

PREPARING COMMUNITY ASSOCIATIONS FOR THE TWENTY-FIRST CENTURY: ANTICIPATING THE LEGAL PROBLEMS AND POSSIBLE SOLUTIONS

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This Symposium affords me the unique opportunity to step back from day-to-day involvement and to draw attention to some areas of the law that are in need of correction or clarification if private community associations are to prosper and be free of

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Editors' Note: Over the past 35 years, Professor Rohan has taught a seminar on cooperatives, condominiums, and home owner associations ("H.O.A") at St. John's University School of Law; for 15 of those years he taught the same course at Columbia Law School. Professor Rohan has also served as legal advisor to various federal and state agencies active in this field. This public service interlude included a stint as Executive Director of the New York State Temporary Commission on Rental Housing, a body charged, inter alia, with modernizing the process whereby apartments that are subject to rent control are converted into condominiums or cooperatives. He also gained invaluable experience in his capacity as counsel to institutional lenders, developers, unit owners and boards of directors of housing entities of all types. In the process, he represented each of the above-mentioned constituents in litigation concerning the creation or operation of community associations. On rare occasions, he has acted as sponsor of the types of projects under discussion. For the past five years Professor Rohan has gained practical experience with some of the most successful planned-unit developments in the United States located in Hilton Head, South Carolina. Accordingly, this article is based on Professor Rohan's professional experience in many aspects of this type of housing, complemented by his academic studies and the treatises he has written or co-authored. *See generally* PATRICK J. ROHAN & MELVIN RESKIN, *CONDOMINIUM LAW AND PRACTICE* (1998); PATRICK J. ROHAN & MELVIN RESKIN, *COOPERATIVE HOUSING LAW AND PRACTICE* (1998); PATRICK J. ROHAN, *HOME OWNER ASSOCIATIONS AND PLANNED UNIT DEVELOPMENTS LAW AND PRACTICE* (1998). The appendices to these treatises contain a comprehensive bibliography and project forms of every description.

In the interest of full disclosure, Professor Rohan advises the reader that he participated as counsel or as an expert witness in the following cases cited or discussed in this article: *817 Fifth Avenue Condominium v. Nixon*; *Brennan v. Breezy Point Cooperative*; *Sherry Associates v. Sherry-Netherland, Inc.*; and *Collins v. Hayden on Hudson Condominium*. Professor Rohan also wishes to acknowledge the major contribution made in the preparation of this article by his research assistants Nora C. Sheehan, Michael V. Buonaspina, and Erik X. Wallace.

hidden pitfalls. Among the major conclusions set forth herein are the following:

1. Practically all new lateral residential developments will include private roads, recreational facilities, or other amenities that necessitate employment of a community association of one type or another. Modern land-use controls, such as cluster-zoning statutes, as well as emerging fiscal policies of local governments, will further accelerate the trend toward home owner association ("H.O.A.") housing. At the same time, economic conditions and the landlord's legal exposure will cause the rental option to all but disappear in every major city. The residential rental market will wither as buildings are torn down or converted into co-ops or condominiums.

2. The entire law of covenants, whether denominated covenants running with the land or equitable servitudes must be recast to recognize that these devices are no longer the servant of individual, despotic land owners acting solely for their own personal gratification or profit. Instead, such covenants now represent the backbone of community association arrangements of all types and should be recognized to be as necessary and beneficial as zoning or other measures passed by local governments.

3. As a general rule, the validity and enforceability of covenants should not vary with the type of parties involved; that is, judicial treatment should not vary depending upon whether a cooperative, condominium, or home owner association is seeking to enforce the covenants. The same may be said of one-on-one suits involving private parties, although covenants in these cases may be more prone to abuse and may not evidence as much concern for the common good.

4. Abuses in the area of discrimination and needless infliction of emotional and economic injury upon constituent owners as they attempt to re-sell their units should be remedied by legislation and/or the re-drafting of project documentation.

5. Legislation is needed to remedy prolonged delays in resolving loss claims and related abuses on the part of carriers insuring these types of projects, especially in light of individual

participants' inability to control this aspect of their personal housing situation.

6. Given the projected long life of these housing arrangements, additional consideration must be given to laws that safeguard their longevity, notwithstanding the Rule Against Perpetuities and related rules.

7. Regulation of retirement communities must be strengthened substantially, especially where six-figure entrance fees are exacted (irrespective of whether such fees are theoretically refundable when the participant leaves the project).

8. Many federal, state, and local measures that are designed to protect the health and welfare of tenants, tradesmen, or the public at large are being applied helter-skelter to community associations. This has led to the imposition of stiff civil and/or criminal penalties upon officers, directors and constituent owners. If left unchecked, this trend will discourage participation by potential officers and directors. It may also cause counsel for home buyers to advise their clients to forego community living in favor of purchasing detached, single-family homes.

Each of these problem areas will be considered in turn.

I. THE AGE OF COMMUNITY ASSOCIATION LIVING IS UPON US

Whether one focuses on the housing pattern in large cities or upon suburbia, one is led inexorably to the conclusion that the age of community association living, as opposed to renting or owning a one-family home, is upon us.¹ The rental market in every urban center is rapidly disappearing as high-rise buildings are torn down, devoted to commercial uses, or converted into

¹ See Joseph Conlon, *Community Associations Rules Aim to Create Peaceful Living*, PAC. BUS. NEWS, Jan. 12, 1998, at 32, available in 1998 WL 8850025 (noting that changes in demographics, the desire for more leisure time, carefree activities, recreational facilities, and the on-going housing-affordability crisis has resulted in increased development of community associations); Ellen Paris, *Millions Opt for Community Associations*, WASH. TIMES, Oct. 24, 1997, at F1, available in 1997 WL 3687492 (estimating that there are 150,000 homeowner and condominium associations across the country, which is more than seven times the number in 1970, and projecting that there will be 225,000 community associations by the year 2000).

condominium or cooperative housing.² The reasons for this trend are many and varied. From an income-tax standpoint, the landlords' deduction for depreciation shrinks, and ultimately disappears in direct proportion to the number of years they have owned their premises. The same is true of the mortgage interest deduction. The loss of this tax shelter for rents has been accompanied by sharp increases in the elements that make up operating costs including fuel, utilities, labor, insurance, and repairs.³ Ever-increasing demands by city administrations for improvements such as the installation of sprinklers and smoke detectors,⁴ and environmental costs such as removal of lead paint and asbestos,⁵ make the future of one's investment in residential real estate all but speculative, as does the occasional threat of reimposition of rent control in buildings not presently subject to such controls.⁶ The revolution that has taken place in the law of

² See Scott E. Mollen, *Real Estate Financing Bureau Adapts to a New Marketplace*, 220 N.Y. L.J., Oct. 22, 1998, at 1 (projecting that practitioners can expect a resurgence of conversions of rental housing to condominium or cooperative ownership as a result of seven years of little new construction, widespread decontrol of rental housing, increased demands for housing in New York City and the recent Wall Street bull market); Mary A. Mitchell, *Cabrini's Mixed Future*, CHI. SUN TIMES, Mar. 6, 1997, at 27, available in 1997 WL 6339708 (describing one ambitious project to tear down high-rise apartments and construct new multi-family housing units).

³ See *Borough of Little Terry v. Vecchiotti*, 7 N.J. Tax 389, 404 (Tax Ct. 1985) (noting rental increases have failed to keep pace with rapidly-increasing operating expenses); see also Pamela Dittmer McKuen, *In-Depth Look at How Properties Stack Up*, CHI. TRIB., Jan. 16, 1998, at 3, available in 1998 WL 2815201 (stating that the median total operating cost of cooperatives increased by 12.2 percent per unit per year in 1995).

⁴ See B.J. Novitski, *New Tools in Fire Protection*, ARCHITECTURAL REC., May 1, 1997, at 207 (discussing new housing code requirements such as installation of fire sprinklers); Brad Bennett, SUN-SENTINEL (Fort Lauderdale), *Accord Reigns in Delray Fire Sprinkler Dispute*, May 5, 1998, at 3B, available in 1998 WL 3262705 (detailing compromises made by city commissions and condominium residents regarding installation of smoke detectors and sprinklers).

⁵ See Jane Schukoske, *The Evolving Paradigm of Laws on Lead-Based Paint: From Code Violation to Environmental Hazard*, 45 S.C. L. REV. 511, 564 (1994) (discussing the broadening net of people who can be held liable for endangerment from lead-based paint to include real estate agents and property managers); see also Elliot H. Levitas & John Vance Hughes, *Hazardous Waste Issues in Real Estate Transactions*, 38 MERCER L. REV. 581, 626-41 (1987) (discussing the impact of asbestos contamination in real property transactions); Mary Rose Kornreich, *Minimizing Liability for Indoor Air Pollution*, 4 TUL. ENVTL. L.J. 61, 91 (1990) (discussing a buyer's enhanced negotiating power to either require a seller to remove asbestos as a precondition to sale or to reduce the selling price to compensate the buyer for containment or removal costs).

⁶ See Joyzelle Davis, *Apartment Prices Jump 18 Percent in Santa Monica*, 20

torts, such as implied warranties and liability for the criminal acts of third parties in certain circumstances, also add to the landlord's worries.⁷ Similarly, hardly a month goes by without a draconian or far-reaching federal, state, or local enactment being placed as a sword of Damocles over the landlord's head. Among these are environmental measures⁸ and discrimination suits. Accordingly, it is safe to conclude that the trend towards conversion to condominiums and cooperatives will accelerate and that the rental housing market in every major city will shrink and ultimately disappear. Unfortunately, the diminishing rental market will not be offset by construction of new rental apartments by the private sector; the same economic and legal factors causing existing landlords to abandon the residential market will also lead builders to erect non-commercial buildings or new condominiums and cooperatives.⁹

This metamorphosis in apartment living finds its parallel in the lateral housing market of suburbia. Commuters no longer seek their own detached, one-family homes with an acre of grass to cut. Instead, they look for a development featuring significant recreational amenities, i.e., golf course, swimming pool, tennis courts and clubhouse, maintained by duly elected officers of a home owner association.¹⁰ Even where these amenities are not

L.A. BUS. J., Jan. 12, 1998, at 1, available in 1998 WL 10249845 (noting that "[r]ent control laws dampen the desirability of an apartment because a landlord cannot generate an income stream through rental increases").

⁷ See, e.g., *Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544 (1998); *Price v. New York City Hous. Auth.*, 92 N.Y.2d 553 (1998); see also Olin L. Browder, *The Taming of a Duty-The Tort Liability of Landlords*, 81 MICH. L. REV. 99 (1982); James L. Weiss, Comment, *Landlord Liability—Obligation to Maintain Adequate Security- A Comparative Study*, 59 TUL. L. REV. 701, 710-11 (1984).

⁸ See Davis, *supra* note 6, at 1 (discussing environmental liabilities).

⁹ See Lois Weiss, *Co-op to Condo Conversion: Saving Glory or Tax Abyss?*, 43 REAL EST. WKLY, Feb. 5, 1997, at 1, available in 1997 WL 10025384 (noting the recent trend to convert residential buildings into condominiums); Bob Temliak, *Real Estate Marketplace*, N.Y. L.J., Aug. 24, 1998, at S10 (discussing the possible conversion of New York cooperatives into condominiums as a result of scarcity and increasing demand).

¹⁰ See Susan F. French, *The Constitution of a Private Residential Government Should Include a Bill of Rights*, 27 WAKE FOREST L. REV. 345, 348 n.15 (1992) (quoting national statistics: "69% of community associations provide swimming pools, 46% clubhouses or community rooms, 41% tennis courts, 28% playgrounds, 20% park or natural areas, 17% exercise facilities, 16% lakes, 4% marinas, 4% golf courses, 4% restaurants"); Wayne S. Hyatt and Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 641 (1993) (pointing out that the development of coop-

in evidence, other facts of life may make communal living a necessity. Thus, for example, a builder may avail himself of the "cluster" housing provision of the local zoning code in order to maximize the number of buildable units, to avoid problematic portions of the construction site (such as wet areas or rocky ledges), or to foster preservation of open space.¹¹ This type of development has become increasingly common in recent years.¹² The same may be said of the practice of economy-minded local governments refusing to accept the dedication of roads and sewage treatment plants within a project.¹³ Faced with restrictive municipal fiscal policies, the developer has little choice but to create a home owner association to administer the private roads and other facilities after the builder's departure.¹⁴

Further, an ever-increasing segment of the population is reaching retirement age.¹⁵ This has created an emerging market of housing for the elderly, including assisted living and nursing

erative associations was partially due to the desire of individual consumers to own recreational amenities); Joseph F. Scalo, *Timesharing in the '90s*, C934 ALI-ABA 435, 439 (1994) (discussing how the timeshare industry has evolved to meet consumer demand for recreational amenities such as golf courses, tennis courts and marinas).

¹¹ Tom Pierce, Note, *A Constitutionally Valid Justification for the Enactment of No-Growth Ordinances: Integrating Concepts of Population Stabilization and Sustainability*, 19 U. HAW. L. REV. 93, 144 n.72 (1997) (stating that cluster housing preserves large areas of undeveloped green space).

¹² See Neil D. Hamilton, *Legal Authority for Federal Acquisition of Conservation Easements to Provide Agricultural Credit Relief*, 35 DRAKE L. REV. 477, 504 n.121 (1985-86) (noting the coming age of cluster housing developments); Boyce Thompson, *Fashion Statement (Changing Styles in Residential Production Architecture)*, 21 BUILDER 17, Aug. 1, 1998, available in 1998 WL 10806939 (discussing the evolution of cluster housing).

¹³ See *Neighborhood News-Cornwall*, HARRISBURG PATRIOT, Aug. 12, 1998, at B04, available in 1998 WL 6475656 (questioning whether existing roads can accommodate the traffic which cluster housing creates); Jan Barry, *Mountainside Development Denied Waiver*, REC. (N. N.J.), Feb. 21, 1998, at A04, available in 1998 WL 5796598 (citing environmental concerns such as traffic and sewage plants that compelled a New Jersey planning board to vote against a zoning waiver that would have permitted construction of cluster housing).

¹⁴ See, e.g., John W. Fisher, II, *The Evolution of Restrictive Covenants in West Virginia*, 100 W. VA. L. REV. 55, 56 (1977) (discussing home owner associations' control over land use and certain common problems such as road maintenance); Hyatt & Stubblefield, *supra* note 10, at 599 (commenting on maintenance responsibilities of home owner associations).

¹⁵ See Neil Shouse, *The Bifurcation: Class Polarization and Housing Segregation in the Twenty-First Century Metropolis*, 30 URB. LAW. 145, 171 n.22 (1998) (noting that the elderly, comprising an increasingly larger share of the population, are an important component of the zoning reform coalition).

home facilities.¹⁶ These projects frequently take the form of condominiums or home owner associations.¹⁷ The same is true of publicly-sponsored shelters for low and middle-income groups.¹⁸ In short, the age of detached, single-family homes and rental apartments is fast drawing to a close and is being replaced by community association living in one form or another.¹⁹

¹⁶ See Joel C. Dobris, *Medicaid Asset Planning by the Elderly: A Policy View of Expectations, Entitlement and Inheritance*, 24 REAL PROP. PROB. & TR. J. 1 (1989) (acknowledging the growing rental housing market for the elderly); Ralph Michael Stein, Book Review, 18 REAL EST. L.J. 112 (1989) (reviewing ARTHUR E. GIMMY & MICHAEL G. BOEHM, *ELDERLY HOUSING: A GUIDE TO APPRAISAL, MARKET ANALYSIS, DEVELOPMENT AND FINANCING* (1988)); Eric Avidon, *Seniors Housing Called Likely to Attract Investors*, NAT'L MORTGAGE NEWS, Sept. 1, 1997, available in 1997 WL 12863077 (commenting that investors will increasingly find senior housing an attractive option over the next 10 years).

¹⁷ It is fashionable to equate "gated communities" with disdain for one's fellow man. In fact, the elderly are drawn to such projects, both for their amenities and for the feeling of safety engendered by the monitoring of visitors and night ground patrol by association personnel.

¹⁸ See Judith Bernstein-Baker, *Cooperative Conversion: Is it Only for the Wealthy? Proposals that Promote Affordable Cooperative Housing in Philadelphia*, 61 TEMP. L. REV. 393 (1988) (commenting that cooperative housing will increasingly become a form of housing for low and middle-income families who require shelter); see also Peter W. Salsich, Jr., *Displacement and Urban Reinvestment: A Mount Laurel Perspective*, 53 U. CIN. L. REV. 333 (1984) (discussing innovative anti-displacement activities in American cities, including the purchase of condominium units for low and middle-income families whose apartments are being converted).

¹⁹ It is difficult to gauge the exact number of condominiums, cooperatives, and home owner associations in the United States and how many people reside therein. However, some approximation of the numbers can be made. As early as 1986, the Supreme Court of California, in surveying the housing market of a single state, observed:

We . . . take judicial notice of the fact that a rapidly growing share of California's population reside in condominiums, cooperatives and other types of common-interest housing projects. Homeowner associations manage the housing for an estimated 15 percent of the American population and, for example, as much as 70 percent of the new housing built in Los Angeles and San Diego Counties. Nationally, "[t]hey are growing at a rate of 5,000 a year and represent more than 50 percent of new construction sales in the urban areas. Projects average about 100 units each, so the associations affect some 10 million owners," according to C. James Dowden, executive vice president of the Community Association Institute in Alexandria, Virginia. . . . [H]ousing experts estimate that there already are 15,000 common-interest housing associations in California. While in some projects the maintenance of common areas is truly cooperative, in most of the larger projects control of the common area is delegated or controlled by ruling bodies that do not exercise the members' collective will on a one-person, one-vote basis.

Frances T. v. Village Green Owners Ass'n, 723 P.2d 573, 578 n.9 (Cal. 1986) (in bank) (citations omitted) (quoting Mike Bowler & Evan McKenzie, *Invisible King-*

II. THE LAW OF COVENANTS AND RESTRICTIONS MUST BE RECAST TO REFLECT THE HOUSING METAMORPHOSIS OUTLINED ABOVE.

Unlike other areas of private-sector law, real property law has never been extensively reviewed or modernized.²⁰ The Great Depression, the Second World War, and the emergence of a unified national economy led to monumental changes in the law of contracts,²¹ employment law,²² child welfare,²³ and taxation.²⁴

doms, CAL. LAW., Dec. 1985, at 54, 56).

More recently, the non-profit trade organization Community Associations Institute ("C.A.I.") estimated that 40 million Americans currently reside in some form of community association project. The C.A.I. estimates that the number of such associations has grown from approximately 10,000 in 1970 to 205,000 at the present time. The C.A.I. further projects that 6,000 to 8,000 new associations are being formed each year. The approximate breakdown by type is estimated as follows: home-owners' associations, 64 percent; condominiums, 31 percent; and cooperatives, 5 percent. See Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461 (1998).

A recent Wall Street Journal article discussed statistics released by the American Seniors Housing Association that reported that the number of senior citizen projects has risen from 1,500 a decade ago to 2,700 facilities today. See Michael Moss, *Home Sweet . . . For Retirees—Moving Into "Continuing Care" Offers No Guarantees*, WALL ST. J., Oct. 8, 1998, at A1. In some jurisdictions, so-called "Master Planned Communities" have been built on a massive scale. The top-ten Active Master-Planned Communities, by size in acres, line up in the following order:

Irving Ranch, Orange County, Calif. 110,000
 Poinciana, Poinciana, Fla. 47,000
 Woodlands, Houston 25,000
 Summerlin, Las Vegas 22,500
 Highlands Ranch, Denver 22,000
 Kingwood, Houston 14,000
 Mission Viejo, Orange Co., Calif. 10,325
 Sienna Plantation, Houston 10,000
 Clear Lake City, Houston 10,000
 First Colony, Houston 9,700

Neal Templin, *The Lure of Planned Suburbs: No Yard Sales, Just 2 Pets*, WALL ST. J., Oct. 7, 1998, at B1.

²⁰ See *Weintraub v. Krobatsch*, 317 A.2d 68, 74 (N.J. 1974) (noting that the law has progressed more slowly in the real property field than in other fields); Vincent DiLorenzo, *Restraints on Alienation in a Condominium Context: An Evaluation and Theory for Decision Making*, 24 REAL PROP. PROB. & TR. J. 403 (1989) (analyzing the policy basis for property law doctrine prohibiting restraints on alienation and the need for changes); see also Susan F. French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928, 928 (1988) (describing the law governing servitudes as the most "archaic body of American property law remaining in the twentieth century").

²¹ See generally P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979) (discussing the changes that have occurred in contract law regarding assent, choice, and reliance based on liabilities); 1 JOSEPH CHITTY, *CHITTY ON CONTRACTS* 8-9 (27th ed. 1994) (noting that statutory regulation of contracts has altered tradi-

Banking and commerce have been overhauled, not only by congressional measures but also by the advent of state legislation, such as the Uniform Commercial Code.²⁵ Even the field of criminal law has been completely changed in the past fifty years,²⁶ as has the lofty subject of constitutional law.²⁷ By contrast, few sweeping changes of any significance have occurred in the field of real property.²⁸ Nowhere is this fact of life more evident than in the area of covenants and restrictions. They continue to be regarded with disfavor as isolated attempts by inept or mean-spirited grantors to interfere with the right of every person to enjoy their property to the absolute fullest.²⁹ Admittedly, some

tional contract law).

²² See LOUIS WEINER, FEDERAL WAGE AND HOUR LAW ix (1977) (noting that amendments to the Fair Labor Standards Act, 29 U.S.C. §§ 201-213 (1994), prompted much litigation and change in the field of labor and employment law); see also *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) (holding that employers must compensate their employees for time spent in pre and post-shift activities if such activities are pre-requisites to principal work activities); *Garcia v. San Antonio Metro. Transit Auth.*, 838 F.2d 1411 (5th Cir. 1988) (deciding that there is no constitutional bar to applying the Fair Labor Standards Act to state and local government employment).

²³ See, e.g., N.Y. SOC. SERV. LAW § 409 (McKinney 1992 & Supp. 1998) (concerning provisional services for children); *id.* § 411 (providing protective services for abused and maltreated children); see also Mychal L. Feldman, Note, *The Child Welfare System and Its Implications on the Best Interests of Children*, 14 N.Y.L. SCH. J. HUM. RTS. 615, 623 (1998) (noting that New York has established more productive child welfare laws and agencies).

²⁴ See I.R.C. § 7441 (West 1989 & Supp. 1998) (codifying the Tax Reform Act of 1969 and establishing the tax court).

²⁵ See, e.g., Larry T. Garvin, *Adequate Assurance of Performance: of Risk, Duress, and Cognition*, 69 U. COLO. L. REV. 71, 71-72 (1998) (noting that with the U.C.C., Karl Llewellyn changed contract law by including the doctrine of adequate assurances).

²⁶ See, e.g., *Brogan v. United States*, 118 S. Ct. 805, 812 (1998) (Ginsburg, J., concurring) (recalling the congressional legislation of 1981 that was intended to revise and recodify federal criminal law); *Standefer v. United States*, 447 U.S. 10 (1980) (detailing the evolution of the criminal law regarding principals and accessories).

²⁷ See *Agostini v. Felton*, 117 S.Ct. 1997, 2016 (1997) (noting that there has been a significant change in the development of our constitutional law). See generally Raymond B. Marcin, *Natural Law, Homosexual Conduct, and the Public Policy Exception*, 32 CREIGHTON L. REV. 67, 81 (1998) (noting that constitutional law is a constantly changing and evolving doctrine).

²⁸ Curiously, the largest single innovation in the real property area in the past half-century has been the advent of condominium legislation nationwide in the early 1960s. This development, in turn, reinvigorated the home owner association as a viable housing vehicle.

²⁹ See *Ridgely Condominium Ass'n v. Smyrnioudis*, 660 A.2d 942 (Md. Ct. Spec. App. 1995) (noting that covenants that are proven to be wholly arbitrary or in viola-

individuals do draft covenants running with the land that fly in the face of common sense and run contrary to public policy, such as covenants that discriminate along racial³⁰ or religious lines,³¹ or that enable the grantor to repurchase the premises at a remote future date for the same price he or she received in selling the property today.³² While such covenants originating in one-on-one situations may have been typical in the past, their quantitative importance is negligible in today's market in light of the widespread use of covenants in condominium, cooperative, and home-owner association arrangements.³³ Nevertheless, the tail

tion of public policy will be invalidated); see also 9 RICHARD R. POWELL, POWELL ON REAL PROPERTY ¶ 673 (Patrick J. Rohan ed. 1998) (noting that the policy favoring unfettered use of land helps to avoid overbroad restrictions which enlarge the class of persons excluded from using the land); French, *supra* note 20, at 928 (opining that the complexity of servitudes law is the result of judicial perception that the unrestrained enforcement of servitudes is dangerous).

³⁰ See *Mayers v. Ridley*, 465 F.2d 630, 631 (D.C. Cir. 1972) (noting that it is unlawful to include discriminatory covenants which indicate a preference based on race in documents for conveyance of property); *Broadmoor San Clemente Homeowners Ass'n v. Nelson*, 30 Cal. Rptr. 2d 316, 318 (Cal. Ct. App. 1994) (holding that discrimination against group homes via restrictive covenants is unlawful).

³¹ See *Southside Fair Hous. Comm. v. City of New York*, 928 F.2d 1336, 1351 (2d Cir. 1991) (noting that government entanglement with religious affairs is not fostered by restrictive covenants forbidding discrimination contained in land transfers between religious communities and governments).

³² See, e.g., *D-F Fund VIII, L.L.C. v. Resolution Trust Co.*, No. CA 3-96 CV-3367-R, 1998 U.S. Dist. LEXIS 93, at *1 (N.D. Tex. Jan. 5, 1998); *Low v. Spellman*, 629 A.2d 57 (Me. 1993); *Syman v. Vanderheval*, 672 N.Y.S.2d 454 (App. Div. 1998).

³³ This is not to say that there are no longer any grantors who might impose restrictive covenants originating with strongly-held personal preferences or viewpoints. Many Southerners still refer to the Civil War as "the recent unpleasantness." As recently reported in the *Charleston Gazette*, one Southerner went a step further. See Bruce Smith, *Plantation Owner Bars All "Yankees,"* CHARLESTON GAZETTE, Feb. 7, 1998, at P4C, available in 1998 WL 5932297. Henry Ingram, Jr. attracted national attention by recording covenants running with the land that, in terms, prohibit "Yankees" from owning or occupying any portion of a 1,688 acre tract of South Carolina farm land. See *id.* His effort to stave off the migration of union sympathizers to the South was described as follows:

More than a century after Gen. William T. Sherman's troops burned every building on the property, Henry Ingram Jr. has vowed never to let his plantation fall into Yankee hands again.

Ingram went down to the courthouse Wednesday and filed deed restrictions barring the sale of the land to anyone from north of the Mason-Dixon Line and anyone named Sherman.

Ingram did not return phone calls to his home on Friday, but he told *The Beaufort Gazette*: "This is the prettiest piece of land in the county, and I want to keep it that way. I want to make sure that no one has access to it that I don't want to be there."

The deed restrictions he filed at the Jasper County courthouse prohibit

continues to wag the dog, as well-meaning judges reiterate the centuries-old proposition that covenants are not favored in the law and should be narrowly construed (if not read out of existence) wherever possible.³⁴ However, in the last half of the twentieth century, covenants and restrictions have evolved from a reflection of the peculiar predilections of one grantor into the lofty status of finely-tuned private zoning measures that make community living possible.³⁵ Accordingly, like zoning ordinances, they should be looked upon favorably (if not benignly) in the abstract, and enforced whenever reasonably possible.³⁶ In fact, home owner associations are often referred to as "protective associations" and "private government[s]" in recognition of this truism.³⁷ Are you not better off with recorded covenants that require your neighbor to park his ice cream truck at his place of business instead of his driveway, and to park his boat in his garage or rear yard? In short, the time has come to bring the law of covenants abreast of the beneficial function these devices actually serve and their all-but-universal presence in modern housing arrangements.³⁸

Real Property, 51 A.L.R.3D 556 (1973 & Supp. 1998).

³⁴ See e.g., *Eagle Enters., Inc. v. Gross*, 349 N.E.2d 816, 818 (N.Y. 1976). See generally 9 POWELL, *supra* note 29, §§ 60.01-11.

³⁵ See Casey J. Little, *Riss v. Angel: Washington Remodels the Framework for Interpreting Restrictive Covenants*, 73 WASH. L. REV. 433, 440 (1998) (noting that since zoning laws already limit the use of property, additional restraints that restrictive covenants impose on land may be viewed as a means of efficiently allocating resources using private agreements).

³⁶ See 1 PATRICK J. ROHAN, *ZONING AND LAND USE CONTROLS* §§ 1.01-05 (1998).

³⁷ EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 140 (1994).

³⁸ Of course, this generalization must be modified to fit special circumstances. In a high-rise cooperative apartment building, for example, the co-op board of directors must be accorded greater control over such factors as noise and anti-social behavior than might be accorded the board of a lateral condominium or H.O.A. Similarly, because there is one mortgage and one real estate tax levy on the entire co-op building, making the cooperators financially interdependent to a greater degree than exists in the condominium and H.O.A. situations, the co-op should be accorded more leeway in rejecting a prospective purchaser on re-sale for financial reasons. Nevertheless, as a general proposition, covenants involving any of the recognized forms of community associations should be benignly construed and accorded uniform treatment. To a great extent, the same approach should be taken with respect to covenants that do not involve community associations, i.e. one-on-one situations.

III. RECORDED COVENANTS SHOULD BE CONSTRUED AND ENFORCED UNIFORMLY, IRRESPECTIVE OF WHETHER THEY INVOLVE CONDOMINIUM, COOPERATIVE OR H.O.A. ARRANGEMENTS, OR ONE-ON-ONE SITUATIONS.

The change in attitude toward covenants advocated above should be made across the board, i.e., their validity and interpretation should be treated the same, irrespective of whether the covenants appear in a condominium, cooperative or H.O.A. case, or in a suit between two private individuals. In this regard, *Eagle Enterprises, Inc. v. Gross*,³⁹ decided by the New York Court of Appeals in 1976, is instructive. A developer of rural land recorded a covenant running with the land.⁴⁰ The covenant obligated his lot purchasers to pay thirty-five dollars annually to defray the developer's cost in creating a well to supply water to the participants during the six-month season when the parcels in question were most likely to be utilized.⁴¹ After having acceded to this arrangement for some time, a recalcitrant owner winterized his cabin, installed a year-round well and refused to pay the developer the agreed-upon sum per annum.⁴² The court reviewed the case under the age-old rules governing covenants to pay money and concluded that the promise could not run with the land.⁴³ The court also cavalierly assumed that the financial bur-

³⁹ 349 N.E.2d 816 (N.Y. 1976).

⁴⁰ See *id.* at 817.

⁴¹ See *id.*

⁴² See *id.* at 818.

⁴³ A unanimous Court of Appeals rendered an opinion containing the following statement:

A close examination of the covenant in the case before us leads to the conclusion that it does not substantially affect the ownership interest of landowners in the Orchard Hill subdivision. The covenant provides for the supplying of water for only six months of the year; no claim has been advanced by appellant that the lands in the subdivision would be waterless without the water it supplies. Indeed, the facts here point to the converse conclusion since respondent has obtained his own source of water. The record, based on and consisting of an agreed stipulation of facts, does not demonstrate that other property owners in the subdivision would be deprived of water from appellant or that the price of water would become prohibitive for other property owners if respondent terminated appellant's service. Thus, the agreement for the seasonal supply of water does not seem to us to relate in any significant degree to the ownership rights of respondent and the other property owners in the subdivision of Orchard Hill. The landowners in *Neponsit* received an easement in common to utilize

den shifted onto the shoulders of the developer and/or other participating owners was negligible.⁴⁴ If the assumption was correct, the burden the complainant agreed to shoulder would also be negligible. Moreover, if this were a condominium arrangement, the statute would prevent participants from absolving themselves of the responsibility of paying their full share by abstaining from making use of shared facilities or services.⁴⁵ If the

public areas in the subdivision; this interest was in the nature of a property right attached to their respective properties. The obligation to receive water from appellant resembles a personal, contractual promise to purchase water rather than a significant interest attaching to respondent's property. It should be emphasized that the question whether a covenant is so closely related to the use of the land that it should be deemed to "run" with the land is one of degree, dependent on the particular circumstances of a case. Here, the meager record before us is lacking and woefully insufficient to establish that the covenant "touches and concerns" the land, as we have interpreted that requirement.

Id. at 819-20 (citing *Neponsit Property Owners' Ass'n v. Emigrant Sav. Bank*, 15 N.E.2d 793, 796 (N.Y. 1938)).

This passage is difficult to reconcile with the reality of real estate fundamentals. Anyone about to acquire a lot for development, other than property serviced fully by a municipality, must have three factors in mind: (1) Is there an all-weather access road; (2) Is there access to electrical service; and (3) Is there a reliable source of water?

Here, the seasonally-occupied property was being serviced by a reliable well for the modest sum of \$35 per year (or less than \$3 per month). Nevertheless, the court found the burden too great and lasting too long. The property purchaser is usually hoping his source of water will be there forever.

⁴⁴ See *id.* at 819 (stating the record did not show "that the price of water would become prohibitive for other property owners if respondent terminated appellant's service").

⁴⁵ See N.Y. REAL PROP. LAW § 339-x (McKinney 1989) ("No unit owner may exempt himself from liability for his common charges by waiver of the use or enjoyment of any of the common elements or by abandonment of his unit."). Section 339-x frequently costs the developer tens of thousands of dollars once the condominium plan is declared effective, insofar as the builder must pay the full common charges on the unsold units (including unbuilt units), on a monthly basis, and cannot demand a common charge forgiveness or step-down rate on such units. If the recalcitrant owner in the *Eagle Enterprises* case had resided in a condominium project that only opened its swimming pool six months of the year, such owner could not build his own year-round pool and expect to reduce his common charges thereby. The same would be true if the condominium only supplied water six months of the year. The unit owner could not expect a stepped-down common charge if he sunk his own well.

The court in *Eagle Enterprises* also waxed enthusiastic over the heat supply covenant in *Nicholson v. 300 Broadway Realty Corp.*, 164 N.E.2d 832 (N.Y. 1959), noting that the covenant would die a natural death when either house was destroyed. See *Eagle Enterprises, Inc.*, 349 N.E.2d at 820 (stating that the covenant "was conditioned upon the continued existence of the buildings"). However, the benefited owner would likely retrofit his house to make sure it survived all perils

covenant would be valid in the condominium context, there is no reason to deem it nefarious and unenforceable in a parallel one-on-one context. Rather, it makes more sense to adopt the modern, liberal approach found in condominium legislation, instead of adhering to the outmoded common law disdain for covenants as an anti-social and an unwarranted interference with one's right to do as one pleases.⁴⁶

and could sue his neighbor if his burdened property were allowed to go to rack and ruin. Therefore, in this writer's view, the *Nicholson* covenant should have been modified or struck down by the courts, and the *Eagle Enterprises* covenant should have been sustained.

⁴⁶ Thus, for example, the New York Courts have customarily been viewed as progressive in the area of covenants and restrictions ever since *Neponsit* was decided. Yet in *Eagle Enterprises*, the New York Court of Appeals stated:

There is an additional reason why we are reluctant to enforce this covenant for the seasonal supply of water. The affirmative covenant is disfavored in the law because of the fear that this type of obligation imposes an "undue restriction on alienation or an onerous burden in perpetuity[.]" In *Nicholson*, the covenant to supply heat was not interdicted by this concern because it was conditioned upon the continued existence of the buildings on both the promisor's and the promisee's properties. Similarly, in *Neponsit*, the original 1917 deed containing the covenant to pay an annual charge for the maintenance of public areas expressly provided for its own lapse in 1940. Here, no outside limitation has been placed on the obligation to purchase water from appellant. Thus, the covenant falls prey to the criticism that it creates a burden in perpetuity, and purports to bind all future owners, regardless of the use to which the land is put. Such a result militates strongly against its enforcement. On this ground also, we are of the opinion that the covenant should not be enforced as an exception to the general rule prohibiting the "running" of affirmative covenants.

Eagle Enterprises, Inc., 349 N.E.2d at 820 (quoting *Nicholson*, 164 N.E.2d at 835).

This rationale is all the more surprising considering that the New York Court of Appeals routinely enforces *expired* covenants and restrictions which provide for the collection of maintenance assessments on the theory that the recalcitrant property owner is liable in quasi contract or a contract implied-in-fact for buying into a community that supplied services and facilities on a pay-as-you-go basis. See Patrick J. Rohan & John P. Healy, *Home Owner Association Assessment Litigation In New York—An Overview* 73 ST. JOHN'S L. REV. 199, 208 n.24 (1999) (citing cases). The court's opinion in *Eagle Enterprises* also ignores the fact that enforcement of covenants is usually done by way of an injunction, a peculiarly equitable remedy that is not granted where to do so would work an injustice.

Similarly, the "change of neighborhood" doctrine is also available to enable the court to eliminate truly outmoded covenants. See N.Y. REAL PROP. ACTS. §§ 1950-55 (McKinney 1979 & Supp. 1999).

No restriction on the use of land created at any time by covenant, promise or negative easement. . . [shall] be declared or determined to be enforceable if, at the time the enforceability of the restriction is brought in question, it appears that the restriction is of no actual and substantial benefit to the persons seeking its enforcement . . . either because the purpose of the restriction has already been accomplished or, by reason of changed condi-

IV. THE CONTROL OF COMMUNITY ASSOCIATIONS OVER RE-SALES AND THE LEASING OF ONE'S UNIT SHOULD BE MORE CLOSELY MONITORED TO PREVENT FINANCIAL HARDSHIP

The modern approach to control of re-sales by constituent unit owners is found in condominium statutes wherein the board of managers has a thirty-day option to match the offer the seller has received from a third party.⁴⁷ This mechanism usually accomplishes substantial justice for all concerned for two reasons. First, the match-offer option is seldom exercised by the board of managers because they generally do not have reserve funds to pay for the acquisition, and, even if they did, they would prefer not to spend it this way. Second, if there is a serious problem, financial or otherwise, with a prospective purchaser obtained by the seller, the latter can usually be induced to find a replacement buyer.⁴⁸ A particular problem occurs in states like New York

tions or other cause, its purpose is not capable of accomplishment

Id. § 1951(1); see also N.Y. REAL PROP. LAW § 345(a). Of course, not all commentators agree with the enlightened views expressed in this article. For a survey of opinions on the social value of covenants running with the land, see Morrison v. Piper, 566 N.E.2d 643 (N.Y. 1990); Cohen v. Olmstead Condominium, No. 22302634 (Sup. Ct. Oct. 15, 1998); Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273 (1997) (suggesting a model for protection of the minority interest in community associations based in part on limits imposed by corporate law on majoritarian actions); Stewart E. Sterk, *Freedom From Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615 (1985) (suggesting that common-law restrictions on freedom of contract can remedy problems of inefficiency and unfairness in the current system of negotiating the removal of servitudes); James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1 (1989) (discussing the advantages and disadvantages of modern promissory servitudes and suggesting possible reforms to limit the effects of servitudes on individual liberty); Timothy C. Shepard, Comment, *Termination of Servitudes: Expanding the Remedies for "Changed Conditions,"* 31 UCLA L. REV. 226, 228 (1983) (proposing "the use of both equitable remedies and damage awards in cases where circumstances have rendered covenants and servitudes unfairly burdensome").

⁴⁷ See Condominium Act of 1964, Pub. L. No. 1964, ch. 82, § 2 (codified as N.Y. REAL PROP. LAW art. 9-B (McKinney 1989)); Walter D. Goldsmith, Practice Commentaries to N.Y. REAL PROP. LAW art. 9-B at 582-85 (McKinney 1989) (citing Smith v. Smith, 497 N.Y.S.2d 192 (App. Div. 1986); Buffalo Seminary v. McCarthy, 451 N.Y.S.2d 457 (App. Div. 1982), *aff'd*, 447 N.E.2d 76 (N.Y. 1983); 100-25 Queens Boulevard Tenant Ass'n v. Abrams, N.Y. L.J., May 18, 1988, at 12 (Sup. Ct. May 17, 1988); Anderson v. 50 E. 72nd St. Condominium, 492 N.Y.S.2d 989 (Sup. Ct. 1985), *aff'd*, 505 N.Y.S.2d 101 (App. Div. 1986); Metropolitan Transp. Auth. v. Bruken Realty Corp., 479 N.Y.S.2d 646 (Sup. Ct. 1984), *aff'd*, 492 N.Y.S.2d 508 (App. Div. 1985), *aff'd*, 492 N.E.2d 379 (N.Y. 1986)).

⁴⁸ The writer has only observed a condominium board exercising its match offer

that, on re-sale, permit a co-op's board of directors to turn down prospective purchasers for no reason or for any reason other than race, creed, color, religion or other constitutionally-prohibited basis.⁴⁹ Even if the board acts in good faith, its ability to exercise broad discretion places the entire financial and social burden back on the outgoing unit owner, who, upon having his proffered buyer rejected, must now start the process of seeking an acceptable purchaser all over again. In recent years, this has worked an extreme hardship on unit sellers relocated to another city by their employers or whose units have become substantially devalued as a consequence of radical downturns in the co-op market.⁵⁰ This evil is compounded by the fact that in most co-ops the cooperator has no right, or a very limited right, to lease out his unit to enable him to carry the unit pending its resale.⁵¹ This

right in the following two situations: (1) Where the board wanted an apartment so it could have a live-in superintendent on the premises; and (2) Where the unit was being offered for sale at a rock bottom price. In the latter case, the board would purchase the unit and immediately resell it at its true market value. The profit made on the re-sale would then be added to the condominium's reserve fund.

⁴⁹ See *Weisner v. 791 Park Ave. Corp.*, 160 N.E.2d 720, 724 (N.Y. 1959) (finding that "[a]bsent the application of [anti-discrimination statutes] . . . there is no reason why the owners of the co-operative apartment house could not decide for themselves with whom they wish to share their elevators, their common halls and facilities, their stockholders' meetings, their management problems and responsibilities and their homes").

⁵⁰ The problem also crops up where a cooperator buys a second apartment in the building for an elderly parent who later passes away. If the second apartment cannot be resold quickly, and the cooperator cannot sublet it, a prolonged period of economic hardship may result because the cooperator must now pay maintenance charges on the second residential unit that they can neither sell nor rent out. It is ironic that, in a building that is not a cooperative, an ordinary tenant has greater protection because he can propose a reasonable, solvent assignee or sublessee to the landlord and is freed from the lease if the landlord refuses to accept such a sublessee. See N.Y. REAL PROP. LAW § 226-b (McKinney 1989). Thus, while the landlord has no duty to mitigate damages, he has a duty to act reasonably in enabling the ordinary tenant to mitigate his own damages. A cooperator, with a greater investment in his building, should receive similar consideration and be permitted to sublet when market conditions make ready re-sale difficult or impossible.

⁵¹ See *Thompson v. 490 W. End Apartments Corp.*, 676 N.Y.S.2d 73 (App. Div. 1998) (denying apartment owner a declaration allowing her to sublease the apartment without the board's consent where the proprietary lease excepted only holders of unpurchased shares from approval requirement); *Yochim v. McGrath*, 626 N.Y.S.2d 685 (Yonkers City Ct. 1995) (holding apartment owner liable to subtenant for constructive eviction when owner rented apartment without prior approval of the co-op board and the board threatened the subtenant with actual eviction); *McVann v. Myers*, 497 N.Y.S.2d 819, 823 (Yonkers City Ct. 1985) (holding that "[t]he proprietary lessee does not enjoy absolute ownership and control over the unit" and "can be evicted . . . for failure to meet . . . [the] obligations" of the lease

double blow to departing unit owners plays havoc with their finances and may impair their credit rating or even push them into insolvency.⁵² This problem should be addressed by the legislature via a measure that only gives the board a right to match the offer the unit seller has received from a third party, or restricts the board's right to turn down a buyer to cases wherein such rejection is "reasonable." Legislative relief might go further and provide for the leasing of one's unit if its immediate sale is frustrated by market conditions or by the board's rejection of the purchaser.⁵³

and by-laws).

⁵² The maintenance of a "wait list" for apartments as suggested in the text, *infra* Part IV(A), would help alleviate this situation in normal economic times. This assumes, of course, that the list is not kept as a means of engaging in a subtle form of discrimination.

⁵³ An excellent piece of legislation along these lines was passed by the New Jersey legislature in 1998. An addition to Chapter 8 of Title 46 of the New Jersey Revised Statutes stipulates as follows:

1. a. The Legislature finds and declares that it is in the public interest of the citizens of this State that the availability of rental housing be encouraged. Therefore restrictions imposed by certain cooperative agreements which unreasonably inhibit or prevent the holder of a proprietary lease to a cooperative unit from making the unit available for rental shall be contrary to the public policy of the State of New Jersey and shall be unenforceable.

b. Subsection a. of this section shall not apply to: any cooperative in which requirements limiting occupancy to holders of proprietary leases to units were established at the time that the cooperative was created, and which requirements were emphasized in the offering document as an absolute condition of ownership, and have been consistently and strictly enforced since that time, or which requirements were established upon the transfer of control of the association board from the developer to the holders of proprietary leases to units through properly amended bylaws which have been consistently and strictly enforced since the time of amendment.

c. Notwithstanding any provision of law to the contrary, in those cooperatives which meet the criteria of subsection b. and in which more than ten units are under one roof, when a unit is offered for sale at or below a sales price such that a sale will result in a return of any investment only, and the unit nevertheless remains unsold for four or more months, then the owner shall have the right, subject to the conditions in subsection d. of this section, to rent the unit for such a period of time until prevailing market conditions permit a sale which will allow recoupment of the investment in the unit. For the purposes of this subsection, investment shall include the purchase price, costs related to the acquisition of the property, and the costs of any improvements made to the property.

d. Nothing in this act shall prohibit a cooperative association from adopting reasonable rules necessary to protect the health, safety or interest of all of the owners, including rules based on lending policies of financial institutions pertaining to owner-occupancy ratios or from requiring a reasonable minimum term of leasehold, nor shall such associations be

A. The "Wait List" Alternative

It may prove advisable for the board of a condominium, cooperative or home owner association to maintain a wait list of "pre-approved" prospects for a unit in the project. This, coupled with a requirement that a prospective unit seller give the board thirty days advance notice of acceptable terms, may solve the problem because the board could give the seller ready access to a

prohibited from requiring that al [sic] tenants comply with the properly adopted rules of the association which are applicable to other unit owners, including, but not limited to, rules relating to such matters as parking, pets, noise, and the number of permitted occupants per unit. A cooperative association which elects to screen tenants shall interview prospective tenants within seven days of the date of the submission of the tenant's name to the association.

Nothing in this act shall grant a tenant any additional rights or protected status under the laws applicable to eviction from rental premises.

2. This act shall take effect immediately.

N.J. REV. STAT. § 336 (1998).

This measure alleviates most, if not all, of the problems mentioned in the text of this article at notes 47 to 53. It also solves another serious problem, that of the threat to potential cooperators' ability to secure bank financing for acquisition of their stock and leases. Most lending institutions will not take a mortgage on property (including coop leases and shares), unless they are certain they can re-sell the same to FNMA. However, the FNMA guidelines for purchasing such loans from banks indicates that the agency will not purchase coop share loans (mortgages) in a building wherein less than eighty percent of the apartments are owner-occupied. See FANNIEMAE, PROJECT STANDARDS, ch. 5, at 845-47 (1990). The recent New Jersey legislation quoted above enables a coop board of directors to guarantee compliance with the requirements of FNMA, by maintaining a wait list of cooperators who wish to sublet their apartments and allowing no more than 20 percent of the cooperators to sublet at any one time. A question may arise as to whether the holders of "unsold shares" must get on such a wait list or are free to do as they please with regard to subletting. Absent extenuating circumstances, it is the writer's view that *all* shareholders should have to abide by this wait list procedure. The practicing bar is becoming increasingly aware of these problems and are advising their clients not to purchase an apartment in a co-op building that may violate the eighty percent owner-occupancy rule of FNMA. See generally, Jay Romano, *Red Flags in a Co-op's Settlement*, N.Y. TIMES, Mar. 7, 1999 (Real Estate), at 5.

It should be noted that there are seldom any suits involving alleged discrimination by condominium boards on re-sale matters, because of the dynamics of the "match offer" device. The "wait list," if properly maintained and operated, should not alter this situation. The one fly in the ointment may be the broker's loss of commissions when a direct sale is made from the wait list without the intervention of a broker. Managing agents of cooperatives, for example, typically manage for a nominal sum and rely on the brokerage profits they will make on the re-sale of units in the building. However, in recent years, managing agents have not been realizing all of their resale brokerage opportunities as departing cooperators or condominium unit owners either try to sell their apartments on their own or employ brokers not affiliated with the managing agent's firm.

list of pre-approved prospective purchasers. This mechanism should be well received because it would save the seller the six percent brokerage commission normally due a real estate agent upon transfer.

B. *The Nixon Case*

There has always been a good deal of confusion surrounding the celebrated case in which former President Richard Nixon was prevented from purchasing an apartment in a luxury high-rise building on Fifth Avenue in New York City.⁵⁴ Because in the end the board of managers did not have to pay to keep President Nixon from acquiring the unit in question, it is often mistakenly described as a case involving the life-and-death control that cooperative housing projects have over their constituent stockholders' right to re-sell their apartments. However, the *Nixon* case actually arose under New York's condominium statute.⁵⁵ Accordingly, all the board of managers had to work with was the customary "match offer" provision. Thus, if they wanted to keep the former president out of the building, their only recourse was to match the contract offer that had been made by Mr. Nixon to the

⁵⁴ Because *817 Fifth Avenue Condominium v. Nixon* never went to trial and the Judge at Special Term never had to act on our request to enjoin the sale, there is no formal citation for the case. However, the major newspapers did track the progress of the litigation, as brief as it was. Thus, for example, the Washington Post reported that:

Residents of a luxury building at 817 Fifth Avenue in New York sued yesterday to block former president Richard Nixon and his wife from buying a 7th-floor condominium, saying the presence of the Secret Service would disrupt their quiet lives.

The lawsuit, filed in state Supreme Court in Manhattan, asks that the Nixons be prevented from buying the 12-room apartment unless they get rid of the Secret Service agents assigned to the former president. Or, as an alternative, the lawsuit said, the Nixons could agree to guidelines set forth by the other residents to restrict Secret Service activities.

Justice Charles Tierney scheduled a hearing for tomorrow at which time the Nixons must show cause why they should not be prevented from purchasing the apartment.

In August Nixon withdrew a \$750,000 offer for a nine-room duplex penthouse on Madison Avenue at 72nd Street after residents of the 16-story cooperative voiced opposition.

Personalities: The Nixons and the Neighbors, WASH. POST, Sept. 20, 1979, at B2; see also Robert McG. Thomas Jr., *Nixons Reported to have Bought East Side House*, N.Y. TIMES, Oct. 5, 1979, at B1 (reporting that Nixon had "given up" on purchasing the apartment and had likely forfeited most of the \$92,500 deposit in a settlement with Hirschfeld).

⁵⁵ See *supra* text accompanying note 49.

unit seller, one Abe Hirschfeld.⁵⁶ However, this writer had only recently converted the building from a rental property into a condominium. In the depths of the 1974 real estate depression, we had arranged for four tenants who challenged the validity of the conversion plan to withdraw their objections and purchase their units for the surprisingly low figure of \$400,000 each. This compromise enabled the conversion plan to be completed. Approximately one year later, Mr. Hirschfeld, one of the four purchasers contracted to re-sell his unit to President Nixon for approximately one million dollars.⁵⁷ When news of the pending sale was reported in the press, the board and the other unit owners were bombarded with threatening correspondence and bomb threats.⁵⁸

The Nixon sale had to be stopped. However, if the board exercised its match offer rights, it would have to pay as much as one million dollars for an apartment that sold for only \$400,000 one year before. Consequently, we brought an order to show cause to enjoin the sale on the theory that Mr. Nixon was disqualified as a matter of law from buying into the building: By having ten armed secret service people patrolling the halls, stairs, elevators, lobby, roof, and basement of the premises, the Nixons would immediately breach the condominium's by-laws and house rules. We decided to proceed by way of an order to show cause to enjoin the closing, because once the closing took place, there was a risk that the law of federal marshals would pre-empt New York's condominium statute and the project's documentation. In order to ease the presiding judge's mind about the board's motivation for excluding Mr. Nixon, we stated in open court that we would waive all objections if Mr. Nixon would waive secret service protection. His attorneys declined this offer, calling it a Hobson's choice. The court then granted a temporary restraining order and scheduled the next court date for two weeks later. Fortunately, President Nixon decided to buy

⁵⁶ See Robert D. McFadden, *Nixon Agrees to Buy Apartment on 5th Avenue From Hirschfelds*, N.Y. TIMES, Aug. 11, 1979, at 1 ("The agreement is not subject to the approval of a board of tenants, as in a cooperative building, but state law allows a condominium's board of managers the right to block a sale by matching any prospective tenant's offer."). The Times reported that "sources close to the negotiations said it was very unlikely that the board would block Mr. Nixon's purchase." *Id.*

⁵⁷ See *id.*

⁵⁸ See *id.*

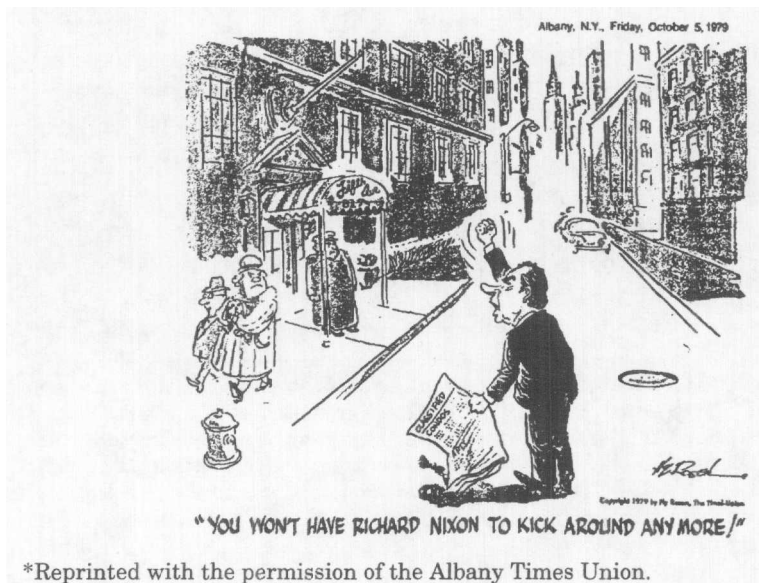
a free-standing town house instead.⁵⁹ This strategy proved to be somewhat costly: it was rumored that Mr. Hirschfeld's counsel, Scott Mollen, Esq., a former student of mine, forfeited most of Mr. Nixon's ten percent down payment of approximately \$100,000.00.⁶⁰

Curiously, Mr. Nixon could have avoided this entire problem if his attorneys had only read the condominium documents. As is usually the case, the documents provided that a unit owner does not need any approval—and the board of managers does not have any "match offer" right—if the sale or gift is between members of one's immediate family. Thus, if the original contract of sale had entered into by one of Mr. Nixon's daughters, she could have subsequently given or sold the apartment to Mr. Nixon, and the board would have been powerless to intervene. In any event, Mr. Hirschfeld reaped additional rewards immediately after the *Nixon* litigation by re-selling his apartment to a foreign businessman, this time for 1.1 million dollars. The board of managers elected not to exercise its match offer right and allowed that sale to proceed.⁶¹

⁵⁹ See Thomas, *supra* note 54, at B1.

⁶⁰ See *id.*

⁶¹ In what was to be the last reference to the *817 Fifth Avenue Condominium v. Nixon* case, cartoonist Hy Rosen published the following cartoon* in the October 5, 1979 issue of the Albany Times Union:



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V. THE INSURANCE LAWS GOVERNING COMMUNITY ASSOCIATIONS
NEED TO BE STRENGTHENED TO PROVIDE ADEQUATE COVERAGE
AND TO EXPEDITE SETTLEMENTS

Because of the hybrid nature of a condominium unit owner's interest, that is, separate ownership of the apartment, coupled with an undivided percentage interest in the common elements, complex casualty insurance questions are certain to arise.⁶² Other aspects of the condominium statutes were predestined to generate legal complications, insofar as most of these measures obligated the condominium's board of managers to insure the entire project, typically in an amount equal to full replacement cost, while at the same time stipulating that the purchase of such a master policy was "without prejudice" to an individual's right to purchase his own insurance.⁶³ This vague statutory provision set the stage for lawsuits on such issues as whether windows and doors were common elements for which the master policy carrier was primarily (if not solely) responsible, or whether they were part of each individual unit, and, therefore, the sole responsibility of the unit owner's insurance carrier.⁶⁴ Finally, and most significantly, the condominium statutes mandate that unit owners continue to pay their monthly common charges to the condominium association (as well as their mortgage payments and real estate taxes), even while out of possession because of a casualty loss they did not cause.⁶⁵ This is in

After losing the presidential election of 1960 to then-Senator John F. Kennedy, Mr. Nixon went back to California to regroup. See DAVID ABRAHAMSEN, *NIXON VS. NIXON: AN EMOTIONAL TRAGEDY* 176-77 (1977). Unfortunately, he lost his next run for office in 1962 when he was defeated in his bid to become governor of California. See *id.* Disillusioned, he told the press corps that he was leaving politics and moving to New York. See *id.* Accordingly, they "won't have Richard Nixon to kick around anymore." *Id.*

⁶² See generally Patrick J. Rohan, *Disruption of the Condominium Venture: The Problems of Casualty Loss and Insurance*, 64 COLUM. L. REV. 1045, 1047 (1964) (discussing "the difficulties inherent in the very nature of the condominium concept and those attributable to improper drafting or peculiarities of the law of insurance").

⁶³ See N.Y. REAL PROP. LAW § 339-bb (McKinney 1964) (amended 1984) (deleting the "without prejudice" proviso); see also Rohan, *supra* note 62.

⁶⁴ Similar problems occur when unit owners, with the approval of the board of managers, make extensive improvements to their units without informing their insurance carriers. Thus, an insurer seeking to avoid some liability at a later date may once again play the unit-versus-common elements shell game.

⁶⁵ Condominium unit owners can guard against this economic double burden by acquiring their own unit casualty policy, with a rider that covers the cost of interim shelter. However, there are limits to the amount carriers will pay for such interim

sharp contrast to the usual rule in the landlord-tenant area and in the field of cooperative housing, wherein rental payments abate while the tenant is out of possession because of a casualty loss that he or she did not cause.⁶⁶ The result is that the condominium boards of managers's delay in restoring units that have been seriously damaged by fire, flood or other catastrophe may inflict both emotional and financial hardship on the dispossessed unit owner.⁶⁷

In some cases the board's indifference to the plight of unit owners who are forced out of their homes may be traceable, in whole or in part, to the intransigence of insurers in settling casualty loss claims. The combination of a board's indifference and a carrier's intransigence caused an eleven-year delay in a recent case that ultimately led to a settlement rumored to be in the half-million dollar range, after years of litigation at the trial court and appellate levels.⁶⁸ This would not have occurred if the applicable condominium or insurance statutes had a provision enabling the court to sanction the carrier and/or the board of managers for unreasonable delay in resolving the loss amount and restoration of the building.⁶⁹

Additionally, certain commonly used carrier practices should

shelter. There is also a limit to the amount of time a family could reasonably be expected to tolerate being cramped into a motel room.

⁶⁶ See, e.g., N.Y. REAL PROP. LAW § 227 (McKinney 1989). Standardized apartment leases and proprietary leases frequently provide that the tenant's rental obligation is forgiven for the period the premises are rendered uninhabitable. The landlord and co-op corporation typically cover losses of rent and maintenance charges by purchasing "loss of rental income" insurance.

⁶⁷ See, e.g., *Collins v. Hayden on the Hudson Condominium*, 637 N.Y.S.2d 51, 52 (App. Div. 1996) (involving 8 years of litigation, 3 appeals and 4 applications for interim relief in a case involving fire damage to common elements); see also *Collins v. Hayden on the Hudson Condominium*, 602 N.Y.S.2d 867 (App. Div. 1993); *Collins v. Hayden on the Hudson Condominium*, 580 N.Y.S.2d 355 (App. Div. 1992). But see N.Y. REAL PROP. LAW § 339-cc(2) (McKinney 1989) ("[A]ny damage to or destruction of the building shall be promptly repaired and reconstructed by the board of managers."). Insurers are constantly litigating casualty insurance losses with condos and their individual unit owners. See, e.g., *Board of Managers v. Federal Ins. Co.*, 669 N.Y.S.2d 332 (App. Div. 1998); *Collins v. Hayden on Hudson Condominium*, 637 N.Y.S.2d 51 (App. Div. 1996); *Collins*, 580 N.Y.S.2d 355; *Schiller v. Community Tech., Inc.*, 433 N.Y.S.2d 640 (App. Div. 1980); *Wiener v. State Farm Fire & Casualty Co.*, N.Y. L.J. June 17, 1998, at 31 (N.Y. Civ. Ct. June 16, 1998).

⁶⁸ See *Collins*, 637 N.Y.S.2d at 52.

⁶⁹ See generally CLIFFORD J. TREESE & KATHERINE ROSENBERY, *COMMUNITY ASSOCIATION INSURANCE GUIDE FOR CONDOMINIUMS AND PLANNED COMMUNITIES* (3d ed. 1987).

be scrutinized and either curtailed or eliminated. For example, it is common for a builder, within the guidelines of the local building code, to place wall-to-wall carpeting over plywood floors and treat them as finished floors. It is also customary for builders to supply lighting fixtures, kitchen counters, and cabinets, dishwashers, stoves, and refrigerators, as well as all customary bathroom fixtures, as part of the new home being sold to the public. At the same time, however, pursuant to the condominium's by-laws, the unit purchaser is responsible for replacing these items if they are later damaged or worn out with the passage of time.⁷⁰ The latter provision makes sense between the unit owner and the condominium association.⁷¹ However, the condominium's master casualty policy premiums are paid out of the unit owner's monthly assessments, and provide for full replacement coverage of the units. Nevertheless, it is not uncommon for insurance company adjusters to point to the above-described by-law provisions and tell the owners of damaged units that they, not the carrier, are responsible for replacing these items. The lay person may be baffled by such assertions and get short-changed by the master policy carrier. This practice by adjusters is all the more reprehensible because insurance carriers generally reap additional profits on condominium unit policies, and on projects which consist of multiple buildings or clusters, where the risk of fire spreading is minimized. The growing number of casualty-related cases, as well as growing legal literature in this field, attest to the existence of these insurance problems and require that these matters be dealt with promptly.⁷² In

⁷⁰ Cf. Richard Siegler, *Agreements for Apartment Alterations*, N.Y. L.J., Nov. 4, 1998, at 3 (stating that an unknowing unit purchaser may be held responsible for fixing alterations made to the apartment by a previous owner).

⁷¹ The average lay person will read such a clause as requiring the unit owner to replace or repair carpeting and appliances that have been worn out over time or damaged by the abuse of family members. However, the average lay person would not imagine that the same provision would enable an insurer to avoid responsibility for these items if they were destroyed or damaged in connection with a major casualty loss.

Where a condominium unit owner combines units or makes substantial improvements to a unit, it is advisable for such unit owner to comply with building department and internal condominium documents requirements. It is also advisable that details of the changes being made be transmitted to the appropriate insurance carrier(s).

⁷² See, e.g., *Weiner*, N.Y. L.J., June 17, 1998, at 32; *Federal Fire Ins. Co.*, 669 N.Y.S.2d 332; cf. *Bernard v. Scharf*, 656 N.Y.S.2d 583 (App. Div. 1997) (ordering the owners of cooperative apartment building to restore fire-damaged building), *rev'd on*

addition to the remedies already suggested above, these disputes might be quickly settled, perhaps at the unit owner's option, by an ombudsman or an arbitrator in order to foster a just settlement and to prompt restoration of affected units or buildings.

VI. IN LIGHT OF THE LONG LIFE PROJECTED FOR COMMUNITY ASSOCIATIONS, CONSIDERATION MUST BE GIVEN TO STATUTORY PROVISIONS GUARANTEEING THE VALIDITY OF PROJECT DOCUMENTATION (THE RULE AGAINST PERPETUITIES AND RELATED COMMON LAW DOCTRINES NOTWITHSTANDING)

In many of the early home owner association arrangements, it was common to provide that recorded covenants and restrictions pertaining to the powers to collect assessments and manage the facilities would expire on a specified date (typically thirty to forty years in the future).⁷³ Similarly, the proprietary lease typically issued along with shares in the cooperative apartment corporation in New York generally was designed to expire on a certain date, usually around the fortieth anniversary of its issuance. Counsel for such projects no doubt thought that forty years was an eternity and hence provided no mechanism to cover the likely contingency that the constituent owners might elect to continue the co-op or H.O.A. far beyond its initial specified expiration date.⁷⁴ This has led to a number of lawsuits questioning the validity of the H.O.A.'s activities, especially the collection of assessments after the expiration date of the original documents.⁷⁵

other grounds, 675 N.Y.S.2d 64 (App. Div. 1998) (finding that the order to restore violated the takings clause), *rev'd sub nom. In re Bernard*, No. 01599 (N.Y. Feb. 23, 1999) (dismissing proceedings on mootness grounds)

⁷³ See, e.g., *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 15 N.E.2d 793 (N.Y. 1938) (enforcing covenants set to expire after 29 years).

⁷⁴ See generally Richard Siegler, *Proprietary Lease Modifications*, N.Y. L.J., July 13, 1990, at 3 (stating that original proprietary leases need to be re-examined and re-written to take into account changing needs and circumstances of owners).

⁷⁵ See, e.g., *White v. Lewis*, 487 S.W.2d 615, 616 (Ark. 1972) (finding that "in toto . . . the restriction and the provisions for waiver [were] unambiguous" and called for automatic extension periods for the covenants); *La Jolla Mesa Vista Improvement Ass'n v. La Jolla Mesa Vista Homeowners Ass'n*, 220 Cal. Rptr. 825, 829 (App. Ct. 1990) ("In our view the benefits to be derived from renewal of the CC & Rs coupled with the benefits gained from a procedure which resolves the renewal issue with certainty and finality are sufficient consideration to support the irrevocability

Because all initial sales of co-op apartments must be made pursuant to an offering plan accepted for filing by the New York State Attorney General's Office, one might logically assume that a new offering plan or some other involvement of the Attorney General's Office would be necessary to revise and extend proprietary leases about to expire. In the one reported case on point, however, the court held that a bare majority could amend and extend the proprietary lease and that the Attorney General's Office need not get involved in the process.⁷⁶ Definitive guidance is required, therefore, in terms of drafting original project documents as well as applicable statutes. At the same time, the legislature should curtail or eliminate the possible application of the "Rule against Perpetuities" and other common-law doctrines concerning indirect restraints upon alienation as they relate to community association documentation.⁷⁷

of the consents obtained by [the defendants]."); *Boyles v. Hausman*, 509 N.W.2d 676, 679 (Neb. Ct. App. 1993) (holding language in an agreement to mean that the covenants were binding for five years, after which they could be changed by a majority vote of the property owners); *Brandwein v. Serrano*, 338 N.Y.S.2d 192, 197 (Sup. Ct. 1972) (finding the lack of assent of some property owners prevented an "Extension Agreement" from "ever attaining validity as a binding restriction"); *Anderson v. Lake Arrowhead Civic Ass'n*, 483 S.E.2d 209 (Va. 1997) (reading the expiration date of covenants literally and refusing to permit them to be revived).

⁷⁶ See *Sherry Assocs. v. Sherry-Netherland, Inc.*, N.Y. L.J., June 13, 1996, at 30 (N.Y. Sup. Ct. 1996), *aff'd*, 657 N.Y.S.2d 549 (App. Div. 1997) (mem.). The unfortunate result in the *Sherry* case permitted one block of stockholders who resided in the hotel to jeopardize the rights of a second group that purchased rooms in the hotel co-op as an investment. The net effect was to override a stockholders' agreement which set up a formula for allocating hotel-type expenses by finding that the formula did not have to be carried over into the new proprietary lease that had been approved by a simple majority. For a discussion of the principles generally governing amendment of co-op documents, see *Brennan v. Breezy Point Cooperative, Inc.*, 473 N.E.2d 738 (N.Y. 1984).

⁷⁷ A number of decisions handed down within the past fifteen years, culminating in *Symphony Space, Inc. v. Pergola Properties, Inc.*, 669 N.E.2d 799 (N.Y. 1996), indicate that the provision of New York's perpetuity statute apply to options. In *Symphony Space*, the Court of Appeals expressly ruled that:

- (1) The New York statutory rule against perpetuities invalidated commercial options that might involve remoteness of vesting;
- (2) Options to purchase that form an integral part of a lease may be sustained;
- (3) "Match offer" provisions, such as those found in various condominium statutes and documents, should be looked upon more favorably, at least where they leave the decision whether to sell or not to the party subject to the "match offer" proviso, and also contain a fair formula for eventually determining the price to be paid for the property;
- (4) Courts will not strain to save options by liberal construction or by assuming that they will be exercised, if at all, within twenty-one years from the date they were created; and

VII. REGULATIONS GOVERNING THE MARKETING AND OPERATION OF RETIREMENT COMMUNITIES MUST BE STRENGTHENED, ESPECIALLY WHERE LARGE ENTRY FEES ARE EXACTED FROM THE PARTICIPANTS

In recent years the "old age home" has been replaced by retirement projects for senior citizens that are still active in sports and related activities.⁷⁸ In addition to the exercise facilities, marketing campaigns for these projects emphasize the benefits of self-sustained living in one's own apartment or condominium, and highlight services ranging from emergency health-care facilities, assisted-living arrangements, and on-site skilled nursing-home type facilities.⁷⁹ In many jurisdictions this niche of the housing market has escaped government notice and regulation. Moreover, in a number of projects, a six-figure entrance fee is charged.⁸⁰ Although representations are often made that these fees are to be refunded when the payor leaves the project, the funds may not be there, in whole or in part, when the refund is requested. This situation arises because there may be neither applicable trust fund provisions nor restrictions on what the de-

(5) Parties disappointed by an unanticipated application of the foregoing rules to their transactions may not be entitled to either rescission or a partial repayment of their consideration, because the granting of these remedies might be equated with the enforcement of the invalid provision.

The foregoing discussion would suggest that a person drafting covenants running with the land that involve affirmative burdens, options to purchase property in a commercial or non-commercial setting, or pre-emptive rights such as match-offer rights in a private or commercial setting, must seriously consider adding an express "perpetuity cut-off" provision, to enhance the chance of success in later litigation. The same advice might apply to the drafting of options to purchase found in leases, although such provisions are viewed more kindly by the courts.

In this connection, it is significant to note that a great many condominium statutes expressly stipulate that a "match offer" provision that favors the association does not violate the jurisdiction's "Rule Against Perpetuities." There is no reason why this type of legislative fiat could not be applied to the longevity of community associations.

⁷⁸ See, e.g., Glenn Ruffenach, *So Long, Bingo: Forget the Old Image of Retirement Communities*, WALL ST. J., Mar. 9, 1998, at R6 (reporting on retirement communities "selling new 'lifestyles' to retirees"); Kathy McCabe, *Peabody is Thinking Big with 1,300-Unit Retirement Community Brooksby Village*, BOSTON GLOBE, Oct. 4, 1998, at 12 (reporting on "the single largest development project ever planned for Peabody[, Massachusetts]").

⁷⁹ The litany of financial risks associated with these various retirement programs is vividly depicted in Moss, *supra* note 19, at A1.

⁸⁰ See, e.g., Emi Endo, *Senior Housing Awaits Approval*, NEWSDAY, Nov. 8, 1998, at G21; McCabe, *supra* note 78.

veloper can do with the money in the interim.⁸¹ Analogous problems arise in projects where the large fee exacted of newcomers is not refundable but is supposed to enable the operator to lower the monthly maintenance charges by providing the latter with supplemental income, such as interest earned on the six-figure entrance fee.⁸² Participants' financial risks may be further complicated by the uncertainties and periodic changes made in Medicare and similar state and federally funded programs as well as regulations governing Health Maintenance Organizations. Several of the projects described above have gone into bankruptcy or are tottering on the brink of insolvency.⁸³ While the issues raised by this type of living are primarily health and longevity related, there are also real estate implications. Accordingly, it may be time for federal and state agencies concerned with senior citizen issues to oversee and regulate such entities, at least with respect to truth in advertising and the safety of participants' up-front cash investments.

VIII. MANY STATUTES AND REGULATIONS DESIGNED TO PROTECT THE PUBLIC AT LARGE, OR TENANTS IN PARTICULAR, ARE BEING APPLIED TO COMMUNITY ASSOCIATION BOARDS OR CONSTITUENT UNIT OWNERS. IF THIS TREND IS NOT CAREFULLY MONITORED, IT MAY WELL CRIPPLE COMMUNITY ASSOCIATION PROJECTS.

Perhaps the largest single threat to community association living (whether in the form of a co-op, condominium, or H.O.A.), may be the courts' power to impose civil and criminal penalties on community associations, even when one or a small number of association board members or employees may be responsible for the harm complained of.⁸⁴ Such an occurrence has the potential to bankrupt associations and their unsuspecting constituent

⁸¹ See generally Michael D. Floyd, *Should Government Regulate the Financial Management of Continuing Care Retirement Communities?* 1 ELDER L.J. 29 (1993) (proposing regulation of continuing care retirement facilities to protect consumers against mismanagement and fraud).

⁸² See *id.* at 45.

⁸³ See Moss, *supra* note 19, at A1 (outlining the hidden economic perils that await retirees who buy into such arrangements without thoroughly investigating the risks involved). Moss traces the steps leading up to the collapse of several well-known and highly regarded senior citizen projects, including some affiliated with religious or other non-profit sponsors. See *id.*

⁸⁴ See Richard Siegler, *The Liability of Board Members*, N.Y. L.J., Jan. 7, 1998, at 3; Richard Siegler, *Director, Officer Liability Insurance*, N.Y. L.J., Jan. 6, 1993, at 3.

owners. This danger is magnified when the association's liability policy does not cover the action or inaction giving rise to the litigant's complaint.⁸⁵ One example would be a suit generated by a prospective member who claims that he or she was excluded from the project for reasons relating to race, creed, color, religion, or some similar suspect criterion.⁸⁶ Such prohibited discrimination is regarded as an intentional tort, and liability aris-

⁸⁵ See, e.g., 2A PATRICK J. ROHAN & MELVIN A. RESKIN, COOPERATIVE HOUSING: LAW AND PRACTICE § 8.02 (1998) (stating that a judgment involving a matter not covered by liability insurance will force the association to make up the difference); see also Richard Siegler, *Troublesome By-Law Provisions*, N.Y. L.J., Sept. 18, 1991, at 3.

⁸⁶ Regarding whether coop director can get indemnity and/or insurance coverage for illegal discrimination see *Biondi v. Beekman Hill House Apartment Corp.*, N.Y. L.J. Aug. 26, 1998, at 22 (Sup. Ct. Aug. 25, 1998). See generally John M. Payne, *From the Courts: The Condominium As Landlord—Determining Tort Liability*, 15 REAL EST. L.J. 365 (1987).

For a unique statute exonerating directors of cooperatives, condominiums and Home Owners Associations under certain defined circumstances see Maryland Real Prop. Code section 14-118 which stipulates as follows:

(a) "Governing body" defined.—(1) In this section "governing body" means a person who has the authority to enforce:

(i) The provisions of a declaration, as defined under § 11-103 of the Maryland Condominium Act;

(ii) Articles of incorporation of a council of unit owners, of a cooperative housing corporation . . . , or of a homeowners association . . . ; or

(iii) The provisions of bylaws, rules, and regulations of a condominium . . . , of a cooperative housing corporation . . . , or of a homeowners association

(2) Governing body includes:

(i) A homeowners association;

(ii) A council of unit owners of a condominium

(iii) A cooperative housing corporation

(b) Actions against governing body for actual damages.—A person sustaining an injury as a result of the tortious act of an officer or director of a governing body while the officer or director is acting within the scope of the officer's of director's duties may recover only in an action brought against the governing body [for the actual damages sustained].

(c) Personal liability of directors or officers prohibited.—In a proceeding against a governing body, a director or officer of a governing body may not be held personally liable for injuries sustained by a party if the director or officer [(1) acted within the scope of his or her duties; (2) acted in good faith; and (3) did not act in a reckless, wanton, or grossly negligent manner].

MD. CODE ANN., REAL PROP. § 14-118 (Supp. 1997). See generally 2A ROHAN & RESKIN, *supra* note 85, § 8.02.

⁸⁶ See 2A ROHAN & RESKIN, *supra* note 85, § 8.02 (1998). On the nature and type of lawsuits brought by unit owners and their guests on common law negligence grounds (including suits brought because of criminal actions by intruders) see *id.* § 8.02 n.7.

ing out of such discrimination is usually not covered by officers' and directors' liability insurance.⁸⁷

A few examples will serve to illustrate the growing menace to community association living presented by such exposure. Recently, in *People v. Premier House, Inc.*,⁸⁸ an inspection of a building managed by a professional managing agent revealed that the premises did not have window guards designed to protect small children from falling to the concrete sidewalk below, constituting both civil and criminal offenses under local law.⁸⁹ The district attorney's office actively pursued an indictment against the officers and directors of the cooperative housing corporation.⁹⁰ However, none of these individuals were experienced in such matters and relied upon the expertise of the building's managing agent for compliance with all applicable laws.⁹¹ While not conceding that its original position on the matter was incorrect or inappropriate, the district attorney's office later relented and agreed to pursue the co-op corporation and perhaps the managing agent and not to indict the co-op's officers and directors.⁹²

More recently, the Supreme Court of New York County refused to grant summary judgment to several cooperative housing corporations that had been sued for discrimination.⁹³ The defendants, all cooperative corporations, employed the same professional managing agent.⁹⁴ The plaintiff, a female, applied to the managing agent for a position as a doorman, but was allegedly turned down because the managing agent engaged in sexual and racial discrimination.⁹⁵ Although it appeared that the professional managing agent acted on its own in the matter, the court opined that the thirteen cooperative corporations may have been aware of the discriminatory practices and might thus be liable to

⁸⁷ See ROHAN & RESKIN, *supra* note 85, § 12.02[2][f].

⁸⁸ 662 N.Y.S.2d 1006, 1008 (Crim. Ct. 1997).

⁸⁹ See *id.* at 1008.

⁹⁰ See *id.*

⁹¹ See *id.* at 1009.

⁹² See *id.* at 1008. If prospective members are not frightened out of serving on the board of a community association by the thought of exaggerated negligence liability, they may certainly think twice before exposing themselves to criminal liability, such as for fraud.

⁹³ See *Hill v. Douglas Elliman Gibbons & Ives*, N.Y. L.J., Oct. 16, 1998, at 28 (N.Y. Sup. Ct. Oct. 15, 1998).

⁹⁴ See *id.*

⁹⁵ See *id.*

the plaintiff.⁹⁶

A similar result was reached in *Sanders v. Winship*.⁹⁷ In *Sanders*, a cooperative housing board rejected a proposed re-sale of an apartment to a Jewish couple.⁹⁸ After the prospective purchasers left their interview session with the co-op board, the wife of the co-op board's president was heard making an anti-Semitic remark.⁹⁹ The New York Court of Appeals relied, in part, on the wife's remark in finding a prima facie case of religious discrimination, even though the person making the remark had no official title or position with the housing cooperative.¹⁰⁰

An even greater extension of community association liability was sought in *Reeves v. Carrollsburg Condominium Unit Ass'n*,¹⁰¹ involving a Washington, D.C. condominium. In *Reeves*, one condominium unit owner harassed another and openly engaged in racially discriminatory comments and conduct.¹⁰² The unit owner complaining of the discriminatory treatment, a long-time resident and former president of the condominium, sued the association on the theory that the group should have done more—including going to court to stop the offending unit owner from harassing her.¹⁰³ She alleged that the wrongdoer shouted racial and sexual slurs at her, wrote her threatening notes and made her feel generally unsafe in the condominium complex on several occasions.¹⁰⁴ Further, the alleged perpetrator had recently pled guilty in a criminal case based on the same charges and was facing a year's probation.¹⁰⁵ The condominium's board of managers ultimately settled out of court, reportedly agreeing to purchase the plaintiff's unit and pay her \$550,000.00 in compensation.¹⁰⁶ The suit and the alleged settlement have both drawn negative comments from the Community Association's Institute,

⁹⁶ See *id.*

⁹⁷ 442 N.E.2d 1231 (N.Y. 1982).

⁹⁸ See *id.* at 1233.

⁹⁹ See *id.*

¹⁰⁰ See *id.* at 1233-35 (finding that the defendant, Mrs. Winship, was a cooperative tenant and "could be found to have been a participating or contributing cause of the withholding of consent").

¹⁰¹ No. 96-2495RMU, 1997 U.S. Dist. LEXIS 21762 (D.C. Cir. Dec. 18, 1997).

¹⁰² See *id.* at *4; see also Bill Miller, *D.C. Condo Owners to Pay for Members Racial Insults*, WASH. POST, June 10, 1998, at A01.

¹⁰³ See Miller, *supra* note 102.

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

a non-profit housing group.¹⁰⁷

The area of racial discrimination is not the only loose cannon community associations have to contend with.¹⁰⁸ On the horizon are suits based on age discrimination;¹⁰⁹ sexual harassment;¹¹⁰ violation of the Americans with Disabilities Act;¹¹¹ toxic torts (stemming from lead paint or asbestos contamination in older buildings);¹¹² criminal conduct of intruders;¹¹³ failure to comply

¹⁰⁷ The press release issued by the Community Association's Institute on June 11, 1998, stated in pertinent part:

"It's widely known that community associations have broad powers of enforcement for covenants included in association documents. But Carrollsburg Condominium was literally hamstrung in its efforts to put a stop to Mr. Schongalla's unacceptable behavior," said Robert M. Diamond, past president of CAI and attorney with Hazel and Thomas, P.C., Falls Church. Diamond represented Carrollsburg a number of years ago when Reeves was on the association board. "Community associations are ill-equipped to force out a homeowner for discrimination and usually are not empowered to purchase an owner's home for that purpose."

"It's ironic that the same people that criticize community associations from failing to protect one owner from the actions of another protest when the association reasonably enforces its architectural restrictions," Diamond said. "The primary vehicle for the enforcement of public laws must be local government and the police. Community associations simply do not have the resources."

"These developments highlight the maturing of community associations and raise new questions about the role community associations will play in society," Diamond said. "We're progressing from disputes over paint colors and treehouses to issues that test the boundaries of community association governance, from dealing with discrimination to efforts to ban "Tier 3" Megan's Law sex offenders from living in associations."

¹⁰⁸ See *Reeves*, 1997 U.S. Dist. LEXIS 21762, at *16 (concluding that the hostile housing environment test applies to claims of racial and sexual harassment).

¹⁰⁹ See, e.g., *Huntington Landmark Adult Community Ass'n v. Ross*, 261 Cal. Rptr. 875 (1989); *Sunrise Country Club Ass'n, v. Proud*, 235 Cal. Rptr. 404 (Ct. App. 1987).

¹¹⁰ See, e.g., *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), *aff'd* 488 U.S. 15 (1988); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983 (4th Cir. 1984); *Beliveau v. Caras*, 873 F. Supp. 1393 (C.D. Cal. 1995); *New York ex rel. Abrams v. Merlino*, 694 F. Supp. 1101 (S.D.N.Y. 1988).

¹¹¹ See, e.g., *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 299 (2d Cir. 1998) (stating that "[t]he Fair Housing Amendments Act of 1988 ('FHAA') extended the Fair Housing Act's principle of equal opportunity in housing to individuals with handicaps"); see also *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995) (finding that a landlord must make reasonable accommodations to a disabled tenant and allow a deaf tenant's hearing dog on the premises, in spite of the landlord's no-pet policy).

¹¹² See generally *Cottle v. Superior Court*, 5 Cal. Rptr. 2d 882 (Ct. App. 1992) (finding that the plaintiffs could not introduce evidence of physical injuries allegedly caused by toxic chemicals where they could not establish probable causation).

¹¹³ See *Frances T. v. Village Green Owners Ass'n*, 723 P.2d 573, 576-79 (Cal.

with "Megan's Law,"¹¹⁴ and a myriad of other grounds for the imposition of civil and criminal penalties and/or punitive damages.¹¹⁵ The legal costs of defending these types of litigation may jeopardize the solvency of smaller community associations. Regardless of the size of the association, bad publicity surrounding these suits will undoubtedly cause many qualified candidates to refuse to serve on their community's boards.¹¹⁶ If the avalanche of suits and the attendant adverse publicity are not curtailed soon, real estate practitioners may begin to recommend extreme counter measures, such as taking title to one's unit in a corporate name or advising purchasers not to buy housing that involves a community association.¹¹⁷

1986) (in bank) (concluding that condominium associations have the same duty of care that landlords have to tenants and thus can be held liable).

¹¹⁴ N.J. STAT. ANN. § 2C:7-1-11 (West Supp. 1998).

¹¹⁵ See *Brown v. Christopher St. Owners Corp.*, 663 N.E.2d 1251 (N.Y. 1996) (affirming order dismissing complaint against tenant made by window washer who fell); *White v. Cox*, 95 Cal. Rptr. 259 (Ct. App. 1971) (involving a trip-and-fall over a water sprinkler); *Goodrich v. Watermill Townhouses, Inc.*, 645 N.Y.S.2d 721 (Sup. Ct. 1996) (concluding that a condominium home owner association did not need to be the title holder of the condominium to be held liable for injuries sustained by an independent contractor's employee who had been hired to maintain the grounds); *Moody v. Cawdrey Assocs., Inc.*, 721 P.2d 708 (Haw. App.) (involving assault of condominium owners' guests by third parties), *rev'd*, 721 P.2d 707 (Haw. 1986) (per curiam).

Another casualty of this liability explosion may be the professional property manager, a hearty but shrinking breed of project managers. In the past, professional property managers were seldom sued for any reason. In recent years, however, their liability exposure has grown at an alarming rate. At the same time, their revenue sources have diminished. Many managing agents work for a small monthly stipend and rely on the profitable real estate brokerage commissions they earn when constituent owners list their property for re-sale with their agency. However, this source of income is shrinking fast, as departing owners circumvent the broker and re-sell directly to the purchaser. See *supra* note 53.

¹¹⁶ See *Miller*, *supra* note 102 (discussing this defense, raised in the *Reeves* case).

¹¹⁷ At least two justifications can be advanced for limiting the liability of community associations and their constituent owners. First, many statutes giving rise to owner liability were drafted with business organizations or entrepreneur landlords in mind. They were enacted with a view that profit-making entities should be held to a traditional negligence standard of care and are able to insure against these risks and pass associated costs along to their customers. Second, there is a long history of exempting rental buildings with three or fewer families in them, so-called "mom and pop" operations, from otherwise-applicable legislative mandates. The modern-day counterpart of this protected class should be the constituent unit owners in community associations. Furthermore, as asserted previously by other authors, the community association operates, in effect, as a local government and its decrees and actions should be immunized accordingly. See *supra* note 37 and accompanying text.

CONCLUSION

The bulk of the early writing in this field, as well as the vast majority of suits, involved building defects, disputes with developers and controlling the anti-social conduct of a few recalcitrant owners. However, a new generation of problems looms on the horizon which involves evils of far greater magnitude that may not be remedied by mere improvements in project documentation. Most of the problems discussed can only be resolved with new legislation or judicial determinations that override firmly-established precedent. In order to safeguard the solvency of community associations, a whole new set of legislative initiatives or classifications may have to be implemented. At the same time, associations, their boards and their constituent unit owners must be advised of their potential liability and be warned against the notion that they are free to violate public policy with impunity.

In view of the myriad (and ever growing) sources of liability faced by constituent owners in all forms of community association arrangements, such individuals would be well advised to purchase an "umbrella" liability policy (with rather hefty liability limits). Consideration should also be given to legislation, as well as modernized project documentation, that would limit the liability of each owner to a pro-rata share of any judgment rendered against the community association (at least where the individual had not been an active participant in the conduct that gave rise to the liability in the first place). See generally Patricia H. Nunley, *An Analysis of Premises Liability of Property Owners in Texas for Third-Party Criminal Acts: An Accomplice to the Crime or Another Victim?*, 27 REAL EST. L.J. 118 (1998); Jerry C.M. Orten & John H. Zacharia, *Allocation of Damages for Tort Liability in Common Interest Communities*, 31 REAL PROP. PROB. & TR. J. 647 (1997); Payne, *supra* note 86; Karen E. Klein, *Condo Owners Liable for Common Area Mishaps*, L.A. TIMES, Mar. 14, 1993, at K1, available in 1993 WL 2339887.

the "Yankee race"—those who were born above the Mason-Dixon line or who have lived there for a year or more—from owning any part of the 1,688 acres.

Also, anyone named Sherman can't even set foot on the property. In fact, Northerners who aren't named Sherman but whose names can be spelled from its letters had better stay out too.

The property, mostly wetlands and tall pines, is five miles north of Savannah, Ga. Ingram said he wants to put a motel, a convenience store and restaurant there, along with homes for himself and family members.

South Carolina banker Langdon Cheves established the plantation in 1829 and it quickly became one of the largest rice operations in the area. It was destroyed in January 1865 as Sherman's troops crossed the Savannah River into South Carolina.

Ingram, who owns several video gambling parlors in the area, bought the property last month for \$1.2 million. He lives on Hilton Head Island, a luxury resort area popular with Yankees.

"Slowly but surely they have taken over Hilton Head, they've taken over Beaufort County. They're infiltrating Jasper County," Ingram told the Savannah (Ga.) Morning News. "They're worse than fire ants."

Ingram said he and his son came up with the language and had a lawyer review it.

Bill McEveven, a Columbia real estate attorney, chuckled when told of the restrictions but said they might stand up. "I'd hate to be judge, though. I don't think you can win with this one," he said.

Federal laws prevent discrimination on the basis of race, color, religion, handicap, marital status or national origin, but say nothing about geography within the United States.

Id.

Ingram's anti-Northerners campaign even attracted the attention of the Associated Press and the American Bar Association. *See, e.g., Yankee-Stay Home! Southern Hospitality on Hold*, A.B.A. J., Apr. 1998, at 14. Mr. Ingram has retained the right to grant exceptions, on a case-by-case basis, for selected Northerners who take a redeeming "Southern Oath," that makes them into "naturalized Southerners."

Both the recorded covenants and "Southern Oath" are reprinted in the Appendix of this article. They were furnished to the writer as a result of a telephone call made to Mr. Ingram in South Carolina. He kindly acceded to my republishing them in the *St. John's Law Review*. However, he might have had second thoughts about the matter if he had known that my wife is the great, great-granddaughter of General William Tecumseh Sherman.

The ultimate irony in this case may lie in the fact that if the law of South Carolina on this subject is the same as that of some other states, the covenants will not be permitted to run with the land because the creator thereof reserved the right to unilaterally release them with respect to any restricted parcels he chooses.

Regarding whether reservation of the right to forgive C & R's makes them ipso facto personal to the developer, see *Finchum v. Vogel*, 194 So. 2d 49 (Fla. Dist. Ct. App. 1966) and *Carranor Woods Property Owners' Ass'n v. Driscoll*, 153 N.E.2d 681 (Ohio 1957). *But see* *Hall v. Gullede*, 145 So. 2d 794 (Ala. 1962); *Kreppel v. Tucker*, 225 N.Y.S.2d 708 (Sup. Ct. 1962); *Goldberg v. Paul*, 178 N.Y.S.2d 349 (Sup. Ct. 1958); *East Sevier County Util. Dist. v. Wachavia Bank & Trust Co.*, 570 S.W.2d 850 (Tenn. 1978). *See generally* Uriel Reichman, *Residential Private Governments: An Introductory Private Survey*, 43 U. CHI. L. REV. 253, 292 (1976); Maurice T. Brunner, Annotation, *Who May Enforce Restrictive Covenant or Agreement as to Use of*

APPENDIX

*COVENANTS AND RESTRICTIONS CREATED AND RECORDED BY
HENRY E. INGRAM*

The property described particularly in Exhibit "A", affixed hereto, and known generally as "Delta Plantation," which was conveyed on or about January 23, 1998 to Henry E. Ingram (Purchaser) from Cullum's Lumber Mill, Inc. (Seller), (hereafter "the Property"), shall be hereafter subject to the following covenants and/or restrictions:

1. The property shall never be leased, sold, bequeathed, devised or otherwise transferred, permanently or temporarily, to any person or entity that may be described as being part of the Yankee race. "Yankee" as used herein, shall mean any person or entity born or formed north of the Mason-Dixon line, or any person or entity who has lived or been located for a continuous period of one (1) year above said line. In determining a "continuous period" as used herein, intermittent periods of one week or less shall not be construed as severing continuity;

2. No person with the last name of Sherman shall ever own, lease, enter, occupy, walk upon, or hold any interest, of any nature or kind in the Property. Any person born up North whose last name may be spelled by using the letters found in the name Sherman is subject to the same restrictions and covenants as if his name were Sherman. No business entity with the name Sherman in its name, trade name, or any previous business name, shall ever acquire or maintain any interest in the Property or provide any goods or services thereon.

3. Nothing contained herein shall be construed as active discrimination against those Southern persons of African descent. In fact, Southern persons of African descent shall not be subject to, and are expressly excluded from, the restrictions and covenants contained in paragraph two (2) above; provided that all subsequent transferors shall be so subject, as will the initial transfer of the Property from the Southern person of African descent to the subsequent transferor. Southern persons of African descent may be given permission upon written request to use, hunt, fish and/or own the Property. Any Southern person of Af-

rican descent is entitled to a ten percent (10%) discount if he or she purchases the Property from Henry E. Ingram or his heirs and/or assigns.

4. Any of the above restrictions, covenants and conditions may be waived in writing by Henry E. Ingram, his heirs or assigns; provided that, in the event that the waiver is being granted by a person other than Henry E. Ingram or his son Sterling Ashley Ingram, the written waiver requires the written approval of at least one other person, related by blood to Henry E. Ingram, who was born in a State of the Union located geographically at least 15 miles South of the State of Virginia.

5. The covenants and restrictions discussed above in Paragraphs one (1) through four (4) are necessary to ensure that the Yankees will never again own or control large tracts of land that rightfully belong in Southern hands and under Southern dominion. They are intended to prevent Yankee ownership of property stolen or conscripted after the great war of Northern aggression after 1865 by the Yankee Carpetbaggers and Scalawags.

6. Delta Plantation will once again be available to the true Southerners to view, camp, hunt, fish, use, enjoy and share as true Southerners are taught from birth. Thank you Sir.

7. No redwood lumber may be used by any person who builds any wooden structure on the property. This restriction is due in part to a certain large redwood tree in the Western United States that is named after the late coward and war criminal William T. Sherman. Additionally this restriction is due in part to certain environmental views shared and held by the authors to these restrictions.

8. These covenants and restrictions were drafted and executed by a true Southerner, Henry E. Ingram, Jr., this 2nd day of February in the year of our God, 1998.

HENRY E. INGRAM, JR.

WITNESS

WITNESS

EXHIBIT A

ALL those certain pieces, parcels or tracts of land situate, lying and being in Jasper County, South Carolina, containing 1606.86 acres, more or less, and 63.02 acres, more or less, and being a portion of Tract A and of the Poindexter Tract of the Delta Plantation Tracts as shown and delineated on that certain plat of survey prepared by Coastal Surveying Company, Inc. dated July 1, 1975 for Chevron Oil Company, which Plat is recorded in Plat Book 18 at Page 60 in the Office of the Clerk of Court for Jasper County, South Carolina. The 1606.86 acre tract being shown and designated as Tract "A", and the 63.02 acre tract being shown and designated as Tract "B" on that certain plat of survey entitled "Plat of 1,674.88 acres, Portion of Delta Plantation Surveyed for Henry Ingram", prepared by Paul D. Wilder, R.L.S. of Wilder Surveying and Mapping, dated January 12, 1998 and recorded in the Office of the Clerk of Court for Jasper County, South Carolina in Plat Book 23 at Page 47. Said Tract "A" being generally bounded and described as follows: on the North by Tract "C" as shown on the aforesaid plat and by the R/W of SC Hwy. 170 and by lands, now or formerly of Collum's Lumber Mill, Inc.; on the Northeast by lands of John E. Cay, III; on the East by the Centerline of the Old Screven Ferry Road and a 30' access easement, and other lands of Collum's Lumber Mill, Inc.; on the South by lands of the Georgia Department of Transportation, and on the West by lands of Tench C. Coxe, III, lands of Daniel E. Huger, and the eastern edge of the R/W of U.S. Highway 17-A. Said Tract "B" being generally bounded and described as follows; on the North by lands of Robert Minis; on the East by the R/W of U.S. Hwy. 17-A; on the South by lands of Carswell; on the Southwest by lands of Clydesdale Club, and on the Northwest by lands of A. Minis, Jr. For a more particular description, reference is hereby made to the aforesaid plat of record.

TOGETHER with those certain easement rights appurtenant to the above described property reserved by Chevron Stations, Inc. in that certain Deed from Chevron Stations, Inc. to Department of Transportation, State of Georgia, dated October 17, 1985 and recorded in Book 89, Page 168, in the records for the Office of the Clerk of Court for Jasper County, South Carolina and all rights of reversion and other rights to the roadbed of

U.S. Highway 17-A retained pursuant to that certain Right of Way Deed dated August 17, 1953 and recorded in Book 30, Page 39, in the Office of the Clerk of Court for Jasper County, South Carolina.

EXCEPTING AND RESERVING UNTO CHEVRON STATIONS, INC., ITS SUCCESSORS AND ASSIGNS, all rights as delineated in that certain deed from Chevron Stations, Inc. to Delta Plantation Corporation, dated June 25, 1987 and recorded in Deed Book 91 at Page 1483 in the Office of the Clerk of Court for Jasper County, South Carolina.

BEING the same property conveyed to Henry E. Ingram, Jr. by Deed of Collum's Lumber Mill, Inc. dated January 23, 1998 and recorded January __, 1998 in Deed Book ____ at Page ____ in the Office of the Clerk of Court for Jasper County, South Carolina.

Jasper County Tax Map Reference: 037-00-02-002 (portion of).

SOUTHERN OATH

Of my own free will and choice, I do hereby in the presence of these witnesses swear to be loyal to the South. With the sole exception of my immediate family, I hereto swear to never utter any good words regarding the dastardly Yankee race even if by some chance I observe some redeeming quality amongst their steed. I will never mention the word Sherman unless it is to describe his cowardly and inhuman characteristics.

When speaking of Yankees, I will refer to them as scalawags or carpetbaggers. I will love, honor and obey the true Southern way of life by never saying anything disrespectful to my wife or children.

I will now whistle or hum Dixie as a sign of my loyalty and as a token of my new out-look on life.

I swear this oath on the grave of Robert E. Lee.

TIME 2:25 PM

DATE 1/24/98

SOUTHERN WITNESSES:

FULL NAME OF OATH

SWEARER:

I will swear Openly on
Videotape This Oath.

STATE OF SOUTH CAROLINA)

:

PROBATE

COUNTY OF BEAUFORT)

Personally appeared before me the undersigned witness who, being duly sworn, deposed and said that (s)he saw the within Henry E. Ingram, Jr. sign, seal and, as his act and deed, deliver the foregoing Covenants and Restrictions and that (s)he, together with the other witness whose name appears as a witness, witnessed the execution thereof.

HENRY E. INGRAM

SWORN TO AND SUBSCRIBED

BEFORE ME THIS 2ND DAY
OF FEBRUARY, 1998.

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 1/22/2003