investments have almost always been the basis for more great fortunes than any other type of investment.”); *see also id.* § 4:7 (“A real estate lender, whether

aim is the principal driver for which types of demand are made on the borrower in terms of conditions, covenants, warranties, and obligations in the loan documentation process.¹⁰¹ In addition, numerous laws and regulations dictate the type of risks that financial lenders are allowed to take when making real-estate-related loans.¹⁰² Some of the basic agreements between the parties will be settled at the outset.¹⁰³ For instance, the market forces and competition with other lenders typically bring the question of the interest rate to a conclusion early on, as well as the long-term amortization structure of the debt service requirements.¹⁰⁴

However, there are other matters—matters that implicate the CCR declaration structure discussed above—which can cause friction between the parties.¹⁰⁵ The lender will be first and foremost concerned with the loan being sufficiently secured by the real estate collateral.¹⁰⁶ The lender will always be on guard for “incompetent management or fraudulent practices that milk the property during the loan term” and thereby “significantly reduce the value of the security.”¹⁰⁷ To this end, the lender will almost always require that the borrower grant a mortgage on the property itself so that in the event there is a default, the development—including the improvements—can be seized and sold.¹⁰⁸

it is an institution (e.g., bank, thrift, or life insurance company) or a private or commercial lender (e.g., corporate financing company or real estate syndicate), has one primary objective: to determine the ability of the borrower to pay periodic debt service on the loan as well as any principal balance remaining at loan maturity. The lender begins with the borrower’s application, which should give a detailed description of both the property and the borrowers as well as a clear statement of the financing requested.”)

101. *See id.*

102. *See, e.g.*, Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101–73, 103 Stat. 183 (codified as scattered sections of Titles 12 and 15 of the U.S.C.A.); *see also* Donald Wood, Loye W. Young, Frederick Frost & Pamela Nichols, *An Overview of FIRREA*, 6 PRAC. REAL EST. LAW 43, 44–49 (July 1990); Marc S. Lowenthal, Gerald W. McEvoy, John M. Rolls, Jr. & Nicholas J. Wood, *The Impact of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) on Lending Practices and Procedures of Savings Institutions*, 26 REAL PROP. PROB. & TR. J. 577 (1991).

103. *See* ARNOLD, *supra* note 100, § 4:3.

104. *Id.* (“Many lenders, for example, see eye-to-eye with the borrower about the desirability of high-ratio, long-term loans with low amortization on high-quality real estate, since the security for the loan cannot be faulted and the lender has minimum loan turnover, which reduces its overhead and operating expenses.”).

105. *Id.* These issues can generally revolve around, among other things, guarding against inflation and damage to the collateral. *See id.*

106. *Id.*

107. *Id.*

108. STUART M. SAFT, *COMMERCIAL REAL ESTATE TRANSACTIONS* § 9:19 (3d. ed. 2013).

The proceeds from the sale can then be applied against the outstanding debt owed by the borrower.¹⁰⁹ The real estate that is offered as collateral for the loan is, quite often, far more important than the financial or economic strength of the borrower himself.¹¹⁰ During the loan approval phase, the lender will go to great lengths to analyze and investigate the property to ensure its value and whether it is viable as an income-producing enterprise.¹¹¹

In a perfect world, the lender is able to fully recover the debt from the seizure and sale of the property.¹¹² In reality, however, the sale of the collateral rarely results in a third-party buyer who pays an amount sufficient to satisfy the debt.¹¹³ This is no less true in Louisiana.¹¹⁴ What often happens is that the lender itself purchases the property at the sheriff's foreclosure sale and thereby becomes the owner for a

109. *Id.* ("A mortgage or a deed of trust is any written instrument creating a lien on real property or by which title to the real property is held as security for the repayment of a debt."). In Louisiana, only the mortgage is recognized as a valid conventional security interest in immovable property. *See* PETER S. TITLE, 1 LOUISIANA REAL ESTATE TRANSACTIONS § 13:17, *in* 1 LOUISIANA PRACTICE SERIES 1109 (2013–2014 ed.). Neither deeds of trust, nor mortgages with a power of sale, are recognized in Louisiana. *See generally id.*

110. *See* ARNOLD, *supra* note 100, § 4:8.

111. *Id.*

112. RESTATEMENT (THIRD) OF PROP.: MORTGAGES §§ 8.1–.6 (1997).

113. *Id.* § 8.3 cmt. a.

Many commentators have observed that the foreclosure process commonly fails to produce the fair market value for foreclosed real estate There are several reasons for low bids at foreclosure sales. First, because the mortgage lender can "credit bid" up to the amount of the mortgage obligation without putting up new cash, it has a distinct bidding advantage over a potential third party bidder. Second, while foreclosure legislation usually requires published notice to potential third party purchasers, this notice, especially in urban areas, is frequently published in the classified columns of legal newspapers with limited circulation. Moreover, because the publication is usually highly technical, unsophisticated potential bidders have little idea as to the nature of the real estate being sold. Third, many potential third party purchasers are reluctant to buy land at a foreclosure sale because of the difficulty in ascertaining whether the sale will produce a good and marketable title and the absence of any warranty of title or of physical quality from the foreclosing mortgagee. Finally, when a mortgagee forecloses on improved real estate, potential bidders may find it difficult to inspect the premises prior to sale. Even though it may be in the self-interest of the mortgagor to allow such persons to inspect the premises, mortgagors who are about to lose their real estate through a foreclosure sale understandably are frequently reluctant to cooperate.

Id.

114. *See* Michael H. Rubin & Jamie D. Seymour, *Deficiency Judgments: An Overview*, 69 LA. L. REV. 783 (2009).

period of time.¹¹⁵ During this time, it is in the lender's best interest to ensure that the property maintains or increases in value and that cash flow continues or is augmented.¹¹⁶ If the value of the property remains high or is increased, the proceeds from the sale to a subsequent purchaser are likely to be more significant and thereby aid in helping the lender recover the loss from the failed loan.¹¹⁷ Similarly, continuous cash flow is equally important because, at least until the property can be sold, the bank can use the income produced from the property to mitigate its losses and pay for ongoing expenses.¹¹⁸ If the development is a residential subdivision, the continuous sale of lots, and the proceeds therefrom, are extremely desirable to the bank.¹¹⁹ Also, if the development is an office building or shopping center, the lender will want to ensure the continued payment of rents and the procuring of new tenants for vacant spaces.¹²⁰

Nevertheless, all of these goals and desires of the lender that becomes the owner of the collateral after foreclosure depend upon the lender maintaining control over the development. Prior to the default and subsequent foreclosure, the developer has control and is able to regulate, guide, and direct the activities and management of the development through the various powers under the declaration.¹²¹ If common areas of the development—such as parking spaces or a community swimming pool—were in need of repair, the developer could charge a special, one-time assessment against all the parcels or units to produce quick cash to

115. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 8.3 (1997).

116. See FANNIE MAE, PROPERTY MAINTENANCE & MANAGEMENT: PROPERTY PRESERVATION MATRIX (2012), available at <https://www.fanniemae.com/content/tool/property-preservation-matrix.pdf> [<http://perma.cc/9EUN-E69E>] (archived Mar. 10, 2014); see also Matthew S. Kirsch, *How Low Can They Go: Remediating Bank Activity Restrictions and Incentives to Facilitate the Responsible Divestiture of REO Property*, 41 REAL EST. L.J. 4 (2012). "REO (real estate-owned) properties" are those that are owned by a lender after a foreclosure where no third-party bidder purchased the property. See *id.*

117. Stephen L. Poe, *Sale of REO Properties Under CERCLA: An Area of Continuing Environmental Risk for Lenders*, 29 AM. BUS. L.J. 43 (1991).

118. For a discussion on the importance of income-producing property to a lender, see MADISON ET AL., *supra* note 93, § 1:1.

119. See, e.g., Treatment of Real Estate Acquired Through Foreclosure Under the OTS's Risk-Based Capital Regulations, Fed. Banking L. Rep. ¶ 82,584 (CCH), 1992 WL 12610531 (Jan. 23, 1992).

120. See Thomas C. Homburgera & Lawrence A. Eiben, *Who's On First—Protecting the Commercial Mortgage Lender: A Lender's Overview of Subordination, Nondisturbance, and Attornment Agreements*, 36 REAL PROP. PROB. & TR. J. 411, 411 (2001) ("The true value of commercial real estate is determined largely by the capitalization of its net income. . . . Lenders must consider, at a minimum, the obligations and liabilities of the parties under the leases, the right of successors-in-title to the real estate to benefit from the leases, and the extent to which the all-important rental income can be reduced, offset, or interrupted.").

121. See *supra* Part I.B and accompanying discussion.

fund the repairs.¹²² If the activities of certain owners and their guests were unruly or undesirable, the developer could use his or her powers under the declaration to promulgate rules to prohibit such activity.¹²³ Everything from guidelines on what types and styles of improvements homeowners in the subdivision can construct on their lots to the type of alarm systems and wall paint a tenant can utilize within its office space can fall within the purview of the declaration and thereby under the control of the developer.¹²⁴ This authority bestows great power on the developer to ensure that the vision of quality, beauty, and aesthetic that was initially envisioned for the development remains, even after possession or ownership of certain portions of the project have been sold to third parties.¹²⁵

The importance of controlling the declaration is no less important to lenders.¹²⁶ This is particularly evident when they become the owners of the property after a foreclosure sale.¹²⁷ The lender needs to ensure that the property is carefully regulated, its activities are coordinated, and its value maintained so that any losses from the nonperforming loan can be offset by income produced from—or the proceeds from the eventual sale of—the property.¹²⁸ In order to achieve these essential objectives, the lender will very often require that, when the loan is made, the borrower not only grant a mortgage on all of the real property and improvements of the development but also grant a security right in the declaration itself.¹²⁹ In this case, when the

122. See *supra* Part I.B.

123. See *supra* Part I.B.

124. See *supra* Part I.B.

125. See *supra* Part I.B.

126. See generally Raymond H. Brescia, Elizabeth A. Kelly & John Travis Marshall, *Crisis Management: Principles That Should Guide the Disposition of Federally Owned, Foreclosed Properties*, 45 IND. L. REV. 305 (2012).

127. See generally Julie A. Tappendorf & Brent O. Denzin, *Turning Vacant Properties into Community Assets Through Land Banking*, 43 URB. LAW. 801 (2011).

128. For a discussion of the importance and utility of declarations of covenants, restrictions, and conditions in real estate developments, see *supra* Part I.B.

129. See, e.g., Master Declaration of Covenants, Conditions, and Restrictions for Lockwood Folly, art. I, § 11, available at [http://www.lockwoodfollypoa.org/PDF/MDCDocs/Section%203%20MASTER%20DECLARATION%20OF%20COVENANTS%2042012%20\(2\).pdf](http://www.lockwoodfollypoa.org/PDF/MDCDocs/Section%203%20MASTER%20DECLARATION%20OF%20COVENANTS%2042012%20(2).pdf) [<http://perma.cc/NB5Q-N95T>] (archived Mar. 10, 2014) (“The Declarant *may assign or pledge* any or all of its rights reserved under the land use documents through an assignment or in an instrument of conveyance or assignment.” (emphasis added)); Declaration of Covenants, Conditions, and Restrictions of Wyncroft, Ex. A, item (g), available at <http://www.wyncroft.org/WHA%20Covenants%20with%20Amend%201.pdf> [<http://perma.cc/4HTP-NGNQ>] (archived Mar. 17, 2014) (“Declarant shall have the right and power to assign and delegate to the respective associations, *or any successor or successors thereto*, at any time and from time to time, all or any part of any of the rights, powers, and authority contained in this Declaration.” (emphasis added)). For an example of such a clause in Louisiana, see Declaration of Covenants, Conditions, and Restrictions for Segnette

borrower defaults and the lender forecloses on the mortgage, the lender can also exercise its rights under the declaration. The mechanics and effects of such an exercise of security rights by the lender are discussed below and underscore the crucial role that the declaration plays even after the development is foreclosed upon.

II. COLLATERALIZING CONTROL

While the declaration provides a wide range of powers and advantages to a lender in the event the property must be obtained or taken over by the lender in a foreclosure sale, it is not always easy or clear how such a complex and multifaceted instrument like a declaration can be collateralized. As discussed here, declarations comprise a myriad of different legal concepts and doctrines that help make the common-interest regime possible. But it is this complexity that makes collateralizing the rights so difficult. In fact, because so many different types of property rights are involved in the construction and functionality of declarations, in most cases these rights cannot be collectively collateralized in one omnibus security device. Rather, each different aspect of the declaration must be collateralized and dealt with separately.

A. Under Mortgage Law—Immovable Aspects of CCRs

The first and perhaps most obvious type of security device to be used in collateralizing declaration rights is under Louisiana's law of mortgages because of the essential role played in CCRs by building restrictions and servitudes (both immovables). Without question, CCRs comprise a number of servitudes and building restrictions that are essential in giving the goals of the declaration enforceability under the law.¹³⁰ Without these legal devices, few if any of the limitations and rules within a declaration would have any effect at all.¹³¹ A building restriction in the declaration might prevent an owner from building a fence out of chain link on his or her property, or a servitude might grant to the owners' association the right to traverse an owner's yard in

Estates, Article XIII, available at http://www.rad65.com/Segnette%20Estates/SE.Declaration_conditions_restrictions.pdf [<http://perma.cc/6XXG-JRC9>] (archived Mar. 10, 2014) (“Declarant’s Rights. Any or all of the special rights and obligations of the Declarant set forth in this Declaration or the By-Laws *may be transferred in whole or in part to other Persons.*” (emphasis added)).

130. A. N. YIANNPOULOS, PREDIAL SERVITUDES § 192, in 4 LOUISIANA CIVIL LAW TREATISE 512 (3d ed. 2004). See also Callies, *supra* note 20, at 325–27.

131. See Callies, *supra* note 20, at 325–27.

order to conduct maintenance on a carefully preserved live oak tree.¹³² However, the combination of these two devices to achieve the goals of a declaration has not always been so readily accepted.¹³³

As a general matter, *negative* restrictions and restraints imposed by a declaration—such as a prohibition on erecting a structure within a certain number of feet from the street or right-of-way—have been widely accepted by Louisiana courts.¹³⁴ Provided they meet all the necessary legal requirements, these restrictions are characterized as predial servitudes, and the negative obligations that are entailed in them are real rights that travel with the land into whose hands it finds itself.¹³⁵ Therefore, the developer may include certain restrictions on the uses, height, and size of improvements in the declaration and impose those restrictions, through the use of predial servitudes, throughout the development.¹³⁶ As lots are individually sold, the predial servitudes stay in place and continue to burden the property even though the developer no longer has an ownership interest in the parcels.¹³⁷

However, for many years the notion of imposing real rights that carried *affirmative* obligations was met with great uncertainty.¹³⁸ French courts attempted to give enforceability to these types of restrictions by expanding the notion of personal obligations and the transfer of related immovable property.¹³⁹ Louisiana courts, however, took a different approach and created a sort of special real right that has become known as the “building restriction.”¹⁴⁰ These devices—

132. For discussion of the various instances of such restrictions, see Patrick Johnson, Jr., *The Civil Code Articles on Building Restrictions: A Critical Analysis*, 53 TUL. L. REV. 583 (1979); Martin Smith, Jr., *Building Restrictions in Louisiana*, 21 LA. L. REV. 468 (1961). See also Louisiana Homeowners Association Act, LA. REV. STAT. ANN. § 9:1141.4–6 (2008).

133. YIANNOPOULOS, *supra* note 130, § 192, at 512. See also Callies, *supra* note 20, at 325–27.

134. YIANNOPOULOS, *supra* note 90, § 229, at 449–54 (citing Goodwin v. Alexander, 30 So. 102 (La. 1901); CIVIL CODE [C. CIV.] art. 689 (Fr.); 3 M. PLANIOL ET G. RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS: LES BIENS, § 923, in 3 DROIT CIVIL (2d ed. Picard 1952); ASTIKOS KODIKAS [A.K.] [CIVIL CODE] art. 1120 (Greece); Balis, Civil Law Property 315 (3d ed. 1955) (in Greek); cf. BURGERLICHES GESETZBUCH [B.G.B.] § 1018 (Ger.); W. DEHNER, § 31 in NACHBARRECHT IM BUNDESGBIET § 31 28II (6th ed. 1982). See also McGuffey v. Weil, 125 So. 2d 154 (La. 1960); cf. Holloway v. Ransome, 43 So. 2d 673 (La. 1949)).

135. YIANNOPOULOS, *supra* note 90, § 229, at 449–54.

136. *Id.*

137. *Id.*

138. See Cambais v. Douglas, 120 So. 369 (La. 1929).

139. YIANNOPOULOS, *supra* note 90, § 229, at 449–54.

140. YIANNOPOULOS, *supra* note 130, § 191, at 376–81. See also Willis v. New Orleans East Unit of Jehovah’s Witnesses, Inc., 156 So. 2d 310 (La. Ct. App. 1963);

often explained as being closely akin to predial servitudes—were described as “charges on immovable property imposed ‘in pursuant of a general plan governing building standards, specified uses, and improvements.’”¹⁴¹ Finally, a formal statutory regime, patterned after the framework that had been developed by Louisiana courts, was adopted by the Legislature in 1977 through the enactment of Civil Code articles 775 through 783.¹⁴² The true utility of these devices is their ability to impose affirmative duties, such that the declarant can force individual owners of parcels or units that are encumbered with the restriction to perform affirmative acts.¹⁴³ Much like the use of CCR declarations across the United States, building restrictions (covenants), in combination with predial servitudes (easements), have been considered one of the most important tools for real estate development in Louisiana and are largely, if not completely, responsible for the enforceability of CCRs.¹⁴⁴

However, that is not to say that building restrictions provide free reign to developers.¹⁴⁵ As long recognized by Louisiana courts, parties are not free to create whatever real rights they wish.¹⁴⁶ Rather, as articulated by the Romans, real rights are “*numerous clausus*,” meaning that they are a closed class and a category unto themselves.¹⁴⁷ Private individuals are generally not given *carte blanche* to contractually create whatever unique type of real right that may suit their needs.¹⁴⁸ Although courts have allowed for some exceptions—

Cunningham v. Hall, 148 So. 2d 808 (La. Ct. App. 1963); Cmty. Builders, Inc. v. Scarborough, 149 So. 2d 141 (La. Ct. App. 1962).

141. YIANNOPOULOS, *supra* note 130, § 191, at 376–81 (quoting LA. CIV. CODE art. 775).

142. *See id.*

143. *See* Martin Smith, Jr., *Building Restrictions in Louisiana*, 21 LA. L. REV. 468 (1961); Eugene G. Taggart, “*Equitable Restrictions*” in *Louisiana*, 33 TUL. L. REV. 822 (1959); *see also* M. PLANIOL ET G. RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS: LES BIENS* § 923 (2d ed. 1952).

144. *See* YIANNOPOULOS, *supra* note 130, § 191, at 376–81; *see also* Callies, *supra* note 20, at 325–26; TITLE, *supra* note 109, §§ 3:48–49.

145. *See* YIANNOPOULOS, *supra* note 90, § 217, at 414–17 and accompanying discussion of the *numerous clausus*.

146. *See id.*; *cf.* Queensborough Land Co. v. Cazeaux, 67 So. 641, 728–29 (La. 1915) (“[W]hile the public policy of the state opposes the putting of property out of commerce, it at the same time favors the fullest liberty of contract (article 1764, C. C.), and the widest latitude possible in the right to dispose of one’s property as one lists (article 491, C. C.), so long as no disposition is sought to be made contrary to good morals, public order, or express law.”).

147. YIANNOPOULOS, *supra* note 90, § 216, at 413–14 (citing Pugliese, *Diritti Reali*, in *Enciclopedia del Diritto* (1964); Weisman, *Some Fundamental Concepts of Property Law: A Critical Survey*, 21 ISR. L. REV. 529, 565 (1986)).

148. YIANNOPOULOS, *supra* note 90, § 217, at 414–17.

such as in the case of mineral rights, limited personal servitudes, and building restrictions prior to codification¹⁴⁹—for the most part such free contractual license has been looked upon negatively.¹⁵⁰ In a seminal case, the Louisiana Supreme Court praised Louisiana's property law system as being "that of simple, uniform and absolute dominion" and said that its narrow and limited statutory allowances for the creation of real rights are "abundantly sufficient to meet all the warrants of civilization, and there is no warrant of law, nor reason of policy for the introduction of any other."¹⁵¹

In the context of building restrictions, there are a few important requirements that can often be overlooked—and therefore destroy the entire regime.¹⁵² First is the need for a general plan of development, and equally important is that this plan must be "feasible and capable of being preserved."¹⁵³ Restrictions that are ambiguous or vague will be denied enforcement.¹⁵⁴ Another essential requirement is that the imposition of the building restrictions must be fairly uniform across the entire development.¹⁵⁵ A failure of uniformity may cause the building restriction to fall into the category of a predial servitude, and if it fails to meet the requirements for such a servitude, the restriction will fail altogether.¹⁵⁶ Lastly and most importantly, the ability to impose

149. LA. REV. STAT. ANN. § 31:3 (2009) ("Unless expressly or impliedly prohibited from doing so, individuals may renounce or modify what is established in their favor by the provisions of this Code if the renunciation or modification does not affect the rights of others and is not contrary to the public good."). See also A. N. YIANNOPOULOS, PERSONAL SERVITUDES §§ 223–31, in 3 LOUISIANA CIVIL LAW TREATISE 455–77 (4th ed. 2000); YIANNOPOULOS, *supra* note 130, §§ 191–200, at 511–35.

150. YIANNOPOULOS, *supra* note 90, § 217, at 414–17 (stating that courts have repeatedly declared that "the modifications of the right of property under our laws are few and easily understood, and answer all the purposes of reasonable use. It is incumbent on courts to maintain them in their simplicity." (citing *Harper v. Stanbrough*, 2 La. Ann. 377, 382 (La. 1847))). See also *Wemple v. Nabors Oil & Gas Co.*, 97 So. 666, 668 (La. 1923).

151. See *State v. McDonogh's Ex'rs*, 8 La. Ann. 171, 251 (La. 1853).

152. YIANNOPOULOS, *supra* note 130, § 193, at 515–19.

153. See LA. CIV. CODE art. 775 (2014); see also *Schwab v. Kelton*, 405 So. 2d 1239 (La. Ct. App. 1981); *Gwatney v. Miller*, 371 So. 2d 1355 (La. Ct. App. 1979); *Bruce v. Simonson Invs., Inc.*, 207 So. 2d 360 (La. 1968); *Salerno v. De Lucca*, 30 So. 2d 678 (La. 1947); *Alfortish v. Wagner*, 7 So. 2d 708 (La. 1942).

154. See *Olivier v. Berggren*, 136 So. 2d 325 (La. Ct. App. 1962).

155. YIANNOPOULOS, *supra* note 130, § 195, at 523. See also *Murphy v. Marino*, 60 So. 2d 128 (La. Ct. App. 1952); *In re Congregation of St. Rita Roman Catholic Church*, 130 So. 2d 425 (La. Ct. App. 1961) (imposing restrictions on only 40% of the parcels within the development was not enough to satisfy the requirements for valid building restrictions of the lots); *Herzberg v. Harrison*, 102 So. 2d 554 (La. Ct. App. 1958); cf. *Rabouin v. Dutrey*, 160 So. 393 (La. 1935).

156. See YIANNOPOULOS, *supra* note 130, § 193, at 515.

affirmative duties is not without limit.¹⁵⁷ Any affirmative acts must be “reasonable and necessary for the maintenance of the general plan.”¹⁵⁸ The requirement that owners become members of a collective association and the requirement that they accept the duty to share in the cost and expenses of maintaining common areas have both been deemed valid affirmative building restrictions by Louisiana courts.¹⁵⁹ However, requiring acts, the demand of which are subject to the capricious discretion of the declarant or that restrict the property to the detriment of public policy, are not valid.¹⁶⁰

Building restrictions¹⁶¹ and servitudes,¹⁶² as discussed above, are both classified as incorporeal immovables under the Louisiana Civil Code.¹⁶³ This is because both building restrictions and servitudes can only affect immovable property.¹⁶⁴ When “the object of a real right is an immovable, the right is an incorporeal immovable.”¹⁶⁵ In the context of a declaration, the object of the real right is the land upon which the common interest community will be constructed.¹⁶⁶ Because the land is a corporeal immovable, the real rights associated with it are incorporeal immovables.¹⁶⁷

157. *See id.* § 195, at 523.

158. LA. CIV. CODE art. 778 (2014). *See also* Louisiana Homeowners Association Act, LA. REV. STAT. ANN. §§ 9:1141.4–6 (1999); Allen Scott Crigler, *Some Observations on Building Restrictions*, 41 LA. L. REV. 1201, 1208 (1981).

159. *See* Town S. Estates Homes Ass’n, Inc. v. Walker, 332 So. 2d 889 (La. Ct. App. 1976) (upholding annual assessments); *Nepveux v. Linwood Realty Co.*, 435 So. 2d 589, 591 (La. Ct. App. 1983) (upholding restrictions stating that “[a]ny house erected . . . shall have a *minimum cost of \$40,000.00 and 2,200 square feet*”). However, interestingly, Louisiana courts have held that the failure to pay assessments is a personal obligation of the owner that remains with the owner, even after the owner has sold the property that is burdened with the real right that imposed the fee in the first place. *See* Vill. Square Shopping Ctr. Ass’n v. Nelson, 522 So. 2d 163 (La. Ct. App. 1988); *see also* Mariner’s Vill. Master Ass’n, Inc. v. Cont’l Props., 639 So. 2d 1188 (La. Ct. App. 1994); A. N. Yiannopoulos, *Common, Public, and Private Things*, 37 LA. L. REV. 317, 329–30 (1977); *cf.* Tall Timbers Owners’ Ass’n v. Merritt, 376 So. 2d 586 (La. Ct. App. 1979).

160. YIANNOPOULOS, *supra* note 130, § 195, at 523.

161. *See* LA. CIV. CODE art. 777 (2014).

162. *See id.* art. 649; A. N. Yiannopoulos, *Predial Servitudes; General Principles: Louisiana and Comparative Law*, 29 LA. L. REV. 1, 13 (1968); YIANNOPOULOS, *supra* note 130, § 6, at 18.

163. YIANNOPOULOS, *supra* note 90, § 146, at 337. *See also* Callies, *supra* note 20, at 325–26.

164. YIANNOPOULOS, *supra* note 90, § 146, at 337.

165. *Id.* at 338.

166. *Id.*

167. *Id.*

Immovable rights can only be collateralized through the use of a mortgage.¹⁶⁸ This is because of Louisiana's exclusivity approach to the types of property that can be mortgaged.¹⁶⁹ Civil law countries, even more so than their common law cousins, take a very narrow view of the types of rights that can be created in property.¹⁷⁰ As such, Louisiana law only allows for five categories of property that may be made subject to a mortgage, and any other attempts to expand this list through contract is ineffective.¹⁷¹ Louisiana Civil Code article 3286 limits mortgage to only (1) corporeal immovable property, including its component parts; (2) rights of usufruct with respect to a corporeal immovable; (3) a servitude of right of use, including any accompanying rights associated with buildings and other constructions located on the land subject to the servitude; (4) a lessee's rights in a lease of an immovable, including the rights to any buildings or other constructions located on the leased land; and (5) any additional property that might be made available for mortgaging through a special enactment of the legislature.¹⁷² Although not specifically stated in article 3286, building restrictions—due to being substantially similar to servitudes and also comprising real rights in a corporeal immovable—may also be encumbered by a mortgage.¹⁷³

Thus, the portions of the declaration that consist of building restrictions and servitudes must be collateralized under the law of mortgage.¹⁷⁴ The lender will typically already have a conventional mortgage on the real estate comprising the development itself in connection with making the loan.¹⁷⁵ And the encumbrance of the land automatically includes any and all building restrictions and servitudes that might exist on the property.¹⁷⁶ Nevertheless, when encumbering

168. See LA. CIV. CODE art. 3286 (2014); see also *Voorhies v. De Blanc*, 12 La. Ann. 864 (La. 1857).

169. See art. 3286; *Miller v. Michoud*, 11 Rob. 225 (La. 1845); *Penn v. Ott*, 12 La. Ann. 233 (La. 1857); *State v. Mexican Gulf Ry. Co.*, 3 Rob. 513 (La. 1843).

170. See Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373 (2002) (“The law of every jurisdiction defines a set of well-recognized forms that property rights can take and burdens the creation of property rights that deviate from those conventional forms. In this respect, property law differs from contract law, which generally leaves parties free to craft contractual rights in any form they wish. Scholars in civil law countries have long been self-conscious about the law’s constraints on property rights.”).

171. Art. 3286.

172. *Id.*

173. See generally YIANNOPOULOS, *supra* note 90, § 146, at 337.

174. Art. 3286. See also *Coguenhem v. Trosclair*, 69 So. 800 (La. 1915).

175. See generally Alfred G. Kyle, *Commercial Real Estate Construction Lending*, 22 PRAC. REAL EST. LAW 7 (2006).

176. LA. CIV. CODE art. 650 (2014). See also LA. REV. STAT. ANN. § 9:1051 (2008).

the CCR declaration—which is itself a separate piece of collateral from the land—it may be desirable to separately describe the servitudes and building restrictions, not because this is legally required, but rather to make clear the intent of the parties and to put courts and third parties on notice of the parties’ intent and the scope of the mortgage.¹⁷⁷ Because the real rights being collateralized under the CCRs are so complex and particular to these types of transactions, the specific building restrictions and servitudes that are set forth in the declaration should be described with specificity in the mortgage document.¹⁷⁸ In this way, the mortgagee (the lender) and the mortgagor (the developer-owner) are able to evidence the intent behind the security contract with regard to the exact nature of the rights being mortgaged—specifically that they are being collateralized as part of the larger collateralization of the CCRs.¹⁷⁹

The lender will have to ensure that when portions of the development are released from the mortgage on the land that the mortgage rights arising under the collateralization of the CCRs are not similarly released. For instance, a lender might release lots within a subdivision from the overall real estate mortgage as the developer sells individual parcels within the neighborhood. However, until the lender is fully paid and the debt is extinguished, it will want to maintain its mortgage rights insofar as they impact the CCRs. This means that the servitudes and building restrictions that continue to encumber each of the lots, even after they are sold to independent, third-party homeowners, must still be maintained subject to the CCR mortgage in favor of the lender. Thus, it is desirable to mortgage these rights separately from one another to ensure that they are not both inadvertently released at the same time. However, there is a theoretical problem that arises here because of the way in which Louisiana law conceptualizes servitudes and the property to which they are attached.¹⁸⁰ Comment (e) to Louisiana Civil Code article 3286 states that “[a] mortgage of the dominant estate implicitly covers all predial servitudes belonging to it. Neither can such a servitude be mortgaged separately.”¹⁸¹ Because a predial servitude cannot be encumbered separately from the land over which it lies, creating a separate collateralization would seem impossible.¹⁸² Under this principle, there would be no way to prevent the release of the lender’s mortgage rights

177. *See generally* art. 3286.

178. *See id.*

179. *Id.*

180. *Id.* cmt. e.

181. *See id.*; *see also id.* art. 650 (“A predial servitude is inseparable from the dominant estate and passes with it. The right of using the servitude cannot be alienated, leased, or encumbered separately from the dominant estate.”).

182. *Id.* art. 650.

over only the land, without also losing its rights in the CCRs that affect that parcel.¹⁸³ Nevertheless, it may be possible to overcome this theoretical challenge by classifying the servitude aspects of the CCRs as being limited personal servitudes, rather than being predial in nature.¹⁸⁴ Although prohibited for predial servitudes, the Civil Code specifically sanctions the use of personal servitudes of use as collateral, and thus it is possible to separately collateralize these types of rights under a distinct and separate mortgage.¹⁸⁵ This classification seems wholly consistent with the workings of servitudes in declarations since they essentially represent real rights that are granted in favor of a juridical person (namely, the homeowners' association) rather than to a dominant estate.¹⁸⁶ The ability to enforce setback lines and uniformity of landscaping, among other things, are all to the benefit of the association and its members, rather than to the actual parcels themselves.¹⁸⁷

Thus, while it is technically possible to include both the mortgage of the real property and the mortgage of the servitudes and building restrictions in the same agreement and only release certain rights for certain purposes at certain times, it would seem more practical and efficient to address them in separate documents to avoid error and an inadvertent release of rights.

B. Under UCC Article 9—Movable Aspects of CCRs

Just as aspects of the CCRs comprise rights that arise in connection with *immovable* property, there are other facets that might be more

183. *See id.*

184. *See id.* art. 3286.

185. *Id.*

186. *See* LaFargue v. U.S., 4 F. Supp. 2d 593 (E.D. La. 1998) (“Louisiana law recognizes that parties may create a personal servitude of right of use in favor of a natural person or legal entity for a specified use of an estate less than full enjoyment. La. C.C. art. 641. In contrast to a predial servitude, which benefits a dominant estate, a personal servitude is for the benefit of a designated person or legal entity. However, the right of use may confer only an advantage that may be established by a predial servitude, *id.* art. 640, and such personal servitudes are regulated by the rules governing predial servitudes to the extent that their application is compatible with the rules governing personal servitudes. *Id.* art. 645.3 The Civil Code also provides that a right of use is transferable unless prohibited by law or contract.”).

187. *See* YIANNOPOULOS, *supra* note 149, § 8:3, at 523–27 (explaining various examples of limited personal servitude that may be created by private contract: “[t]hus, the rights of passage, of aqueduct, of light, or of view, may be stipulated in favor of a person rather than an estate. It is the same as to fishing or hunting rights, and the taking of fruits or products from an immovable.”); *see also* Parish of West Feliciana *ex rel.* West Feliciana Parish Police Jury v. Thompson, 2009 WL 839525, at *1 (La. Ct. App. Mar. 27, 2009).

appropriately classified as incorporeal *movable* rights.¹⁸⁸ These rights include contract rights that are collectively established between the unit or lot owners and the developer pursuant to the declaration.¹⁸⁹ As discussed above, the exact nature of these rights have caused some frustration among Louisiana courts because of the way in which these rights have the effect of creating real rights that bind heirs, successors, and assignees of the original parties to the contract but have many of the features of personal contractual obligations.¹⁹⁰ This distinction is important because only certain, narrow types of rights in immovable property can be encumbered under the law of mortgage.¹⁹¹ Similarly, only rights that arise in connection with movables can be collateralized under Louisiana's version of article 9 of the Uniform Commercial Code (UCC article 9).¹⁹² It is because of this mixed-bag of property rights that coalesce together to form a declaration of CCRs that lenders and their counsel are often left a bit perplexed as to how to effectively collateralize such an important but very complex document.¹⁹³

As a general matter, all rights, obligations, and actions are, in theory, movable, but the law sometimes treats them, for legal purposes, as immovable-related rights when the object of the right, obligation, or action is an immovable.¹⁹⁴ This legal fiction is articulated in Louisiana Civil Code article 470, which declares, in part, that “[r]ights and actions that apply to immovable things are incorporeal immovables” and include things like servitudes and building restrictions.¹⁹⁵ For these rights, the law of mortgage is the correct security device.¹⁹⁶ However, incorporeal rights—such as the declaration rights that are more contract based—must be collateralized under UCC article 9.¹⁹⁷ Louisiana Civil Code article 473 states that “[r]ights, obligations, and actions that apply to a movable thing are incorporeal movables. Movables of this kind are such as bonds, annuities, and interest or shares in entities possessing juridical personality.”¹⁹⁸

One particularly important contract-based, incorporeal movable right arising under the CCRs is the declarant's ability to control the association until such time as a certain number of lots or units are

188. See *supra* Parts I–II and accompanying discussion.

189. See *supra* Parts I–II.

190. See *supra* Part II.A.

191. See *supra* Part II.A.

192. See JASON J. KILBORN, *LOUISIANA SECURITY DEVICES: A PRÉCIS* 3–4 (2006); MICHAEL H. RUBIN, *LOUISIANA LAW OF SECURITY DEVICES: A PRÉCIS* 271–75 (2011).

193. See generally KILBORN, *supra* note 192; RUBIN, *supra* note 192.

194. See YIANNPOULOS, *supra* note 90, § 146, at 337.

195. LA. CIV. CODE art. 470 (2014).

196. See *supra* Part II.A.

197. KILBORN, *supra* note 192, at 3–4; RUBIN, *supra* note 192, at 271–75.

198. LA. CIV. CODE art. 473 (2014).

leased or sold to third parties.¹⁹⁹ In other words, for a certain period of time after construction has commenced and after the development has been completed, the declarant will retain the ability to solely or primarily appoint the members of the board of directors of the association.²⁰⁰ By doing so, the director maintains control over the operation, revenues, expenditures, and decision-making of the development.²⁰¹ The control rights under the declaration are akin to the way in which a party exercises control over a corporation through ownership of all or a majority of the shares of stock in that company.²⁰² In this way, the declarant's rights of control over the association are classified as a form of incorporeal movable under Louisiana Civil Code article 473.²⁰³

UCC article 9 incorporates the idea of using incorporeal movables as collateral through several different types of collateral categories.²⁰⁴ These include the right to demand payment for services that have been rendered or goods that have been sold or leased (accounts receivable), the right to demand payment of money from a depository institution (deposit accounts), the right to recover against an individual in tort (tort claims and judgments), and, last but not least, the catch-all category of general intangibles.²⁰⁵ As discussed below, this last category—that of general intangibles—best fits the types of contract-based rights that are found in CCRs.²⁰⁶

Rights that have been held to constitute general intangibles under the UCC article 9 analysis include rights in intellectual property, such as copyrights, patents, and trademarks, rights under a franchise or license agreement, causes of action (except for those arising in tort), and goodwill.²⁰⁷ Importantly, the general intangible collateral category is considered to be a catch-all, residual grouping such that if a type of movable cannot fit under one of the other categories, it will be deemed

199. See *supra* Part II.B–C and accompanying discussion.

200. See *supra* Part II.B–C and accompanying discussion.

201. See *supra* Part II.B–C and accompanying discussion.

202. See GLENN G. MORRIS & WENDELL H. HOLMES, BUSINESS ORGANIZATIONS §§ 14.01–.05, in 7 LOUISIANA CIVIL LAW TREATISE 419–26 (1999).

203. See art. 473; see also *Moreland v. Rucker Pharmacal Co., Inc.*, 59 F.R.D. 537 (W.D. La. 1973); *McRoberts v. Hayes*, 181 So. 2d 390 (La. 1965); *Succession of McGuire*, 92 So. 40 (La. 1922).

204. See LA. REV. STAT. ANN. §§ 10:9-102(a)(2), (29), (42), :9-109(d)(9), (12) (2002); see also KILBORN, *supra* note 192, at 9–10.

205. KILBORN, *supra* note 192, at 9–10.

206. See § 10:9-102(a)(42).

207. KILBORN, *supra* note 192, at 10. See also § 10:9-102(a)(42) (“‘General intangible’ means any personal property, including things in action, other than accounts, chattel paper, tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, life insurance policies, and money. The term includes payment intangibles and software.”).

to represent a form of general intangible.²⁰⁸ Louisiana law has little jurisprudence interpreting the definition of “general intangibles” and often looks to common law courts in interpreting their versions of UCC article 9 in helping to make the determination.²⁰⁹ Because these CCR contract-based rights do not fit into any of the other incorporeal movable categories described above (i.e., accounts receivable, deposit accounts, and tort claims/judgments), the catch-all category is most appropriate. The residual nature of this category evidences the intent of the drafters of UCC article 9 and courts that have interpreted it to ensure that those particular rights in movable property that fail to meet the more narrowly drawn parameters of the other collateral categories nevertheless find a home in the catch-all of general intangibles.²¹⁰

A slightly colorable argument may be made that the control rights under the declaration are not really general intangible rights but are rather a form of investment property.²¹¹ As stated above, the right to control the association’s board of directors is arguably similar to the declarant owning a controlling number of shares of stock in the association.²¹² Investment property is another form of UCC article 9 collateral that is separate and apart from the various forms of incorporeal movables described above. Investment property includes securities and commodity contracts “of the kind traded in investment markets and regulated in part by Article 8 of the UCC.”²¹³ Shares of stocks in a corporation are also included in this classification.²¹⁴

UCC article 9 contemplates a complicated system for granting security (both in its attachment and perfection) in investment property that hinges, in part, on whether the property right is certificated or uncertificated and whether it is held directly or indirectly by the owner.²¹⁵ While the right to dictate the makeup of a corporate board is one of the rights that arises under shares of stock, stock also brings with it various other rights—including rights to profits and a distinct

208. See *Johnson v. Cottonport Bank*, 259 B.R. 125 (W.D. La. 2000).

209. *In re A. Angelle, Inc.*, 230 B.R. 287 (W.D. La. 1998) (“Although there are no Louisiana cases on point, case law from other jurisdictions uniformly holds that franchise agreements and licenses fall within the definition of “general intangibles.”). See, e.g., *In re Scheidmantel Olds–Cadillac, Inc.*, 144 B.R. 296 (W.D. Pa. 1992); *In re Topsy’s Shoppes, Inc.*, 131 B.R. 886, 888 (D. Kan. 1991); *In re Hengalo Enterprises, Inc.*, 51 B.R. 54 (S.D. Fla. 1985).

210. See generally Christopher K. Odinet, *Testing the Reach of UCC Article 9: The Question of Tax Credit Collateral in Secured Transactions*, 64 S.C. L. REV. 143 (2012).

211. See § 10:9-102(a)(49).

212. See *supra* Part II.B.

213. KILBORN, *supra* note 192, at 8–9. See also 3 PETER A. ALCES ET AL., *UNIFORM COMMERCIAL CODE TRANSACTION GUIDE* § 27:03 (2013).

214. KILBORN, *supra* note 192, at 8–9.

215. See *id.* at 8–9, 28–31.

ownership interest in the legal entity itself.²¹⁶ The declarant's right to control the board of the association is less like these other stock rights. The declarant does not own the association due to his or her control powers, nor does he or she derive a profit from the association in the same way that a shareholder is entitled to dividend payments.²¹⁷ In fact, the association is almost always qualified as a tax-exempt organization such that its operations and revenues cannot inure to the benefit of any private individual.²¹⁸ Thus, while it may be compelling to draw a parallel between this aspect of CCRs to the rights of control that arise in connection with shares of stock—and thus classify it as UCC article 9 investment property—it is more accurately classified as a form of UCC article 9 general intangible property.²¹⁹ But to be safe, a lender may choose to take a belt-and-suspenders approach and obtain a collateral interest in the control rights of the declarant under both the investment property method²²⁰ and under the method for collateralizing general intangibles.²²¹

C. Under the Law of Pledge—Gap Filling

Lastly, any discussion of the complexity and intricacies of collateralizing a declaration of CCRs would not be complete without at least visiting the law of pledge.²²² Until the advent of UCC article 9 in Louisiana, the Civil Code articles on the law of pledge served as the

216. MORRIS & HOLMES, *supra* note 202, §§ 25.01–26.04, at 633–55.

217. *See generally* LA. REV. STAT. ANN. § 9:1141.1–9 (Supp. 2014); *see also* LA. REV. STAT. ANN. § 9:1121.101–108 (2008).

218. *See* Carl B. Kress, Comment, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association*, 42 UCLA L. REV. 837 (1995); MCKENZIE, *supra* note 3, at 7.

219. *See* ALCES ET AL., *supra* note 213 (“Section 9–106 of the Code treats ‘general intangibles,’ collateral that does not fit within the other denominated categories, but which, nevertheless, has commercial value when hypothecated to a secured party. The majority of the cases treating collateral interests in general intangibles involve classification issues. Because the only way to perfect a collateral interest in a general intangible is by filing, a court’s classification of a property interest as a general intangible may frustrate the expectations of a secured party who failed to perfect its interest in the general intangible by filing. To protect the collateral from later challenges, the provident creditor will consistently treat items of dubious classification as general intangibles and file. The Official Comment to Section 9–106 lists several examples of general intangibles: goodwill, literary rights, rights to performance copyrights, trademarks and patents. Courts have determined that the general intangible classification is quite broad and that many property interests may fall within the scope of the classification. Interests in general intangibles arising in the future may be subject to the secured party’s collateral interest by including general intangibles within the scope of the after-acquired property clause.”).

220. *See* KILBORN, *supra* note 192, at 8–9, 28–31.

221. *Id.* at 10, 12–19.

222. *See* LA. CIV. CODE arts. 3133–3181 (2014).

primary vehicle by which to grant a security interest in movable property.²²³ The law of pledge is steeped in civil law history and—representative of its longevity—the pledge articles have remained relatively unchanged since the Civil Code of 1870.²²⁴

Much like the law of mortgage and UCC article 9, a right under the law of pledge is an accessory obligation²²⁵ that provides security for the performance of the principle obligation.²²⁶ And, like the other two security devices discussed above, a pledge creates a real right in the collateral, which gives the creditor the right to seize and sell the property in satisfaction of the debt.²²⁷ As to what types of property may be the object of a pledge, Louisiana Civil Code article 3142 states quite broadly that a debtor may “pledge whatever belongs to him,” which includes any incorporeal rights he or she may have in property.²²⁸ The various types of property that Louisiana courts have recognized as being susceptible of pledge include, among other things, security rights in shares of stock,²²⁹ the right to collect proceeds from a mineral lease,²³⁰ and even crops.²³¹ And, setting aside UCC article 9, because the movable aspects of CCRs are incorporeal, they too may be the object of a contract of pledge.²³²

However, one particularly interesting characteristic of the law of pledge is that it has historically required that the creditor maintain possession of the movable collateral in order to maintain his or her

223. In actuality, pledge is meant to encompass both pawn (the pledge of movables) and antichresis (the pledge of an immovable). However, for purposes of the article, the term “pledge” is used to mean the granting of a security interest under the law of pledge is only a movable. This is the common use of the term because antichresis has been so seldom used in modern Louisiana history. *See id.* art. 3134; *see also id.* art. 3135 (“A thing is said to be pawned when a movable thing is given as security; and the antichresis, when the security given consists in immovables.”). It should be noted that, as of this writing, the Louisiana State Law Institute is recommending a comprehensive revision to the law of pledge to clarify and update its rather dated provisions.

224. *See* RUBIN, *supra* note 192, at 61; *see also* Succession of Lanaux, 15 So. 708, 711–12 (La. 1894) (“The symbol of the pledge, in the Roman law, is the fist of the creditor closed on the pledge, denoting that actual possession which all recognize as linked to the pledge, and without which none can exist.”).

225. LA. CIV. CODE art. 3137 (2014).

226. *See id.* art. 3136.

227. *See id.* arts. 3133–3181; *see also* RUBIN, *supra* note 192, at 61.

228. *See* LA. CIV. CODE art. 3142 (2014).

229. *New Orleans Nat. Banking Ass’n v. Wiltz*, 10 F. 330 (E.D. La. 1881).

230. *Grace-Cajun Oil Co. No. 3 v. Fed. Deposit Ins. Corp.*, 882 F.2d 1008 (5th Cir. 1989).

231. *Weill v. Kent*, 28 So. 295 (La. 1900); *Nat’l Bank of Commerce v. Sullivan*, 41 So. 480 (La. 1906).

232. *See* LA. CIV. CODE art. 3153 (2014).

security right.²³³ And in the case of incorporeal rights—which of course cannot be reduced to physical possession—the Code requires that something must be substituted as a symbol to take the place of actual delivery.²³⁴ Thus, generally mere agreement of the parties to pledge an incorporeal right is not sufficient to effect fictitious possession to the pledgee;²³⁵ rather, some kind of symbol of the right must be delivered to the creditor.²³⁶ For example, “shares of stock in a corporation may be pledged by delivery of the stock certificate evidencing the interest in the corporation.”²³⁷ For a lender seeking to obtain a security right in a declaration of CCRs under the law of pledge, actual possession of the document would be impracticable—chiefly because the declaration must be recorded in the public records in order to have effects against third parties and detention of the declaration would not bestow any particular rights on the possessor. But, since the rights are incorporeal anyway, actual delivery is dispensed with under Civil Code article 3153.²³⁸ Such being the case, the declarant should create some kind of document evidencing his or her rights under the CCRs—such as an agreement for the collateral assignment and pledge of the rights under the CCRs—which would then be executed by the parties and retained by the lender.²³⁹

233. See *id.* art. 3152; see also *In re Pleasant Hill Lumber Co.*, 52 So. 1010 (La. 1910). But over time, courts overcame this obstacle in the law of pledge by stating that as long as the movable was initially transferred to the creditor, the creditor could then hand the property back to the debtor with the understanding that the debtor was holding it “in trust” on behalf of the creditor and that the security right remained in place. See *Britton v. Harvey*, 16 So. 747 (La. 1895). Evidence of this intent of the parties was typically accomplished through signing an agreement known as a “trust receipt.” See RUBIN, *supra* note 192, at 64.

234. See art. 3153; see also *Liberty Farms, Inc. v. Miller*, 45 So. 2d 610 (La. 1950).

235. *Caffin v. Kirkwan*, 7 La. Ann. 221 (La. 1852).

236. *Id.*

237. *Liberty Farms*, 45 So. 2d at 615.

238. Art. 3153.

239. See *id.*; see also *Liberty Farms*, 45 So. 2d 610. While the need to create a physical symbol of the incorporeal movable right being pledged, as articulated in *Liberty Farms*, has arguably been substantially limited through the 1989 revision to Louisiana Civil Code article 3158, it is nonetheless advisable to include self-serving language in the collateral pledge agreement to ensure that the lender and the debtor are both acknowledging the lender’s quasi-possession of the incorporeal CCR rights through its possession of the physical document. This confusion arises, in large part, due to missing Louisiana Revised Statutes section 9:4321, which was repealed in 2001 when UCC Article 9 was enacted and which dealt specifically with pledging incorporeal movable rights that are not evidenced by a written instrument. See *Citizens Bank & Trust Co. v. Consol. Terminal Warehouses, Inc.*, 460 So. 2d 663, 689 (La. Ct. App. 1984). Unlike promissory notes, bills of exchange, and the like, which are incorporeal rights evidenced by a writing, CCRs are rights that, although created through a written instrument, do not confer any rights upon the

While the use of the term “pledge” is still quite prevalent in Louisiana commercial transactions, it is merely the result of culture and custom, rather than any real use of the pledge articles.²⁴⁰ This is because in the 1990s, the Louisiana Legislature adopted UCC article 9, which almost completely superseded the articles on pledge.²⁴¹ Today, with some narrow exceptions, the sole vehicle whereby one may grant a security interest in movable property is by following the rules of UCC article 9, which are laid out in chapter 9 of Title 10 of the Louisiana Revised Statutes.²⁴² Thus, any attempt to grant a security interest in movable property after January 1, 1990, must comport with the rules of UCC article 9, as the law of pledge of movables—with few exceptions—is largely no longer applicable.²⁴³

Considering pledge’s lack of contemporary use and utility, one might wonder how it is implicated in the collateralization of a declaration of CCRs. Once again, the reason stems from the complex and multifaceted nature of the instrument itself. As indicated above, CCRs comprise a myriad of rights that are both considered movable and immovable.²⁴⁴ And, in some cases, it is difficult to tell whether a certain right is strictly movable or strictly immovable.²⁴⁵ For instance, the ability to appoint the members of the board of the association that governs the development would seem to be a contractual, personal right.²⁴⁶ However, one might also argue that because this right is incorporated into the declaration and so closely concerns the ability to exercise real rights over immovable property—i.e., increasing and collecting special assessments against the lots or units—that it could also be classified as a right in an immovable.²⁴⁷

The law of mortgage is one of narrow construction, meaning that only those certain types of immovable property listed in the Civil Code

holder of that written instrument. Thus, the repeal of Louisiana Revised Statutes section 9:4321 leaves a hole in the law as to how to perfect a proper pledge of an incorporeal movable when such a right is not evidenced by a writing.

240. See KILBORN, *supra* note 192, at 4.

241. RUBIN, *supra* note 192, at 61.

242. *Id.* See also LA. REV. STAT. §§ 10:9-101 to -809 (2002).

243. See LA. CIV. CODE art. 3133.1 (2014) (“This Title shall apply to pledges of movables that are delivered prior to the time Chapter 9 of the Louisiana Commercial Laws becomes effective, including without limitation those pledges that may secure future obligations and lines of credit, as well as to pledges entered into on or after the time Chapter 9 of the Louisiana Commercial Laws becomes effective that are exempt or otherwise excluded from coverage thereunder.”).

244. See *supra* Part II.A–B.

245. See *supra* Part II.A–B.

246. See *supra* Part I.A–B and accompanying discussion.

247. See *supra* Part I.A–B.

may be encumbered by this type of security device.²⁴⁸ Movable property is specifically excluded from the law of mortgage.²⁴⁹ However, Louisiana Revised Statutes section 10:9-109(d)(11) states that “[t]he creation or transfer of an interest in or lien on real property” is excluded from coverage under UCC article 9.²⁵⁰ In other words, the mixed nature of many of the rights in a declaration of CCRs might be too much like a right in a movable to be covered by the law of mortgage but too much like a right in an immovable to be covered by UCC article 9.²⁵¹ This begs the question of whether some aspects of the CCRs fall into a sort of gap in Louisiana law whereby they cannot be encumbered by a consensual security device at all. In these cases, a shrewd lender’s counsel should adopt a belt and suspenders approach and attempt to utilize what is left of the law of pledge to ensure any additional rights are picked up that might be precluded from collateralization under the laws of mortgage and UCC article 9.

Nevertheless, once a security right has been obtained in the CCRs—under any one or all of the aforementioned types of security devices available in Louisiana—the next important issue is determining what type of liability the lender subjects him or herself to upon foreclosure of his or her rights in the declaration. To what extent must the lender, now crowned declarant, pay for the sins and misdeeds of the original declarant?

III. SUCCESSOR DECLARANTS AND LIABILITY IN LOUISIANA

The question of successor liability for the lender, now turned declarant, is an issue that continues to vex Louisiana real estate lawyers. There is no direct statutory authority on point, and Louisiana courts have not yet created a jurisprudential solution. The source of this uncertainty likely arises out of the mixed nature of CCR declarations.²⁵² As is often the criticism by common law commentators, these association regimes are held together by a concoction of the law of easements, building restrictions, and land covenants, as well as special homeowner and condominium association statutes.²⁵³ In Louisiana, each of these various legal principles has different rules and requirements that either specifically address the liability of successors or fail to lay out a particular framework for

248. See *supra* Part I.A.

249. See *supra* Part I.A.

250. LA. REV. STAT. ANN. § 10:9-109(d)(11) (Supp. 2014).

251. See *supra* Part II.A–B.

252. See Natelson, *supra* note 77, at 50–51.

253. See Reichman, *supra* note 90.

liability altogether.²⁵⁴ As such, lenders and their attorneys are left with the question of whether to actually become the declarant after foreclosure because, despite the opportunity to have extensive legal control over the development, the potential for inherited liability is too great.²⁵⁵ Understanding the way in which liability passes—or does not—can be essential in determining what to do with collateral rights in the declaration upon a default. Choosing not to become the declarant can mean that the lender forfeits substantial authority and control over the quality, value, and continued maintenance of the overall development.

A. Under Assignment and Assumption Principles

Because the question of what regime or set of rules governs the liability of a lender who dons the mantle of the declarant remains unanswered, a review of several possibilities is in order. The first of these is the law of assignment and assumption of obligations, which is governed by Section 1 of Chapter 4, Title III of Book III of the Louisiana Civil Code: “Assumption of Obligations.”²⁵⁶ As a general rule, all obligations are transferable, unless they are strictly personal and therefore unable to be transferred.²⁵⁷ The Louisiana Civil Code provides a scheme for making this determination,²⁵⁸ but typically the rights and duties laid out in any declaration of CCRs will specifically state that the rights, duties, and obligations contained therein are freely assignable.²⁵⁹ And, even if such a statement is not so expressly made, it

254. See Uniform Condominium Act (1980), reprinted in UNIFORM REAL PROPERTY ACTS 7, 7–174 (1991); see also Uniform Common Interest Ownership Act (2008), reprinted in UNIFORM REAL PROPERTY ACTS 345, 345–556 (1991); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.4 (2000).

255. See *Oceanside Cmty. Ass’n v. Oceanside Land Co.*, 195 Cal. Rptr. 14 (Cal. Ct. App. 1983).

256. See LA. CIV. CODE, ch. 4, § 1, Title III of Book III (comprising LA. CIV. CODE arts. 1821–24 (2014)).

257. See LA. CIV. CODE art. 1765 (2014); see also SAUL LITVINOFF, OBLIGATIONS § 4.1, in 5 LOUISIANA CIVIL LAW TREATISE 55 (2d ed. 2001) (“The Louisiana Civil Code provides that every obligation is deemed heritable as to all parties, except when the contrary results from the terms or from the nature of the contract.”).

258. See LITVINOFF, *supra* note 257, §§ 4.11–.15, at 58–66 (describing the various tests and situations under which an obligation is deemed strictly personal and thus insusceptible of being assigned or otherwise transferred).

259. Master Declaration of Covenants, Conditions, and Restrictions for Lockwood Folly, *supra* note 129, art. II, § 9 (“The Declarant *may assign or pledge* any or all of its rights reserved under the land use documents through an assignment or in an instrument of conveyance or assignment.” (emphasis added)); Declaration of Covenants, Conditions, and Restrictions of Wyncroft, *supra* note 129, art. 9 (“Declarant shall have the right and power to assign and delegate to the respective associations, *or any successor or successors thereto*, at any time and from time to

is implied that such is the case because the developer will necessarily be transferring his or her rights in the declaration when authority and control is eventually ceded to the elected board of directors of the association.²⁶⁰

If the lender, through a security device as set forth above, obtains the rights of the declarant, then he or she has in some sense been assigned those rights and has correspondingly assumed the responsibilities and benefits that go with them.²⁶¹ Although Louisiana generally considers an assignment to include a transfer of title,²⁶² jurisprudence has also considered the granting of a security right under the auspices of the law of assignment.²⁶³ In terms of the transfer of debts, Louisiana law recognizes that as long as the “burden is not increased, rendering performance to one obligee or to another is relatively immaterial for the obligor, since he must perform anyway.”²⁶⁴ In this case, the lot or unit owners must perform—for instance, in the paying of regular assessments—vis-à-vis the declarant regardless of who occupies that position.²⁶⁵ And by the same token, it will likely not matter who is performing the declarant’s duties—such as regular maintenance of the development, ensuring the common areas are kept aesthetically pleasing, maintaining the facilities so they function properly etc.—as long as they are being done well and timely.²⁶⁶ There is an exception, of course, for when the obligee (i.e., the homeowner) is relying on some special skill of the obligor (i.e., the declarant) in performing such duties.²⁶⁷ But because the duties are typically outsourced to a third party (such as a property management company) and are, in fact, eventually turned over to the association’s elected board anyway, it is difficult to imagine a scenario whereby an

time, all or any part of any of the rights, powers, and authority contained in this Declaration.” (emphasis added)). For an example of such a clause in Louisiana, see Declaration of Covenants, Conditions, and Restrictions for Segnette Estates, *supra* note 129, at article XIII (“Declarant’s Rights. Any or all of the special rights and obligations of the Declarant set forth in this Declaration or the By-Laws may be transferred in whole or in part to other Persons . . .”) (emphasis added)).

260. See *supra* Part I.A–B.

261. See generally TITLE, *supra* note 109, § 16:1, at 1484–85.

262. See *Lusher v. Kilcrease*, 384 So. 2d 589 (La. Ct. App. 1980); see also *Dorvin Land Corp. v. Jefferson Parish*, 469 So. 2d 1011 (La. Ct. App. 1985); *White v. Gaines*, No. 6455, 1877 WL 8158 (La. Nov. 1877).

263. See, e.g., *Citizens Bank & Trust Co. v. Consolidated Terminal Warehouse, Inc.*, 460 So. 2d 663 (La. Ct. App. 1985).

264. LITVINOFF, *supra* note 257, § 10.3, at 226.

265. See *id.*

266. *Id.*

267. See *id.*

assignment would be prohibited.²⁶⁸ Moreover, because the declaration typically stipulates that all rights in the document are assignable, there is little question as to whether the owners' consents must be obtained.²⁶⁹

Two categories of assumptions are primarily discussed by obligations commentators.²⁷⁰ The first occurs when the obligee and a third party agree that the third party will perform on behalf of the obligor.²⁷¹ This scenario is inapplicable to the declarant–lender relationship described here as far as successor declarants are concerned. The second and more relevant assumption occurs when an obligor and a third party agree that the third party will assume the obligations that the obligor owes to the obligee.²⁷² Under such a scenario, the obligee's consent is not necessary (although the obligee may still give it) to make the agreement effective between the parties.²⁷³ Regardless of whether or not consent is given, both the third party and the original obligor are liable for the performance to the obligee.²⁷⁴ So of course, in our developer–declarant situation, the lender is the third party and the obligor is the declarant who owes various obligations to the owners under the declaration.²⁷⁵ By taking a security interest in the declaration, one might characterize the transfer that occurs when the lender exercises its rights and becomes the declarant itself as being a sort of transfer and assumption of the developer's rights under the declaration.²⁷⁶ However, Louisiana law does not require that the owners (the obligees to whom performance is due) consent to the transfer.²⁷⁷ Such being the case, the lender (now the declarant) and the developer (the original obligor) are *both* liable to the owners for whatever obligations are owed under the declaration.²⁷⁸

As is evident from the nature of CCR declarations, the declarant is both an obligee and an obligor.²⁷⁹ He or she both owes duties to the owners (regular maintenance and repair of the development and its facilities and common areas) and is owed duties by them in return (the timely payment of assessments, adherence to the rules and regulations

268. *See id.*

269. *See supra* note 129.

270. *See* LA. CIV. CODE arts. 1821, 1823 (2014); *see also* LITVINOFF, *supra* note 257, §§ 10.11–16, 10.21–26, at 228–39.

271. *See* art. 1823.

272. *See id.* art. 1821.

273. LITVINOFF, *supra* note 257, § 10.12, at 229.

274. *Id.* §§ 10.13–14, at 230–31.

275. *See supra* Part I.A and accompanying discussion.

276. *See supra* Part II and accompanying discussion.

277. *See* LITVINOFF, *supra* note 257, § 10.11, at 229.

278. *See id.* §§ 10.13–14, at 230–31.

279. *See supra* Part I.A.

of the development, etc.).²⁸⁰ The same duality of roles is true with respect to the owners as well.²⁸¹ Because the declaration is a form of bilateral or synallagmatic contract, whereby both parties (the declarant and the owners) may demand performance and owe performance reciprocally, both the active and the passive aspects of the agreement are transferred.²⁸² The assignment of such a complex agreement is recognized under Louisiana law, and by effecting such a transfer, the third party (the lender in this case) becomes the recipient of the performance owed by the owner and responsible for the obligations owed by the declarant.²⁸³

Thus, once the assignment is completed and the lender exercises its rights as the assignee under the declaration, there is a question of liability. Under the general theories of assumption, the assignee is responsible for all of the rights and duties of the assignor.²⁸⁴ Whatever obligations are due by the developer as the original declarant would be due by the lender as the successor declarant.²⁸⁵ Louisiana commentators often state that, similar to subrogation (assumption's cousin institution), the assignee steps into the shoes of the assignor for all purposes such that it occupies the very place in every respect as the one that it succeeded.²⁸⁶ The jurisprudence bears this out in practice.²⁸⁷

280. See *supra* Part I.A–B and accompanying discussion.

281. See LA. CIV. CODE art. 1908 (2014) (“A contract is bilateral, or synallagmatic, when the parties obligate themselves reciprocally, so that the obligation of each party is correlative to the obligation of the other.”).

282. See LITVINOFF, *supra* note 257, § 10.34, at 241–42.

283. See *id.* (“The inter vivos transfer of both the active and the passive side of an obligation, that is, the assignment of a credit-right on the one hand and the assumption of the corresponding obligation on the other, may be involved in a complex transaction such as the assignment of a bilateral or synallagmatic contract. Each party to such a contract is bound to render to the other a certain performance and is also obligee of the performance that the other party has bound himself to render in return, which is succinctly expressed by saying that parties to such contracts are reciprocally obligors and obligees. The case may be that one of those parties may agree with a third person to have the performance he owes under the contract rendered by that person, and may also assign to that person his right to receive the return performance. When such is the situation, the third person assumes the obligation of which one of the parties to the contract is obligor, and also becomes assignee, or transferee, of the credit-right which that party has as obligee.”).

284. See LITVINOFF, *supra* note 257, § 10.3, at 226–27.

285. See *id.*

286. See *id.* § 11.33, at 260 (“Aside from those differences, the rights acquired by an assignee and a subrogee are indeed the same. Both acquire, besides the principal right to demand performance from an obligor, any accessory rights that may accompany the principal right, including not only suretyship, as recognized by traditional law, but also the right of preference arising from mortgage, pledge or privilege. In the case of assignment of a credit-right, the wide range of accessory rights that may be acquired by the assignee is clearly stated in an article of the Louisiana Civil Code.”); see also *Dardar v. Ins. Guar. Ass’n*, 556 So. 2d 272 (La. Ct.

In *Hardy v. Whitney*,²⁸⁸ the court held that when a third party assumes the obligation to make repayment of the loan of another, he or she essentially “assume[s] whatever obligation was owed.”²⁸⁹ Similarly, the court in *McCrorry v. Terminix Service Co., Inc.* stated that when a contract is assumed under Civil Code article 1821, the assignee becomes bound entirely by its terms and “cannot be given relief merely because they assumed a bad and/or outdated bargain.”²⁹⁰ And the jurisprudence is replete with cases between assignees of mineral leases and their assignors arguing over the contractual language in assignment and assumption clauses as to whether the full force of Civil Code article 1821 has effected a complete transfer of all rights and obligations—including those involving remedial obligations for abandoned wells.²⁹¹

If the lender–declarant’s successor liability is characterized under the Louisiana Civil Code’s framework for assignment and assumption of obligations, then the liability for past bad acts and breaches by the developer as the declarant would pass automatically to the lender.²⁹² The lender, upon becoming declarant, would step into the shoes of the developer for all intents and purposes to the extent of the obligations and duties that are articulated and imposed in the declaration.²⁹³ Because the assumption of liability rules are so absolute, there would be little way for the lender to avoid liability, unless it had specifically, contractually limited itself in the security agreement with the developer at the onset. By agreeing to only assume certain rights and duties of the developer upon taking control as the new declarant, the lender would therefore be able—under the Civil Code article 1821 jurisprudence—to cherry-pick and limit its liabilities as successor under the declaration.²⁹⁴ Under this theory, the lender could essentially insulate itself from certain liabilities, but this, of course, assumes that the

App. 1990); *Dauphin v. Lafayette Ins. Co.*, 817 So. 2d 144 (La. Ct. App. 2002); *Horn v. Lacoste*, 793 So. 2d 319 (La. Ct. App. 2001).

287. See *Dardar*, 556 So. 2d 272; *Dauphin*, 817 So. 2d 144; *Horn*, 793 So. 2d 319.

288. 480 So. 2d 766 (La. Ct. App. 1985).

289. *Id.* at 769.

290. 609 So. 2d 883, 886 (La. Ct. App. 1992) (citing *Groom v. W.H. Ward Lumber Co.*, 432 So. 2d 984 (La. Ct. App. 1983)); *La. Power & Light Co. v. Mecom*, 357 So. 2d 596 (La. Ct. App. 1978).

291. See *Davis Oil Co. v. TS, Inc.*, 145 F.3d 305 (5th Cir. 1998); see also *Pinnacle Operating Co. v. Ettco Enters., Inc.*, 914 So. 2d 1144 (La. Ct. App. 2005); *Bradford v. Onshore Pipeline Constr. Co.*, 853 So. 2d 756 (La. Ct. App. 2004); *Union Oil Co. of Cal. v. Cheyenne Oil Props., Inc.*, 839 So. 2d 1170 (La. Ct. App. 2003).

292. See LITVINOFF, *supra* note 257, § 10.3, at 226–27.

293. See generally *id.*

294. *Id.*

obligations under the declaration are appropriately classified as being completely contractual in nature. As discussed below, many aspects of the CCRs are, in fact, closely tied to real rights that are governed by a wholly different regime.

B. Under Servitudes and Building Restrictions

The question of liability as to successors-in-title to property that is burdened by a predial servitude or building restriction raises interesting questions. As a general matter, the obligations that are imposed by building restrictions, such as those that comprise CCR declarations, run with the land.²⁹⁵ For some time, there was debate among Louisiana courts and commentators as to whether these obligations were personal obligations of the property owners that were consented to when the property was first purchased or if they were purely the result of real obligations.²⁹⁶ The Louisiana Supreme Court finally clarified this point in *Brier Lake, Inc. v. Jones*, holding that the obligations imposed in CCR declarations were to be classified solely as real obligations on the parcels, not personal obligations of the individual owners.²⁹⁷ In this same vein, referring to both building restrictions and servitudes, Professor Yiannopoulos further expounded that “the holder of a real right may abandon it by a unilateral act. Abandonment enables the holder of a real right to *avoid obligations and charges attached to a thing*.”²⁹⁸ Therefore, the liability of one who owes an obligation that derives from a real right may dispense with his or her duties by merely transferring the immovable to another.²⁹⁹

Thus, in viewing the issues of successor liability for declarants through the lens of building restrictions and servitudes, the successor declarant would seem to take on all the duties and liabilities of its predecessor.³⁰⁰ Because the obligation is derived purely from its association with the land—rather than with the individual owner—the transfer of the property would unavoidably transfer the obligation and

295. YIANNOPOULOS, *supra* note 130, § 195, at 523.

296. *See* *Mariner’s Vill. Master Ass’n, Inc. v. Cont’l Props.*, 639 So. 2d 1188, 1193 (La. Ct. App. 1994); *see also* *Vill. Square Shopping Ctr. Ass’n v. Nelson*, 522 So. 2d 163 (La. Ct. App. 1988).

297. 710 So. 2d 1054, 1063 (La. 1998) (“Jones’ property was, by virtue of the recordation of the validly enacted Original Restrictions, subject to the Original Restrictions requiring the affirmative duty of paying assessments, not to exceed \$180.00 per year. We hold that this obligation is properly characterized as a building restriction and is subject to the two-year prescriptive period of La. C.C. art. 775 and is not a personal obligation under La. C.C. art. 3499. To the extent that *Mariner’s Village*, *supra*, and *Village Square*, *supra*, held otherwise, they are overruled.”).

298. YIANNOPOULOS, *supra* note 90, § 214, at 396.

299. *See id.*

300. *See id.*

any past failures to perform the obligation that accompanied it.³⁰¹ Therefore, it necessarily follows that it would be impossible to separate the liability for nonperformance of a real obligation from the real obligation itself.³⁰² To do so would undermine the very idea that the duties that are attendant upon holders of immovable property subject to a real obligation are not the personal obligations of the owner.³⁰³ If such is the case, then the lender who assumes the role of declarant necessarily assumes the obligations of the original declarant who failed to perform.³⁰⁴ Because the duties, both affirmative and negative—which are comprised chiefly of building restrictions and servitudes—are real obligations that are imposed upon the entire development, then any subsequent transfer of the development would necessarily effect a transfer of those rights and duties.³⁰⁵ And the developer (as the original declarant) is able to “avoid obligations and charges attached to” the property by transferring it to another.³⁰⁶ This result seems harsh but would be consistent with the general principles governing the transfer of immovable property subject to a real obligation in Louisiana.

A look to the common law is instructive in this area. Interestingly, the Restatement (Second) of the Law of Property (Servitudes) provides some direct guidance as to successors of covenants and servitudes, which are utilized in a comprehensive common interest community declaration.³⁰⁷ Section 4.4(1) states that:

An original party or successor to a servitude burden that runs with an interest in property incurs liability on account of the servitude burden only for obligations that accrue during the time the party or successor holds the burdened property interest.³⁰⁸

The comments to the provision explain that the liabilities of a successor to a servitude are limited to only those that arise during the time the successor holds the servitude.³⁰⁹ Any obligations that might have accrued prior to the transfer are not applicable to the successor.³¹⁰ The example given in the comments illustrates how a transferor is liable to pay assessments levied against the property pursuant to a

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.4 (2000).

308. *Id.* § 4.4(1).

309. *Id.* cmt. b.

310. *Id.* *See also* Bd. of Dirs. of Olde Salem Homeowners' Ass'n v. Sec'y of Veterans Affairs, 589 N.E.2d 761 (Ill. App. Ct. 1992).

neighborhood declaration up to the date of the transfer.³¹¹ The transferee is only liable for assessments after the date of transfer *and not for prior unpaid assessments accruing before the transfer*.³¹² Thus, the general rules set forth in the Restatement would suggest that the successor declarant is not liable for the past, unfilled obligations of its predecessor declarant, such that the lender could exercise its security rights without fear of being forced to pay for the sins of the developer.

However, the guidance from the Restatement regarding affirmative obligations, and breaches thereof, with regard to successors is a bit more complex.³¹³ In general, common law courts have imposed declaration obligations that are of a continuing nature upon a successor.³¹⁴ For instance, if the declaration states that the declarant is responsible for maintaining the community golf course, a successor declarant will be held liable for this continued obligation of maintenance and repair.³¹⁵ However, Restatement section 4.4(3) describes a more nuanced, contract-based carve-out to this general rule for successor liabilities in stating that “[t]he duration of any person’s liability to perform a servitude burden in gross is determined according to the rules governing liability to perform contractual obligations.”³¹⁶ As such, common law courts have further elaborated on this contract-based exception.³¹⁷ If a developer was bound in the declaration under contract (rather than in property) to construct certain common facilities but neglected to do so, he or she would nonetheless continue to be responsible for fulfilling this obligation even after his or her rights as declarant had been transferred to another party.³¹⁸ Thus, if the declarant failed to construct the community pool as dictated by the declaration and subsequently transferred his or her rights under the declaration to another, the successor might be relieved by a court from

311. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.4(1) cmt. b (2000).

312. See *id.* The comments do, however, indicate that “parties to covenants may, of course, create obligations that will continue to bind the covenantor after transfer of the property, subject to the limitations imposed by Chapter 3 [] on restraints on alienation and restraints on trade or competition.” *Id.*

313. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.4(3) (2000).

314. *Oceanside Cmty. Ass’n v. Oceanside Land Co.*, 195 Cal. Rptr. 14, 20 (Cal. Ct. App. 1983) (“Generally, after the covenantor transfers the land and his or her successor becomes liable on the covenant, the covenantor is relieved from further obligation.”).

315. *Id.*

316. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.4(3) (2000).

317. See *Associated Grocers of Iowa Coop., Inc. v. West*, 297 N.W.2d 103 (Iowa 1980).

318. See *City of Glendale v. Barclay*, 385 P.2d 230 (Ariz. 1963); *Indian Lake Maint., Inc. v. Oxford First Corp.*, 572 So. 2d 536 (Fla. Dist. Ct. App. 1990); *Associated Grocers of Iowa Coop., Inc.*, 297 N.W.2d 103.

having to construct the pool because of the original contractual obligation of the developer to complete said construction.³¹⁹

Under this line of cases, the question of successor liability for affirmative obligations to construct common areas might be a bit more uncertain. If the developer–declarant’s obligations could be classified as purely contractual in nature, then the duty to construct these common facilities or improvements would remain with him or her, despite a third party having become the declarant.³²⁰ But, if the duty was recognized as merely a continuing obligation of the declarant under the declaration, then it would be more akin to an obligation arising from a covenant and therefore transfer to the successor with the property itself.³²¹ Still, some states have specifically legislated with respect to the issue, such as section 1466 of the California Civil Code, which provides that “[n]o one, merely by reason of having acquired an estate subject to a covenant running with the land, is liable for a breach of the covenant before he acquired the estate, or after he has parted with it or ceased to enjoy its benefits.”³²²

It is possible that Louisiana courts might similarly distinguish a duty in a declaration that derives from contract principles from one that is derived from real obligations in limiting a successor declarant’s liability. However, such a distinction would likely be born from the specific facts and circumstances of each case (and the dictates of equity) rather than from any firm rules.³²³ Such a shifting, fact-based framework greatly diminishes the ability of the successor declarant to accurately weigh and balance its potential liabilities with any certainty because the characterization of the various rights under the declaration would be left to the discretion of the courts.

319. See generally GERALD KORNGOLD, *PRIVATE LAND USE ARRANGEMENTS* § 9.14 (1990).

320. See *id.*

321. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.4, reporter’s note (2000); see also *Oceanside Cmty. Assoc. v. Oceanside Land Co.*, 195 Cal. Rptr. 14 (Cal. Ct. App. 1983).

322. CAL. CIV. CODE § 1466 (Westlaw 2007); FLA. STAT. ANN. §§ 718.116 (for condominium unit owners), 719.108 (for cooperative unit owners), 721.15 (for time-share-period owners) (Westlaw 2014).

323. It should be noted that Louisiana courts have historically been hesitant in utilizing equity when it concerns real rights due to the strictness of the public records doctrine. See, e.g., *Title Research Corp. v. Rausch*, 450 So. 2d 933 (La. 1984). Nonetheless, when confronted with a result that would be offensive to notions of fairness and justice, Louisiana courts have shown a willingness to employ extra-statutory reasoning in order to reach a more balanced or equitable approach. See, e.g., *Stolier v. Stolier*, 357 So. 2d 1334 (La. Ct. App. 1978); *Nelson v. Burkeen Const. Co.*, 717 So. 2d 261 (La. Ct. App. 1998); *Commercial Union Ins. Co. v. CBC Temporary Staffing Servs., Inc.*, 897 So. 2d 647 (La. Ct. App. 2004).

C. Under Corporate Law Theories

Another theory under which the question of successor liability for lenders who become declarants might be resolved stems from theories of corporate law.³²⁴ The general rule of American corporate law is that when one legal entity sells or otherwise transfers its property to another legal entity, the assets are transferred free and clear, except for any valid and preexisting security rights or liens.³²⁵ However, exceptions have been made over time to help blunt the harsh and unfair results that can come from a strict application of this general principle.³²⁶ Sometimes these exceptions came from legislative acts, and other times they sprang from the equitable powers of the courts.³²⁷ Although generally derived from similar theories that aim to pierce through the corporate structure when justice so requires, some lawyers and commentators have argued that the exception theories to successor liability arise under tort law principles as well.³²⁸

Louisiana courts have taken a particularly amorphous view with regard to successor liability, often rejecting the notion of adopting a uniform or “ultimate test of successor firm liability.”³²⁹ However, they have generally followed much of the same analysis on certain instances of successor liability as common law courts.³³⁰ The first scenario for successor liability in Louisiana, and often the easiest to understand, involves the express or implied assumption of liabilities.³³¹ In this case, Louisiana courts have looked to whether the facts of the parties, specifically the successor, evidence an intent to assume the obligations of the transferor.³³² The justification behind this theory is to look to the business negotiations between the parties and respect their allocation of transferred responsibilities.³³³ Under the successor declarant scenario, it might be difficult to discern whether the borrower and the lender ever really came to an agreement as to the liability between them should the lender become the declarant because the anticipation of both

324. See generally George W. Kuney, *Successor Liability in Louisiana*, 55 LA. B.J. 172 (2007).

325. See George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*, 6 FLA. ST. U. BUS. L. REV. 11 (2007).

326. Kuney, *supra* note 324.

327. *Id.* at 172. See also Steven L. Schwarcz, *Collapsing Corporate Structures: Resolving the Tension Between Form and Substance*, 60 BUS. LAW 109 (2004).

328. Kuney, *supra* note 324.

329. *Bourque v. Lehmann Lathe, Inc.*, 476 So. 2d 1125 (La. Ct. App. 1985).

330. See Kuney, *supra* note 324.

331. See *id.*; see also Michael J. Zaino, *Bielagus v. EMRE: New Hampshire Rejects Traditional Test for Corporate Successor Liability Following an Asset Purchase*, 45 N.H. B.J. 26 (2004).

332. *Bourque*, 476 So. 2d at 1127.

333. *Id.*

parties, at least at the onset, is that there would never be a default and the loan would be paid in full.³³⁴ Nonetheless, perhaps the use of this theory would suggest that the lender and the borrower could agree in the collateral security documents that should the lender become the declarant, all liability for preexisting acts should remain with the borrower.³³⁵ In such a case, this theory of corporate-successor liability would suggest that the court would respect the agreement between the parties.³³⁶ However, the agreement of the parties as to the allocation of risks might leave all liabilities with a defunct corporation and thereby cause great inequity to third-party claimants. As such, Louisiana courts have been reluctant to fully endorse this theory of successor liability, preferring to distinguish the facts of each case to provide a course of redress that is fair to third parties.³³⁷

Fraud is at the core of Louisiana's second theory of successor liability.³³⁸ This theory is typically seen in the creditor-fraud scenario whereby a debtor-corporation transfers certain valuable assets—which would otherwise be the common pledge of its creditors—to a separate but affiliated corporation.³³⁹ By doing so, the debtor-corporation hopes to remove the assets from possible seizure by its creditors.³⁴⁰ The Louisiana Supreme Court stated in *Wolff v. Shreveport Gas* that it would attach the ancestor's liability to the successor when a transfer of assets was made to perpetuate fraud.³⁴¹ But, the creditor-fraud theory is less applicable to the lender turned declarant scenario. The borrower-developer is not attempting to transfer its powers under the declaration to escape its responsibilities to the association members.³⁴² Rather, power is being unwillingly wrenched from it by its creditor because of its failure to pay the loan.³⁴³ Because the transfer is involuntary on the part of the transferor, it is doubtful that this fraud-based theory would

334. *See generally id.*

335. *Id.*

336. *Id.*

337. *See* Kuney, *supra* note 324, at 173; *see also* TLC Novelty Co., Inc. v. Perino's Inc., 881 So. 2d 1267 (La. Ct. App. 2004); Morrison v. C.A. Guidry Produce, 856 So. 2d 1222 (La. Ct. App. 2003); Central Bus. Forms Inc. v. N-Sure Sys. Inc. 540 So. 2d 1029 (La. Ct. App. 1989).

338. *See* Kuney, *supra* note 324, at 173; *see also* Milliken & Co. v. Duro Textiles, LLC, 19 Mass. L. Rptr. 509 (Mass. 2005) (discussing the causation requirements involved in this theory).

339. Kuney, *supra* note 324, at 173.

340. *Id.*

341. 70 So. 789 (La. 1916).

342. *See supra* Part I.C and accompanying discussion.

343. *See supra* Part I.C and accompanying discussion.

play a part in imposing liability under the declaration upon the lender.³⁴⁴

The last theory under which Louisiana courts have imposed successor liability in abrogation of the general rule against it involves *de facto* mergers.³⁴⁵ The main aspects of this theory were also announced by the Louisiana Supreme Court in *Wolff v. Shreveport Gas*.³⁴⁶ This theory can arise in any of four scenarios.³⁴⁷ The first involves multiple corporations ceasing to exist, with only one new entity left at the end.³⁴⁸ The second involves a situation whereby “one of the corporate parties ceases to exist while the other continues.”³⁴⁹ The third involves a new corporation that, although not formally, is, in reality, “the reincarnation of the old one.”³⁵⁰ And lastly, the fourth involves a shell corporation that, although it continues to exist, has in fact merged with another entity that has acquired all of its assets and business.³⁵¹ In each of these scenarios, it is difficult to see how a lender–declarant would be imposed with liability, unless the borrower and the lender were affiliate companies or the borrower was a wholly owned subsidiary of the lender.³⁵² If such were the case, then the doctrine of continuation of corporate existence that was articulated in *Wolff* and its progeny would seem to apply.³⁵³

In reviewing all of the possible theories under which Louisiana courts impose successor liability, it seems likely that the declarant–lender could only fall into the first category.³⁵⁴ In such a case, it would be incumbent upon the lender to ensure that it does not contract with the borrower so as to suggest that it will assume past obligations and liabilities under the declaration.³⁵⁵ Nevertheless, it should be remembered that the doctrine of successor liability in corporate law is an equitable one, meant to provide fairness to the parties when justice demands that liability transfer to a successor.³⁵⁶ It is not difficult to

344. See *supra* Part I.C and accompanying discussion regarding the specific facts and circumstances surrounding CCRs and the fact scenarios under which Louisiana’s various successor liabilities arise.

345. See generally G. William Joyner III, *Beyond Budd Tire; Examining Successor Liability in North Carolina*, 30 WAKE FOREST L. REV. 889, 894 (1995).

346. 70 So. at 794.

347. Kuney, *supra* note 324, at 174.

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. See *id.*; see also *Nat’l Sur. Corp. v. Pope Park, Inc.*, 121 So. 2d 240, 243 (La. 1960); *Russell v. SunAmerica Sec., Inc.*, 962 F.2d 1169, 1175 (5th Cir. 1992).

354. Kuney, *supra* note 324, at 173.

355. *Id.*

356. See MORRIS & HOLMES, *supra* note 202, § 37.02, at 279.

imagine that a court, when faced with claims by association members for unfulfilled obligations of the declarant, might turn away from the broke and financially distressed developer and to the resource-rich and capable lender to provide relief.³⁵⁷ As with all doctrines that are born out of equity, the lack of clear rules and guidelines makes predictability difficult.³⁵⁸

IV. FAIRNESS AND FLEXIBILITY: CRITIQUES AND A PROPOSED SOLUTION

Louisiana law presents a variety of possible theories, but no definitive answers, as to the issue of successor liability for lenders turned declarants.³⁵⁹ Louisiana law provides a relatively small menu of options for courts to use in dealing with these complicated lender–borrower–third-party-owner transactions.³⁶⁰ In trying to balance the rights of the parties and provide the most fair and market-efficient solution, courts have very few doctrines with which to wield and none are squarely on point.³⁶¹

A. A Critique of State Doctrinal Possibilities

While all or any one of the concepts and doctrines offered above could arguably be used to fill the gaps in determining liability for lenders turned declarants, they all come with their own unique set of limitations and complications.³⁶² First, because it is the granting of a security interest in the declaration that allows the lender to become the declarant, it arguably makes sense to use assignment and assumption concepts to determine the liability of a successor declarant.³⁶³ However, this analysis presents its own set of problems because an absolute application of the rules of assignment and assumption could variously create too great a burden on the lender in being subject to the

357. *See generally id.*

358. *Id.*; *see also* Kuney, *supra* note 324, at 173 (“When examining successor liability, especially when crossing from one jurisdiction to another, one should keep in mind that there is variance and overlap between the species and their formulation in particular jurisdictions. The label a court uses for its test is not necessarily one with a standardized meaning applicable across jurisdictions. Accordingly, it is dangerous to place too much reliance on a name; the underlying substance should always be examined.”).

359. *See supra* Part III.A–C and accompanying discussion.

360. *See supra* Part III.A–C.

361. *See supra* Part III.A–C.

362. *See supra* Part III.A–C.

363. *See supra* Part III.A.

past misdeeds of the borrower or too little accountability on the new declarant vis-à-vis the unit or lot owners.³⁶⁴

Alternatively, because servitudes and building restrictions are so intimately bound up in the common interest community concept—whether used in an apartment building, a commercial office/retail development, or a residential subdivision—it seems persuasive to analyze successor liability under Louisiana’s property-oriented principles.³⁶⁵ However, these frameworks are fairly broad and would seem to absolutely transfer the real obligations (including obligations arising from nonperformance) to the successor owner, without regard to the culpability of the prior owner.³⁶⁶ And while the Restatement of Property (Servitudes) provides a more nuanced approach that contemplates the timing and nature of real obligations arising from the owner of land vis-à-vis owners in a chain of title, this approach has not been adopted in Louisiana.³⁶⁷ Further, the Restatement’s contract versus real rights distinction is inconsistent and lacks the level of clarity that would be needed to truly create a reliable resolution to the issue of successor declarant liability.³⁶⁸

Lastly, corporate law’s varied scheme for successor liability provides a fairly nuanced construction that could serve as a guidepost in helping to determine the question of successor liability.³⁶⁹ However, the jurisprudence that directs and informs corporate successor liability is distinctly different from the facts and circumstances of most lender collateral take-over scenarios. In addressing the issue of lender liability for declarants, Louisiana will likely employ various portions of the laws of assignment, assumption, servitudes, building restrictions, and corporate successor liability to craft a fair and suitable remedy.³⁷⁰ The question that arises, however, is to what extent any of these theories, even when combined or amalgamated with one another, can provide the necessary tools to craft a remedy that comports with the need to limit liability in order for the real estate financing market to operate efficiently but also provides the protections deserved by the unit or lot owners when a prior declarant has caused them to suffer a loss.³⁷¹

364. *See supra* Part III.A.

365. *See supra* Part III.B.

366. *See supra* Part III.B.

367. *See supra* Part III.B.

368. *See supra* Part III.B.

369. *See supra* Part III.C.

370. *See supra* Part III.C.

371. *See supra* Part III.C.

B. The Community Regime Approach

Despite their individual deficiencies, the theories offered above³⁷² share one common flaw: none are meant to deal with the very detailed, sophisticated, and complex nature of common-interest developments.³⁷³ The beauty—as well as the complexity—of these developments, which comprise such an assortment of parties, uses, purposes, and functions, is that they are only made possible by a combination of elements from all of these assorted legal regimes.³⁷⁴ The transferability and assignment of rights help provide a structure to facilitate the necessary financing that makes the construction and operation of the project possible.³⁷⁵ Principles of real charges on property in the form of servitudes and building restrictions provide mechanisms to enforce standards of quality and infuse the declaration with functionality and authority.³⁷⁶ And finally, the interposition of corporate and business entity constructs make continuing governance and order possible for the duration of the development's life.³⁷⁷

However, the issue of successor liability for declarants is a very specific and idiosyncratic problem that is particular to these types of developments where the parties bind themselves to a government-style private structure of rights and duties to acquire, maintain, and develop their common-ownership interests in the property.³⁷⁸ The complex arrangement of these parties—the owners, the developer, and the lender—does not neatly fit into any of the above legal regimes. In order to address such a nuanced issue born out of such a complex and multifaceted legal framework, only a comprehensive legislative enactment that is specifically geared toward these types of developments can effectively address the issue.³⁷⁹

1. Deficiencies in Current Statutory Frameworks

Louisiana has adopted a comprehensive framework for at least two different types of common interest communities.³⁸⁰ The first is the Louisiana Condominium Act (LCA), which was first enacted as the Horizontal Property Act of 1962 but was amended, renamed, and

372. See *supra* Part III.A–C.

373. See *supra* Part III.A–C.

374. See *supra* Part III.A–C; see also *supra* Part I.A–C and accompanying discussion.

375. See *supra* Part III.A.

376. See *supra* Part III.B.

377. See *supra* Part III.C.

378. See *supra* Part I.A–C and accompanying discussion.

379. See generally *supra* Part I.A–C.

380. YIANNPOULOS, *supra* note 90, § 144, at 334–35.

reenacted in both 1974 and again in 1979.³⁸¹ While the general rules of ownership in the Louisiana Civil Code do not recognize or allow such a system of ownership of vertical units and co-ownership of common elements in the way that condominiums are contemporarily thought of, the LCA provides a special legal regime that supplements the Louisiana Civil Code and allows for such a structure.³⁸²

The other common interest community system that has been specifically codified in Louisiana is the Louisiana Homeowners Association Act (LHOA).³⁸³ Much like the LCA, the LHOA allows for the establishment of a single, comprehensive legal regime that is given the power—through a combination of corporate law, building restrictions, and servitudes—to provide and maintain uniform and quality standards for the grounds, buildings, and improvements within a residential subdivision.³⁸⁴ Both statutes allow for, among other things, the creation of an association to govern the community, the ability to dictate aesthetic and other property standards to maintain the quality of the development, and the power to impose fees that constitute liens against the property that support the costs and expenses of maintenance and repair.³⁸⁵

However, despite their many useful qualities, neither the LCA nor the LHOA address the duties and responsibilities of lenders who step into the shoes of the declarant vis-à-vis the unit or lot owners within the common interest community.³⁸⁶ The LHOA defines a declaration as “any instrument, however denominated, that establishes or regulates, or both, a residential planned community, and any amendment thereto” but does not elaborate any further as to its effects or the transfer or the rights under it.³⁸⁷ Similarly, the LCA actually mentions the declarant and imposes on the declarant a duty to collect two months’ worth of assessments at the time of the initial sale of the units in order to build up an association reserve but goes no further to address the potential

381. LA. REV. STAT. ANN. § 9:1121.101 (2008).

382. YIANNOPOULOS, *supra* note 90, § 144, at 334–35. (“Like its predecessor, the Condominium Act of 1979 is a statute of limited scope, ancillary to the Civil Code. As a specialized extension of the Civil Code, the statute ought to be interpreted against the background of the Louisiana civilian tradition and in harmony with it. Matters not directly determined by the act will be resolved by application of the pertinent provisions of the Civil Code. It ought to be kept in mind that the act does not authorize horizontal division of all immovables, but merely of immovable property subjected to a condominium regime by the appropriate declaration.”). *See also* Tyler J. Douglas, *Unreasonable Results from the Lack of Reasonableness Standard in the Louisiana Condominium Act*, 12 LOY. J. PUB. INT. L 209 (2010).

383. LA. REV. STAT. ANN. §§ 9:1141.1–9 (2008).

384. *Id.*

385. *See id.*

386. *Id.* §§ 9:1121.101, :1141.1–9.

387. *Id.* § 9:1141.2.

liabilities once he or she is no longer the declarant.³⁸⁸ In essence, Louisiana's only two statutes that are directly related to the creation and governance of common interest communities are completely devoid of any guidance as to what rights and duties a successor inherits when he or she dons the mantle of the declarant.³⁸⁹ Although Louisiana has not ventured down the path of creating a single, comprehensive common interest community statute that addresses, among other things, successor liability for declarants, various model and uniform acts dealing specifically with such developments offer several viable options.

2. *The Uniform Common Interest Ownership Act*

Model and uniform acts often serve as guideposts to Louisiana courts in looking to fill gaps in the law.³⁹⁰ In many instances, the Louisiana Legislature has adopted—either wholesale or merely in part—various model or uniform acts as part of an ongoing effort to modernize and improve state law in a given area.³⁹¹ The Model Business Corporation Act,³⁹² the Model Execution of Wills Act,³⁹³ various articles from the Uniform Commercial Code,³⁹⁴ and the Model Act Governing the Representation of Children in Abuse Neglect³⁹⁵ are just a few of the uniform acts that have been used in furthering efforts to provide more efficiency in the law and to harmonize Louisiana law with the law of other states.³⁹⁶

And while model and uniform acts can and are promulgated by a variety of groups across the country and around the globe, a

388. *Id.* § 9:1121.101.

389. *Id.*; *id.* § 9:1141.1–9.

390. See Christopher K. Odinet, *The Anchor Effect—Contemporary Legal Reform, the Civil Law Tradition, and Changing Expectations*, 88 TUL. L. REV. (forthcoming Spring 2014).

391. See *id.*

392. See, e.g., LA. REV. STAT. ANN. § 9:286 (2008). The editor's comment notes: "This section is derived from the more extensive provisions on indemnification contained in the 1983 Revised Model Business Corporation Act." *Id.*

393. See LA. REV. STAT. ANN. § 9:2401, editor's note (2005) ("This section was based upon the 'Uniform Wills Act, Foreign Executed, of 1910' which was declared obsolete when its provisions were incorporated in and covered by § 7 of the 'Model Execution of Wills Act, of 1940.' The latter act has not been adopted by the legislature, but its improved language was tracked in this Section.").

394. See LA. REV. STAT. ANN. §§ 10:1-101 to -109, :3-101 to -807, :4-101 to -504, :4a-101 to -507, :5-101 to -118, :7-101 to -701, :8-101 to -511 (2003); LA. REV. STAT. ANN. §§ 9-101 to -809 (2002).

395. See LA. CHILD. CODE art. 679 cmt. b (2014) ("These changes are consistent with the A.B.A. Model Act Governing the Representation of Children in Abuse Neglect, and Dependency Proceedings adopted in August, 2011.").

396. See generally Odinet, *supra* note 390.

particularly influential organization that has made a substantial impact in the ongoing effort to harmonize the various laws in the United States is the National Conference of Commissioners on Uniform State Laws (ULC).³⁹⁷ Among the areas of the law given treatment by the ULC include efforts to deal with real estate collective or associated type communities.³⁹⁸ Its first efforts resulted in the Uniform Condominium Act of 1977, the Uniform Planned Community Act of 1980, and the Model Real Estate Cooperative Act of 1981.³⁹⁹ But there was a general desire to combine these various related and similar legal regimes into one model act.⁴⁰⁰ This desire resulted in the 1982 promulgation of the Uniform Common Interest Ownership Act (UCIOA).⁴⁰¹ The UCIOA was meant to supplant and take the place of the three prior acts by creating a comprehensive framework for all common-interest ownership regimes, which would be able to contemplate the legal needs and desires of those building, working, and living in condominiums, cooperative developments, and other types of planned communities.⁴⁰²

In order to fulfill these omnibus goals, the UCIOA was drafted to be both wide-ranging and all-inclusive such that it covers everything from the creation of the common interest real estate community, to the management and proper administration of the development, all the way to the termination, in whole or in part, of the entire regime.⁴⁰³ And—because real estate transactions have taken on a greater complexity over time—the UCIOA also provides a prophylactic framework of disclosures, warranties, buyer's rights, and other consumer protections.⁴⁰⁴

397. See generally Henry D. Gabriel, *The Revisions of the Uniform Commercial Code—Process and Politics*, 19 J.L. & COM. 125, 126 (1999).

398. See generally Robert Kratovil, *The Declaration of Restrictions, Easements, Liens, and Covenants: An Overview of an Important Document*, 22 J. MARSHALL L. REV. 69, 79–80 (1988).

399. See *Common Interest Ownership Act Summary*, UNIFORM L. COMMISSION, NAT'L CONF. OF COMMISSIONERS ON UNIFORM ST. L., <http://uniformlaws.org/ActSummary.aspx?title=Common%20Interest%20Ownership%20Act> (last visited Nov. 7, 2013) [<http://perma.cc/EB5Q-KL7K>] (archived Mar. 10, 2014).

400. See generally *id.*

401. *Id.*

402. *Id.* See also Gordon H. Buck, *Beware the Inadvertent Condominium the Commercial Common Interest Community—Choices under the Uniform Condominium Act*, 22 REAL PROP. PROB. & TR. J. 65 (1987).

403. See *Common Interest Ownership Act Summary*, *supra* note 399.

404. *Id.*

a. Liability for Original Declarants Under the UCIOA

Interestingly, the UCIOA provides very specific guidance as to successor liability for declarants.⁴⁰⁵ In fact, not only does the UCIOA contain provisions that are specifically on point, it contains a rather intricate framework that attempts to balance the rights of the innocent successor declarant and the rights of the injured lot or unit owners who have suffered a loss.⁴⁰⁶ Specifically, section 3–104 of the UCIOA provides for the effects of the transfer of declarant rights.⁴⁰⁷ The section states that when a declarant has transferred rights under the declaration, the declarant’s liability is as follows:

- (1) A transferor is not relieved of any obligation or liability arising before the transfer and remains liable for warranty obligations imposed upon him by this [act]. Lack of privity does not deprive any unit owner of standing to maintain an action to enforce any obligation of the transferor.
- (2) If a successor to any special declarant right is an affiliate of a declarant[], the transferor is jointly and severally liable with the successor for any obligations or liabilities of the successor relating to the common interest community.
- (3) If a transferor retains any special declarant rights, but transfers other special declarant rights to a successor who is not an affiliate of the declarant, the transferor is liable for any obligations or liabilities imposed on a declarant by this [act] or by the declaration relating to the retained special declarant rights and arising after the transfer.
- (4) A transferor has no liability for any act or omission or any breach of a contractual or warranty obligation arising from the exercise of a special declarant right by a successor declarant who is not an affiliate of the transferor.⁴⁰⁸

Thus, under this regime, the developer, as the original declarant, is not off the hook for his or her own bad acts or failure to fulfill obligations.⁴⁰⁹ Specifically, the UCIOA provides that liability remains with the developer for those obligations and duties that arose under his or her reign as declarant and continue even when the declarant powers have been placed into the hands of another.⁴¹⁰

405. See Uniform Common Interest Ownership Act, UNIFORM LAW COMMISSION (2008).

406. *Id.* § 3–104.

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

b. Liability for Successor Declarants Under the UCIOA

However, section 3–104 further stipulates, in pertinent part, explicitly what liabilities a successor declarant, such as a lender who forecloses on its security rights in the declaration, incurs.⁴¹¹ Generally, all successor declarants are subject to the obligations and liabilities imposed by the UCIOA or the declaration, but, importantly, they are not subject to liabilities that might arise out of

- (A) Misrepresentations by any previous declarant;
- (B) Warranty obligations on improvements made by any previous declarant, or made before the common interest community was created;
- (C) Breach of any fiduciary obligation by any previous declarant or his appointees to the executive board; or
- (D) Any liability or obligation imposed on the transferor as a result of the transferor’s acts or omissions after the transfer.⁴¹²

Here, the UCIOA’s framework contemplates the exact scenario involving Realty Bank, Developer A, and Bluebell Lane discussed in the introduction above as to what position a lender is placed when it dons the mantle of the declarant.⁴¹³ The risk and uncertainty that faces the lender in determining whether to foreclose on the declaration is made explicit and certain by the dictates of the statute.⁴¹⁴

411. *Id.*

412. *Id.* See also *id.* cmt. 1 (“This section deals with the issue of the extent to which obligations and liabilities imposed upon a declarant by this Act are transferred to a third party by a transfer of the declarant’s interest in a common interest community. There are two parts to the problem. First, what obligations and liabilities to unit owners (both existing and future) should a declarant retain, notwithstanding his transfer of interests. Second, what obligations and liabilities may fairly be imposed upon the declarant’s successor in interest.”).

413. *Id.* cmt. 7 (“The section handles the problem of certain successor declarants (i.e., persons whose sole interest in the project is the protection of debt security) in three ways. First, subsection (c) provides that, in the case of a foreclosure of a security interest or a sale by a trustee in bankruptcy of any units owned by a declarant, any person acquiring title to all of the units being foreclosed or sold may request the transfer of special declarant rights. In that event, and only upon such request, such rights will be transferred in the instrument conveying title to the units and such transferee will thereafter become a successor declarant subject to the other provisions of this section. In the event of a foreclosure, sale by a trustee under a deed of trust, or sale by a trustee in bankruptcy of all units owned by a declarant, if the transferee of such units does not request the transfer of special declarant rights then, under subsection (d), those special declarant rights cease to exist and any period of declarant control terminates.”).

414. *Id.* § 3–104.

In attempting to protect the interests of the unit or lot owners, the lender must take on all duties and responsibilities that are imposed upon the declarant under the law and the declaration.⁴¹⁵ However, the lender is not subjected to those responsibilities that arise from any fraud that was perpetuated by the developer such as misrepresentations regarding the quality of certain improvements and amenities in the development.⁴¹⁶ Nor is the lender responsible for special obligations of warranty or the breach of the developer's fiduciary duties when it was in control of the association—such as the misappropriation of association funds or malfeasance in management of the development.⁴¹⁷

And lastly, the UCIOA provides a special rule for lenders who both purchase the property at foreclosure sale and take on the mantle of the declarant but only intend to hold these rights for an interim time period until a willing buyer can be identified.⁴¹⁸ During this interim holding period, the lender is strictly and narrowly limited in its ability to exercise rights under the declaration, but, in return for this limitation, is exempted from any and all liability under the declaration except for its own bad acts.⁴¹⁹ This last provision “permits a foreclosing lender to undertake such a transaction without incurring the full burden of declarant obligations and liabilities.”⁴²⁰ Of course, these lender-friendly rights are balanced against the “need for continuing operation of the association and, to that end, permit[] a foreclosing lender to assume control of the association for the purpose of ensuring a smooth transition” to a subsequent buyer.⁴²¹

As the editor's comments to section 3–103 so clearly set forth, the UCIOA strives to balance “what obligations and liabilities to unit owners (both existing and future) a declarant should retain” with “what obligations and liabilities may fairly be imposed upon the declarant's successor in interest.”⁴²² In doing so, the UCIOA addresses the important question of what happens to a lender who takes a security interest in a declaration to protect its collateral but faces the risk of being subjected to open-ended liability.⁴²³ In answering this question, the UCIOA subjects the original declarant to “continuing obligations and liabilities for promises, acts, or omissions undertaken during the period that he was in control of the community,” while at

415. *Id.*

416. *Id.*

417. *See id.*

418. *See id.*

419. *Id.*

420. *Id.* cmt. 7.

421. *See id.* § 3–104.

422. *Id.* cmt. 1.

423. *Id.* § 3–104.

the same time releasing that same original declarant from “responsibilities with respect to the promises, acts, or omissions of a successor over whom he has no control.”⁴²⁴ The new successor incurs obligations to the unit or lot owners for which it can accurately assess and plan for and be relieved of the phantom of liability for unknown liabilities arising from the acts of its predecessor.⁴²⁵

3. *A Call for Reform*

In addressing the issue of successor liability for declarants, Louisiana has no direct statutory or jurisprudential authority from which to draw a definitive conclusion.⁴²⁶ Also, of the several sources of state law that can be drawn from, none provide Louisiana courts with the precise tools that they need to craft an inclusive jurisprudential remedy.⁴²⁷ Each legal regime described above, in combination with the others, plays an integral part in the common-interest ownership regime, but none can be joined in such a way as to address the issue of what to do with the rights and duties of third parties who step into the shoes of the declarant.⁴²⁸

The issue of successor liability for declarants in common interest communities is not an easy one.⁴²⁹ It involves the intersection of very important but very opposed interests.⁴³⁰ On the one hand, the unit or lot owners must be protected from the malfeasance or breach of the declarant’s responsibilities by having a party against which they can seek recourse.⁴³¹ Further, to ensure that the new declarant (the lender) has sufficient buy-in and commitment to the development, a certain level of liability and responsibility must be imposed upon the declarant to give him or her some skin in the game.⁴³² All the while, however, any resolution of the issue must ensure that reliable and risk-assessable security rights are available to parties that lend the money and make the investments that cause the many successful common interest communities across the country to be possible.⁴³³

What Louisiana needs is a comprehensive framework that can address all of the specific and complex scenarios that often arise in common interest communities, and the UCIOA provides many key

424. *Id.* cmt. 2.

425. *Id.* § 3–104.

426. *See supra* Part III.A–C.

427. *See supra* Part III.A–C.

428. *See supra* Part III.A–C.

429. *See supra* Part III.A–C.

430. *See supra* Part I.

431. *See supra* Part I.

432. *See supra* Part III.

433. *See supra* Part I.

provisions that can be used in crafting such a statute.⁴³⁴ The UCIOA ensures that the original declarant is not relieved of liability for the original promises that he or she had made and the obligations that he or she had undertaken, while at the same time imposes upon the lender enough responsibility that it will feel that it has sufficient legal responsibilities to warrant careful and prudent administration of the development.⁴³⁵ And lastly, to effectuate an efficient transition of the property into the hands of a more permanent owner, the UCIOA allows the successor declarant to surrender some of its rights under the declaration for an interim period in exchange for a waiver of most liabilities.⁴³⁶ The enactment of all or most of these concepts into either the LCA, the LHOA, or some combined, comprehensive common-interest statutory framework would provide just the kind of definitive set of rules and standards that would provide fairness both to the unit or lot owners and the successor declarant, while at the same time creating a level of stability and reliability in the Louisiana real estate lending market.⁴³⁷

CONCLUSION

As American real estate and land-use planning continues to gravitate toward common interest communities and highly planned developments, the use of CCR declarations to achieve these policy goals is all too inevitable.⁴³⁸ Furthermore, on the heels of the Great Recession and the economic woes that accompanied the housing industry's crash in 2007 and 2008, lenders are more cautious than ever in their support of speculative real estate projects.⁴³⁹ This lender hesitation highlights, more so now than ever, the importance of a

434. See *supra* Part IV.B.2 and accompanying discussion.

435. See *supra* Part IV.B.2.

436. See *supra* Part IV.B.2.

437. See *supra* Part IV.B.2.

438. See *supra* Introduction and Part I and accompanying discussion.

439. See Brena Swanson, *Freddie Mac: Mortgage Rates Unwind After Making Progress*, HOUSINGWIRE (Nov. 27, 2013, 10:05 AM), <http://www.housingwire.com/articles/28141-freddie-mac-mortgage-rates-unwind-last-weeks-progress> [<http://perma.cc/5B8F-A8K6>] (archived Mar. 10, 2014); Brian Collins, *Mortgage Companies Face Tough First Quarter, Industry Expert Says*, NAT'L MORTGAGE NEWS (Nov. 27, 2013, 12:46 PM), http://www.nationalmortgagenews.com/dailybriefing/mortgage-companies-face-tough-first-quarter-industry-expert-says-1040074-1.html?site=default_msn [<http://perma.cc/A9P8-EKRV>] (archived Mar. 10, 2014); Jann Swanson, *Short Sales Becoming Less Favorable for Lenders*, MORTGAGE NEWS DAILY (Nov. 25, 2013, 6:27 PM), http://www.mortgagenewsdaily.com/11252013_realtytrac_home_sales.asp [<http://perma.cc/R8V9-N4SW>] (archived Mar. 10, 2014); Les Christie, *Mortgage Rates Fall amid Weak Economic Data*, CNN MONEY (Nov. 21, 2013, 11:37 AM), http://money.cnn.com/2013/11/21/real_estate/mortgage-rates/ [<http://perma.cc/4V3Y-3BVE>] (archived Mar. 10, 2014).

developer being able to provide strong and dependable collateral to entice the lender to advance funds.⁴⁴⁰ The declaration of CCRs represents an important piece of such a collateral package because of the many advantages that it bestows on the holder.⁴⁴¹ The declarant is able to enforce the collection of common assessments that support the maintenance of the development and has considerable decision-making authority as to the direction and goals of the common interest community.⁴⁴²

But in Louisiana, the decision to take a security interest in such collateral is not one that can be easily made by a lender.⁴⁴³ The difficulty in making this determination lies in the open question of exactly how such incorporeal rights can be effectively collateralized, as well as what types of liability the lender will incur as the successor to the developer when it becomes the declarant.⁴⁴⁴ As to the first question, Louisiana's law of security devices seems to require a piecemeal and multidimensional approach to taking a security interest in CCRs.⁴⁴⁵ Many of the most important and widely used security devices are implicated in ultimately confecting such collateral in favor of the lender.⁴⁴⁶ Because the declaration comprises rights that are movable and immovable in nature (as well as some rights that are arguably mixed), a lender will need to take a mortgage in the various servitudes and building restrictions on the land and improvements, as well as a UCC article 9 interest in the general intangible movable aspects of the declaration. And finally, as a prophylactic measure, the lender should obtain a pledge of the "gap" or "in between" aspects of the CCRs.⁴⁴⁷

With regard to the lender's liability as the successor under the declaration, the resolution to this issue is even more uncertain.⁴⁴⁸ The laws of many other states provide a body of case law and various statutory sources from which this issue can be analyzed.⁴⁴⁹ However, Louisiana lacks such direct, on-point resources for this particular type of CCR-related lender liability. One possibility is for the question to be analyzed under the framework of the law of assignments and assumption because, essentially, the collateralization of the CCRs represents a transfer of the rights of the developer as the declarant to a third party (the

440. *See supra* Introduction and Part I.

441. *See supra* Part I.

442. *See supra* Part I.B.

443. *See supra* Part II.

444. *See supra* Part II–IV.

445. *See supra* Part II.

446. *See supra* Part II.

447. *See supra* Part II.C.

448. *See supra* Part III.

449. *See supra* Part IV.B.

lender) to secure repayment of the debt.⁴⁵⁰ On the other hand, one could equally argue that because so many of the most salient features of a declaration of CCRs comprise building restrictions and limited personal servitudes, the issue of successor liability should be governed by that particular legal regime.⁴⁵¹ And lastly, because the control of the association—which governs the common interest community itself—is the chief power being conferred by the declaration on the developer, and thereby being foreclosed and taken over by the lender, one might assert that the established doctrine of successor liability under the corporate law system should be dispositive.⁴⁵²

In the end, each of these lenses through which the issue of the successor liability of lenders turned declarants can be viewed provide a weak and unclear result.⁴⁵³ The reason for these inadequacies stems from the fact that each of these different types of legal regimes are distinctly part of the makeup of a common interest community, but it is their interplay and ability to connect with each other that gives effect to the CCR framework itself and thereby makes the community viable.⁴⁵⁴ The way in which the building restrictions and servitudes provide an enforcement mechanism for the association, which is funded, in turn, by the statutory authority to charge assessments against the lots or units, all come together to form the very core of what makes a common interest community possible.⁴⁵⁵ No single aspect operates alone to give life to the whole.⁴⁵⁶

Therefore, because of the complex and labyrinthine set of rules and legal institutions that underlie CCR declarations, it is only logical that an equally nuanced and comprehensive statutory construct would be needed to address the intricate issues of successor liability for lenders turned declarants.⁴⁵⁷ One such legal construct is the Uniform Common Interest Ownership Act, which provides an omnibus statutory framework for all common interest communities—whether residential, condominium, commercial, or mixed-use—and provides a fair and balanced system for the allocation of risks and liabilities between the declarant and successors.⁴⁵⁸ And while it may not be necessary to adopt the UCIOA in full, an incorporation of its more useful and wide-

450. *See supra* Part III.A.

451. *See supra* Part III.B.

452. *See supra* Part III.C.

453. *See supra* Part IV.A.

454. *See supra* Part IV.

455. *See supra* Part II.A.

456. *See supra* Part IV.A and accompanying discussion of the interplay between the various property, contract, and corporate law institutions in forming the declaration.

457. *See supra* Part IV.B.2.

458. *See supra* Part IV.B.2.

ranging provisions into Louisiana law would go far in creating a legal approach to dealing with both the collateralization and the lender liability issues related to CCR declarations.⁴⁵⁹

As Louisiana has managed to weather the storms of the housing crisis better than many of its sister states, lawmakers must be mindful that in order to maintain an active and thriving real estate market, the laws governing such transactions must be clear and even-handed.⁴⁶⁰ In doing so, Louisiana should adopt a comprehensive approach to the issue described here, which takes into account the rights of the aggrieved lot or unit owners such that they would be afforded an avenue of recourse for their losses or damages, while at the same time apportioning liabilities between the lender and the borrower in a way that provides fairness, foreseeability, and the capacity to reasonably assess the risks of CCR foreclosure.⁴⁶¹

459. See *supra* Part IV.B.3.

460. See Kate Morgan, *The Nation's Foreclosure Crisis Seems to Have Skipped Louisiana*, NOLA (Dec. 27, 2008, 10:09 PM), http://blog.nola.com/tpmoney/2008/12/the_nations_foreclosure_crisis.html [<http://perma.cc/UXB9-GZVL>] (archived Mar. 10, 2014); *State of The South: Jobs Rise but What About Real Estate?*, INVESTORS BUS. DAILY (Nov. 14, 2013, 6:15 PM), <http://finance.yahoo.com/news/state-south-jobs-rise-real-231500864.html> [<http://perma.cc/8NHC-24NB>] (archived Mar. 10, 2014); *Louisiana Housing Market Strong Despite National Trends*, PRWEB (June 13, 2013), <http://www.prweb.com/releases/2008/06/prweb1042744.htm> [<http://perma.cc/SWW5-FYM2>] (archived Mar. 10, 2014).

461. See *supra* Part IV and accompanying discussion.