

Condominium Versus Home Owner Association Arrangements-- An Overview

Curtis J. Berger

Patrick J. Rohan

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

DEVELOPMENT AND FINANCING CONDOMINIUM V. HOME OWNER ASSOCIATION ARRANGEMENTS — AN OVERVIEW

CURTIS J. BERGER* AND PATRICK J. ROHAN**

A developer about to start a residential project must decide whether the undertaking should be fashioned along traditional one-family home lines, along condominium lines, or in the home owner association mold. Assuming the developer has a modicum of experience, he and his marketing advisers will be able to gauge the pros and cons of the detached one-family home format. However, a good deal of legal expertise would be required in order to pass upon the comparative merits of the condominium and home owner association arrangements. This paper is intended to serve as a survey of the major points to be considered in making this choice. At the outset, however, it should be noted that the relative weight to be attached to any one factor will vary with time, place and circumstance. Thus, for example, if there are no condominiums in the area, the time, effort and expense necessary to educate the consumer and/or the institutional lender may indicate that the home owner association format is the only logical choice. In another locality condominiums may abound, and the non-condominium project may not be well received. Accordingly, while all of the items discussed below should be considered, the developer will have to decide the relative weight to be assigned to each factor in light of the market in which he is operating, his capital requirements and the like.

FACTORS AFFECTING CHOICE

Applicability of Governmental and Private Land Use Controls

When viewed in nonlegal terms, it would seem that the developer is supplying the same product to the consumer, irrespective of whether he labels it a condominium or a home owner association type of development. In point of fact, the physical layout of the project, including recreational or other common facilities, will usually be the same, regardless of the label placed upon the development.¹ However,

* Professor of Law, Columbia University School of Law. A.B., University of Rochester, 1948; LL.B., Yale University, 1951.

** Professor of Law, St. John's University School of Law. B.A., 1954, LL.B., 1956, St. John's University; LL.M., Harvard University, 1957; J.S.D., Columbia University, 1965.

¹ See generally Schreiber, *The Lateral Housing Development: Condominium or Home Owners Association?*, 117 U. PA. L. REV. 1104 (1969); URBAN LAND INSTITUTE, *THE HOMES ASSOCIATION HANDBOOK* (1964); Aloï, *Legal Problems in Planned Unit Development*, 1

the project may be treated differently under certain public and private land use controls, depending upon the label attached to it. Thus, for example, while some condominium statutes specifically prohibit discrimination by local governments against condominiums in the area of zoning, most such statutes are silent on the subject. This has made it possible for some localities to attempt to zone out condominiums by an express provision against such projects, or by a requirement that all of the land under certain types of structures must remain in single ownership.² Faced with this situation, the developer would have to decide whether to seek a variance or rezoning,³ to litigate as to the validity of the zoning provision in question, or to pass up the condominium format. The opposite situation could also present itself, as, for example, where the developer wishes to create a cluster housing development and the local zoning law makes no provision for cluster arrangements. If the municipality is receptive to condominiums, the state condominium statute might provide a sufficient basis for constructing the cluster project.⁴ Again, some jurisdictions (including Massachusetts and New York), have exempted condominiums from the subdivision control law. This could give the condominium developer a significant advantage over his non-condominium counterpart.

Recorded covenants and restrictions affecting the property must also be considered. In several recent cases the language found in such covenants has been held sufficiently broad to rule out condominium projects.⁵ In reaching this conclusion, the courts have not been impressed with the argument that the covenants were drafted and imposed years before the first condominium statute was adopted. Thus, for example, it is conceivable that a restriction limiting use of the property to "single family homes" might be construed as prohibiting the erec-

REAL ESTATE L.J. 5 (1972); Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987 (1963).

² For litigation involving an attempt by a municipality to zone out condominiums, see *Lancaster Dev., Ltd. v. Village of River Forest*, 84 Ill. App. 2d 395, 228 N.E.2d 526 (1967); *Bridge Park Co. v. Borough of Highland Park*, 113 N.J. Super. 219, 273 A.2d 397 (1971).

³ It should be noted that in some jurisdictions a request for a variance is considered a tacit admission that the zoning ordinance is valid, hence the party requesting the variance may not be in a position to attack the zoning ordinance thereafter in court. Cf. *Rubin v. Board of Directors*, 16 Cal. 119, 104 P.2d 1041 (1940).

⁴ Thus, for example, an attached townhouse condominium might be built in an apartment house zone, where the ordinance makes no specific provision for townhouse or garden apartment type construction. For a review of a proposal to use "passive condominiums" as a substitute for a PUD or townhouse type of zoning ordinance, see 2 CONDOMINIUM REP., June 1974, at 6.

⁵ See, e.g., *Callahan v. Weiland*, 291 Ala. 183, 279 So. 2d 451 (1973); *Hoffman v. Cohen*, 202 S.E.2d 363 (S.C. 1974).

tion of a condominium project, even though condominium units are separately owned, mortgaged and taxed. Rather than face a lawsuit midway in the construction of the development, the builder may either seek initially a declaratory judgment as to the scope and meaning of the covenant, or forego the condominium format in favor of the home owner association arrangement. Here again, however, the question of the covenant's applicability could arise, depending upon whether, and to what extent, the residents' association held title to common areas and facilities, and whether the homes were attached.

State and Federal Filing Requirements

During the past decade, a few states have adopted regulations governing the construction, conversion, and marketing of condominium projects. These regulatory statutes and procedures have been fashioned along "full disclosure" lines similar to those prevailing in the securities field. The rapidly growing condominium market and the widely publicized overreaching on the part of some condominium developers will no doubt induce the vast majority of states to embark upon similar regulatory programs. Legislation currently pending in Congress may accelerate this trend by imposing federal controls where a gap in state controls is found to exist. Accordingly, it is safe to predict that formulation of an "offering plan" based upon full and fair disclosure, as well as regulation of the legal documentation and marketing program, will soon be commonplace as far as condominium developments are concerned. Depending upon the size and intricacy of the project, the cost of compliance, including engineering reports, printing and legal fees, may run anywhere from ten to one hundred thousand dollars and beyond. A lead-in time of approximately three months should also be anticipated for compliance with these state procedures. By contrast, very few states have similar filing requirements where the project takes the form of a home owner association, with California and New York being the two most notable exceptions. Accordingly, a developer may be able to proceed more expeditiously and without the added expense of a registration with state authorities if he adopts the residents' association approach. It should be anticipated, however, that this loophole will eventually be closed in most states, since similar projects should be treated alike irrespective of label. Moreover, local planning and zoning boards may exert greater influence over residents' associations by seeking a veto power over subsequent decisions of the home owners and their association. For example, these agencies might assert a right to

disapprove any subsequent change in the bylaws of the association or a change in the recorded covenants and restrictions affecting the property.

To the extent any present or future federal regulatory requirements are specifically aimed at condominiums, the home owner association format may have a temporary advantage. However, it is more likely that the substance of the transaction, and not its label, will be controlling. Thus, for example, filing with the Securities and Exchange Commission would be necessary if the developer were offering units for sale coupled with a "rental agency" or "rental pool" (to facilitate leasing when the owner is not using his unit).⁶ This would follow on the ground that the developer is offering an "investment contract,"⁷ irrespective of whether the project technically constituted a condominium or a home owner association arrangement.⁸ Similarly, if the units, or significant recreational facilities, would not be completed within two years from the time a purchaser signed a contract to buy, the developer would be required to file with the Department of Housing and Urban Development under the regulations promulgated pursuant to the Interstate Land Sales Full Disclosure Act,⁹ irrespective of how the project was classified for local real property law purposes.

Staged Developments and The Construction Lender's Pre-Sale Requirement

Where the builder's capital is limited, or the projected rate of absorption by the home buyer is uncertain, it may be desirable to develop a project in stages. In such situations, it may be impossible to tell in advance what the eventual number of units will be. By the same token, the developer's early experience with certain types of units and various price ranges may lead to marked changes in the pricing and style of later sections. In the case of a condominium development, it will eventually be necessary to specify the undivided interest in the common elements attributable to each unit. This aspect of the unit will be of vital concern to both the potential unit purchaser and his mortgagee. Accordingly, it may not be possible to defer a decision on

⁶ See SEC Securities Act Release No. 5347 (Jan. 4, 1973) [hereinafter cited as SEC Release No. 5347].

⁷ See SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946); SEC Release No. 5347, *supra* note 6.

⁸ By way of illustration, SEC Release No. 5347, *supra* note 6, which twice refers to "condominiums and other interests in real estate with similar features," would seem to apply equally to condominiums and home owner associations.

⁹ 15 U.S.C. § 1701 *et seq.* (1970). The Office of Interstate Land Sales Registration (OILSR) explains the application of the Act to condominium sales at 39 Fed. Reg. 7824, 7825 (1974); 38 Fed. Reg. 23,866 (1973).

this matter until such time as the developer knows how many units will be built. In some jurisdictions, like New York, the Attorney General may require that this determination be made before title is closed on the first unit. In New York, for example, this early determination of the project's ultimate size even prevents effective use of the "chinese menu" approach to phased projects, beyond the date title to the first unit is closed. The difficulty is compounded where the developer bases the undivided interest of each unit upon its value, as opposed to its square footage, in relation to the value of all of the units combined. This approach may solidify the offering price of the completed units as well as those yet to be built.¹⁰ Most, if not all, of these difficulties may be avoided by use of the home owner association format, since each purchaser is usually given the same vote and same assessment as all other unit owners. Hence, possible variations in the ultimate number of units to be constructed, or in their price, will not adversely affect the purchasers in the first stage.

A similar problem is encountered in the area of pre-sale requirements of institutional lenders. In order to guarantee that a condominium project will be a success from a marketing standpoint and to prevent a situation in which a project would be half occupied by unit owners and half occupied by lessees, construction lenders usually establish a high ratio pre-sales requirement before sizable construction advances are made to the developer. Thus, it is not uncommon for a lender to require that the vast majority of units be under purchase agreements before construction may proceed in earnest. Unless the developer is willing to splinter his project into multiple condominiums, such a pre-sale requirement can cause prolonged delays. By contrast, a developer proposing to develop a home owner association project need only pre-sell a few homes in order to commence construction. Thus, for example, if four homes are being constructed as part of a fourplex arrangement, each such structure can be started as soon as four prospective buyers sign purchase agreements.¹¹ If the absorption rate does

¹⁰ For a more detailed discussion of this problem, see 1 P. ROHAN & M. RESKIN, *CONDOMINIUM LAW AND PRACTICE* § 16.03[2] (1974) [hereinafter cited as ROHAN & RESKIN].

¹¹ Thus, for example, condominiums fall under the multi-family classification for purposes of FHA mortgages, while units sold as part of a home owner association arrangement fall under the single family home program of the FHA. The latter type of program involves a much less demanding pre-sale requirement.

In any circumstance where the developer intends to construct additional recreational facilities if, but only if, subsequent phases are constructed, he cannot accomplish this as part of a single condominium arrangement. He can accomplish this by a phased home owner association arrangement. It should be noted, however, that in taking this approach, the overall plan should be disclosed to the lending institution and to FHA, but purchasers in the first phase should not be apprised of the contingent plan to add

not live up to expectations, the developer can slow the pace of construction or sell off the unused portion of the property. This could not be done if the property had been earmarked as part of a single condominium consisting of a pre-arranged number of units.

Problematical Requirements of the Prevailing Condominium Statute

Development of a particular parcel along condominium lines may be stymied by express or implied requirements of the particular state's enabling statute. Thus, for example, many states prohibit condominiums on a leasehold, thereby ruling out such projects where the land cannot be acquired in fee. Similarly, most condominium statutes indicate that the land under the various structures cannot be treated as part of a unit, but must be classified as a common element. Accordingly, the unit buyer could not be given title to the land under his home, nor to the front and rear yard. The question of contiguity may also arise. While the better view is that one continuous parcel of land is not necessary for a condominium, and that such a project may be built upon noncontiguous parcels,¹² the question is not free from doubt. Finally, almost all of the condominium statutes mandate that common expenses be borne by a unit owner according to his unit's undivided interest in the common elements, which, in turn, is usually based on the value or square footage of his unit over that of the entire project. This requirement may prove troublesome in lateral housing projects wherein an equitable distribution of costs might call for each unit owner to bear the exact same share as every other unit owner.¹³

The development fashioned along home owner association lines avoids all of these problems, since there is no statutory straitjacket to restrict the draftsman's freedom. Accordingly, the underlying documentation for such a project can be adapted to meet the prevailing situation. This, of course, assumes that local zoning and planning officials do not insist upon local elected officials having a voice in, or veto power

more recreational facilities when, as and if, the sales momentum causes subsequent phases to be built.

¹² See generally 1 ROHAN & RESKIN § 16.03[1].

¹³ Again, the developer might be advised to use the home owner association format in instances wherein he seeks to pay little or nothing by way of common charges on the completed but unsold units, as well as on the units that have not as yet been started. The various condominium statutes contain no specific authorization for forgiveness of such charges, or for the payment of a stepped-down charge on incomplete or unsold units. An argument could be made that the condominium statutes impliedly proscribe such arrangements, irrespective of the equities involved.

over, the original covenants and restrictions, or subsequent amendments to the original documents.

Real Estate Tax and Income Tax Complications

The condominium statutes of the various states mandate that the local assessor must give the sponsor a separate real estate tax lot number and tax assessment for each condominium unit. Such statutes usually contain the further caveat that no tax assessment shall be made against the common elements. Instead the value of such commonly held property must be read back into the value of the individual units that comprise the project. Armed with these legislative directives, condominium developers have experienced little difficulty in working out their real estate tax assessments.

Where the home owner association format has been employed, resolution of these matters has proved much more difficult. Where valuable recreation and other facilities (such as tennis courts, golf courses, swimming pools or a club house) have been conveyed to a nonprofit corporation or similar entity, these holdings should be taxed to that entity and not to the individual home owner. If the association is forced to assess its members to meet the real property tax, and then pays the levy, the income tax deduction for such payment will be wasted. The association typically has little or no income against which to offset the deduction, and the home owners are technically not entitled to deduct their pro rata contribution to the association. In many localities this problem has been avoided or minimized through the device of giving the association a negligible real estate tax bill, or none at all, despite the valuable facilities held by the association as record owner. The value of such facilities is read back into the homes of the individual members, who then pay the real estate tax and obtain a full deduction on their income tax return.¹⁴ While the result achieved is an equitable one, it usually rests upon nothing firmer than accepted practice in the assessor's office, and could conceivably be upset if challenged in court. Thus, for example, it may be difficult to justify giving the association no real estate tax bill whatsoever where the association holds fee title to a golf course. A statutory solution should be found to this problem, fashioned along the lines of the real estate tax provisions of the condominium statute.

¹⁴ This procedure was followed by the assessor in New York City, for example, with respect to the recreational facilities held by the residents' association in Village Green, a large planned unit development recently constructed on Staten Island by a subsidiary of Loew's Corporation.

In theory, every condominium must file a federal tax return, whether or not it has income from outside sources or from nonresidential use of the units or common elements. For tax purposes, the condominium will be treated as an association taxable as a corporation. The consequences that follow filing include: (1) there is no tax liability if the income comes entirely from assessments against residential units and is spent to maintain the common areas; (2) no tax is payable if the income comes entirely from assessments against residential units and if any overage, not spent in the year collected to maintain the common areas, is applied against the following year's assessment;¹⁵ (3) no tax ensues if the income comes entirely from assessments against residential units and if any overage, not spent to maintain the common areas, is spent on nondeductible capital improvements; (4) there is tax liability as to any expenditures for the maintenance of the common areas paid for with income received from non-unit owners.¹⁶

Home owner associations, since generally organized as nonprofit corporations, must file corporate tax returns. The Internal Revenue Service has recently ruled,¹⁷ however, that a home owner association which maintains common areas for the benefit of all of the residents of a development qualifies for a section 501(c)(4) exemption (social welfare organization). As a result, no tax is payable if the income comes entirely from assessments against homeownership members and is spent to maintain the common areas or to make nondeductible capital improvements,^{17a} or is applied against the following year's assessment. Nor does tax ensue if the association receives rental income from non-members or "passive" income from other sources, *viz.*, dividends, interest, etc., and uses this income to reduce the maintenance charges paid by homeownership members. Especially as to rental income, however, the association must not carry on an active business, since the special tax treatment applies only to passive income sources. Thus, if the association itself operated a swim club, the gain from the operation would be taxed if used to reduce the costs of homeownership members. No tax would result, apparently, if the association were to lease the swim club to an independent third party who paid a rental not based on a profit-sharing arrangement. This tax advantage, however, is one that Congress or the Service might readily cut off, since it depends

¹⁵ Rev. Rul. 70-604, 1970-2 CUM. BULL. 9.

¹⁶ See INT. REV. CODE OF 1954, § 277.

¹⁷ Rev. Rul. 72-102, 1972-1 CUM. BULL. 149.

^{17a} See, e.g., Rev. Rul. 74-563, 1974 INT. REV. BULL. No. 47, at 6.

on the continued treatment of home owner associations as section 501(c)(4) entities.¹⁸

Day-to-Day Operational Problems

There would appear to be several reasons why the condominium format enables the group to function more cohesively than would a home owner association. The condominium association and its board of managers are creatures of statute, possessing certain well defined powers and obligations. By way of illustration, the board has complete control of the common areas and the exterior of all the units, thereby assuring uniformity and proper maintenance. Recalcitrant unit owners may be fined, with the fine being enforced by a lien on the offending unit owner's property. Nonpayment, in turn, can lead to foreclosure, and the unit cannot be effectively conveyed to a bona fide purchaser while such a fine or common charge remains unpaid. Perhaps of greater significance, a specified fraction of the unit owners may vote to impose a special assessment upon all the constituent unit owners for any worthwhile purpose, including affirmative improvements, in any amount deemed necessary or desirable. In the case of a home owner association, the authority of the group to act or to impose monetary obligations upon their constituent members is usually based upon the terms of previously recorded covenants and restrictions. Authority to act in any given situation can be seriously questioned. Thus, for example, the authority to assess residents for upkeep and beautification of private roads in the project might not encompass additional assessments for the purpose of establishing a private police force to patrol the area. The common law in this field has never been entirely satisfactory, especially in view of the traditional viewpoint that covenants and restrictions are to be strictly construed.¹⁹ Further, courts have been loathe to authorize one cotenant to improve his fellow cotenant out of his interest in the property by means of a forced contribution to affirmative improvements.²⁰ Accordingly, until a legislative foundation is laid for the powers and functions of home owner associations, or prevailing common law doctrines respond to meet current day needs,

¹⁸ The IRS recently denied section 501(c)(4) classification to condominium associations. Rev. Rul. 74-17, 1974 INT. REV. BULL. No. 2, at 11. However, a number of proposals presently before Congress would resolve this problem by exempting both condominium and home owner association assessments received by the respective associations from income taxation. As in the past, unrelated business income would remain subject to taxation. See 1 ROHAN & RESKIN § 15.06.

¹⁹ See 5 R. POWELL, POWELL ON REAL PROPERTY § 673 (rev. ed. 1974) [hereinafter cited as POWELL ON REAL PROPERTY].

²⁰ See 4A POWELL ON REAL PROPERTY, *supra* note 19, § 604.

the condominium format will continue to offer a more satisfactory vehicle for implementing the day-to-day operation of residential projects.²¹

HYBRID APPROACHES TO THE CHOICE OF VEHICLE

Where a particular project will consist of one hundred or more units, the developer can solve some of the problems mentioned in the first portion of this article by adopting hybrid solutions. Thus, for example, in phased condominium projects it is often possible to proceed according to the "chinese menu" approach. Here the developer indicates that the unit owner's undivided interest in the project will be found in column A if only 100 units are built; in column B if 200 units are built; and in column C if 300 units are built. The sponsor's right to build the second and third sections, respectively, is circumscribed by a time limit and specified notice procedures.²² Another approach commonly employed is that of a reservation of the right to build the second phase as part of the one condominium or as a parallel, but separate, condominium.²³ This gives the developer the option to treat the second phase as a new condominium venture, in order to change specifications, increase prices or make changes in the project's documentation.

Where costly recreational facilities are being constructed at the outset of the development, still another approach is commonly employed. Such facilities are conveyed to an umbrella association, and each group of homes is treated as a distinct condominium association. Upon completion and sale of the first such phase, the developer gives each unit purchaser an automatic membership in the umbrella association, coupled with the obligation to pay a pro rata share of the funds

²¹ By way of illustration, the home owner association often finds it difficult to adequately cover the area of casualty insurance, since their participating owners, and their mortgagees, regard each unit as if it were a detached one-family home. Because statutes require it, the unit owner in a condominium may enjoy far better protection in the event of fire than would his counterpart in a homes association. The master policy must provide for rebuilding of a damaged unit where overall damage to the project is insubstantial. The unit mortgagee may not exercise its standard right to use the insurance proceeds to reduce the mortgage. Where project damage is substantial, it is the unit owners who decide whether to rebuild or not. Neither the unit mortgagees nor the insurance company can usurp that decision. This is not necessarily so in a homes association, where each townhouse buyer gets his own insurance policy with all of the standard clauses unchanged.

²² For an illustration of a condominium project built and marketed pursuant to this type of plan, see the documentation of Wellesley Green (Wellesley, Mass., May 1971), reprinted in 1A ROHAN & RESKIN App. C-8.

²³ This approach was followed in the construction and marketing of the Key Biscayne Towers, a high-rise condominium constructed by a major insurance company as a joint venture with the builder.

necessary to maintain the umbrella association's facilities. The developer retains the right to grant similar memberships to the purchasers of units in subsequent condominium phases, up to a predetermined maximum number of family memberships. The participating unit owner is billed by the umbrella association for his pro rata share of the cost of maintaining the recreational facilities and by his local condominium association for the common expenses connected with maintaining everything else.²⁴

A leading authority on planned unit developments, Professor Krasnowiecki of the University of Pennsylvania, has recently made another proposal for accomplishing the same overall objective.²⁵ His plan would work as follows:

1. The developer creates a central home owner association to own and operate the common areas and facilities.
2. The developer records a declaration of covenants, easements, and restrictions that covers the first stage of the project. This declaration grants to each condominium owner and his tenants, with his consent, the right to use designated common areas and facilities and the right to membership in the central home owner association. The declaration also reserves to the developer the right to record supplementary declarations that would add to the association's common areas and facilities. All additions, however, must accord with a general plan — as to both the number of dwelling units eligible for association membership and the area and location of added facilities. The plan would be made known to each condominium purchaser when he acquires his unit.²⁶ Moreover, the developer must agree that any additional association members shall be assessed for their fair share of the common expenses.

²⁴ This approach was utilized in the construction and marketing of Heritage Village, a highly successful retirement condominium in Southbury, Connecticut. This multi-stage project is comprised of more than thirty separate condominiums which operate under an umbrella association.

²⁵ See Krasnowiecki, *Townhouse Condominiums Compared to Conventional Subdivision with Homes Association*, 1 REAL ESTATE L.J. 323 (1973).

²⁶ The Ransom Oaks development, a 1,500-acre planned community in Amherst, New York, combines the home owner association-condominium technique, perhaps the first such combination in New York State. There, the condominium purchaser becomes a member of a small "village" association which owns and operates common recreation areas for the residents of the "village," as well as a larger "umbrella" association to which all residents of Ransom Oaks are members. In other words, the purchaser participates in a double home owner association as well as a condominium form of ownership. Ransom Oaks is a joint venture between a Buffalo developer, Caldwell Development Corp., and PIC Realty Corp., a wholly owned subsidiary of the Prudential Insurance Co. of America.

3. The developer records the condominium declaration "on top of" the covenants and restrictions that create the central organization. It will make each unit owner subject to assessment by his condominium council for its own internal common elements and by the central home owner association for the central common areas and facilities. Each unit owner will get a stated percentage interest in his condominium and a perpetual easement of enjoyment in the central facilities.
4. No later than the closing of the first condominium unit, the developer transfers all first stage common areas and facilities to the central home owner association, free and clear from all liens, with all improvements either completed or guaranteed by bond or cash escrow.
5. When the developer is ready for the next stage, he will file a supplementary declaration of covenants, easements and restrictions that will bring the new section within the jurisdiction of the central home owner association in accordance with the general plan.

The great attraction of this scheme is the flexibility which it preserves for the developer to market his newer sections as condominiums, or as a conventional subdivision, or even as rental units.

Professor Krasnowiecki provides these additional pointers: the assessments from the central homes association should run individually against each unit; the declaration of covenants, easements, and restrictions must protect the earlier unit purchasers against being forced to pay the total expense of a major central facility while unsold units remain; the developer should agree to bear his share of the cost attributable to unsold units until most of the units are sold; and alternatively, the assessment against any unit owner might be held to a ceiling dollar amount.²⁷

CONCLUSION

This article is intended to acquaint the developer and his counsel with the various points at which the law accords different treatment to the condominium versus the home owner association, in order to assist them in making an informed choice of vehicle for their project. No attempt has been made to quantify the relative difficulty involved in drafting the legal documentation for each type of development. It

²⁷ There is a problem with OILSR regulations, however, if significant recreational or other common facilities will not be completed within two years from the date the first purchaser signs a contract. See text accompanying note 9 *supra*, note 11 *supra*.

should be noted, however, that the draftsman of documentation for a residents' association labors under a double burden. He must first fashion an adequate list of legal rights and obligations, making use of the common law tools of contracts, covenants and easements. Historically, these tools have proven difficult to work with and, on occasion, have frustrated even the clearly revealed intentions of the draftsman. Further, the documentation of the non-condominium project must anticipate the vagaries of the building process by covering such matters as temporary working easements, utility easements, the settling of buildings, encroachments, utilities passing under or through multiple units and the like. Adequate machinery must also be provided for future modification of the project's documentation to meet constantly changing circumstances. The prevailing statutes do much of this work for the draftsman of condominium type projects by providing the constituent unit owners and the board of managers with the necessary authority to proceed with such matters. This factor should not be overlooked.