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THE DECLARATION OF RESTRICTIONS, EASEMENTS, LIENS, AND COVENANTS: AN OVERVIEW OF AN IMPORTANT DOCUMENT

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PREFATORY NOTE

The declaration of restrictions ("declaration"), a product of this century, has become an important document in modern land development. Unfortunately, little has been written about it. Few lawyers distinguish between the statutory and non-statutory declaration. Some basic article, I concluded, was needed to introduce the bench and bar to this document. The word "declaration" does not even appear in the indexes of the property casebooks. It is, of course, folly to pretend that those who read this article will be well-informed about declarations, especially considering that varying legislation and decisional law occur in virtually all states on this topic. Moreover, the declaration must be construed with the other documents that are employed to create the land development. Nevertheless, a general introduction to declarations will serve a useful purpose. To the extent possible, this material is presented in chronological order.

HISTORY

The declaration, a creation of this century's lawyers' ingenuity, has assumed an importance in real estate transactions rivalling that of the standard documents, deeds, mortgages, and leases. Yet to gain insight into the nature of this document one must go back to 1848, when the concept of the general plan of building restrictions made its appearance.¹ After experimenting with restrictive covenants in

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1. See *Tulk v. Moxhay*, 2 Ph. 774, 41 Eng. Rep. 1143 (1848) (restrictive covenant between vender and purchaser will be enforced in equity against all subsequent purchasers whether or not it runs with the land). The rule was later adopted in America as well. *Norcross v. James*, 140 Mass. 188, 191-92, 2 N.E. 946, 948 (1855) (grantor's covenant not to work quarry on adjacent land was within equitable rule of notice).

deeds and encountering frustrating obstacles, this century's lawyers found a solution to their problems in the declaration of restrictions. Thus, the declaration of restriction owes its existence to the need for an efficient document that can be dependably employed to create and enforce general plan restrictions affecting land developments. The date, 1848, has obvious significance. This was in the very heart of the Industrial Revolution, which was triggered by the invention of the steam engine late in the eighteenth century. Coal-fired factories were springing up all over England and some device was needed to protect residential areas from invasion by factories. For a plan of restrictions to be enforceable against subsequent purchasers, the plan must be general (substantially uniform) and some recorded document or documents must exist that impart constructive notice of the general plan.² Hence, the trip from restrictions in deeds to restrictions in declarations involved a necessary detour. That detour took the restrictions into the plat of subdivision. This is a familiar, recordable document.

THE NON-STATUTORY DECLARATION OF RESTRICTIONS

For many years the inclusion of general plan restrictions in plats worked quite nicely. Every deed incorporates the plat by reference.³ But it must be remembered that with most plats everything on the plat is hand-lettered by the surveyor. As expensive land developments began to appear, the general plan restrictions began to grow in length and complexity. Restrictions could no longer fit into the space provided by the plat document. Hence, some ingenious lawyer hit upon the idea of simply including in the plat the statement that all land in the subdivision was restricted by a declaration of restrictions that was recorded contemporaneously with the plat.

Because the plat contains a statement that all the land in the development is subject to restrictions in the contemporaneously recorded declaration of restrictions, the familiar doctrine that "recitals in the chain of title impart constructive notice" applies. The rule is that if a recorded document makes reference to another recorded document, the two will be read together.⁴ Note also that the declaration itself is in the chain of title. When the plat is recorded, no lots have been conveyed. Therefore, the name of the developer who signed the plat and the declaration must be searched by prospective purchasers. Hence, the attorney searching the title can be certain

2. Reno, *The Enforcement of Equitable Servitudes in Land*, 28 VA. L. REV. 952 (1942).

3. *Kosel v. Stone*, 146 Mont. 218, 221, 404 P.2d 894, 896-97 (1965).

4. Annotation, *Record as Charging One with Constructive Notice of Provisions of Extrinsic Instrument Referred to In Recorded Instrument*, 82 A.L.R. 412, 416 (1933).

that any recorded declaration will be found if it has been properly recorded.⁵

CREATION OF A GENERAL PLAN BY DEEDS-RECORDING PROBLEMS

Where the general plan restriction appears in the plat of subdivision recorded by the land developer, no problems arise. It is perfectly clear that such a restriction is a general one, binding and benefiting all lots in the subdivision. Clearly it is a general plan. And since every lot purchaser must take notice of the recorded plat and its accompanying declaration of restrictions, he has constructive notice of the restriction.⁶ Therefore, any lot owner may enforce the restriction against any other lot owner.

Before land developers hit upon the idea of incorporating restrictions in plats by reference to the declaration of restrictions, general plan restrictions were created by provisions in the various deeds to the individual lot owners. Here several situations are possible:

1. Suppose the subdivider incorporates the restriction in all deeds to all lots in the subdivision, and the restriction is so worded that it shows a general plan is intended. Here a general plan exists, and each lot owner must take notice of it. For example, the deed might read as follows: "All lots in the subdivision shall be used for residence purposes only."

2. Suppose the subdivider, immediately after recording his plat, which contains no restrictions, makes and records a deed of all lots in the subdivision to X. This deed contains a restriction binding and benefiting all lots. The lot purchasers receive their deeds from X. A general plan exists and all persons must take notice of it.

3. Suppose, however, the restriction is so worded that it does not reveal any intention to create a general plan but seems to restrict only the lot described in the deed, as where it provides: "The lot hereby conveyed shall be used for residence purposes." If all deeds contain an identical provision, this creates in most states a general plan.⁷ In a few states, however, this will not create a general plan.⁸ Even in those states that would hold a general plan exists, a lot purchaser is under no obligation to check the deeds to other lots in the subdivision to see if comparable restrictions have been in-

5. See *South Shore Homes Assn. v. Holland Holiday's*, 219 Kan. 744, 549 P.2d 1035 (1976).

6. See *Leverson v. Laird*, 190 N.W.2d 427, 432 (Iowa 1971).

7. See, e.g., *Snow v. Van Dam*, 291 Mass. 477, 197 N.E. 224 (1935) (erection of commercial structure for sale of ice cream and dairy products enjoined as violation of restriction limiting use of property for residential purposes).

8. See *Werner v. Graham*, 181 Cal. 174, 183 P. 945 (1919) (where deeds sold land with building restrictions, but without specific reference to a common plan, intent of parties governed by language of deed alone).

serted in such deeds. They are not in his chain of title. This means that a lot owner who wishes to violate the restriction may do so on the ground that though a general plan exists, he had no notice of it when he bought his lot.⁹

4. Suppose that a restriction is in the form given in paragraph 3, containing no suggestion of a general plan, but that some deeds contain the restriction, some contain different restrictions and others contain no restrictions at all. Because there is no substantial uniformity, there is no general plan.

5. Suppose the deed is in the form suggested in paragraph 1—that is, it reveals the existence of a general plan. Such a deed has a double operation. It restricts the lot sold and also restricts all lots retained by the subdivider. A general plan exists. Suppose, however, that the subdivision contains 100 lots. The first lot sold is Lot 1. The deed contains this restriction. The next lot sold is Lot 50. This deed contains no restrictions. Many states hold that although a general plan exists, a purchaser of Lot 50 is not obliged to search deeds conveying other lots in the subdivision for general plan clauses. Therefore, the purchaser has no notice of the restriction and he is not bound by it.¹⁰ In other states, all lot purchasers must take notice of any deed that contains a general plan clause.¹¹ Under this doctrine, the purchaser is even bound by a restriction that is not in his chain of title.

While this author knows of no decision so holding, it is entirely possible that the law developed in this awkward fashion because of the clumsiness of the grantor-grantee index. Having spent a good many years in a recorder's office, this author is quite familiar with how the system operates. The index is divided into columns, the last column being devoted to a description of the property conveyed. Here the recorder fills in a legal description of the property conveyed, but rarely does the recorder include in this column any easement or building restriction described in the deed. Perhaps an illustration will make this clear.

EXAMPLE: A owns two adjoining lots, lots 1 and 2. He makes and records to B a deed of lot 1. In this deed he includes a clause that no building shall be erected on the front 30 feet of lot 1. The Recorder will show lot 1 in the column for property conveyed but will not bother making mention of the restriction.

9. *Buffalo Academy of the Sacred Heart v. Boehm Bros.*, 267 N.Y. 242, 196 N.E. 42 (1935).

10. *See id.*

11. *See Finley v. Glenn*, 303 Pa. St. 131, 154 Atl. 299 (1931) (subsequent grantees bound by building restrictions in earlier deed of property although they were without actual notice of same); *see generally* Annotation, *Agreement Between Real Estate Owners Restricting Use of Property As Within Contemplation of the Recording Laws*, 4 A.L.R. 2d 1419 (1949).

RECORDING PROBLEMS OF THE NON-STATUTORY DECLARATION

Some courts have held that the filing of a non-statutory declaration suffices to create restrictions that impart notice even though they were not specifically mentioned in the subdivider's deeds.¹² In California, precisely the opposite has been held. There, the declaration is totally ineffective unless the deeds refer to it.¹³ However, it suffices to state in the deeds that the land is subject to covenants, conditions, restrictions, and easements of record.¹⁴ Obviously, this is a poor practice. A detailed clause should be used in the deed referring specifically to the declaration.

A different rule is applied if all of the restrictions, liens, and covenants are included in a recorded plat. After all, how can you possibly locate your lot without looking at the plat? And if you look at the plat you are bound to see the restrictions. The same rule applies if the plat states on its face that all lots are subject to restrictions set forth in a declaration "recorded contemporaneously herewith." Simultaneous recording of the plat and declaration appears to suffice.¹⁵ In recent decisions the declaration appears to be achieving independent recordable status. The declaration is now a standard real estate document, used for creating easements, building restrictions, planned unit developments, and condominiums.¹⁶ When recorded, it imparts constructive notice.¹⁷

Of course, if a mere declaration of restriction is recorded, and is not referred to in subsequent plats and deeds, arguably it is not in the chain of title.¹⁸ Deed clauses are used to implement the declara-

12. See, e.g., *Kosel v. Stone*, 146 Mont. 218, 404 P.2d 894 (1965) (deeds describing property as being located in subdivision according to official plat on file, bound purchasers to restrictions only on the plat); *Stewart Transp. Co. v. Ashe*, 269 Md. 74, 304 A.2d 788 (1973) (subsequent purchasers of beach property bound by restriction against commercial use of piers that appeared only in previously recorded subdivision declaration).

13. *Girard v. Miller*, 214 Cal. App. 2d 266, 275, 29 Cal. Rptr. 359, 364 (1963). The argument is that a mere recorded declaration, before any deeds are made, creates no rights in third parties and is merely a revocable declaration of intent. *Id.* at 276, 29 Cal. Rptr. at 365. A declaration is not considered recorded until at least one deed has been recorded. *Id.*

14. See *Seaton v. Clifford*, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972); *Lake Saint Louis Community Ass'n v. Ringwald*, 652 S.W.2d 158 (Mo. App. 1983); *David v. Huguenor*, 408 Ill. 468, 97 N.E.2d 295 (1951).

15. See *Kosel v. Stone*, 146 Mont. 218, 404 P.2d 894 (1965).

16. *Kratovil, Building Restrictions — Contracts or Servitudes*, 11 J. MARSHALL J. OF PRAC. AND PROC. 465 (1978).

17. *Bessemer v. Gersten*, 381 So. 2d 1344 (Fla. 1980); *South Shore Homes Ass'n v. Holland Holiday's*, 219 Kan. 744, 549 P.2d 1035 (1976); *Levitt Homes v. Old Farm Homeowner's Ass'n*, 111 Ill. App. 3d 300, 444 N.E.2d 194 (1982); *Lake Sherwood Estates Ass'n v. Continental Bank*, 677 S.W.2d 372 (Mo. App. 1984); *Strickland v. Overman*, 11 N.C. App. 427, 181 S.E.2d 136 (1971); *Preston Tower Condo. Ass'n v. S.B. Realty*, 685 S.W.2d 98 (Tex. Ct. App. 1985).

18. *Mortgage Investors of Washington v. Moore*, 493 So.2d 6, 8 (Fla. Dist. Ct. App. 1986).

tion. To fully implement the declaration, it is prudent to insert a clause in the deed to the home buyer or apartment buyer. Such a clause might be:

SUGGESTED FORM: Subject to Declaration of Easements, Restrictions, Liens, and Covenants dated _____ and recorded in the Office of the Recorder of Deeds of _____ County, as Document No. _____ which is incorporated herein by reference thereto. Grantor grants to the Grantee, his heirs and assigns, as easements appurtenant to the premises hereby conveyed, the easements created by said Declaration for the benefit of the owners of the parcel of realty herein described. Grantor reserves to himself, his heirs and assigns, as easements appurtenant to the remaining parcels described in said Declaration, the easements thereby created for the benefit of said remaining parcels described in said Declaration and this conveyance is subject to said easements and the right of the Grantor to grant said easements in the conveyances of said remaining parcels or any of them, and the parties hereto, for themselves, their heirs, personal representatives, and assigns, covenant to be bound by the covenants, restrictions, and agreements in said document set forth. Said covenants and restrictions are covenants running with the land both as to burden and benefits, and this conveyance is subject to all said covenants and restrictions as though set forth in full herein. The land hereby conveyed is also subject to the liens created by said Declaration, and same are binding on the grantees, their heirs, personal representatives, and assigns. All of the provisions of said Declaration are hereby incorporated herein as though set forth in full herein.

THE DECLARATION OF EASEMENTS

The declaration of easements really began with the simple pre-war townhouses erected at right angles to the street. Each unit owner, except the one whose unit abutted on a street, needed easements for ingress, egress, water, and so forth. The declaration served two purposes, namely, it created the town house development and also created the necessary easements. Of course, recording the declaration created no rights. All the land was owned by the developer. Hence, in the first deed out to each unit a clause was needed to refer to the declaration as is suggested in the preceding paragraph.

Today, of course, we are in an era of huge developments. One monstrous building may house offices, stores, hotels, rental apartments and condominiums. The declaration of easements becomes a very voluminous document. But even here the document does not rest on a statutory foundation. Zoning amendments are needed and the village planning department has much to do with the drafting of the contents of the declaration. But the document is not a statutory document in the way we describe a condominium declaration.

CONDOMINIUM DECLARATION: STATE STATUTES

In general, the condominium is created pursuant to the local statute. Hence, the declaration, being a statutory declaration, must contain the elements required by the statute.

The declaration is the primary instrument by which the property is committed to a condominium plan of ownership. It is the operative document creating a condominium that subdivides the declarant's interest in the land horizontally and vertically. To establish a condominium, the developer must declare his intention to do so by recording a declaration containing the information required by statute. In some states the declaration is referred to as a Master Deed.¹⁹

The FHA Model Act defines the declaration as "the instrument by which the property is submitted to the provisions of the Act and such declaration as from time to time may be lawfully amended." Suggestions are offered as to the form of the declaration.

Generally, the early ("first generation") state acts followed the provisions suggested by the FHA Model Act. They all stressed the importance of a sufficient legal description, not only of the land on which the project is to be built or located, but also of the buildings, the apartments, the common elements and the limited common areas, and the facilities.²⁰ Of course the draftsman is at liberty to include other provisions so long as they do not conflict with the statute. And the statutes are far from uniform. The provisions of the declaration are covenants running with the land.²¹

The crudity of the draftsmanship in the early state statutes is visible on almost every page. For example, in the Illinois Act it is provided, as in section 6(a) of the federal model, that the percentage of common elements cannot be changed except by agreement of all of the unit owners.²² There is no provision forbidding the draftsman to "draft around" this clause, which, of course, they did.²³ Unless the statute forbids, parties may waive the provisions of the statute by contract.²⁴ In the middle of the 1970s the problem of phased development attracted considerable attention.²⁵

19. *Barclay v. DeVeau*, 384 Mass. 676, 429 N.E.2d 323 (Mass. 1981).

20. 15A AM. JUR. 2d *Condominiums and Co-operative Apartments* § 13 (1976).

21. *Saint Paul Fed. Bank for Sav. v. Wesby*, 149 Ill. App. 3d 1059, 501 N.E.2d 707 (1986); *Pepe v. Whispering Sands Condominium Ass'n*, 351 So. 2d 755, 757 (Fla. Dist. Ct. App. 1977).

22. ILL. REV. STAT. ch. 30, § 304 (1963).

23. See the discussion *infra* notes 46-52 and accompanying text of the "add on" condominium.

24. *Steen v. Modern Woodmen of Am.*, 296 Ill. 104, 119, 129 N.E. 546, 552 (1920); 17 AM. JUR. 2d *Contracts* § 173 (1964); 17 C.J.S. *Contracts* § 207 (1963).

25. *Rosenstein, Inadequacies of Current Condominium Legislation — A Critical Look At The Pennsylvania Unit Property Act*, 47 Temple L.Q. 655 (1974); *Garfinkel, Structuring an Incremental Residential Condominium*, 20:6 PRAC. LAW. 11

This lesson was learned and later Uniform Acts forbade "drafting around" of important provisions. If it were not possible to draft around the language of the original statutes, phased developments would have been impossible. Hence, it is idle to conjecture that some court would declare that phased development is forbidden in the condominium field, especially in the early days when condominiums were new. Phased development is common and necessary in American real estate practice. Let us pursue this thought.

One serious oversight in the original condominium statutes that tracked the federal act was the fact that phased development was totally overlooked. It was assumed that the condominium would consist of one high rise apartment building. American developers prefer to operate on a grander scale. Thus, a developer would tender his lender plans for two high rise identical apartments with shared amenities, such as an outdoor swimming pool. The lender, of course, would be more conservative. His suggestion would be that the developer buy parcel A and develop it. If there were fifty units, each unit (assuming they were identical) would have a two percent interest in the common elements. If they sold well, the developer could pick up his option on Parcel B and develop that building. If each apartment was awarded an interest in the common elements, as is necessary under the condominium statutes, each such unit would receive a one percent interest and, in order to come out to 100%, a subtraction would be made from the common elements in unit A, so that each unit would have a one percent interest. Taking away a fee title that has been bought and paid for is not an easy task. As previously observed, the old statutes seemed to forbid such a subtraction. Nevertheless, a method had to be, and was, found. Lawyers learned to "draft around" the statute in order to create the "add on" condominium. It took several pages of text to describe the appropriate procedure.²⁶ The original UCA provisions on "add ons" were substantially amended later.

In a historical note to the Illinois Revised Statute, there is a report on the work of a House Committee that led to a change in the statute that tracks the 1980 Amendments to the UCA. That report stated in part:

That committee in its Report to the House of Representatives and the General Assembly of the State of Illinois, March, 1975, observes that the then Condominium Property Act required, at the time of recording of the declaration that the full percentage interest in the common elements be allocated and assigned to all units. Any subsequent change in the percentage allocation required approval of all

(Oct. 1974); Comment, *Phasing Condominiums*, 48 ST. JOHN'S L. REV. 872 (1974). The legislatures responded. See ILL. REV. STAT. ch. 30, § 324, as amended in 1978.

26. See Appendix.

unit owners. This precluded a staged condominium development. According to the committee, staged developments are characterized by the construction of the housing and supportive facilities for extensive planned communities a step at a time.

The committee, nevertheless, found that staged condominium developments were proceeding in Illinois through project documentation authorizing the developer to amend the declaration to adjust the percentage interest upon annexation. The adoption of the amendments was taking place without unit owner approval, and the committee concluded: "Apparently such procedures have won acceptance in the real estate community, and have not evoked wide spread dissatisfaction among purchasers."

Recognizing substantial disadvantages to the unit owner from the developer having an unlimited power to alter and reallocate percentage interest, the committee recommended that add-on procedures be authorized in the future only in accordance with uniform statutory procedures requiring an express reservation of the right by the developer to add-on and reallocate percentage interests and providing specific information to be set forth in the original declaration. P.A. 80-1110, effective January 1, 1978 implemented that recommendation.

The second paragraph of Section 25 provides that if the developer wishes to reserve the right to add additional property to the condominium, the original declaration shall contain: (a) an express statement reserving the option to add additional property to the condominium; (b) a statement of the method by which the allocation of percentage interest will be adjusted if additional units are added; (c) a legal description of all land which may be added to the property; (d) a time limit of ten (10) years from the date of the recording of the declaration after which the option to add additional property shall no longer be in effect and a statement of the circumstances, if any, under which it may earlier terminate; (e) a statement as to whether all property will be added at the same time, and if not, whether there is any limitation on the order of addition; (f) a statement of limitations, if any, concerning the location of improvements that may be made on the additional land; (g) a statement as to whether there is a maximum number of units which may be included on the additional land; (h) a statement as to whether structures, improvements, buildings and units on the added property will be compatible with those on the existing property; and (i) any plat or site plans or other graphic material which the developer may wish to include to supplement or explain the information provided.

Several states, for example, Illinois,²⁷ specifically provide for adjustment of the common elements where an "add on" takes place. By specifically providing in the declaration for the add-on, the subtraction of the common elements, the recording of the declaration, and delivering each purchaser a copy of the declaration, the statute prevents injustice to the unit purchasers.

27. ILL. REV. STAT. ch. 30, § 906 (1987).

THE HOMEOWNERS ASSOCIATION

When a landowner in the early days of the general plan sought to enforce his rights, it became evident that some entity was needed to enforce general plan building restrictions. Litigation is costly and chancy. Thus, some ingenious lawyer hit upon the idea of a homeowners association ("HOA"). This is usually a non-profit automatic membership corporation referred to as "Unit Owners Association."²⁸ This means that each lot owner is a mandatory member of the association, and his membership automatically passes to his purchaser when the lot is conveyed. The declaration of restrictions describes the association in detail and confers upon it the right to levy assessments on the lot owners. A lien is created upon any lot that does not pay the assessment levied against it. The original HOA was a non-statutory concept, although most of the HOAs involve formation of a corporation under the local non-profit statute.

The formation of a homeowners association may be accomplished in several ways. The documentation involves four basic steps: (1) preparing and recording the subdivision plat; (2) preparing and recording the *declaration* of covenants applicable to the land; (3) preparing the charter and by-laws of a homeowners association and obtaining a charter from the state; and (4) sale of the lots by deeds that confirm the rights and duties provided for in the first three steps.²⁹ The existence of the HOA begins when the documents creating the association are recorded.³⁰

In any land development where a non-statutory home association and a declaration exist, the right of enforcement of restrictions, liens, and covenants is transferred by the declaration to the homeowners association.³¹ Subsequent owners of the land become burdened with the restrictions of these declarations and covenants and obtain the benefits of the association.³² The creation of the HOA does not preclude enforcement by the lot owners.

At times, the case law has suggested that the association is acting as agent of the property owners.³³ At other times, it is suggested

28. See UNIFORM CONDOMINIUM ACT § 3-101.

29. *Perry v. Bridgetown Community Ass'n Inc.*, 486 So. 2d 1230, 1233 (Miss. 1986).

30. *Id.*

31. *Merrionette Manor Homes Improvement Ass'n v. Heda*, 11 Ill. App. 2d 186, 136 N.E.2d 556 (1956); *Garden Dist. Prop. Owners' Ass'n v. City of New Orleans*, 98 So. 2d 922 (La. Ct. App. 1957); *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938); *Rodruck v. Sand Point Maintenance Comm.*, 48 Wash. 2d 565, 295 P.2d 714 (1956); Vogel, *Lake Community Developments with Property Owners' Associations*, 8 URB. LAW ANN. 169 (1974).

32. *Lincolnshire Civic Ass'n, Inc. v. Beach*, 46 A.D. 2d 596, 598, 364 N.Y.S.2d 248, 251 (1975).

33. *Neponsit Property Owners' Ass'n, v. Emigrant Indus. Sav. Bank*, 278 N.Y.

that the association is acting as a third-party beneficiary of the covenants in the declaration.³⁴ Or, the association is acting as the assignee of the developer.³⁵ Occasionally, the court has simply said that the association is a "convenient instrument by which the property owners may advance their common interests."³⁶ It does no harm to combine all these thoughts into the declaration.

As to the powers of homeowner associations, there are those which the declaration confers,³⁷ and those which the statute creating non-profit corporations confers. Characteristic of the HOA in a planned unit development ("PUD") is the existence of a common area owned by the HOA and the use of which is enjoyed by all the unit owners. Hence, the declaration must provide easements to create these rights to use the area. Since the law does not specify any particular form which an easement must take, the creation of easements by means of a recorded declaration followed by a deed containing grants and reservations of the easements is universally recognized as a proper means of creating easements. The right to use the common areas must be accomplished by the creation of easements and covenants. It should not be done by dedication. A dedication is the giving of rights to the public. Hence, the word dedication has no place in the creation of private, as distinguished from public, rights and should be avoided.³⁸

THE ORIGINAL UNIFORM CONDOMINIUM ACT (UCA)

Most of the early condominium statutes were unsophisticated and clumsy. Many problems that arose were not foreseen and were not dealt with. Hence, the need for a uniform act became obvious. In a prefatory note to the UCC, the authors describe the situation and furnish a summary of the act.³⁹

The Uniform Condominium Act ("UCA"), originally approved by the National Conference of Commissioners on Uniform State

248, 262, 15 N.E.2d 793, 798 (1938).

34. See *Anthony v. Brea Glenbrook Club*, 58 Cal. App. 3d 506, 511-12, 130 Cal. Rptr. 32, 34-35 (1976) (mandatory membership in association was an asset to all property owners located within the complex); Note, *Organizing the Townhouse in Indiana*, 40 IND. L.J. 419, 429 (1964) (any party intended to benefit from the covenants may enforce them).

35. Note, *supra* note 34, at 430.

36. *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. at 262, 15 N.E.2d at 798; Note, 24 CORNELL L.Q. 133, (1939) (discusses the *Neponsit* decision). Prior to *Neponsit*, this same idea was expressed in *In re Public Beach*, Borough of Queens, 269 N.J. 64, 199 N.E. 5 (1935), where the court noted that the membership corporation is a device used by the owners to hold and control the property in which they have a common right of any easement. *Id.* at 75, 199 N.E.2d at 8.

37. *Perry v. Bridgetown Community Ass'n*, 486 So.2d 1230, 1233 (Miss. 1986).

38. *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 204 (Tex. 1963).

39. This is a lengthy note. Reference is made to it because it is readily available.

Laws in 1977 and revised substantially in 1980, has become the law in many states. The original version of the law remains in Minnesota, New Hampshire, Pennsylvania and West Virginia. The following states have enacted the revised version: Missouri, Nebraska, New Mexico, and Rhode Island. The Virginia Condominium Act, which is the predecessor to the UCA, has been the law in Virginia since 1975. The Virginia act was, however, modified in 1980 to incorporate many provisions of the UCA. In addition, Arizona, Louisiana, Michigan, and Wisconsin have passed fragmentary portions of the UCA.

THE CONDOMINIUM DECLARATION-RECORDING

The condominium declaration is a statutory declaration. Recording of the declaration with the appropriate county official is a statutory act and is a prerequisite for the commitment of the property to the condominium form of ownership. The FHA Model Act suggests that the declaration, any amendment thereof, any instrument by which the provisions of the Act may be used, and every instrument affecting the property or any apartment is entitled to be recorded and that neither the declaration nor any amendment shall be valid unless duly recorded. The state laws almost invariably require recording of the declaration and by-laws.⁴⁰

THE DECLARATION-AMENDMENTS

Virtually all statutory declarations contain clauses permitting the declarations to be amended. Invariably this clause describes a procedure and, as in section 2-119 of the original UCA, restricts matters forbidden by the UCA as amended. The amendment will be void if the procedure is not followed.⁴¹ Section 2-119 of the UCA calls for a 67 percent vote of the unit owners to create an amendment. An amendment must also be reasonable or it will be declared void.⁴²

In general, a purchaser of a lot, unit, or condominium apartment is treated as relying on the declaration that exists on the public records when he buys his property. Any amendment adopted af-

40. 15A AM. JUR. 2d *Condominiums and Co-operative Apartments* § 15 (1976).

41. See *Wolinsky v. Kadison*, 114 Ill. App. 3d 527, 534, 449 N.E.2d 151, 157 (1983) (where declaration or by-laws provide procedures to govern board action, those procedures should be followed). But before any units are sold, the developer may do as he pleases. *Seashore Club v. Seashore Club Condo*, 180 N.J. Super. 81, 88, 433 A.2d 819, 823 (1988).

42. *Crest Builders, Inc. v. William Falls Improvement Ass'n*, 74 Ill. App. 3d 420, 393 N.E.2d 107 (1979); *Unit Owners Ass'n v. Gillman*, 223 Va. 752, 768, 292 S.E.2d 378, 386 (1982).

ter he has recorded his deed may not be binding upon him.⁴³ However, if the clause permitting amendments states that it will retroactively bind prior purchasers, such purchasers arguably will be bound. That is part of the contract they agreed to.⁴⁴ Where there is a governing law, as in the case of condominiums, the law may expressly give the board the power to adopt amendments and make them binding on *all* unit owners. This, of course, governs.

Thus, an amendment to a declaration may be made retroactive in several ways. The declaration may contain a strong clause, making it clear that any and all amendments can be retroactive in any respect. Lacking such a clause, amendments will be prospective only.⁴⁵ If the statute contains a provision that all amendments shall be retroactive this may accomplish the desired result. Thus, the declaration may provide that the regime will be governed by the condominium statute "as lawfully amended from time to time."⁴⁶

THE DECLARATION-COVENANTS

In every development described here, except the old-fashioned pre-war townhouse, there is need for some entity (the HOA), to operate the property and to levy assessments that create a lien on the units in default. Accompanying this *in rem* type of enforcement provision is a provision creating running covenants that render the defaulting owner personally liable for payment of the defaulted assessments. Some examples of other covenants are those which require the unit owner to maintain his unit property, or to refrain from invading common elements. All these run with the land.⁴⁷ Thus, we have added new functions to the declaration, but, except as to the condominium, they are governed largely by case law. Of course, a well-drafted declaration will spell out in detail the rights and duties of the parties and the methods of enforcement. In this era of agreed remedies, we can expect to encounter some imaginative remedies.

43. *Streams Sports Club v. Richmond*, 99 Ill. 2d 182, 193, 457 N.E.2d 1226, 1232 (1983); *Breene v. Plaza Tower Ass'n* 310 N.W.2d 730, 734 (N.D. 1981).

44. *Seagate Condominium Ass'n v. Duffy*, 330 So.2d 484 (Fla. Dist. Ct. App. 1976); *Kroop v. Caravelle Condominium Inc.*, 323 So.2d 307, 309 (Fla. Dist. Ct. App. 1975).

45. *Breene v. Plaza Towers Ass'n*, 310 N.W.2d 730 (N.D. 1981).

46. *Century Village, Inc. v. Wellington, E, F, K, L, H, J, M, & G Condominium Ass'n*, 361 So. 2d 128 (Fla. 1978); *Sandalfoot South One Inc. v. Sandal Foot Country Club Inc.*, 404 So.2d 752 (Fla. App. 1981), *quashed*, 438 So. 2d 354 (Fla. 1983).

47. *St. Paul Fed. Bank for Sav. v. Weby*, 149 Ill. App. 3d 1059, 501 N.E.2d 707 (1986).

UNIFORM CONDOMINIUM ACT BEFORE 1980: CONVERTIBLE REAL ESTATE

In dealing with a condominium declaration under the first draft of the UCA, one must be familiar with the concept of convertible real estate. This concept is one added to introduce greater flexibility into condominium drafting, especially for the developer using phased development.⁴⁸

Convertible real estate, like additional real estate, is a device which permits the declarant to build the project in phases, but offers certain advantages which additional real estate may not provide.

For example, suppose the declarant is developing a condominium project eventually to consist of 100 units in two 50-unit buildings, with one underground garage lying beneath both buildings to serve all 100 units. The entire garage and only one building will be completed first. The simplest way of creating this condominium may be to include in the declaration all of the real estate which will constitute the condominium, and to designate the location of the second building and the garage as convertible real estate. The 50 units in the first building could then be conveyed after they are completed, together with any limited common element parking spaces to be assigned to those units by converting a portion of the convertible real estate in the underground garage into limited common elements. This could be done before the second building (also in convertible real estate) is completed and converted into 50 more units. However, the entire parcel of real estate would be part of the condominium from the beginning and a mere amendment of the declaration would suffice to describe the conversion of the second building into units.

The designation of a portion of a condominium as convertible real estate would not be a subdivision (requiring plat approval) of that real estate. On the other hand, if a declarant created a condominium out of a portion of his property and declared the remainder as additional real estate, that might constitute a subdivision of the real estate under local ordinances, requiring local approval. This portion of the UCA was amended in 1980.

UNIFORM CONDOMINIUM ACT: ADD-ONS AND WITHDRAWALS—THE 1980 AMENDMENTS

In the old days, a developer who planned to develop in phases might buy a tract of land and take options on adjoining parcels. If sales on the first parcel were brisk, he could exercise his option and buy a second parcel. This introduced the problem of the "add on"

48. U.C.A. § 1-103, comment 6 (original draft).

condominium. It took several pages of text to describe the appropriate procedure to "draft around" the statute because the federal model and all "first generation" statutes required consent of all unit owners to any change in the common elements. Some lengthy provisions were needed to "draft around" this portion of the statute.⁴⁹ The Act as amended in 1980 describes the procedure permitted under the new flexible provisions of the Act by reservation of "development rights". The declaration must expressly reserve the right to take advantage of these flexible provisions.⁵⁰ The provisions for adding or withdrawing real estate require amendments to the declaration and are described in sections 2-109(f) and 2-110, UCA as amended in 1980. These development rights contribute importantly to the flexibility of the condominium. These have been summarized as follows:

Special declarant rights are preserved to the declarant, but also affect transferees or successors to the rights of the developer. The following are examples of some declarant rights; (a) to convert convertible real estate in a flexible condominium; (b) to add additional real estate to a flexible condominium; (c) to withdraw withdrawable real estate from a flexible condominium; (d) to convert a unit into two or more units and common signs, and models; and (f) to use easements through the common elements for the purpose of making improvements within the condominium or within any convertible or additional real estate.⁵¹

Hyatt takes the view that all land that might be added as additional land should be described in the condo declaration.⁵² He suggests that all doubt be resolved in favor of describing a large additional area.⁵³ Indeed, there is nothing to prevent a developer from describing an area as large as a county or state to insure that the development will not be hampered over a long period of time.⁵⁴

Any introduction of more land is bound to affect the common element interests. The amendment should set forth the changes.⁵⁵ Some cases, however, hold that a unit purchaser is entitled to rely on a recorded declaration as spelling out his rights.⁵⁶ This suggests

49. See Appendix.

50. The Uniform Condominium Act as amended in 1980 covers this material in § 1-103(11). The comments to § 2-107 of the act requires the declaration to describe the formula to be used.

51. Cohen, Goldberg, & Mulvaney, *Condominium Law: A Comparison of the Uniform Act with the Illinois Act*, 14 J. MARSHALL L. REV. 387, 392 (1981) (citing UCA § 1-103(21)).

52. W. HYATT, CONDOMINIUMS AND HOME OWNERS ASSOCIATIONS § 7.04 (1985).

53. *Id.* § 7.63.

54. *Id.*

55. Thomas, *Woodburn Village Condominium Documents*, ALI-ABA RESOURCE MATERIALS: CONDOMINIUM, PLANNED UNIT DEVELOPMENTS AND CONVERSION DOCUMENTS, 272 (3d ed. 1985) (example amendment).

56. See, e.g., *Pepe v. Whispering Sands Condo Ass'n*, 351 So.2d 755 (Fla. Dist.

that the original condominium declarations contain detailed warnings as to what might happen if more land is added. For example, this could double the occupants of the swimming pool and users of other recreational facilities.

Section 403 of Chapter 3 of the Federal National Mortgage Association Lending Guide provides a good summary of the unilateral annexation provisions that many lenders required to be contained in the declaration. Section 403 tracked largely with Illinois Revised Statutes, ch. 30, §325 and provided:

[A] description of the legal method of expansion that will be used;

a legal description of the annexable property, and the number of units that may be added;

the time limit within which any expansion will take place (usually limited to seven years from the recordation date of the project declaration);

the method for determining the effective date for assigning assessments or granting voting rights to the annexed units;

a requirement that all improvements intended for future phases will be substantially completed prior to annexation;

the formula for determining the undivided interest in the total common areas of the project that will be allocated to the owners of the annexed units;

a statement of the reciprocal easements for specified common areas in the various phases, if the unit owners in the new phases do not share an undivided interest in the project's total common area;

a description of the annexation document that will be recorded;

a statement covering all reasonably necessary details and procedures required by law when the expansion is to be accomplished by the future merger of legally separate projects; and

a requirement that future improvements will be consistent with the initial improvements in terms of quality of construction.

THE NON-STATUTORY PLANNED COMMUNITY

In general, the planned unit development ("PUD") is a concept so familiar to the legal fraternity that no need exists to describe it here.

The PUD is created by recording a plat of subdivision which delineates the building lots and common areas, and by recording a declaration of covenants, conditions, and restrictions which sets forth the rules governing the property, creates an association which holds title to the common areas,⁵⁷ provides that membership in the

Ct. App. 1977).

57. Ownership of the common areas by an HOA stamps the development as a

association is automatic upon the purchase of a unit, establishes voting rights and the rights of the owners to use the common areas, sets out the obligation of unit owners to pay assessments to defray expenses for the maintenance of the common areas, and makes such assessments a lien on the unit until paid. Often ordinance approval is required before the PUD can be recorded.⁵⁸ There is also some state law providing for the creation of PUDs.⁵⁹ Before the first lot is sold, the developer obtains zoning and subdivision approval, incorporates the nonprofit home association, and records the land subdivision plat and declaration of covenants and easements for all of the land in the planned unit. His plat identifies: (1) the property to be transferred to public agencies, such as any proposed public streets; (2) the individual homesites; (3) the common areas to be transferred by the developer to the home association; and (4) any other parcels, such as a church site or shopping center, to be kept by the developer or transferred to others. Recorded contemporaneously with the plat is a declaration of easements, covenants, restrictions, and liens. The community is now created.

The declaration imposes restrictions on the use of the units and the common areas. Thus, it is, in part, a declaration of restrictions. It creates a diversity of easements over the common areas and parts of the residential units and thus is also a declaration of easements. Statutes may exist regarding the assessment liens created by the PUD. But again, in most states, it is not truly a statutory document to the extent that the condominium is a statutory creature. A form is occasionally found.⁶⁰

There are occasional states that deal briefly with some aspect of a Planned Community.⁶¹ Some deal with the "Common Interest Community" that has an area owned in common and maintained for the use of unit owners by an HOA empowered to levy assessments. The statute referred to permits such an HOA to use forcible detainers against delinquent unit owners. The references to the declaration are brief. Many ordinances contain elaborate provisions outlining the requirements that must be met for a valid PUD.⁶² In some states rather elaborate provision is made for the PUD.⁶³ Provisions therein

PUD, not a condominium. See *Fleet v. Valley Greene Associations*, 371 Pa. Super. 530, 538 A.2d 567 (1988) (if common elements not owned by unit owners, the project is not a condominium).

58. *Levitt Homes v. Old Farm Homeowners Ass'n*, 111 Ill. App. 3d 300, 305, 444 N.E.2d 194, 197 (1984) (PUD procedure set forth in detail).

59. ILL. REV. STAT. ch. 110, § 9-102(8) (1987).

60. 7 AM. JUR. LEGAL FORMS 2d, *Covenants, Conditions and Restrictions* § 77:76 (Supp. 1988).

61. See e.g., ILL. REV. STAT. ch. 110, § 9-102 (1987).

62. See *Levitt Homes Inc. v. Old Farm Home Ass'n*, 111 Ill. App. 3d 300, 444 N.E.2d 194 (1982) (discussing ordinance requirements for valid PUD).

63. CAL. BUS. & PROF. CODE § 11003 (West 1987).

refer to the contents of the declaration.⁶⁴ Statutes of some sort exist in New Jersey, Kansas, Colorado, Montana, Nevada, California, Ohio, Illinois, Idaho, Massachusetts, Kentucky, Arizona, New York and Indiana.⁶⁵ To some limited extent (picketing, for example) both state and federal constitutions apply.⁶⁶ In some states the planned unit legislation is lumped with the condominium legislation.⁶⁷ But in the main, at the present time, the Planned Community is a non-statutory development. Ordinances presently provide the only legislative control.⁶⁸ The bewildering diversity of ordinance regulation is undesirable and places too much power in the hands of local officials, who may be more interested in blocking the new community than regulating it. Hence, the need of a statute.

THE STATUTORY PLANNED COMMUNITY—THE UNIFORM PLANNED COMMUNITY ACT

The old-fashioned townhouse development, built during World War II and shortly thereafter, was simply a string of row houses usually erected at right angles to the street. There was no HOA and no assessments were levied. For obvious reasons this type of development leaves much to be desired. The Planned Community has an HOA that levies assessments. This is the characteristic that enables one to distinguish early PUDs.⁶⁹ All the important issues of consumer protection and association management that are present in the condominium are also present and set forth in the Planned Community Act, Prefatory Note, 4. It is for this reason that the National Conference of Commissioners on Uniform State Laws created the Uniform Planned Community Act ("UPCA") and approved it in 1980.⁷⁰ The philosophy that marked the Uniform Condominium Act was brought forward into this new law.

§2-101 of the Act is as follows:

§ 2-101. [Creation of the planned community].

A planned community may be created pursuant to this Act only by recording a *declaration* executed in the same manner as a deed. The *declaration* must be recorded in every [county] in which any portion

64. REAL ESTATE CONDOMINIUMS AND PLANNED UNIT DEVELOPMENTS, ALI-ABA COURSE OF STUDY MATERIALS (1986).

65. 5 P. ROHAN, ZONING AND LAND USE CONTROL § 32.01[6] (1980).

66. See generally Rosenberry, *The Application of Federal and State Constitutions to Condominiums, Cooperatives and Planned Developments*, 19 REAL, PROP., PROB. & T.J. 1 (1984) (application of constitutional principals to PUDs).

67. Plaza Joint Venture v. City of Atlantic City, 174 N.J. Super. 231, 239-40, 416 A.2d 71, 75 (1980).

68. See generally Hustoles, *The U.P.C.A.: Regulating Multiple Ownership*, 13 URB. LAW. 185 (1981) (discussing legislative control).

69. *Id.* at 189.

70. UNIFORM PLANNED COMMUNITY ACT, 7B U.L.A. 1 (1980) [hereinafter UPCA].

of the planned community is located, and must be indexed [in the Grantee's index] in the name of the planned community and the association and [in the Grantor's index] in the name of each person executing the declaration.⁷¹

§2-105 is as follows:

§ 2-105. [Contents of Declarations]

(a) The declaration for a planned community must contain:

- (1) the names of the planned community and the association;
- (2) the name of every [county] in which any part of the planned community is situated;
- (3) a legally sufficient description of the real estate included in the planned community;
- (4) a statement of the maximum number of units which the declarant reserves the right to create;
- (5) a description of the boundaries of each unit created by the declaration, including the unit's identifying number;
- (6) a description of any real estate which is or must become common elements and limited common elements, other than those specified in Section 2-102(2) and (4), as provided in Section 2-109(b)(10);
- (7) a description of any real estate (except real estate subject to development rights) which may be allocated subsequently as limited common elements, other than limited common elements specified in Section 2-102(2) and (4), together with a statement that they may be so allocated;
- (8) a description of any development rights and other special declarant rights (section 1-103(25)) reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised;
- (9) if any development right may be exercised with respect to different parcels of the real estate at different times, a statement to that effect together with (i) either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right, or a statement that no assurances are made in those regards, and (ii) a statement as to whether, if any development right is exercised in any portion of the real estate subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real estate;
- (10) any other conditions or limitations under which the rights described in paragraph (8) may be exercised or will lapse;
- (11) an allocation to each unit of the allocated interests in the manner described in Section 2-107;
- (12) any restrictions on use, occupancy, and alienation of the units;
- (13) the [recording data] for recorded easements and licenses appurtenant to or included in the planned community or to which any

71. *Id.* at 32.

portion of the planned community is or may become subject by virtue of a reservation in the declaration; and

(14) all matters required by Sections 2-106, 2-107, 2-108, 2-109, 2-115, 2-116, and 3-103(d).

(b) the declaration may contain any other matters the declarant deems appropriate.⁷²

Not surprisingly, large portions of the declaration are indistinguishable from condominium declarations under this Act. For example, UPCA preserves the pattern of the UCA approach to association control.⁷³

§1-104 is so important that it is set forth in full:

§1-104. [Variation by Agreement]

Except as expressly provided in this Act, provisions of this Act may not be varied by agreement, and rights conferred by this Act may not be waived. A declarant may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of this Act or the declaration.⁷⁴

Since it is the purpose of this article merely to introduce the practitioners to the existence of the new laws, there is no need to pursue further the manner in which this Act deals with the problems that occur in every Planned Community.

It is often stated that the way to create a Planned Community is to record a declaration in the same manner as a deed.⁷⁵ Strictly speaking this is not quite accurate. No third parties have rights until the first unit is sold, if there are no public rights. As to recording the declaration, the Act introduces a new concept. Section 2-101 of the UCA (1980 version) requires that the declaration be indexed in the declaration's name. Also the name of the HOA should appear in the index.

THE UNIFORM COMMON INTEREST OWNERSHIP ACT

The Uniform Common Interest Ownership Act ("UCIOA") was adopted by the Commissioners in 1982.⁷⁶ Its history and a description of its scope are given succinctly in a Prefatory Note.⁷⁷ It combines into one Act the structures previously contrived for the UCA

72. *Id.* at 37, 38.

73. Special Subcomm., Comm. on Condominiums, Coops. and Homeowner Ass'ns, *Codifying the Law of Homeowners Associations: The Uniform Planned Community Act*, 15 REAL PROP., PROB. AND TR. J. 854, 861 (1980).

74. UPCA, *supra* note 70, at 21.

75. Hustoles, *supra* note 68, at 191-92.

76. UNIFORM COMMON INTEREST OWNERSHIP ACT, 7 U.L.A. 231 (1982) [hereinafter UCIOA].

77. *Id.* at 231-36. See also 15A AM. JUR. 2D *Condominiums and Co-operative Apartments* § 14 (Supp. 1988).

and the UPCA and adds co-operatives.

Nearly without exception, UCIOA achieves the goal of uniformity among all three forms of ownership simply by consolidating the three prior Acts of the Conference and adding a very few generic definitions. The principal new definition is "common interest community."

Because of the use of consistent definitions and policies in the three Acts preceding UCIOA, consolidation of the three in the merged Act was a relatively simple task. The section numbering system of UCIOA is entirely parallel with the other three Acts, and the language of UCIOA tracks, as applicable, with the cognate sections of those three Acts. Differences in result between the three Act are preserved where appropriate. At the same time, during the drafting of UCIOA, in a few instances, it became clear that some differences in result were of form rather than legitimate substance. In those cases, the substantive result of one or more of the three Acts was changed to reflect a policy generally applicable in all forms.

The result is that a state wishing to consider legislation in the common interest ownership field has a range of choices from which to select. Many states will wish to adopt comprehensive legislation, providing maximum flexibility and certainty to all developers, lenders, and title insurers, while at the same time providing all unit purchasers and their associations a uniform level of disclosure, warranty protection, and other rights. In those states, the consolidated Act is a workable and desirable long-term solution. Other states may wish simply to adopt a modern condominium statute to replace an existing but plainly outdated, statutory structure. In those states, UCA alone is the obvious choice. Finally, in states where existing "second" or "third" generation condominium statutes are seen as satisfactory, but a need for additional certainty and structure is desirable for planned communities or cooperatives, the two Acts governing those forms of ownership are available. Following adoption of one of the three constituent Acts, it would be very feasible, by a few carefully considered amendments, to adopt UCIOA and thereby extend coverage to include all forms of ownership in the field.

Because the common elements are owned by the HOA in a planned community, in contrast to a condominium, there is no common interest allocated to unit owners in a planned community.⁷⁸ Thus, any conveyance of the common elements is by the HOA. The HOA may convey part of the common elements.⁷⁹

A good digest of some major provisions of the UCIOA is found

78. UCIOA §§ 1-103 comments 3 and 7, 3-102(8), 3-112, *supra* note 76, at 244-45, 326, 342-43.

79. UCIOA § 3-112 comment 2, *supra* note 76, at 342.

in American Jurisprudence.⁸⁰ The requirements concerning the content of the declaration are very elaborate and extend over several pages. Amazingly, the planned community appears to be moving from an era of no-regulation to an era of extensive regulation.

THE DECLARATION UNDER THE UCIOA

The UCIOA is the most modern of the uniform acts in this area. It had long been evident that the typical condominium was an unwieldy creature. The problem of placing hazard insurance on these divided ownerships was a difficult one. The liability of the unit owners in tort where injuries occurred on the common elements was another problem. Hence, the UCIOA was drafted so that the declaration could place ownership of the common elements in the HOA.⁸¹

The UCIOA contains provisions that greatly simplify the processes involved in "add on" condominiums.⁸² Under Section 1-103(13) and Section 2-110 of the UCIOA, an "add on" to the original area may be accomplished by exercise of "development rights." Obviously this will involve adding some language to the declaration. The new Act adds co-ops to the type of development covered. This again will involve the development of a special type of declaration suited to this development. Other provisions of the new Act add a new component of flexibility to the old-fashioned condominium. The draftsman will be confronted with new drafting problems.

THE APPLICABLE LAW

In determining the law applicable to declarations, one might easily blunder into the assumption that the common law must be resorted to in dealing with common law declarations and the governing statute will provide answers on the meaning of statutory declarations. This, of course, would be a monstrous error. First, a state cannot have two conflicting policies on the same protection. When a statute clearly defines the state policy on a particular position, the courts are bound by this declaration, unless a question of constitutionality is involved. Second, statutes are precedential, as I have pointed out.⁸³ Suppose for example, that a state has enacted a new condominium law stating that no amendment to future condomin-

80. 15A AM. JUR. 2D *Condominiums and Co-operative Apartments* § 14 (Supp. 1988).

81. See UCIOA introductory comment, *supra* note 76, at 233.

82. See generally Geis, *Beyond the Condominium: The Uniform Common-Interest Ownership Act*, 17 REAL PROP. PROB. & TR. J. no. 4 (1982) (discussing the benefits of the UCIOA's provisions).

83. Kratovil, *Unconscionability—Real Property Lawyers Face a New Problem*, 21 J. MARSHALL L. REV. 1, 8 (1987).

ium declarations shall have any retroactive effect and that any agreement to the contrary is void. This is a valid statement of the state's policy on this question. Obviously, any prior decisions allowing the parties to agree for retroactive effect in any common law declaration or statutory planned unit development are overruled. The state has established a new policy. Any future declaration is subject to that policy.

All declarations are subject to contract principles of good faith and fair dealing. The enactment of the UCC, for example, did not abolish the vast treatment of this subject that antedates the Code.⁸⁴ The requirements of good faith and fair dealing long antedate the Code.⁸⁵ Even the statutes that antedate the Code and deal with good faith are relevant.⁸⁶

Then, there are the topics of unconscionability and priority assessment liens, both covered by formidable bodies of commentary and decision. To all of this must be added the fact that each of the uniform acts can be cited as authority, even if the decision is in a state that has not adopted the act.⁸⁷ Thus, any discussion limited to the declaration itself must stand as an artificial island in the midst of an ocean of relevant law.

CONCLUSION

The objective of this article was to attempt to assign to the declaration its proper place in modern property law. To accomplish this it became necessary to draw upon a number of uniform acts. This, in itself, should be of service to the profession, because, for some reason, the uniform acts do not get the publicity they deserve. Probably a majority in our profession are practicing without familiarity with these acts and the excellent commentaries they provide, which give one keen insight into the law and all its infirmities as it stands before the uniform act is adopted.

One can hope that articles like this will draw the attention of the bar to the fact that statutes are precedential even where the issues in question fall outside the scope of the statute, so long as the statute expresses a policy that governs the issues. One can also hope

84. *Noonan v. First Bank of Butte*, 740 P.2d 631, 634, 636 (Mont. 1987).

85. Pratt, *American Contract Law at the Turn of the Century*, 39 S.C.L. REV. 415, 456, 459, 461 (1988).

86. See Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. OF CHI. L. REV. 666, 667 (1963).

87. See Redarowicz v. Ohlendorf, 2 Ill. 2d 171, 441 N.E.2d 324 (1982) (citing Uniform Land Transactions Act); *In re Estate of Thompson*, 66 Ohio St. 2d 433, 438-39, 423 N.E.2d 90, 94 (1981) (citing Uniform Probate Code); *Commonwealth v. National Bank and Trust Co.*, 469 Pa. 188, 191-92, 364 A.2d 1331 (1976) (citing Uniform Land Transactions Act).

that the bar will learn to treat the uniform acts as precedential across the board, whether or not the state has adopted the particular Uniform Act.

One can also hope that this article will help explain how modern property law evolves. New forms of real estate documents will constantly be created. Then, as defects and injustices make their appearance, statutes will be enacted and construed. Then, as diversity of law countrywide puts unnecessary burdens on developers and lenders, Uniform Acts will come into being. As defects are discovered in the Uniform Acts, they also will be amended. The Comments provided in the Uniform Acts make it possible for the practitioner to grasp a complex new concept readily. Dangers come to light. It must be determined whether the statute or the common law apply to a given situation. A word like "declaration" can refer to either a common law document or a statutory document. The burden rests on those of us who write for the legal periodicals to point this out. Then the case books will pick it up. Time is more important than detail. An article like this suffices to put the bench and bar on notice that something new has arrived.

Finally, if the legislatures have learned anything from the problems discussed in this article, they will routinely provide in their statutes some clause indicating whether the parties are at liberty to agree otherwise.

APPENDIX*

§ 809. The add-on—in general. The “add-on” on “expandable” condominiums presents some rather novel legal problems.

EXAMPLE: *D*, a developer, plans a high-rise condominium on Parcel A. If it is successful, he will build a similar high-rise on Parcel B adjoining. Both buildings will use walks and roads that traverse both parcels, a parking area located partly on each parcel, and a swimming pool located on a third parcel, Parcel C, adjoining both parcels. At the outset, the purchasers of units in the building on Parcel A will each have a 4 percent interest in the common elements including the roads, walks and parking area on Parcel A and the swimming pool adjoining. If *D* decides to build on Parcel B, several things must take place.

1. The Owners of units on Parcel A must automatically have their share of the common elements that will also be used by Parcel B unit owners reduced to 2 percent.
2. *D* must be in a position to convey to unit owners of Parcel B the 2 percent that was subtracted from the share of Parcel A unit owners.
3. The mortgages on Parcel A units must suffer a similar subtraction.
4. The common elements located entirely in each of the two buildings (corridors, stairways, elevators, etc.) should become limited common elements, since the unit owners in the other building have no genuine occasion to utilize them.
5. And if *D* plans additional buildings, provisions must be included for additional additions and subtractions.

As can be seen, this notion was not envisioned when the first condominium statutes were drafted and it makes rather heavy demands upon the traditional common law real property concepts. Nevertheless, it is believed that proper documentation will make the whole thing workable.

§ 810. The add-on-declaration—the general clause. To set the stage for the transaction, a clause is included in the Declaration of Condominium that spells out the intention to create an “add-on” condominium:

The area comprised within the present development is herein denominated the “Condominium Area.” The developer reserves the right to annex to the Condominium Area all or a portion of the land described as follows:

(which area is denominated herein the “Development Area.”)

No rights of any character whatever of any unit owner in annexations within the Development Area attach until an amended declaration is filed of record annexing part of all of the Development Area to the condominium hereby created. Upon the recording of such amended declaration the land therein described shall be deemed to be governed in all respects by the provisions of this Declaration of Condominium. The right is reserved to add

* Reprinted from R. KRATOVIL, MODERN REAL ESTATE DOCUMENTATION (1975) (published by Prentice Hall).

land to the "Development Area" by a declaration stating such intention and describing the land so added.

This clause accomplishes several purposes: (1) The unit purchasers in Parcel A are given notice that the project can expand and are given notice of the perimeters of the expanded area: (2) All persons are notified that on expansion, the tract, as expanded, is one condominium: (3) Unit purchasers in Parcel A and Parcel B are told to look to a coming Amended Declaration for a definition of their rights in the annexed areas.

§ 811. The add-on-partial invalidity clause. As will be seen, the techniques employed are of the "suspenders and belt" variety. Several devices are employed, and it should be made clear that they are supplementary to each other, for example:

Various provisions of this declaration and deeds and mortgages of the units and common elements contain clauses designed to accomplish a shifting of the common elements. None of said provisions shall invalidate the other, but each shall be deemed supplementary to the other toward the end that a valid shifting of the common elements can be accomplished.

§ 812. The add-on-power of appointment. The Declaration states that the deed is deemed to reserve to the developer a power of appointment in favor of unit owners in Parcel B. There appears to be no legal objection to the use of such device. Unit owners in Parcel A take with constructive notice of this power, the consequence of which is to subtract part of their ownership in the common elements. Such a clause is as follows:

Each deed of a unit shall be deemed to reserve to the developer the power to appoint to unit owners, from time to time, the percentages in the common elements set forth in amended declarations.

§ 813. The add-on-clause creating a power coupled with an interest. The developer will retain some fee ownership in both Parcels A and B when the annexation of Parcel B into the condominium takes place. This, it is argued is a sufficient "interest" to qualify under the "power coupled with an interest" rule. The clause giving the developer such a power to shift percentages in the common elements is as follows:

A power coupled with an interest is hereby granted to _____ as attorney in fact to shift percentages of the common elements in accordance with amended declarations recorded pursuant hereto and each deed of a unit and common elements in the Development (as herein defined) shall be deemed a grant of such power to said attorney in fact.

§ 814. The add-on-clause estopping the unit owner from contending that the condominium is not a statutory condominium. The objections to a "common law" condominium

are well-known and will not be restated here. Since a great number of people will change position in the belief that a statutory condominium was created, the unit owners and persons claiming under them should be estopped by a clause in the Declaration as follows:

Each Unit Owner by acceptance of the deed conveying his Unit agrees for himself and all those claiming under him, including mortgagees, and this Declaration is in accordance with the Condominium Property Act.

§ 815. The add-on-safety-valve easement clause. Whether or not the condominium is a statutory one, all the unit owners can be guaranteed common law easements for the enjoyment of the common elements by a clause as follows:

Each Unit Owner shall also be entitled to a perpetual easement, appurtenant to said Unit, for the use of the Common Elements in the Condominium Declarations herein mentioned and for the purposes in said Declarations set forth.

§ 816. The add-on-deed provision. The deed provision must be drawn with meticulous care. One suggested clause is as follows:

Together with a percentage of the common elements as set forth in Declaration recorded as Document _____ which percentage shall automatically change in accordance with amended declarations as same are filed of record pursuant to said Condominium Declaration recorded as Document _____ and together with additional common elements as such amended Declarations are filed of record, in the percentages set forth in such amended Declarations, which percentages are hereby conveyed effective on the recording of amended Declarations as though conveyed hereby.

This deed is given on conditional limitation toward the end that the percentage interest of the grantees in the common elements shall be divested *pro tanto* and vest in grantees of other units in accordance with the terms of said Declaration recorded as Document _____ and amended declarations recorded pursuant thereto, and a right of revocation is also reserved to the grantor to accomplish this result.

The acceptance of this conveyance by the grantees shall be deemed an agreement within the contemplation of the Condominium Property Act to a shifting of the common elements pursuant to the Condominium Declaration recorded as Document _____ and to all the other terms of said Declaration, which is incorporated herein by reference thereto, and to all the terms of the amended Declaration recorded pursuant thereto.

Several comments are offered: (1) The deed does not set forth a specific percentage of the common elements, but refers to the original Declaration and amended Declarations for such percentage. The deeds and declarations will be read together, and this should satisfy the statute. The Declaration as to Parcel A sets forth the 4 percent percentage. This is clear as crystal. The amended Declaration when Parcel B comes in states a new percentage, 2 percent, and this again is crystal clear. (2) The deed conveys an after-acquired title in the

Parcel B common elements to the unit owners in Parcel A. This is perfectly commonplace. Enurement of title by warranty deeds, by deeds of bargain and sale, by deeds expressing such intention, and by estoppel presents no novelty to the real property owners. (3) The deed creates a conditional limitation. It is quite clear that a deed can state a condition which, if it occurs, can shift title from the grantee to a third person. 28 Am. Jur. 2d *Estates*, § 335. Here the condition that triggers partial divestiture of a percentage of the common elements is the filing of an Amended Declaration bringing in Parcel B. (4) The deed contains a right of revocation. Such a clause is valid. 28 Am. Jur. 2d *Estates*, § 154. Again, we have here another device that enables the developer to reduce the percentages of the common elements in parcel A when Parcel B is added. The percentage thus revoked back into the developer can be conveyed to the unit owners in Parcel B. (5) Shifting of title under the Statute of Uses is also an additional legal concept utilized here. (6) The shifting is set forth both in the deed and Declaration, so that no unit owner can pretend ignorance of the device. (7) The last paragraph of the deed clause is an effort to utilize the language of some statutes that a changing of the unit percentages can be effected by agreement of the unit owners.

§ 817. The add-on-mortgage clauses. Each mortgage on a unit will need a mortgage clause, somewhat along the following lines:

The lien of this mortgage on the common elements shall be automatically released as to percentages of the common elements set forth in amended declarations filed of record in accordance with the Condominium Declaration recorded as Document _____ and the lien of this mortgage shall automatically attach to additional common elements as such amended declarations are filed of record, in the percentages set forth in such amended declarations, which percentages are hereby conveyed effective on the recording of such amended declarations as though conveyed hereby.

§ 818. The add-on-preservation of lien for common expenses. Once a lien for expenses is assessed to unit owners in Parcel A, it ought not be reduced by addition of Parcel B to the project. Hence, the following clause in the Declaration:

The recording of a Supplemental Condominium Declaration or Consolidated Master Condominium Declaration shall not alter the amount of the lien for expenses assessed to the Unit prior to such recording.

§ 819. The add-on-time limit. The declaration must contain a time limit, because shifting executory interests are subject to the rule against perpetuities. It is best to keep the period short.

§ 820. The add-on—limited common areas. Where the statute permits this, the Declaration and Amended Declaration can provide that when an annexation is made, the facilities physically

peculiar to building A shall be limited common elements for the unit owners in that building, and the same for Unit B. In such case, the unit owners would have a greater percentage in the limited common elements than they would have in the general common elements.

§ 821. The add-on "Chinese Menu" approach. A more conservative approach to the problem is the "Chinese Menu" approach. Here the original Declaration lists a percentage of the common elements if no annexation is made. A separate and smaller percentage is set forth in a separate column if Parcel B is added. A third column lists a still smaller percentage if Parcel C is added and the declaration stops there. Each buyer in Unit A knows the smallest percentage to which his percentage in the common elements can be reduced. It has the advantage of certainty but lacks the advantage of flexibility.

References on the add-on: 9 San Diego L. Rev. 28, 41; 9 Law Notes 19; 1970 Law Forum 160; 1 Valp. U. L. Rev. 85; 14 Hastings L.J. 320 (plat approval laws).

