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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

Bolton and Florence Anderson, et al., Plaintiffs, vs. Recreation Centers of Sun City, Inc., a nonprofit corporation, Defendant/Third-Party Plaintiff Linda Moyer and Richard Stewart, Third-Party Defendants.	Case No. CV2015-012458 **DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** (Hon. Roger Brodman) (Oral Argument Requested)

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Introduction

Plaintiffs have moved for partial summary judgment on Count One of their Amended Complaint seeking a declaration that Sun City, Arizona[1] constitutes a "planned community" under Arizona's Planned Community Act (the "Act") with Recreation Centers of Sun City, Inc. ("RCSC") as its "association." A.R.S. § 33-1802 (1) & (4). Plaintiffs no longer seek this declaration on a classwide basis, but only individually. Pls.' Mot. for Class Cert. at 1 n.1.

Plaintiffs have failed to meet their burden of establishing that *all* of Sun City's declarations satisfy the Act. Sun City consists of numerous sections built in phases, each with its own declaration. There are hundreds of declarations. Plaintiffs must show each one includes the following covenants running with land requiring:

1) The creation of homeowners' association (the association must be created "pursuant to" the declaration);
2) That all owners are "mandatory members" of the association (owners must *automatically* become members upon taking title); and
3) That all owners pay assessments to the association (mandatory assessments).

See A.R.S. § 33-1802(1)-(4); *Shamrock v. Wagon Wheel Park Homeowners Ass'n*, 206 Ariz. 42, 45-46 ¶¶ 13-16, 75 P.3d 132, 135-36 (App. 2003).

Plaintiffs' original declarations recorded by Del Webb do not include any of these covenants. C. LaVoy Decl., Exs. 1-25. They do not mention an association, membership, or assessments.[2] *Id*. This was because Del Webb founded RCSC and its predecessors as a

[1] As used herein, "Sun City" refers to Del Webb's original Sun City development shown on the map attached as Exhibit A and does not include Del Webb's other Sun City developments, such as Sun City West.

[2] The condominium declarations reference an unincorporated board of management to oversee the condominium complex, but its authority does not extend beyond the complex.

type of country club, not a homeowners' association. The distinction is that an association is provided for in the declaration, while a club is not.

The initial club that Del Webb formed, Sun City Civic Association, encountered financial difficulties because membership was optional and fewer owners joined than expected. Del Webb's solution was to begin requiring all buyers to sign a Facilities Agreement that obligated them to pay assessments regardless of whether they qualified to join or did so. To perpetuate the assessment obligation, the contract included a provision requiring the owner to have his or her buyer sign a substitute Facilities Agreement.

In the late 1990s most of the single-family sections in Sun City amended and restated their declarations to modernize them (the "Amended Declarations"). Plaintiffs offer one of these Amended Declarations into evidence. Pls.' SOF, Ex. 31. Plaintiffs' counsel avers and RCSC does not dispute that all of the Amended Declarations include an identical paragraph 16, which provides in relevant part: "Each owner of a lot shall execute a [] Facilities Agreement . . . and such [] Facilities Agreement, including the obligation to pay the annual homeowner fee and special assessments . . . shall be binding upon and inure to each Owner's assigns and successors." *Id*., Ex. 31 ¶ 16.

Plaintiffs argue paragraph 16 triggered the Act for the entirety of Sun City. But this is impossible given that the Amended Declarations only cover a small fraction of Sun City's sections. They do not cover any of the condominium sections, nor some single-family sections (*e.g.*, Rancho Estates). *See* Def.'s Resp. to Pls.' SOF ¶ 16. The non-adopting sections remain subject to the original declarations. The Act also expressly excludes condominiums from the definition of planned community. A.R.S. § 33-1802(4).

Even if the Amended Declarations covered the entirety of Sun City, they still do not satisfy the Act. First, the Act requires that RCSC have been created as the homeowners' association "pursuant to a declaration," which it was not. A.R.S. § 33-1802(1). The Amended Declarations identify Sun City Home Owners Association

("SCHOA"), not RCSC, as the "Association" for Sun City. Pls.' SOF, Ex. 31 ¶ 16. Second, the Amended Declarations does not include mandatory-membership language. Paragraph 16 does not even mention membership. Plaintiffs' argument that an obligation to pay assessments satisfies the Act's mandatory-membership requirement is meritless. Third, Paragraph 16 does not impose an assessments obligation, but rather requires an owner to sign a Facilities Agreement; the assessment obligation arises under the Facilities Agreement when executed.

And finally, the Act, which was enacted in 1994, cannot be retroactively applied to Sun City, which opened in 1960. Doing so would upset substantive rights.

Factual Background

Del Webb conceived of Sun City as a retirement community for active seniors in the late-1950s. A map of Sun City, covering approximately 14 square miles, is attached as Exhibit A. The first two sections, New Life and Unit 1, opened in 1960.

Del Webb included extensive recreational amenities, such as golf courses, swimming pools, and club houses to attract prospective buyers. In a marketing brochure, Del Webb invited prospective buyers to "Visit the Country Club World of SUN CITY, ARIZONA." C. LaVoy Decl., Ex. 30. Another brochure explained the "facilities . . . are being donated by the Webb Corporation to a non-profit corporation composed exclusively of residents of YOUR town and operated by them for the benefit of all of you." *Id*., Ex. 29.

The first organization that Del Webb created to receive and manage these recreational facilities was Sun City Civic Association, an Arizona non-profit corporation, formed in 1961. Pls. SOF ¶ 65. It owned and managed Oakmont Recreation Center for New Life and Unit 1. *Id*. ¶ 72. With respect to membership, its articles state:

> The corporation formed hereby . . . shall be composed of members rather than shareholders. Each *resident* home owner of Newlife [sic], [and] Unit Number 1 . . . *may* become a member.

Pls.' SOF, Ex. 39 at 2, Art. IV (emphasis added). Membership was subject to the eligibility requirement of "resid[ing]" in the home. *Id*. Assuming eligibility, membership was optional as signaled by the word "may." *Id*.

The second organization was Sun City Town Hall Center, formed in 1963. Pls. SOF ¶ 66. Again, it was an Arizona non-profit corporation. *Id*. It initially owned and managed Fairway Recreation Center for Units 2 through 6. *Id*. ¶ 74.

Del Webb later decided to consolidate Sun City's recreational facilities into a single entity. *Id*. ¶ 83. Towards that end, Del Webb formed the third non-profit corporation in 1968, Sun City Community Association. *Id*. ¶ 92. It was renamed RCSC in 1972. *Id*. ¶ 105. The assets of the earlier entities were transferred to RCSC, which today owns and manages most of Sun City's recreational facilities. *Id*. ¶ 96.

As with its predecessors, membership in RCSC is subject to eligibility requirements. Pls. SOF, Ex. 9 (Art. II § 1). RCSC's articles state that no one "shall be entitled to membership in this Corporation . . . except as shall be provided in the Bylaws." *Id*. RCSC's bylaws state that membership is subject to "qualifications" (*i.e.*, eligibility requirements). *Id*. The three primary qualifications are:

- The owner must be a deeded real estate owner of a Sun City property;
- The owner must be at least 55 years old or qualify under the spousal exemption; and
- The owner must occupy the property as his or her primary Arizona residence (unless he or she has another Arizona residence more than 75 miles away).

Assuming eligibility, RCSC's bylaws state that up to two owners per property "shall be entitled to a Member Card" permitting him or her to use the recreational facilities. *Id*. The owner must appear at RCSC and affirmatively request a Member Card.

Id. Only those qualified owners issued a Member Card are "considered as the Membership of the Corporation." *Id*.

Argument

I. THERE ARE THREE TYPES OF ORGANIZATIONS FOR COVENANTED COMMUNITIES.

The modern planned community traces back to the Homes Association Handbook (the "Handbook") published in 1964 by the Urban Land Institute (ULI) in partnership with the Federal Housing Administration (FHA). The Handbook provided "[c]omprehensive guidance on the legal aspects of homes associations and planned-unit developments." *See* FHA, Land Planning Bulletin No. 6, *Planned Unit Development with a Homes Association* 53 (1964) (hereinafter "FHA Bulletin"). It led to the FHA and Veterans Administration insuring residential mortgages in such developments, thereby "spur[ing] the 1960s boom in common interest communities." James L. Winokur, *Critical Assessment: the Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1137 n.8 (1998); *see also* Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L. J. 697, 711 (2010); Jan Z. Krasnowiecki, *The Pennsylvania Uniform Planned Community Act*, 106 DICK. L. REV. 463, 471 (2002); Jan Z. Krasnowiecki, *Townhouses with Homes Associations: a New Perspective*, 123 U. PA. L. REV. 711 (1975); Donald R. Stabile, COMMUNITY ASSOCIATIONS: THE EMERGENCE AND ACCEPTANCE OF A QUIET INNOVATION IN HOUSING 4 (2000).

Based on a two-year study of hundreds of developments across the country, the Handbook recognized three types of covenanted-community organizations:

A. Automatic association

The first type is the automatic association, which is the modern HOA. The Handbook defines it as:

> an incorporated, nonprofit organization operating under recorded land agreements through which (a) each lot owner in a planned unit or other

> described land area is automatically a member, and (b) each lot is automatically subject to a charge for a proportionate share of the expenses for the organization's activities, such as maintaining common property.

Handbook at 403 (cited pages attached as Ex. B); *see also* FHA Bulletin at 4 (adopting almost identical definition). The Handbook recommends that developers establish this type of organization. Handbook at 114.

B. Non-automatic association

The second type is the non-automatic association where "membership is optional with the home owner" or "membership is at the discretion of the association." Handbook at 114. "In both, membership rights are specified in the covenants, and in neither is there a provision for assessments which would run with the land and bind every home owner." *Id*. "Maintenance funds are derived principally from annual dues collected from members, and no home owner is obligated to pay such dues if he renounces membership." *Id*. at 114-15. The Handbook explains:

> These non-automatic homes associations, therefore, do not have the built-in strengths of automatic membership associations, and must depend for a continuing source of funds upon the attraction which their facilities have for their members.

Id. at 115.

C. Club

The third type of organization is the "club." Handbook at 114. "The homeowners club functions much the same as the non-automatic homes association," but "is distinguished . . . by the fact that it is not provided for in the land agreements, and that membership in the club is always optional with the home owner and almost always discretionary with the management." *Id*. at 119.[3] Its "[p]rimary purpose is usually to

[3] *See also* Angela Gilmore, *Recreational Covenants and Residential Communities*, 17 No. 4 PRAC. REAL EST. LAW. 23 (July 2001) (hereinafter "*Recreational Covenants*") (noting that, besides an association, a developer can fund recreational amenities by "require[ing] property owners to purchase memberships in a country club or sports club that owns and maintains the recreational facilities").

provide recreational facilities for members." *Id*. at 401.

The club approach was popular among developers in the 1950s when Sun City was conceived. Among developments started between 1951 and 1957, 40% were structured as clubs or non-automatic associations. *Id*. at 18 (*see* Table 2-c). Between 1958 and 1960, it was 33%. *Id*. The percentage declined to 8% between 1961 and 1962. *Id*.

II. THE ACT CODIFIES THE AUTOMATIC ASSOCIATION.

The Act's definition of "[a]ssociation" requires that the association be "created *pursuant to* a declaration," not independently like a club. A.R.S. § 33-1802(1) (emphasis added). This means the declaration must provide for the creation of an association.

The Act's definition of "[p]lanned community" requires that all owners be "mandatory members" of the association. A.R.S. § 33-1802(4). Every owner must automatically become a member upon taking title. *Shamrock*, 206 Ariz. at 45 ¶ 14, 75 P.3d at 135. The Handbook's model declaration includes the following mandatory-membership language: "Every person or entity who is a record owner of a fee or undivided fee, interest in any lot . . . shall be a member of the Association." Handbook at 386 (see Art. III § 1); *see also Duffy v. Sunburst Farms East Mut. Water & Agr. Co., Inc.*, 124 Ariz. 413, 414, 604 P.2d 1124, 1125 (1979) (concerning declaration that stated "every record owner . . . 'shall automatically become a member of the . . . Association'").

Shamrock explains "[t]he Act's definitions identify the types of homeowners' associations subject to the Act: those with mandatory membership and that require payment of assessments." 206 Ariz. at 45 ¶ 13, 75 P.3d at 135. "The Act does not, however, prescribe how to create such an association." *Id*. The court in *Shamrock* looked "to the common law governing restrictive covenants" for guidance. *Id*. Under the common law, "[i]n order to impose automatic membership on owners of property located within a neighborhood or community development, this requirement must appear in a deed restriction embodied within a recorded instrument." *Id.* at 45 ¶ 14, 75 P.3d at 135;

see also id. at 43 ¶ 1, 75 P.3d at 133 ("[W]e hold that mandatory membership in a new homeowners' association can only be imposed on owners of lots within an existing subdivision by recording deed restrictions to that effect.").

Such deed restriction must reside in the declaration, which the RESTATEMENT describes as follows:

> . . . the term "declaration" means the recorded document or documents that contain the servitudes that create and govern the common-interest community, regardless of label. In modern real-estate practice, the original servitudes are commonly set forth in a document labeled a "declaration" that is recorded before any lots or units are sold. When the first lot or unit is sold subject to those servitudes, they become effective as to all the property described in the declaration. The name of the document that contains the servitudes varies from state to state, and sometimes varies depending on the type of development. Before declarations came into common use, the servitudes that created a common-interest community were usually set forth in the deeds to the individual lots, or shown on the face of the recorded plat. The term "declaration" as used in this Chapter includes plats and deeds to individual lots that impose or reflect the servitudes that create or govern common-interest communities.

RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.2 cmt. *e* (2000) (hereinafter "RESTATEMENT").[4]

Both the Act's definitions of "[p]lanned community" and [a]ssociation" require that all owners be required to pay assessments. A.R.S. § 33-1802(1) & (4). The assessment obligation must exist "under the declaration." A.R.S. § 33-1802(1); *see also Shamrock,* 206 Ariz. at 45 ¶¶ 12-13, 75 P.3d at 135. As the Handbook explains:

> Fundamental to the legal arrangement for a homes association is the covenant for assessments which must be made to run with the land so that the association can be assured of a continuing, legally enforceable source of maintenance funds. The covenant, we have noted differs from restrictive or

[4] The RESTATEMENT defines a "servitude" as "a legal device that creates a right or an obligation that runs with land or an interest in land," including "easements, profits, and covenants." RESTATEMENT § 1.1(1) & (2). "Running with land means that the right or obligation passes automatically to successive owners or occupiers of the land or the interest in land with which the right or obligation runs." *Id*. § 1.1(1)(a).

> "protective" covenants because it calls for an affirmative act on the part of the owner—the payment of annual maintenance assessments.

Handbook at 314.

The Act's required covenants—directing the creation of an association, making all owners automatic members, and requiring all owners pay assessments—define the "automatic association" recommended in the Handbook (at 403).

III. RCSC AND ITS PREDECESSORS WERE FOUNDED AS A CLUB, NOT AN AUTOMATIC ASSOCIATION.

RCSC and its predecessors are a club because they were not referenced in Sun City's original declarations; consistent therewith, the original declarations do not reference membership or assessments. *Cf. Recreation Centers of Sun City, Inc. v. Maricopa Cnty.*, 162 Ariz. 281, 288, 782 P.2d 1174, 1181 (1989) (describing RCSC and its recreational facilities as "similar to . . . (country clubs)").

The Handbook specifically identifies RCSC's earliest predecessor, Sun City Civic Association, as a club. Handbook at 121. The Handbook explains the history of it:

> In the New Life and Unit 1 sections of Sun City, the developer intended to turn over the Community Center to a homeowners club. However, he did not publicize a definite program of ownership and operation of the recreational facilities during the initial sales period. When the Sun City Civic Association was activated early in 1961, many of the residents, who were living on fixed incomes, lacked the funds for club expenses which they had not anticipated when they bought. Consequently, despite the high quality recreational facilities, membership participation was, surprisingly, not high—1010 out of possible 1475 members—and financial problems ensued.

Id.

To remedy this, "the developer drew up a Community Facilities Agreement to be signed by the prospective home buyer." *Id.* "While not recorded as covenants for a homes association, this agreement fixed a maximum assessment and obligated all residents to pay." *Id*. Learning from this experience, Del Webb switched to the automatic association in future developments. "Del E. Webb Corporation let experience guide it from the club

to the automatic homes association as the surest way to protect the value of the community." *Id*. "[T]he covenants of . . . [its] later developments call for an automatic homes association." *Id*.

IV. THE AMENDED DECLARATIONS DID NOT TRANSFORM RCSC INTO AN AUTOMATIC ASSOCIATION.

Once Del Webb cast the die of a "club" by not providing for an association, membership, or assessments in the original declarations, this could only be changed by amending the original declarations according to their amendment procedures. *Shamrock*, 206 Ariz. at 46 ¶¶ 15-16, 75 P.3d at 136. The amendment would need to include all of the required covenants—association creation, mandatory membership, and mandatory assessments—to trigger the Act.

A. No association-creation covenant.

While the Amended Declarations reference RCSC in paragraph 16, RCSC still was not "created *pursuant to* a declaration." Act. A.R.S. § 33-1802(1) (emphasis added). RCSC was formed approximately 30 years *before* the Amended Declarations were recorded. Pls.' SOF ¶ 92.

To get around the "pursuant to" requirement, Plaintiffs argue RCSC's articles are part of the declaration, but that is contrary to *Shamrock*, which specifically holds the non-profit corporation's articles and bylaws cannot amend the declaration. 206 Ariz. at 46 ¶¶ 15-16, 75 P.3d at 136; *see also Wilson v. Paya de Serrano*, 211 Ariz. 511, 516 ¶ 20, 123 P.3d 1148, 1153 (App. 2006) ("Because the Declaration does not provide that the subdivision shall be limited to older-person housing, the amendment to the bylaws was insufficient to impose this age restriction."). The Handbook further explains:

> We have classified homes associations as automatic on the basis of express provisions in the documents which affect title to the land, without reference to what is provided in the articles or bylaws of the association. The reason for this is that the articles and bylaws are subject to amendment on the

> question of membership, and moreover, these corporate documents cannot create an obligation which would run with the land.

Handbook at 7.

Plaintiffs' theory that articles and bylaws are part of the declaration is also contrary to the Act's definitions. The Act defines "[d]eclaration" and "[c]ommunity documents" separately. A.R.S. § 33-1802(2) & (3). The community documents are the declaration *plus* the association's "bylaws, articles of incorporation, if any, and rules, if any." A.R.S. § 33-1802(2). The articles thus are not part of the declaration. *See also* RESTATEMENT § 6.2 cmt. *f* (explaining that "governing documents," which is the RESTATEMENT's equivalent term to community documents, "is a broader term than 'declaration' " and includes other "foundational documents for the association such as the articles of incorporation . . . and bylaws").

B. No mandatory-membership covenant.

Paragraph 16 of the Amended Declarations does not include mandatory-membership language. It does not mention membership, let alone make it mandatory.

Tacitly conceding this, Plaintiffs look elsewhere, citing myriad other organizational and historical documents that they contend support their position, including articles, bylaws, development plans, correspondence, the Consolidation Agreement, RCSC's offering statement, various deeds, press releases, newspaper articles, and Facilities Agreements. But none of these documents purport to or could amend Sun City's operative declarations according to their amendment procedures to impose mandatory membership for all lots in Sun City.

No recent version of the Facilities Agreement mentions membership and, even if it did, the Facilities Agreement is *not* part of the "declaration" under the Act. A.R.S. § 33-1802(3). Extrinsic, changeable documents referenced in a declaration—such as RCSC's articles, bylaws, and Facilities Agreement referenced in paragraph 16—do not thereby become part of the declaration. The changeability of articles and bylaws is precisely why

they cannot be part of the declaration; otherwise the association could change the declaration without following its amendment procedures by changing its articles or bylaws. Handbook at 7. The same is true with the Facilities Agreement. The many versions of the document highlight that it is subject to change. Treating the Facilities Agreement as part of the declaration would allow RCSC to amend the declaration without following its amendment procedures by simply revising the document. Also, for the Facilities Agreement to be part of Sun City's declarations, there would need to be a signed, recorded one for every lot or unit in the community, which there is not. Def.'s Resp. to Pls.' SOF ¶ 15.

Plaintiffs focus on several older (pre-1972) versions of the Facilities Agreement stating that members "will be the home owners" or similar language. Mot. at 7:8-12. This makes ownership an eligibility requirement for membership, but does not *automatically* make every owner a member. Just the opposite, Sun City Civic Association's articles made clear that membership was optional: "[e]ach resident home owner . . . *may* become a member." Pls.' SOF, Ex. 39 at 2, Art. IV. Membership is likewise optional under RCSC's articles and bylaws (*see supra* at 4).

Plaintiffs cite three early-1980s Del Webb deeds for *commercial* parcels to other developers with mandatory-membership restrictions triggered if the land is ever residentially developed, which none of the parcels has been. As noted in the Handbook, Del Webb regretted establishing Sun City without an automatic association. Perhaps these deeds were aimed at not repeating the mistake if the commercial parcels were eventually residentially developed. In any event, the inclusion of mandatory-membership language in them only highlights the absence of such language in Plaintiffs' declarations.

Plaintiffs argue, "Arizona courts have recognized that owners are 'mandatory members' based solely on ownership in a planned community." [Mot. at 6:7-8] Plaintiffs cite two unpublished cases where our Court of Appeals noted that, because the

subdivision was a planned community under the Act, the owner was a member. *See Comanche Heights Homeowners Ass'n v. Pollard*, 2016 WL 1592759, at *1 ¶ 2 (Ariz. App. Apr. 21, 2016); *Ahwatukee Bd. of Mgmt., Inc. v. Feng Qin*, 2015 WL 6088168, at *1 ¶ 2 (Ariz. App. Oct. 15, 2015). The difference here is that Sun City is not a planned community because there is no mandatory-membership covenant in the operative declarations and thus membership cannot be inferred from ownership.

C. No mandatory-assessments covenant.

The Act requires the association have "the power *under the declaration* to assess association members." A.R.S. § 33-1802(1) (emphasis added). Here, RCSC's assessment power arises under a signed Facilities Agreement, which is not part of the declaration. Plaintiffs cite RCSC's bylaws stating that all owners must pay assessments, but, again, articles and bylaws are not part of the declaration. *Wilson*, 211 Ariz. at 516 ¶ 20, 123 P.3d at 1153; *Shamrock*, 206 Ariz. at 46 ¶¶ 15-16, 75 P.3d at 136.

V. ASSESSMENTS DO NOT EQUAL MEMBERSHIP.

Plaintiffs argue "[t]he existence of recorded documents and Facilities Agreements requiring owners to pay assessments and otherwise abide by RCSC's governing documents and rules . . . establishes they are mandatory members even if they are not deemed to be official 'Members' entitled to a Membership Card." Mot. at 6:8-12.

The assessment obligation under a Facilities Agreement is independent from membership. The RESTATEMENT notes "there may be some, mostly older, communities in which membership in the association and the obligation to pay assessments are independent." RESTATEMENT § 6.2 cmt. *d*. That is the situation here, although the assessment obligation exists outside of the declarations under the Facilities Agreement.

Plaintiffs argue it is unfair that ineligible owners are assessed, but this is what they agreed to when they purchased and signed a Facilities Agreement. Their grievance is with Del Webb which established the system. Plaintiffs argue the Facilities Agreement is

unconscionable as to ineligible owners, but offer no evidence of this and, regardless, this has no bearing on the Act's applicability.

Plaintiffs' argument that an obligation to pay assessments satisfies the Act's mandatory-membership requirement is incorrect. The Act treats mandatory membership and mandatory assessments as distinct requirements. Construing assessments as membership would collapse the two requirements into one, rendering the mandatory-membership requirement inert, redundant, and meaningless surplusage. *See In re Estate of Zaritsky*, 198 Ariz. 599, 603 ¶ 11, 12 P.3d 1203, 1207 (App. 2000) ("We avoid interpreting a statute so as to render any of its language mere surplusage, and instead give meaning to each word, phrase, clause, and sentence so that no part of the statute will be void, inert, redundant, or trivial.") (internal quotation marks, brackets and ellipses omitted).

The presumption against surplusage applies with particular force where, as here, the language in question was added by amendment. The House of Representatives' original version of the Act did not include the "mandatory members" phrase, but the Senate added it in a floor amendment. H.B. 2256, 41st Legis., S. Am. (*see* Wright floor amendment). Plaintiffs' interpretation would render the Senate's amendment pointless.

Plaintiffs' argument that assessments equal membership was also specifically rejected in *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, 226 P.3d 411 (App. 2010). *Dreamland* was a 55-or-older recreational retirement community established in the early 1960s (*id*. at 43 ¶¶ 2-4, 226 P.3d at 412), not long after Sun City. As here, the original declarations did not reference an association, membership, or assessments, *except* for the section 18 declaration (recorded much later in 1978) that required "each residential unit" to pay "the initial and annual assessments herein described." *Id*. at 43-44 & 49 ¶¶ 4-5, 30 & n.1, 226 P.3d at 412-13 & 418. The trial court held this assessment language imposed mandatory membership, but the Court of Appeals

reversed. *Id*. at 47 ¶ 20, 226 P.3d at 416. "In fact, the section 18 Declaration imposed an assessment only" and "[t]he Declaration neither required nor guaranteed DVCC membership." *Id*. ¶ 22; *see also id*. n.11 ("[T]he assessment obligation imposed on initial purchasers in section 18 did not give them membership rights in DVCC . . . .").

Plaintiffs misread *Dreamland* when they write "the Court of Appeals held that the requirement to pay assessments equated to mandatory membership." [Mot. at 8:11-12] Plaintiffs cite the court's discussion of the "Second Amended Declarations" recorded in 2003 and 2004. *Dreamland*, 224 Ariz. at 44 & 48 ¶ 6, 226 P.3d at 413 & 417. The court noted "the Second Amended Declarations . . . require membership in DVCC." *Id*. at 48 ¶ 27, 226 P.3d at 417. Plaintiffs assume the court said this because it interpreted mandatory assessments as mandatory membership, but that would be directly contrary to the its holding regarding the section 18 declaration. *Id*. at 47 ¶ 22 & n.11, 226 P.3d at 416. The explanation for the court's mandatory-membership finding is far simpler. The "Second Amended Declarations" expressly state that "[e]very owner of a Lot shall be a Member of the Corporation." C. LaVoy Decl., Exs. 37-39 at 9 (copies of Second Amended Declaration for multiple Dreamland Villa sections).

Equating assessments with membership would also violate A.R.S. § 10-3601(B)'s consent requirement. "Section 10-3601(B) addresses admission of members to a nonprofit corporation and provides that '[n]o person shall be admitted as a member without that person's consent. Consent may be express or implied.'" *Dreamland*, 224 Ariz. at 46 ¶ 19, 226 P.3d at 415 (alteration in original); *see also Shamrock*, 206 Ariz. at 45 ¶ 11, 75 P.3d at 135. Consent is inferred from the act of purchase with notice of mandatory membership from the declaration. *Dreamland*, 224 Ariz. at 47 ¶ 19, 226 P.3d at 416. Consent cannot be inferred in the absence of clear mandatory-membership language in the declaration.

VI. THE RESTATEMENT TAKES A CONCEPTUALLY DIFFERENT APPROACH.

Plaintiffs cite the RESTATEMENT'S definition of "member" as "the owner of a property burdened by a servitude described in subsection (1)." RESTATEMENT § 6.2(4). Subsection (1) describes a servitude to pay for the upkeep of common areas whether there is an association or not. *Id*. § 6.2(1). The RESTATEMENT thus defines membership as a servitude to pay.

This does not help Plaintiffs for two reasons. First, paragraph 16 of the Amended Declarations does not impose a servitude to pay, but rather one to sign a Facilities Agreement; thus, Plaintiffs do not qualify as a "member" under the RESTATEMENT's definition. Second, the comment to the RESTATEMENT's definition explains that "[t]he term 'member' as used in this Chapter means member of the common-interest community, rather than member of the association." RESTATEMENT § 6.2 cmt. *d.* The RESTATEMENT does this because its definition of a common-interest community[5] does not require an association. RESTATEMENT § 6.2(1). Subsection (1)(a) specifically contemplates there is no association, which necessitates a different conception of membership. The comment further explains, "Although rare, there are common-interest communities in which no association has been formally organized." *Id*. § 6.2 cmt. *e*.

The Act, by contrast, requires an association and conceptualizes membership as a relationship to the association. This is why *Dreamland* and *Shamrock* cite to the Arizona Non-Profit Corporations Act, specifically A.R.S. § 10-3601(B)'s member-consent requirement. It is also why A.R.S. § 10-3304(B)(1) in the Arizona Non-Profit Corporations Act cross-references A.R.S. § 33-1802 in the Act.

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[5] A planned community under the Act is different that a common-interest community under the RESTATEMENT. Common-interest community is a broader category that "includes condominiums and cooperatives, as well as other forms of planned developments." RESTATEMENT § 6.1 cmt. *a*. The Act excludes condominiums. A.R.S. § 33-1802(4).

This particular RESTATEMENT goes beyond summarizing the law and "attempts to modernize the law of real covenants." *Recreational Covenants* at 24. It "has significant variations on the elements of the law of covenants" and "has yet to be accepted by the courts." *Id*. The RESTATEMENT's conception of membership reflects such a departure. Arizona "do[es] not follow the Restatement blindly, . . . and will come to a contrary conclusion if Arizona law suggests otherwise." *Powers v. Taser Int'l, Inc.*, 217 Ariz. 398, 403 ¶ 19, 174 P.3d 777, 782 (App. 2007) (citation omitted). Inferring membership from assessments based on RESTATEMENT would conflict with A.R.S. § 33–1802's language and structure and be contrary to *Dreamland*'s holding that mandatory assessments do not equal mandatory membership.

VII. THE ACT EXPRESSLY EXCLUDES CONDOMINIUMS FROM THE DEFINITION OF A PLANNED COMMUNITY.

Because the Act expressly excludes condominiums from the definition of planned community, A.R.S. § 33-1802(4), the entirety of Sun City cannot be a planned community. At an absolute minimum, the motion should be denied as to the condominium Plaintiffs: Jean Battista, Olga Carlson, Mary Gransden, Sherry Johnson-Traver, Shirley Koers, Elizabeth Mercer, Arlef Moyer, Arthur Neault, Diane Patrakis, Gay Sousek, Anne Randall Stewart, and Wendy Wood.

VIII. RCSC IS NOT ESTOPPED FROM DISPUTING THE APPLICABILITY OF THE ACT.

Plaintiffs cite seven superior court cases where RCSC's collection law firm, Maxwell & Morgan, referred to RCSC as a "planned community" or cited provisions of the Act in filings. RCSC instructed the firm that the Act does not apply, but the firm has not consistently adhered to this admonition, especially when using forms.

These inadvertent references do not judicially estop RCSC from disputing the Act's applicability. Judicial estoppel only applies in a subsequent matter between *the same parties*.[6] None of Plaintiffs were parties in these earlier cases.

The doctrine also only applies where the prior action was "successfully maintained." *Standage Ventures, Inc. v. State*, 114 Ariz. 480, 483, 562 P.2d 360, 363 (1977). Success requires not only that the party have obtained relief, but that maintenance of the position was a "significant factor" in obtaining such relief. *State v. Towery*, 186 Ariz. 168, 183, 920 P.2d 290, 305 (1996). In the *Morgan* case, the judgment was by *stipulation*, not the court deciding the matter based on RCSC's assertion. Mot. at 14:20-21. In the *Quality Loan* and *MTC Financial* cases, RCSC requested an award of attorney's fees in excess-proceeds cases initiated by foreclosing lenders. RCSC sought the award on multiple independent grounds: a fee-shifting provision in the declaration; A.R.S. § 12-341.01; A.R.S. § 33-812(I); A.R.S. § 33-1807(H) (part of the Act). RCSC's invocation of the Act was not a significant factor where RCSC was entitled to the award on other grounds. *See Towery*, 186 Ariz. at 183, 920 P.2d at 305 (holding testimony was not a significant factor given the alternative evidence of defendant's guilt). In the remaining cases, Plaintiffs do not contend RCSC obtained relief based on the position. Mot. at 14-15.

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[6] *See State v. Tucker*, 205 Ariz. 157, 164 ¶ 37, 68 P.3d 110, 117 (2003); *Towery*, 186 Ariz. at 182, 920 P.2d at 304; *In re Estate of Cohen*, 105 Ariz. 337, 340-41, 464 P.2d 620, 623-24 (1970); *Adams v. Bear*, 87 Ariz. 288, 294, 350 P.2d 751, 755 (1960); *Martin v. Wood*, 71 Ariz. 457, 459, 229 P.2d 710, 711–12 (1951); *Rossi v. Hammons*, 34 Ariz. 95, 102, 268 P. 181, 184 (1928); *Rezaik v. Farmers Ins. Co.*, 2016 WL 3264108, at *2 (Ariz. App. June 14, 2016); *In re Marriage of Thorn*, 235 Ariz. 216, 222 ¶ 27, 330 P.3d 973, 979 (App. 2014), *review denied* (Jan. 6, 2015); *Flood Control of Dist. Of Maricopa Cnty. v. Paloma Inv. Ltd. P'ship*, 230 Ariz. 29, 41 ¶ 35, 279 P.3d 1191, 1203 (App. 2012); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Maricopa Cnty.*, 196 Ariz. 173, 175 ¶ 7, 993 P.2d 1137, 1139 (App. 1999); *DeAlfy Properties v. Pima Cnty.*, 195 Ariz. 37, 41 ¶ 10, 985 P.2d 522, 526 (App. 1998); *Otis Elevator Co. v. Valley Nat'l Bank*, 8 Ariz. App. 497, 498, 447 P.2d 879, 880 (1968).

IX. THE ACT CANNOT BE RETROACTIVELY APPLIED TO A PRE-EXISTING DEVELOPMENT.

Pursuant to A.R.S. § 1-244, a law cannot apply retroactively absent an express declaration by the legislature: "No statute is retroactive unless expressly declared therein." *See also Garcia v. Browning*, 214 Ariz. 250, 252-53 ¶ 11, 151 P.3d 533, 535-36 (2007) (holding that pursuant to A.R.S. § 1-244, "the legislature has plainly directed that we are not to look to external sources, such as legislative history, to determine whether a statute is to be applied retroactively") (superseded by statute on other grounds as recognized by *State v. Rios*, 225 Ariz. 292, 296 ¶¶ 9-10, 237 P.3d 1052, 1056 (App. 2010)). The Act does not declare that it applies retroactively to preexisting communities.

An exception to A.R.S. § 1-244 allows retroactive application that "is merely procedural and does not affect an earlier established substantive right." *Bouldin v. Turek*, 125 Ariz. 77, 78, 607 P.2d 954, 955 (1979). But the exception does not apply here because retroactive application of the Act would impair substantive rights:

- Sun City's declarations do not impose mandatory membership. Imposition of the Act would make all owners automatic members of RCSC and thereby impair owners' substantive right to decline membership.
- Imposition of the Act would upset third-party lien rights by, except in a few instances, elevating RCSC's lien to first position. A.R.S. § 33-1807(B).
- RCSC has the substantive right under pre-Act Facilities Agreement to charge certain fees that Plaintiffs contend violate the Act.
- Imposition of the Act would otherwise adjust the parties' rights and obligations under Sun City's declarations to conform to the Act.

See Nickerson v. Green Valley Recreation, Inc., 228 Ariz. 309, 316 ¶ 13, 265 P.3d 1108, 1115 (App. 2011) (holding statutes purporting to abolish touch-and-concern requirement could not be applied retroactively because this "would affect the parties' substantive rights as established when the [assessment] covenants were created").

The Supreme Court has clarified that substantive law "'creates, defines and regulates rights' while a procedural law establishes only 'the method of enforcing such rights or obtaining redress.'" *Aranda v. Indus. Comm'n of Arizona*, 198 Ariz. 467, 470 ¶ 12, 11 P.3d 1006, 1009 (2000) (citing *Hall v. A.N.R. Freight Sys., Inc.*, 149 Ariz. 130, 138, 717 P.2d 434, 442 (1986)). Here, Plaintiffs seek "the protections the Act affords," thereby impliedly admitting that the law they wish to apply is substantive and not merely procedural.

Conclusion

For the foregoing reasons, plaintiffs' motion for partial summary judgment to have Sun City declared a planned community under the Act should be denied.

RESPECTFULLY SUBMITTED this 18th day of May, 2018.

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Exhibit A

SUN CITY GENERAL PLAN

MARICOPA COUNTY, ARIZONA

JANUARY 1980

KEY — LAND USE
- SINGLE FAMILY
- DUPLEX
- APARTMENTS
- FOURSOMES
- GOLF COURSES

1 MARINETT

THIS PLAN IS A SCHEMATIC PRESENTATION OF FUTURE DEVELOPMENT OF SUN CITY, ARIZONA, WHICH WILL BE SUBJECT TO CHANGE AT ANY TIME IN ACCORDANCE WITH THE REQUIREMENTS OF ACTUAL DEVELOPMENT.

N W E S

800 0 800 1600

2 BELL

3 SUNDIAL

4 LAKE VIEW

5 OAKMONT

6 FAIRWAY

7 MT. VIEW

(10) Parcel Number

Exhibit B

THE HOMES ASSOCIATION HANDBOOK

- *A Guide to the Development and Conservation of*
- *Residential Neighborhoods with*
- *Common Open Space and Facilities*
- *Privately Owned and Maintained by*
- *Property-Owners Associations Founded on*
- *Legal Agreements Running with the Land*

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THIS BULLETIN WAS PREPARED UNDER CONTRACT FOR THE FEDERAL HOUSING ADMINISTRATION WITH THE COLLABORATION OF THE U.S. PUBLIC HEALTH SERVICE AND THE CO-SPONSORSHIP OF OFFICE OF CIVIL DEFENSE, URBAN RENEWAL ADMINISTRATION, VETERANS ADMINISTRATION & NATIONAL ASSOCIATION OF HOME BUILDERS.

ULI—the Urban Land Institute

1200 18th Street, N.W.

Washington, D.C. 20036

OBJECTIVES

ULI—the Urban Land Institute is an independent, nonprofit research and educational organization incorporated in 1936 under the laws of the State of Illinois. Its interests and activities cover the entire field of urban planning, growth and development. Among the principal purposes of the Institute are to study and to interpret trends in real property and to seek their orientation in the changing economic, social and civic needs of the country; to study principles and methods by which urban land can be developed and improved most efficiently; and to act as a clearing house in this field for the dissemination of information in the form of case material, monographs, and technical journals.

This bulletin is one of a series of research publications to further the objectives of the Institute and to make generally available authoritative information of assistance to those seeking knowledge in the urban field.

ISBN 0-87420-050-4
Library of Congress Card Catalog Number 64-8521

Revised Printings in 1966 and 1970
Printed in the United States of America

Cover Photograph: Wembley Lane, Seattle

Foreword

Homes associations for the maintenance of common properties under agreements running with the land can be traced conceptually as far back as medieval England. Pioneered decades ago in modern form, several hundred such associations with memberships embracing over a hundred thousand homes now exist in the United States. Prior to the study reported here, the experience of these associations has never been systematically examined.

The Federal Housing Administration, seeing the potential value of such an examination as a major aid to land planning progress, enlisted the cosponsorship of five other interested agencies. The FHA and its co-sponsors then selected the Urban Land Institute to undertake the study. In the spring of 1962 ULI launched a nation-wide investigation of existing subdivisions and community developments having common properties maintained by Homes Associations. Results of the study are reported here. The Urban Land Institute has borne the costs of general supervision, printing, and publication of this handbook.

The study was made for the Federal Housing Administration, Technical Studies Program, under FHA contract No. HA (---) fh–844, with the collaboration of the Division of Environmental Engineering and Food Protection, and National Institute of Mental Health, Public Health Service, HEW, co-sponsored by the Office of Civil Defense, Urban Renewal Administration, Veterans Administration and National Association of Home Builders. In addition to funds, the sponsors provided to the Institute the services of two investigators, Byron R. Hanke of FHA and William C. Loring of PHS. Their agencies placed them on full-time detached assignment to the Institute for the study.

This bulletin contains the findings and recommendations of the Urban Land Institute resulting from its Homes Association Study. The Institute assumes full responsibility for its contents which does not necessarily reflect the position or policy of the sponsors. The report is for use by the FHA and its co-sponsors at their own discretion.

Homes Associations have long been of intense interest to me, and the firm I head, Mason-McDuffie Co., has established them in many developments. Among them is St. Francis Wood in San Francisco, which has successfully stood the test of a half century of operation.

It is our firm belief that the information and recommendations contained in the handbook will be of major value to land developers, planners, home builders, appraisers, mortgage lenders, realtors, attorneys, association officers, and public officials concerned with the planning, development, and operation of stable and attractive residential areas for the home owner and the community.

Maurice G. Read

Maurice C. Read, President, ULI

1964

Figure 1-B. With a Homes Association.

Included with the AHA's for statistical purposes are five *simulated automatic homes associations*, or *SAHA*. These do not meet all the AHA requirements but have features such as control of utilities, which give them a clearly automatic character.

1.33 *OTHER AUTOMATIC HOMES ASSOCIATIONS.* It has been mentioned earlier that our principal classification of an organization as a homes association is based on the presence, in the covenants or other documents affecting title to the land, of a provision for an association of home owners. A very small percentage of the associations studied provided specifically for optional or discretionary membership; these are discussed under 1.42, "Non-Automatic Homes Associations." We have classified homes associations as automatic on the basis of express provisions in the documents which affect the title to the land, without reference to what is provided in the articles or bylaws of the association. The reason for this is that articles and bylaws are subject to amendment on the question of membership, and moreover, these corporate documents cannot create an obligation which would run with the land (see 12.2, 12.3 and 26.3). Proceeding on this sound basis, in the course of the study we came across a few cases where the covenants call for an association of home owners which would maintain common areas and facilities, but do not expressly describe the membership rights or the method which will be used to keep the association in funds for the performance of its duties. In the course of the statistical work on the field material we classified these associations as *undetermined homes associations*, or *UHA*, meaning that the membership and source of funds are not fully described or fixed in the covenants. There were only six of these associations in the study.

We have also received information involving another group of associations indicated as homes associations. Because the relevant documents were not received (particularly the covenants), we classified them for statistical purposes as — *homes associations*, or —*HA*. Sixty-two of these were found in the study. Because almost all other homes associations in the study were clearly automatic rather than non-automatic, we considered the sixty-two —HA's and the six UHA's as automatic homes associations for statistical purposes. In statistical references, this combination of AHA's, UHA's and —HA's is identified as the 233 *largely automatic associations*.

medium priced developments indicate that their problems require special attention. While only 15 per cent of the 233 largely automatic associations reported the subdivision had difficulty in getting official approval, 28 per cent of the low-medium associations reported such trouble. The data in Table 2-b indicate, however, that other problems do not occur in subdivisions in the low-medium price ranges any more frequently than in other price ranges, and some difficulties apparently are much less frequent. This suggests that local officials reviewing subdivision proposals in the lower price range should consider carefully the experience of existing associations and the recommendations in 3.3.

In both the clearly automatic sample (N=165) and the largely automatic sample (N=165+68), 16 per cent of the associations were reported to have experienced difficulty of organizing and keeping active. The data in Table 2-b indicate that the 39 low-medium associations in the largely automatic sample have about the same incidence of trouble as the total sample. This is encouraging, and suggests that the lower priced developments can use homes associations as successfully as the medium and high priced. However, among the 18 low-medium developments reporting in the clearly automatic sample, it must be noted that 22 per cent had had difficulty keeping active. So, as a precaution to assure the success that is possible in the lower priced field, it is recommended that developers give such associations the special guidance discussed in Chapters 15 and 16.

Among the 165 clearly automatic associations with the "no answers" excluded in a cross-tabulation, the largest percentage reporting no difficulties in organizing and keeping active was in the high price range, where 87 per cent reported no problem. The medium-high, low-medium-high, and low-medium ranges were represented as having no such problem in 79 per cent, 75 per cent, and 73 per cent of the cases respectively.

One hundred and twenty-six clearly automatic associations reported on both age of development and problems in organizing and keeping active. Nineteen per cent of these experienced such problems at one time or another. Only 6 per cent of the new associations (1961–1962) had trouble, due in part to lack of experience and in part to their still close ties to the developer. The older associations (1950 and earlier) reported incidence of such trouble was 16 per cent, about the same as the sample average. Many of the difficulties of all types within this older group related to the changing stage of family life cycle typical of the resident households and the effect of this change on interest in the association's properties and programs. More significantly, however, 25 per cent of the automatic associations organized in the period 1951–1960 reported some kind of difficulty in either organizing or keeping active. This situation reflects the problems of associations which have outgrown the period of developer guidance but which failed to build a sound operating tradition while such guidance was available. These matters are discussed in Chapters 15 and 16.

Difficulties in use and maintenance of common properties are reported in one-eighth and one-sixth of the AHA's in all price ranges, respectively; Table 2-b. Their occurrence apparently is much less frequent in a typical low-medium price development, but much more frequent in one spanning the full range of low-medium-high. Difficulty with maintenance was about double the 17 per cent average of the total sample average in the low-medium-high price range; but such difficulty was recorded by only 5 per cent of the low-medium price range. Similarly, while 11 per cent of the total sample reported difficulty in regulating use of common areas, double that percentage had such difficulty in

Table 2–c. Percentage Distribution of Developments by Period Started.

Period Started	Percentage of 88 Clearly Automatic Associations *	Percentage of 165 Clearly Automatic Associations	Percentage of 223 Largely Automatic Associations			Percentage of 94 Non-Automatic Associations
			All Price Ranges	Low-medium-high (25)	Low, Low-medium & Medium (39)	
Before 1920	14%	8%	6%	4%	0%	3%
1920–1929	19	14	11	8	0	0
1930–1939	26	5	4	12	3	1
1940–1945	14	7	5	12	3	3
1946–1950	5	7	8	12	5	12
1951–1957	3	23	23	20	18	40
1958–1960	10	20	26	24	32	33
1961–1962	9	16	17	8	39	8

* Officer Form. Other columns are from General Form.

Chapter 9

Clubs and Other Non-Automatic Associations

9.1 General

The preceding chapters represent a wide range of residential developments with homes associations established under recorded land agreements. While the study focuses on automatic-membership homes associations, it includes a number of other organizational types which have non-automatic membership such as private clubs and civic associations. We discussed the legal structures of these two categories of private associations in Chapter 1. To contrast their operations with the automatic homes associations just discussed, we shall examine in this chapter several types of non-automatic organizations.

In the cases discussed, we shall see how a citizens' association flounders in the problems of operating and maintaining recreation areas, even though it may be generally effective as a voice of the people and an influence upon local government. We shall also see how successful developers have started with the club concept, and then, profiting by experience, have turned in subsequent developments to the automatic-membership homes association.

This selection of the automatic homes association by those developers who have experimented with other options first may be the strongest testimony that can be presented in favor of the automatic homes association.

The development data listed at the start of the following sections are explained at the end of Section 4.1. For site plan symbols, see Appendix K.

9.2 Non-Automatic Homes Associations

Spring Lake, Memphis. 1949.

13 miles NE of metro center of .6 pop.; Shelby Co., Tenn.
130 acres, 153 sites, 45 built. Med.-high price; 100′ × 200′; 1.2 luga.
Spring Lake Ass'n., OHA. $9/person/yr. ave., $9/person/yr. max.
Lake, dam, neighborhood entrance, buffer fence owned by developer.

Kentwood Park, Los Angeles. 1957.

26 miles SE of metro center of 6.7 pop.; Orange Co., Calif.
52 acres, 206 sites, 206 built. High price; 70′ × 103′; 4.0 luga.
Kentwood Park, Inc., OHA. $84/yr. ave., no max.
Recreation area, swimming pool, park, common hall, off-street walks.

Huntington Beach, New York. 1926.

36 miles E of metro center of 10.7 pop.; Suffolk Co., N.Y.
600 sites, 540 built. Low-high price; varied.
Huntington Beach Community Ass'n., OHA. $25/yr. ave., no max.
Pier, launching ramp, beaches, shelters, playground.

Huntington Bay Hills, New York. 1933.

36 miles E of metro center of 10.7 pop.; Suffolk Co., N.Y.
100 acres, 220 sites, 200 built. Medium-high price; 15,000 sq. ft.; 2.0 luga.
Bay Hills Property Owners Ass'n., DHA. $20/yr. ave., no max.
Roads and two 50′-wide access areas leading to the beach.
Huntington Bay Hills Club, CC. $75/yr. ave.
Cabanas, beach pavilion, parking area, tennis courts, park.

Lakewood, Little Rock. 1950.

8 miles N of metro center of .24 pop.; Pulaski Co., Ark.
2000 acres, 3000 sites, 1500 built. Med.-high price; 80′ × 150′; 1.5 luga.
Lakewood Property Owners Ass'n., DHA. $18/yr. ave., $.002/sq. ft./yr. max.
Lakes, recreation areas, parks, off-street walkways.

Ilex Hills, Portland, Ore. 1959.

9 miles NE of metro center of .8 pop.; Multnomah Co., Ore.
20 acres, 60 sites, 36 built. High price; 90′ × 95′; 3.0 luga.
Holly Hills Home Owners Ass'n., DHA. No max.
Parks, walkways.

In Chapter 1 we divided the non-automatic membership homes associations into two types: one in which membership is optional with the home owner, and the other in which membership is at the discretion of the association. In both, membership rights are specified in the covenants, and in neither is there a provision for assessments which would run with the land and bind every home owner. Maintenance funds are derived principally from

annual dues collected from members, and no home owner is obligated to pay such dues if he renounces membership.

These non-automatic homes associations, therefore, do not have the built-in strengths of automatic membership associations, and must depend for a continuing source of funds upon the attraction which their facilities have for their members. Failure to obtain a substantial membership can result in difficulties such as those encountered in *Spring Lake*, a lake-centered subdivision near Memphis, Tennessee. The developer took pains to preserve the rural character of the countryside. However, since many of the lots front directly on the thirty-two acre lake which is the chief common property, there is little real inducement to join the association or pay assessments. Resident participation is nominal. As a result, the developer is forced to retain and keep up the common properties himself.

The development governed by a non-automatic membership association must be well planned to thrive. *Kentwood Park* in Anaheim, California, is a successful development in which good site planning as well as attractive facilities, have overcome the weakness of a non-automatic homes association. See Figures 11.7-A, -B and -C. The two-acre common area is easily accessible to most lots via walkways leading from seven *culs-de-sac*, and via street frontage at one end of the park. Three sides of the park are surrounded by homesites which are buffered by a solid concrete-block wall with openings for the walkways. This allows maximum utilization of the park area for recreational purposes. Among the facilities provided are swimming and wading pools, play equipment, tennis courts, ballfield, and club house; Figure 9-A. The association owns and operates these facilities, paying for maintenance and lifeguard service.

Each resident is eligible to join the association, but only those who exercise this option pay the monthly dues of $7.00. Since this arrangement alone does not provide adequate financial resources, the association accepts outside members who pay a

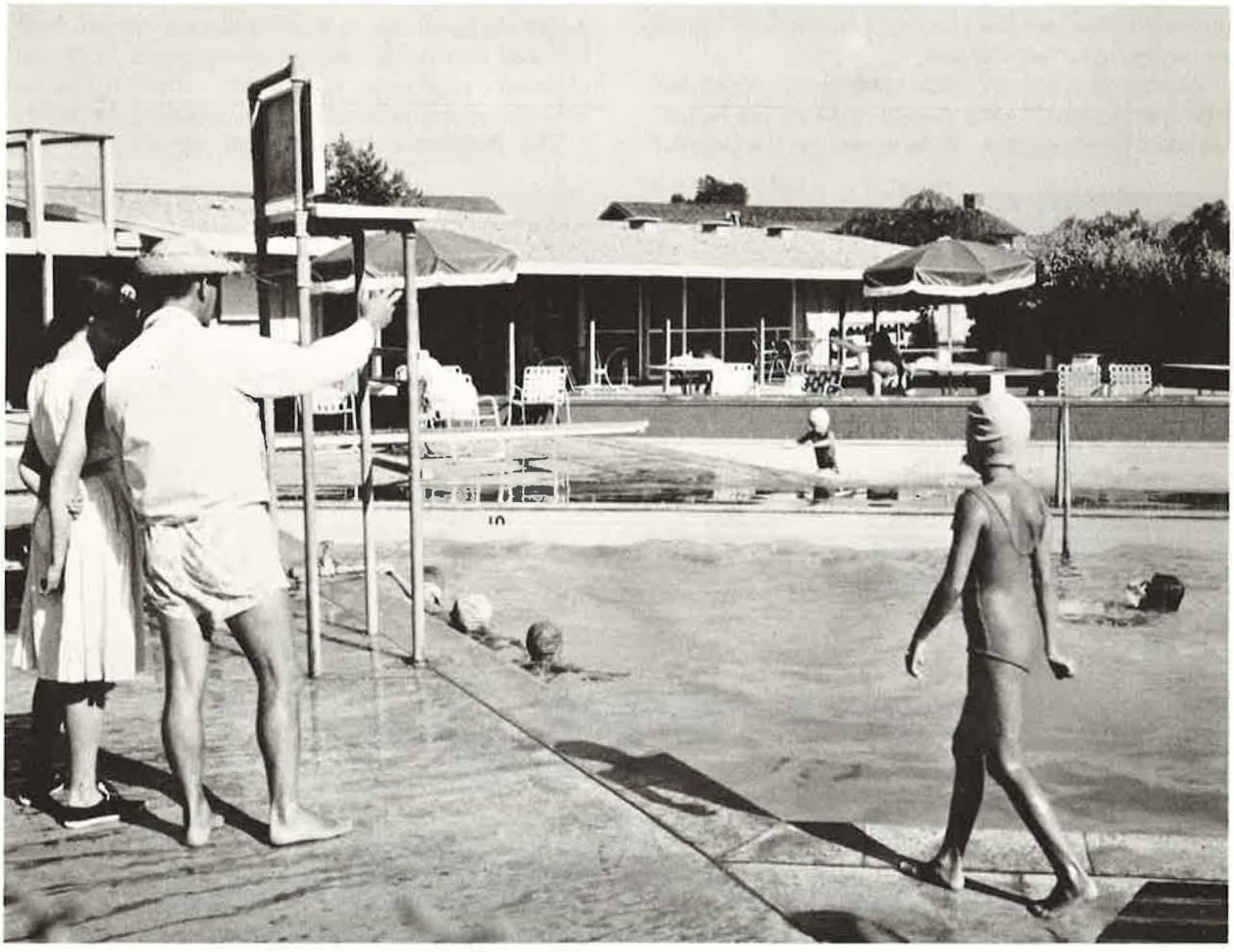

Figure 9-A

many of the problems usually brought on by non-automatic homes associations.

In *Ilex Hills*, we find a situation where a development was overcome by difficulties which it might have been able to resist more effectively if it had had an automatic instead of a non-automatic homes association. Inspired by *Radburn* (6.6), the developer planned a large neighborhood with a network of interior parks and merchandized the first section with model homes and a landscaped park, both of which were featured in a very attractive brochure. See Figures 9-D and 9-E.

Sales of the Ilex Hills sites were retarded by some design shortcomings in the realm of privacy, a high sales price for the area, and a buyers' housing market. However, these weaknesses were compounded by negative aspects of the non-automatic homes association. First, since assessments were not defined in the covenants, buyers were wary of a possible high maximum. Second, the voluntary aspect of the association threatened prospective buyers with a situation in which they might not have sufficient cooperation in maintaining common facilities. Third, covenant restrictions were unclear and this could lead to difficulties between resident groups.

These weaknesses in the community organization did not go unnoticed by the developer's competition who used them to cut further into already weakened appeal.

When the development plan was abandoned, the residents already there found that they did not have the dynamic association needed to make the most of what common property was left to them. Thus, we see that the more troubles a development faces, the more it needs an automatic homes association in order to ride them out.

9.3 Homeowners Clubs

Greenmeadow, San Jose. 1954.

17 miles NW of metro center of .6 pop.; Santa Clara Co., Calif.
45 acres, 243 sites, 243 built. High price; 66′ × 100′; 3.8 luga.
Greenmeadow Community Ass'n., HC. $1.00 dues, $75 (full membership)/yr. ave., $18 (partial)/yr., no max. 0.34 RSR.
Recreation area (2.9 acres), swimming pool, nursery school, park, off-street walkway, buffer planting, parking.

Sun City (New Life and Unit One), Phoenix. 1960.

17 miles NW of metro center of .7 pop.; Maricopa Co., Ariz.
480 acres, 1475 sites (incl. about 200 apts.), 1475 built. Low-med. price; 70′ × 110′; 3.0 luga.
Sun City Civic Ass'n., Inc., HC. $36/yr. ave., no max.
Community Center, including swimming pool, recreation areas, hobby rooms and hall. Golf courses owned by developer.
Sun City Civic Ass'n., CA.

Heather Hills, Indianapolis. 1961.

11 miles E of metro center of .7 pop.; Marion Co., Ind.
118 acres, 337 sites, 250 built. Low-high price; 80′ × 130′; 2.9 luga.
Heather Hills Country Club, CC. $36/yr. ave., no max.
Swimming pool, recreation area, golf course.
Heather Hills Homeowners Ass'n., CA.

Forest Glen, near New London-Groton-Norwich. 1959.

13 miles W of metro center of .2 pop.; Middlesex Co., Conn.
60 acres, 100 sites, 99 built. High price; 100′ × 200′; 1.7 luga.
Forest Glen Ass'n., HC. $10/yr. ave., no max.
Tennis courts, park, entranceway.

Incline Village, Reno. 1960.

28 miles SW of metro center of .1 pop.; Washoe Co., Nev.
2300 acres, 4000 sites, 50 built. High price; 100′ × 200′; 1.7 luga.
Incline Village Recreation Ass'n., HC. $50/yr. ave., no max.
Two beaches—not yet improved.

Southglenn, Denver. 1961.

13 miles S of metro center of .9 pop.; Araphoe Co., Col.
720 acres, 1590 sites, 350 built. Med.-high price; 100′ × 130′; 2.2 luga.
Southglenn Country Club, Inc., HC. User fees, no max.
Recreation area (21.7 acres), tennis courts, playground, swimming pool, 9-hole, par-3 golf course; all proposed.

Casa Solana, Santa Fe. 1955.

3 miles NW of non-metropolitan city; Santa Fe Co., N.M.
190 acres, 672 sites, 660 built. Med.-high price; 70′ × 105′; 3.5 luga.
Casa Solana Neighborhood Ass'n., HC. $10/yr. ave. (add'l fee for pool membership), no max.
Swimming pool, small recreation area, common hall.

New Papago Parkway, Phoenix. 1958.

10 miles E of metro center of .7 pop.; Maricopa Co., Ariz.
240 acres, 875 sites, 875 built. Med.-high price; 67′ × 95′; 3.6 luga.
New Papago Parkway Recreational Park, Inc., HC. $20/yr. ave. & $15/yr. ave. user fees, no max.
Swimming pool, recreation area, landscaped park.

Bow Mar, Denver. 1947.

12 miles SW of metro center of .9 pop.; Arapahoe Co., Col.

404 acres, 269 sites, 230 built. High price; 1 acre; 0.66 luga.

Bow Mar Owners, Inc., HC. $50/yr. ave., no max.

Recreation area with beach, park and common hall.

The homeowners club functions much the same as the non-automatic homes association discussed in the preceding section. It is distinguished, however, by the fact that it is not provided for in the land agreements, and that membership in the club is always optional with the home owner and almost always discretionary with the management. Detailed analyses of these organizational types are in Chapter 1.

Like the non-automatic homes association, the club derives its funds from dues and admission fees. Since a member can be held responsible only for current or past dues, and can avoid future obligations by resigning or being expelled, the homeowners club cannot establish a shockproof financial base.

Since the crux of the financial problem is membership participation, facilities must be designed to attract and serve an optimum number of residents. To preclude difficulties between the developer and the homeowners when the club is activated, a clearly defined program regarding ownership and operation of the facilities must be publicized during the initial sales period. Once the club is activated, an effective system of communication must be devised whereby new membership can be elicited and old membership encouraged to continue participation.

Obviously, many homeowners will support such glamour facilities as the swimming pool, the tennis courts, and the golf course. However, when money is needed to keep up facilities that "just sit there," many owners may decide to take advantage of their option to withdraw. Thus, if parks or preserves must be supported for the long-range interest of the community, the automatic association is best equipped to do the job. For this and other reasons discussed below, many of the developers of communities with homeowners clubs found it advantageous to change to automatic-membership associations in later development projects.

Greenmeadow.—Greenmeadow in Palo Alto, California, managed to survive the drawbacks of a homeowner club because it has outstanding facilities and a talented body of residents. The difficulties arose when the developer attempted to activate the homeowners club. Unfortunately, he had not made available, to each prospective buyer during the initial sales period, unequivocal information regarding ownership and operation of common facilities. When the Eichler organization began Greenmeadow in 1954, they wanted to do something different with an irregularly shaped parcel of land. They planned a landscaped park, a swimming pool and a combination nursery school and meetinghouse as an integral part of the development. The City of Palo Alto approved the necessary reduction in lot size with the stipulation that the park would be privately maintained and restricted to the use of Greenmeadow residents. See Figures 9-F, -G, and 11.3-P thru 11.3-S.

The original intention of the developers was to retain ownership of the swimming and nursery school facilities, charging each participating homeowner a fee, and to form a homeowners' corporation to own the park, issuing one share of stock to each homeowner. During the initial sales period, this intent was not made clear to each prospective buyer. Consequently, many of the homeowners felt that, having bought their house and lot, they automatically owned the community center. When the developer called a meeting and made known the actual plan, the residents elected to organize independently of the developers and to secure control of the community center. Faced with the possibility of a boycott and the prospect of operating the center at a loss, the developers sold the common property to the residents for a token sum.

The residents then formed a club in which two types of optional membership were made available: full participating with swimming pool privileges, and partial participating with no pool privileges. Ninety-five per cent of the residents presently belong to the club, and almost all of these are full members.

The vitality of the club is fostered by an organizational set-up which assures democratic representation of all twenty home blocks; see Figure 9-F. It also provides opportunities for all residents to participate through its numerous committees. The elected board of directors emphasizes effective communication to maintain old and elicit new resident participation in order to keep the association active. The club publishes an informative letter welcoming new owners, a monthly newsletter, and a resident directory. At the start of the swimming season, the club issues a six-page, mimeographed set of pool rules, together with ten free guest tickets for the pool.

The club has the further advantage of operating facilities which were designed to both encourage maximum use and to provide a supplemental source of income. The revenue from annual dues is augmented by building rentals, and swim school and nursery school fees. As a result, the association operates on a firm financial footing, with sufficient funds to employ a nursery school director and staff, a pool manager and staff, and a gardener.

The homeowners club in Greenmeadow has func-

tioned successfully because of the excellent facilities available, the particularly interested and talented groups of residents, and the developers' cooperation in resolving the difficult situation which arose during the sales period. However, one should note that in spite of this success, the progression in organizational types within the Eichler developments, from the community club of Greenmeadow through various other clubs and cooperatives, has culminated in the use of the automatic homes association in one of the most recent Eichler developments, *Geneva Terrace* (7.2).

Sun City.—The experience of the Del E. Webb Corporation in its Sun City developments closely parallels that of the Eichler organization. In January 1960, the opening of the New Life and Unit 1 sections of Sun City marked the first stage in a long-range program of satellite communities designed exclusively for active retirement. The New Life and Unit 1 sections of 1475 units in homes and cooperative apartments featured an elaborate Community Center (pool, auditorium, hobby rooms, club rooms, and shuffleboard courts) adjacent to a shopping center, and an eighteen-hole golf course; Figures 9-H, 9-I, 9-J and 11.1-A. Sales of homes and apartments continue strong in later sections of Sun City, begun in 1961 a mile and a half south of the initial Community Center. These feature a Town Hall Center (recreation center), and a second eighteen-hole golf course.

In the New Life and Unit 1 sections of Sun City, the developer intended to turn over the Community Center to a homeowners club. However, he did not publicize a definite program of ownership and operation of the recreational facilities during the initial sales period. When the Sun City Civic Association was activated early in 1961, many of the residents, who were living on fixed incomes, lacked funds for club expenses which they had not anticipated when they bought. Consequently, despite the high quality recreational facilities, membership participation was, surprisingly, not high—1090 out of possible 1475 members—and financial problems ensued. This is rather low in view of the nature of the development as a satellite community for elderly in which the recreational facilities and active retirement are featured.

To avoid this situation in the later second section, the developer drew up a Community Facilities Agreement to be signed by the prospective home buyer. While not recorded as covenants for a homes association, this agreement fixed a maximum assessment and obliged all residents to pay. Thus, the homeowners club in the Town Hall Center sections was expected to function much the same as an automatic homes association, with an equitable degree of financial stability. Even so, assessment collection is a problem, although the proportion of participation is better than in the New Life and Unit 1 sections. For comment on such continuity agreements, see 1.43.

The Del E. Webb Corporation's celebrated retirement communities now extend to Tampa, Florida, and to areas near Riverside and Bakersfield, California. All embody the developer's philosophy of active retirement, with recreational facilities designed to fulfill all anticipated social, cultural, and creative needs of the retired homeowner. However, the covenants of these later developments call for an automatic homes association. Like the Eichler organization, the Del E. Webb Corporation let experience guide it from the club to the automatic homes association as the surest way to protect the value of the community. Its latest development, *Clear Lake City* in Houston, is discussed at 8.3.

Heather Hills, started in 1961 in Indianapolis, included a golf and swimming club for both residents and non-residents. Experience in this development of 300 medium-priced homes resembles that of *Greenmeadow.* The lack of clear explanation or definite agreements concerning the swimming pool led to misunderstandings and difficulties between developer and homeowners. In a later venture, the developers have planned an automatic-membership association for Heather Hills Gardens, or Ramblewood, mentioned in 7.2.

A similar situation occurred in *Forest Glen* in Old Saybrook, Connecticut. Lack of pre-sale information regarding the common areas led to subsequent use of the facilities by non-members who felt that the developer had promised the facilities to them and not to the club. Obviously this made it difficult to collect dues and maintain a satisfactory level of membership participation. As a result of this unfavorable experience, the developer established an automatic-membership association in his current development, *The Highlands,* at Ledyard, Connecticut.

Incline Village, a large land development operation recently started at Lake Tahoe, may in time furnish another experience with an indefinite arrangement for a voluntary club. Like *New Seabury* on Cape Cod (8.3), it is planned as a series of self-contained neighborhoods appealing to various buyer groups. The attractive sales brochures mention the voluntary home-owners club and the two

Chapter 23

Affirmative Covenants

23.1 Introduction

Fundamental to the legal arrangement for a homes association is the covenant for assessments which must be made to run with the land so that the association can be assured of a continuing, legally enforceable source of maintenance funds. The covenant, we have noted, differs from restrictive or "protective" covenants because it calls for an affirmative act on the part of the owner—the payment of annual maintenance assessments. (See discussion 12.3.)

The law on the subject of affirmative obligations running with the land can hardly be characterized for its clarity or simplicity. The *Restatement of Property* calls it "the most perplexing of the many questions which may arise out of a promise respecting the use of land." [1]

The explanation for the obscure and confused state in which the subject finds itself today is not hard to find. In everyday real estate transactions there is relatively little call for imposing affirmative obligations upon the fee owner of land. Of the obligations that might be imposed, the one most widely used—the covenant for maintenance assessment—is the one least likely to be challenged in court. The cost of litigation compared to the annual assessment, the dubious advantage of the owner of establishing the invalidity of a levy which protects the value of his home, these considerations guarantee that it would take a very odd combination of circumstances, not to say an oddly motivated litigant, to present a serious challenge to the covenant, let alone take it to the appelate level where it would come to light in the printed reports.

We have not been able to undertake a search for reported opinions at the trial level. However, responses to our Officer Form show that court action to enforce assessments is seldom necessary and interviews in the field indicate that such action as is taken normally stops at the filing of a complaint—which generally produces payment. All this serves to explain why the reported cases dealing specifically with maintenance assessments can be counted on the fingers of one hand.

The fact that few home owners have judged it worthwhile to challenge the validity of this covenant, while obviously encouraging as a practical matter, is little comfort to the attorney whose duty it is to be convinced of the legality of the arrangement which he prepares. Doubtless, too, he will be called upon to persuade mortgage lenders, or the FHA, that the arrangement is sustainable against challenge in the courts regardless of whether it is imminent or remote.

Despite the apparent confusion of authority, on proper analysis, there can be very little doubt that modern courts will sustain the maintenance assessment as running with the land. Because we are dealing with an unfrequented area of the law, such analysis necessitates a clear understanding of the weight which ought to be assigned to some of the older cases, often furnishing the only available authority in any particular state and a special feel for the concepts, part rational, part mystical, which are so characteristic of our early land law.

Thorough and informed treatises and monographs on the subject are not lacking.[2] On the whole, however, the tendency of the writers has been to lump all affirmative obligations together, obscuring, in many ways, some of the distinctions and practical points that should be considered by the attorney in arriving at an opinion concerning maintenance assessments, and in the steps which he must take to effectuate the arrangements for a homes association. Among these, are the following:

> (1) Existing analysis of the circumstances under which affirmative obligations will run with the land has, we feel, been insufficiently sensitive to one very critical distinction—the distinction between a money obligation which is sought to be enforced solely as a *lien* against the land and a money or other affirmative obligation which is sought to be enforced as a general personal obligation of the owner.
>
> If the distinction is not stressed, decisions which apparently refuse to allow a covenant to run as a personal obligation (where execution will issue against all of the assets of the owner)

[1] *Restatement of Property: Servitudes* (1939), § 540.

[2] Clark, *Covenants and Interests Running with the Land*, (2d Ed. 1947); *American Law of Property*, Vol. II (1952), § 9. Dealing specifically with maintenance assessments, there is an informative monograph by Charles Ascher printed in *Urban Redevelopment Problems and Practices* (Woodbury Ed. 1951), Part III, pp. 223–309.

Appendix F

Model Form:
Declaration of Covenants and Restrictions

Note

This suggested form presents *only* the opening phrases of the declaration and all of the provisions which should be included to create the proper legal foundation for a homes association, with power to enforce the declaration and to levy assessments against each property for the maintenance by it of common properties and facilities. This form does *not* present the protective covenants covering use, upkeep of property, nuisance, etc., which will appear in a full declaration, on the ground that forms for such covenants are readily available—see *The Community Builders Handbook*, Executive Edition (Washington: Urban Land Institute, 1960); Federal Housing Administration *Data Sheet 40*, Rev. 4/59—and that these must, in any event, be tailored to the character of a particular development.

Included in this form, however, is a provision for architectural control, Article VII, because we judge that this control is of central importance to the success of a homes association. (See 12.6.) Additionally, covenants to govern the rights and obligations of party wall owners are included here at Article VI, because planned-unit development with common open space will frequently involve some form of townhouse and because the obligation to pay for the maintenance and repair of a party wall is closely related in legal theory to the obligation to pay maintenance assessments. For the same reasons, provisions relating to exterior maintenance are included in Article VIII.

As an aid to an understanding of this form, it is suggested further that the reader consider the Note preceding Appendix G.

THIS DECLARATION, made this _____ day of _____, A.D. 19__, by (name of developer), hereinafter called Developer.

WITNESSETH:

WHEREAS, Developer is the owner of the real property described in Article II of this declaration and desires to create thereon a residential community with permanent parks, playgrounds, open spaces, and other common facilities for the benefit of the said community; and

WHEREAS, Developer desires to provide for the preservation of the values and amenities in said community and for the maintenance of said parks, playgrounds, open spaces and other common facilities; and, to this end, desires to subject the real property described in Article II together with such additions as may hereafter be made thereto (as provided in Article II) to the covenants, restrictions, easements, charges and liens, hereinafter set forth, each and all of which is and are for the benefit of said property and each owner thereof; and

WHEREAS, Developer has deemed it desirable, for the efficient preservation of the values and amenities in said community, to create an agency to which should be delegated and assigned the powers of maintaining and administering the community properties and facilities and administering and enforcing the covenants and restrictions and collecting and disbursing the assessments and charges hereinafter created; and

WHEREAS, Developer has incorporated [1] under the laws of the State of _____, as a non-profit corporation, THE _____ ASSOCIATION, for the purpose of exercising the functions aforesaid;

NOW THEREFORE, the Developer declares that the real property described in Article II, and such additions thereto as may hereafter be made pursuant to Article II hereof, is and shall be held, transferred, sold, conveyed and occupied subject to the covenants, restrictions, easements, charges and liens (sometimes referred to as "covenants and restrictions") hereinafter set forth.

ARTICLE I

DEFINITIONS

Section 1. The following words when used in this Declaration or any Supplemental Declaration (unless the context shall prohibit) shall have the following meanings:

(a) "Association" shall mean and refer to the_____ _____Association.

(b) "The Properties" shall mean and refer to all such existing properties, and additions thereto, as are subject

[1] Note that it is assumed that the Association has been brought into legal existence before, or at the same time as, this declaration is filed of record—as we have recommended, see text 12.42.

The additions authorized under this and the succeeding subsection, shall be made by filing of record a Supplementary Declaration of Covenants and Restrictions with respect to the additional property which shall extend the scheme of the covenants and restrictions of this Declaration to such property.[9]

Such Supplementary Declaration may contain such complementary additions and modifications of the covenants and restrictions contained in this Declaration as may be necessary to reflect the different character, if any, of the added properties and as are not inconsistent with the scheme of this Declaration. In no event, however, shall such Supplementary Declaration revoke, modify or add to the covenants established by this Declaration within the Existing Property.[10]

(b) *Other Additions.* Upon approval in writing of the Association pursuant to a vote of its members as provided in its Articles of Incorporation, the owner of any property who desires to add it to the scheme of this Declaration and to subject it to the jurisdiction of the Association, may file of record a Supplementary Declaration of Covenants and Restrictions, as described in subsection (a) hereof.[11]

(c) *Mergers.* Upon a merger or consolidation of the Association with another association as provided in its Articles of Incorporation, its properties, rights and obligations may, by operation of law, be transferred to another surviving or consolidated association or, alternatively, the properties, rights and obligations of another association may, by operation of law, be added to the properties, rights and obligations of the Association as a surviving corporation pursuant to a merger. The surviving or consolidated association may administer the covenants and restrictions established by this Declaration within the Existing Property together with the covenants and restrictions established upon any other properties as one scheme. No such merger or consolidation, however, shall effect any revocation, change or addition to the covenants established by this Declaration within the Existing Property except as hereinafter provided.[12]

stage to the membership of the existing association unless he obtains its approval as provided in subsection (b). The plan is not required to be very specific so that only obvious departures from its general terms will fall under the procedure of subsection (b). In any event, to the extent that there may be some dispute whether any particular departure requires the use of the procedure under subsection (b), the developer need not be delayed in development since the issue is only whether the added properties should be brought under the jurisdiction of the existing association and the developer is free to create a new association for the added properties. Moreover, if a dispute develops, to create a new association may be in his best interests.

[9] For the purpose of this wording, see 24.2.

[10] Even if the protective covenants established in added stages of the development differ in detail from those established in prior stages, there is no pressing need, indeed it would be inappropriate, to allow for any modification of the old covenants. See text 12.82 and 24.4.

[11] See footnote 8.

[12] There is no reason why a merger should require any change in the protective covenants. However, a change in the maximum and basis of the assessments may be necessary to facilitate uniform administration. See text 13.7, and Article V, Section 5 of this Declaration.

ARTICLE III [13]

Membership and Voting Rights in the Association

Section 1. *Membership.* Every person or entity who is a record owner of a fee or undivided fee, interest in any Lot [or Living Unit] which is subject by covenants of record to assessment by the Association [14] shall be a member of the Association, *provided that* any such person or entity who holds such interest merely as a security for the performance of an obligation shall not be a member.

Section 2. *Voting Rights.* The Association shall have two classes of voting membership: [15]

> *Class A.* Class A members shall be all those owners as defined in Section 1 with the exception of the Developer. Class A members shall be entitled to one vote for each Lot [or Living Unit [16]] in which they hold the interests required for membership by Section 1. When more than one person holds such interest or interests in any Lot [or Living Unit] all such persons shall be members, and the vote for such Lot [or Living Unit] shall be exercised as they among themselves determine, but in no event shall more than one vote be cast with respect to any such Lot [or Living Unit].[17]

[13] This designation has been adopted for cross-reference purposes only. In the full declaration, intervening Articles governing protective covenants may be inserted; see footnote 5. This provision governing membership and voting rights *must* appear in the covenants even though it may be repeated in the Articles or By-Laws of the Association, see text 12.5 and 27.3; see also 26.32.

[14] This provision identifies each member by reference to his fee ownership of any lot which is subject to assessment. Thus the owner of any property which is exempt under Article V, Section 11 is not a member. This is consonant with the requirement that every owner of assessable property must be a member in order that the covenants run with the land; see 1.32. The bracketed matter should be inserted when the development includes multifamily rental or condominium units. In the case of condominium units, the bracketed matter will make clear that each dwelling unit owner is entitled to membership which is imperative if the assessments are to run with the site and structure or with the units (since the condominium owners are owners not only of their individual units but also common owners of the site and structure). In the case of rental units, the bracketed matter will not extend membership to the tenants (since they are not fee owners) but it will make clear that the landlord has membership rights with respect to each unit which he can delegate to his tenants under the leases (see provision of sample By-Laws, Appendix H, Article V, Section 2, providing for a right of delegation by the owner-member to members of his family and to his tenants). It is not advisable to extend automatic membership rights to tenants.

[15] The purpose of a two-class membership is discussed in 15.5. The applicable non-profit corporation statute must be consulted to determine whether weighted voting power is authorized. Where it is not authorized or where equal voting power for developer and home owners is preferred, the alternative provisions suggested at footnote 21 may be used.

[16] The bracketed matter should be inserted where the development includes multifamily rental or condominium units. See footnote 14.

[17] This provision will cover the case of joint tenancies, tenancies by the entireties and tenancies in common where

Appendix J

Definitions

Organizational categories are discussed in Chapter 1. Their abbreviations are listed in Appendix B.

Citizens association: voluntary membership organization open to residents of a neighborhood, community, or political subdivision of a state, whose primary purposes are to express members' viewpoints on community questions and to improve the community. (See 1.44.)

Club: organization not mentioned in covenants or restrictions, membership in which is optional with home owner and/or discretionary with club management. Primary purpose is usually to provide recreational facilities for members. Depending on geographical limitations on membership, these may be classified as home-owners clubs or community clubs. (See 1.43.)

Cluster development: A land subdivision with a majority of the individual building sites abutting directly on parks or other common open space.

Common property: a parcel or parcels of land, together with the improvements thereon, the use and enjoyment of which are shared by the owners and occupants of the individual building sites in the planned unit.[1]

Development section: a land area smaller than a development stage, particularly one for which a separate subdivision plat is recorded.

Development stage: a group of houses together with related common areas and facilities. This may be either (a) a planned unit which is an independently-operable entity, or (b) an area which is added to such a unit to create a larger planned unit.

High price: home price range considered high in a particular locality, as determined by the local FHA field office.

Homes association: an incorporated, nonprofit organization operating under recorded land agreements through which (a) each lot owner in a planned unit or other described land area is automatically a member, and (b) each lot is automatically subject to a charge for a proportionate share of the expenses for the organization's activities, such as maintaining a common property;[2] or rarely, such an organization with land agreements but with membership and assessments optional with the lot owner and or discretionary with the organization management; unless otherwise indicated in the handbook text, an automatic-membership homes association rather than a non-automatic homes association.

Automatic homes association: an automatic-membership homes association as defined above. "Clearly automatic associations" and "largely automatic associations" designate groupings especially made for statistical purposes in this handbook, as outlined in 1.3.

Non-automatic homes associations: the second type of homes association defined above and rarely encountered; a homes association in which membership and assessments are optional with the home owner and/or discretionary with the association management; see 1.42.

Low price: home price range considered low in a particular locality, as determined by the local FHA field office.

Medium price: home price range considered medium in a particular locality, as determined by the local FHA field office.

Non-automatic association, or non-automatic neighborhood association: a citizens association, club, or non-automatic homes association; see 1.4.

Planned unit: a land area which (1) has both individual building sites and common property such as a park, and (2) is designed and organized to be capable of satisfactory use and operation as a separate entity without necessarily having the participation of other building sites or other common property; the ownership of the common property may be either public or private.[3]

Planned-unit development: a single planned unit as initially designed; or such a unit as expanded by annexation of additional land area; or a group of contiguous planned units, either operating as separate entities or merged into a single consolidated entity.[4]

Price: see high price, low price, and medium price.

Section: see development section.

Stage: see development stage.

Superblock: a land area with homes on loop streets and culs-de-sac having direct access to a central common area and to wide collector streets at the perimeter; usually an area of several hundred homes.

[1] Definition from FHA Land Planning Bulletin No. 6, *Planned-unit Development with a Homes Association.*

[2] See footnote 1.

[3] See footnote 1.

[4] See footnote 1.