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Celeste M. Hammond
John Marshall Law School, 7hammond@jmls.edu

SYMPOSIUM:

THE ROBERT KRATOVIL MEMORIAL SEMINAR IN REAL ESTATE LAW: REINVENTING AMERICA'S MASTER PLANNED COMMUNITIES

FOREWORD

CELESTE M. HAMMOND*

The Annual *Robert Kratovil Seminar in Real Estate Law* brings together academics and practicing attorneys to focus on important areas of real estate law. The Fourth Kratovil Seminar presented in October 1997, *Reinventing America's Master Planned Communities*, focused on whether the time has come to reinvent and restructure the condominium and homeowner associations which govern the lives and restrict the property of millions of Americans.

By the end of the 1980s there were more than 130,000 residential community associations operating in the United States and more than 30 million Americans subject to their governance. Predictions are that at least fifty million Americans will be living in some form of common interest community by the turn of the century, since nearly one out of every three housing units being built has some form of governing association.

Associations have become an integral part of life. Association rules, regulations, conditions and restrictions bind not only the first buyers, but all subsequent owners as well, and they are enforced by a board of directors. In addition to providing for maintenance of the common areas that all members of the community have a right to use, these rules, regulations, conditions and restrictions set up a governing structure that can make binding rules on lifestyle issues ranging from the ubiquitous "no pet" covenants to prohibitions on political signs or even requiring certain colored curtains in the windows. Common interest communities form an

* Professor of Law and Director of the Real Estate Law Center and LL.M. Program in Real Estate Law at The John Marshall Law School; B.S., Loyola University; J.D., The University of Chicago Law School

alternative political universe whose residents may lack many of the rights that Americans have come to regard as fundamental.[1]

The Kratovil Seminar provided the gathering place for introducing and indicating the analytical perspective of the symposium authors. The articles by Wayne S. Hyatt, Evan McKenzie and Michael C. Kim were written as part of the preparation for the seminar presentations and in response to the ideas formulated as a result.[2] Katherine N. Rosenberry, who was unable to participate in the Kratovil program, considers trends in judicial reactions to community association covenants -- an important aspect not covered during the Seminar.

Wayne S. Hyatt, the Kratovil Seminar's Keynote Speaker, has contributed much of the scholarship in this area of the law where the response of scholars and, what he terms "reflective legal practitioners," has not yet kept pace with the evolution of the community association structure. His article, *Common Interest Communities: Evolution and Reinvention*, expands his body of work that includes other law review articles, a treatise and a soon to be published casebook which he co-edited with Susan French.[3]

From his vantage point as a practicing attorney representing both developers and community associations, Hyatt analyzes the real estate market changes that require a new legal response to the issues confronting those who live in these common interest communities such as the Disney Development Company's Town of Celebration. As developers of planned communities seek to "build community" through creation of a social infrastructure where the community association concerns itself with much more than use by residents of the common areas and maintenance, the legal perspective needs to evolve as well. Hyatt credits the Restatement of the Law Third Property (Servitudes) as one of the important forces encouraging the needed evolution. He warns of counter forces that impede the evolution, especially legal inertia with a reliance on

1. Michael Pollan, *Town Building is No Mickey Mouse Operation*, N.Y. TIMES MAG., Dec. 17, 1997, at 56 (describing author's trip to Celebration, developed Disney Development Company, in Florida for a first hand reaction to a tightly controlled new urban community example).

2. Our thanks to the Chicago Title Insurance Company Foundation for its generous support of this series generally and to the Community Associations Institute's College of Community Associations Lawyers for its co-sponsorship of this particular program. The contribution of Hugh Brodkey, Virginia Harding, Thomas Homburger, Samuel Lawton, Rory Smith, Gene Stunard, Herbert Fisher, Michael Kim and Debra Stark, members of the planning committee who helped formulate the topic, identify the speakers and induce them to participate is gratefully acknowledged. Finally, this series succeeds because of the enthusiasm of Dean Robert Gilbert Johnston for the activities of the Real Estate Law Center at The John Marshall Law School.

3. COMMUNITY ASSOCIATION LAW: CASES AND MATERIALS ON COMMON INTEREST COMMUNITIES (Wayne S. Hyatt & Susan French eds., forthcoming 1998).

precedent, fear of waiver and reliance upon form documents that may not reflect the changes. Also, the society emphasizes "rights" that are only portrayed with respect to the individual and not in terms of the common community rights that must be respected for a community association to function.

In his article, Hyatt identifies and analyzes a wide array of legal issues that "await" resolution ranging from the constitutional rights of individual residents to a proper principle for association governance to a "more pragmatic and optimistic" underpinning for the restrictive character of common interest communities. Hyatt ends by offering a blueprint for the necessary reinvention but, as he is quick to point out, not a conclusion.

Professor Evan McKenzie's article, *Reinventing Common Interest Developments: Reflections on a Policy Role for the Judiciary*, continues the focus of his book *Privatopia: Homeowner Associations and the Rise of Residential Private Government*. Writing both as a lawyer and political scientist, he argues for a more active role for the judiciary in reviewing the underlying "contract" that is the basis for governance in common interest developments (CIDs). He carefully notes that he is using the political scientist's broad definition of "public policy;" a definition that encompasses any course of action taken through any level of government. Here, he speaks of what courts might do in the absence of legislative or executive action.

McKenzie characterizes the CID situation as one in which a private dispute has been transformed to one that raises significant public policy questions and which calls for a judicial response beyond passively enforcing the terms of standardized contracts. He maintains that in the absence of legislative attention to areas where private relationships "implicate important public values" courts have made use of constitutional principles, common law doctrines of contracts and torts and the principles of equity to review and restructure such relationships. He suggests that, even in recognizing the collective action problem that plagues the individual homeowner in a CID, the courts could promulgate creative contract law and treat legislative inaction not as ratification, but as an indication of legislative paralysis caused by shortcomings of the political system. In this way, courts would protect individual owners from provisions of the CC and R's that are essentially adhesion contracts. This would force the producers of CIDs to do better and ultimately make the association a stronger institution.

Michael C. Kim's article, *Involuntary Sale: Banishing an Owner from the Condominium Community*, springs from his experience representing both community associations and individual association members. In his article, he proposes a remedy for associations to pursue against disobedient members. He provides a typical provision that would be found in the declaration or bylaws

and recorded to give notice to subsequent owners. Since there are no appellate opinions to date that involve enforcement of such a provision, he analogizes to a number of situations in which there is no misconduct or fault on the part of the unit owner and yet the association, operating under majoritarian principles, is authorized to force a sale of the unit (e.g. the decision to sell the condominium property as a whole which can be accomplished without unanimous consent and over the objections of minority members).

He evaluates statutory considerations and the variety of standards of judicial review of condominium action to conclude that there is no *per se* ban on the involuntary sale remedy. Moreover, since the covenant provisions include a judicial sale, at least in Illinois, constitutional due process requirements appear to be met, although concerns about the fairness of the sales price are much the same as in the mortgage foreclosure process.

Noting the conflict between the basic right, and perhaps duty, of the community association to enforce its covenants with the "rugged individualism" of some members, Kim views the involuntary sale remedy as self-limiting but useful and appropriate in some situations.

Professor Katherine N. Rosenberry's article, *Home Businesses, Llamas and Aluminum Siding: Trends in Covenant Enforcement*, reviews recent cases from throughout the United States and identifies several trends: 1) courts are increasingly recognizing the importance of covenants and are likely to find that covenants attach to the land; 2) courts are more closely scrutinizing board enacted rules by applying the rule of reason test; 3) courts are increasingly allowing associations to levy fines for violation of governing documents; 4) defenses to enforcement actions are more likely to succeed where courts have discretion and less likely to succeed where courts do not have discretion; and 5) courts are likely to find association covenants and rules violate the federal Fair Housing Act and Amendments to the federal Telecommunication Act. This careful survey will help lawyers predict which covenants and rules are likely to be enforced in the future (and which will not). Thereby, it should guide those who advise common interest association developers and boards.