LAKE COMMUNITY DEVELOPMENTS WITH PROPERTY OWNERS' ASSOCIATIONS: SELECTED PROBLEMS FOR LOT OWNERS

JOHN G. VOGEL, JR.*

INTRODUCTION

Dissatisfaction with urban housing and living conditions, a heightened interest in ecology, the demand for outlets to spend increased leisure time, and the desire to turn a quick profit are among the factors contributing to the tremendous land boom of recent years.[1] To fulfill the need for new housing and leisure time outlets, numerous land developers are making public offerings of an increasingly complex variety of residential, commercial and recreational facilities. One type of development is the recreational lake community. The developer buys a large tract of land, creates one or more artificial lakes, and subdivides the remainder into lots. The developer then sells individual parcels to purchasers wishing to build a new or a second home. The buyer may desire access to recreational facilities or may simply wish to hold the land for investment purposes.

The artificial lake communities that provide the focus of this Note have several common characteristics: a corporate developer who began the project; a subsequently formed property owners' association;[2] and

* A.B., 1968; J.D., Washington University, 1974.

1. *See* R. BURBY, LAKE-ORIENTED SUBDIVISIONS IN NORTH CAROLINA: DECISION FACTORS AND POLICY IMPLICATIONS FOR URBAN GROWTH PATTERNS: DEVELOPER DECISIONS (1967).

2. A property owners' association is "an organization of home owners residing within a particular development whose major purpose is to maintain and provide community facilities for the common enjoyment of the residents." URBAN LAND INSTITUTE, THE HOMES ASSOCIATION HANDBOOK 5 (rev. 1970) [hereinafter cited as HANDBOOK]. (All materials quoted and cited from the HANDBOOK are reprinted from Technical Bulletin 50 Homes Association Handbook with permission from ULI-the Urban Land Institute, 1200 18th St., N.W., Washington, D.C., 20036. Copyright 1964, revised 1970.) The Urban Land Institute distinguishes types of homes associations on the basis of mandatory membership and payment of assessments. The Institute further distinguishes other types of residential/organizational structures such as condominiums, co-operatives, trusteeships, municipal corporations, and special districts. *Id.* at 6-13.

a single-family dwelling unit format. While similar difficulties are also experienced in New Towns[3] or planned unit developments,[4] this Note is limited to the key problems of lake community developments.[5]

I. The Legal Basis of the Property Owners' Association

A property owners' association (POA) is typically the culmination of the developer's activities in creating a new lake community development.[6] The POA serves not only as a private mechanism for providing community services and facilities, but also as the entity to which the developer will shift his remaining property interests and control before disengaging himself from the project.[7] It is important to understand the legal foundation upon which a POA rests before an analysis of its functions can be undertaken.

The primary function of the POA is to provide services necessary

---

3. The terms "New Town" and "new community" have been used interchangeably. They have been defined as "large-scale developments constructed under single or unified management, following a fairly precise, inclusive plan and including different types of housing, commercial and cultural facilities, and amenities sufficient to serve . . . residents . . . . They may provide land for industry . . . or offer . . . employment opportunities eventually achiev[ing] a considerable measure of self-sufficiency." U.S. Advisory Comm'n on Intergovernmental Relations, Urban and Rural America 64 (1968). One author has stated that, "The 'true' New Town . . . is not only large in terms of population and geographical area, but attempts to reflect the full diversity of urban life, providing a mixture of jobs, housing and recreation which will appeal to the widest possible range of people." Comment, *Democracy in the New Towns: The Limits of Private Government*, 36 U. Chi. L. Rev. 379-80 (1969) [hereinafter cited as *New Towns*].

4. "Planned unit development" means an area of land, controlled by a landowner, to be developed as a single entity for a number of dwelling units, and commercial and industrial use, density, lot coverage and required open space to the regulations established in any one or more districts created, from time to time, under the provisions of a municipal zoning ordinance enacted pursuant to the conventional zoning enabling act of the state.

U.S. Advisory Comm'n on Intergovernmental Relations, ACIR State Legislative Program 31-36-00 at 5 (Cum. Supp. 1970).

5. For a discussion of consumer fraud in lake community developments see M. Paulson, The Great Land Hustle (1972); The Rockefeller Bros. Fund, The Use of Land: A Citizens Policy Guide to Urban Growth (W. Reilly ed. 1973) [hereinafter cited as The Use of Land]; D. Tymon, America for Sale (1973). For remedies that have been developed to protect purchasers see Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-20 (1970); Morris, *The Interstate Land Sales Full Disclosure Act: Analysis and Evaluation*, 24 S.C.L. Rev. 331 (1972).

6. Handbook 5.

7. *Id.*

to the community's continued existence and to maintain the common open spaces and facilities that make life in such a community enjoyable.[8] To insure successful provision of services and maintenance of amenities, a mechanism is needed to provide control that is permanent and effective, yet flexible enough to allow for future change. Based on a study of numerous subdivisions purporting to have some form of ownership control, the Urban Land Institute has concluded that the future success or failure of these projects will depend on the type of organizational structure adopted.[9] The Urban Land Institute's study revealed that the control and power vested in POAs could be viewed along a continuum of preferability. The continuum is composed of the following kinds of associations: automatic membership associations with mandatory membership and with each lot governed by affirmative and negative covenants and restrictions;[10] optional associations with nonmandatory membership and no provision for assessments that run with the land;[11] discretionary associations with membership at the association's discretion and covenants that do not purport to burden the land with assessments;[12] and, clubs that are not provided for in the covenants or other documents affecting the title to land with membership at the homeowner's option subject to the discretion of the club management.[13] The mechanism found by the Urban Land Institute to guarantee most effectively the continued viability of the project is an automatic membership association built on a system of restrictive and affirmative covenants that are binding on every property owner.

Restrictive covenants governing the use of land are a familiar concept of property law and present few theoretical problems unless they are found to be oppressive, contrary to public policy, or a restriction on the alienability of land.[14] Restrictive covenants governing architectural styles and the permissible uses of a particular parcel of land have generally been accepted as useful tools in land use planning and

8. *Id.*

9. *Id.* at ix.

10. *Id.* at 6.

11. *Id.* at 8

12. *Id.*

13. *Id.*

14. *See generally* R. POWELL, REAL PROPERTY 703-46 (P. Rohan ed. abr. ed. 1968); H. TIFFANY, 3 REAL PROPERTY 417-517 (3d ed. 1939); 2 AMERICAN LAW OF PROPERTY 335-400 (A. Casner ed. 1952).

control.[15] Restrictive covenants are considered a particularly useful tool in the case of lake community developments.[16] The question for the developer, and ultimately the property owner, is not the desirability of such restrictions, but rather how they are created and whether they will be continuous, enforceable and uniform.[17]

Attaching restrictions to one parcel of property presents few problems. A host of problems are encountered, however, when a developer attempts to create a uniform set of restrictions for an entire subdivision that are enforceable by the developer and subsequently by the POA and individual lot owners.[18] There are four potential combinations of persons that could be involved in the enforcement of a promise regarding a parcel of land: (1) plaintiff is the original promisee or initial beneficiary of a promise and defendant is the original promisor; (2) plaintiff is the original promisee or initial beneficiary, but defendant is an assignee of the original promisor; (3) plaintiff claims the benefited land under or through the original promisee or beneficiary and defendant is the original promisor; and (4) neither plaintiff nor defendant were parties to the original promise.[19] Given the complexity of a large-scale subdivision and the refusal of most courts to enforce covenants against parties who either were not original parties to the promise or who took the property without notice of the restrictions,[20] the developer, as well as the prospective property owner, needs assurance that the method used will insure the uniform enforcement of the restrictions.

---

15. *See* Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167 (1970); Consigny & Zile, *Use of Restrictive Covenants in a Rapidly Urbanizing Area*, 1958 WIS. L. REV. 612; Lundberg, *Restrictive Covenants and Land Use Control: Private Zoning*, 34 MONT. L. REV. 199 (1973).

16. Deed restrictions used to control land use in artificial lake subdivisions supplement underlying shoreland zoning controls by more specifically regulating land use. They are not subject to the constitutional attacks that plague regulations, such as uncompensated taking of private property and discrimination. They are more permanent than public regulations which may be changed at the political whim of the governing body.

Kusler, *Artificial Lakes and Land Subdivisions*, 1971 WIS. L. REV. 369, 417-18 [hereinafter cited as Kusler].

17. HANDBOOK 309.

18. *Id.* at 309-13.

19. Dunham, *Promises Respecting the Use of Land*, 8 J. LAW & ECON. 133, 141-42 (1965).

20. 2 AMERICAN LAW OF PROPERTY, *supra* note 14, at 432.

The method most commonly employed to achieve this result is embodied in the doctrine of reciprocal negative easements:

> When an owner subdivides a parcel of land for sale in lots and it is shown that he intended at that time, to subject all of the lots to a uniform set of restrictions, the common law doctrine is that, as soon as the first lot is sold subject to such restrictions, the rest of the land (still in the subdivider's hand) is automatically restricted by the same restrictions.[21]

An intention to subject the subdivision to a common set of restrictions may be inferred from the fact that most of the lots were sold subject to the same restrictions.[22] The best way to show a common scheme, however, is to file a declaration of restrictions along with the recorded plat of the proposed subdivision before the first lot is sold.[23]

Courts have held that the uniform restrictions will automatically attach to the remaining lands held by the common grantor and are thus enforceable against a subsequent purchaser who takes with notice of the restrictions.[24] Courts will enforce the restrictions against a subsequent purchaser even though the restrictions were not specifically mentioned in his deed, since an inspection of the grantor-grantee index will disclose the earlier conveyance by the common grantor. Thus, a subsequent purchaser has constructive notice of the uniform scheme of restrictions that negates any defense that he is a bona fide purchaser for value without notice.[25] When such a general plan exists, anyone who purchases a lot with knowledge of the scheme may enforce the restrictions against any prior or subsequent purchaser.[26] Cases have also held that restrictions are enforceable by and against subsequent purchasers even though the restrictions have not been recorded in the deed of every lot sold by the common grantor and even though the restrictions may not be exactly the same for each lot included in the common plan.[27]

---

21. HANDBOOK 310.

22. *Id.*

23. *Id.*

24. 2 AMERICAN LAW OF PROPERTY, *supra* note 14, at 432.

25. Turner v. Brocato, 206 Md. 336, 111 A.2d 855 (1955); Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925); Annot., 4 A.L.R.2d 1364, 1371 (1949). *Contra*, Smith v. Community Synagogue, 128 N.Y.S.2d 663 (Sup. Ct. 1953) (holding that notice could only be based on what was in the chain of title).

26. TIFFANY, *supra* note 14, at 501. *See, e.g.*, Cejka v. Korn, 127 S.W.2d 786 (Mo. App. 1939); Reed v. Hazard, 187 Mo. App. 547, 174 S.W. 111 (1915).

27. Turner v. Brocato, 206 Md. 336, 111 A.2d 855 (1955); Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925). One commentator has suggested

Although courts are generally willing to allow parties bound by the common plan to modify the restrictions,[28] it has been held that when the common grantor has reserved the right to modify freely the restrictions concerning any of the properties in a subdivision, this reservation prevents finding a common plan and prevents the lot owners from enforcing the restrictions among themselves.[29] Courts are also unwilling to apply the doctrine of reciprocal negative easements to lands owned by the common grantor at the time the restrictions were recorded but not included in the original scheme of restrictions.[30] This limitation applies to staged developments even though the developer fully intended to include the other lands in the common scheme at a later time.[31]

The interest of lake community developments in affirmative covenants stems from the desirability and necessity of having mandatory maintenance assessments. While courts have readily enforced restrictive covenants, when properly created and not contrary to public policy, they have been reluctant to enforce affirmative covenants running with the land.[32] English courts held that before an affirmative covenant would be enforced, especially against a subsequent purchaser, the court had to find an intention that the covenant was to run with the land, that the covenant "touched or concerned" the land, and that there was privity of estate between the parties.[33] Additional problems developed because of the difficulty of obtaining relief

---

that there only has to be a "reasonable uniformity" in the applicability of the restrictions. POWELL, *supra* note 14, at 726. *See, e.g.*, Elliott v. Keely, 121 Ind. App. 529, 98 N.E.2d 374 (1951); Margate Park Protective Ass'n v. Abate, 22 N.J. Super. 550, 92 A.2d 110 (Ch. Div. 1952); Rowe v. May, 44 N.M. 264, 101 P.2d 391 (1940).

28. *See, e.g.*, Lakeshore Estates Recreational Area, Inc. v. Turner, 481 S.W.2d 572 (Mo. 1972) (single lot modification of the original restrictions by agreement of the parties).

29. Suttle v. Bailey, 68 N.M. 283, 361 P.2d 325 (1961); Mauro v. Tomasullo, 28 Misc. 2d 66, 212 N.Y.S.2d 148 (Sup. Ct. 1961); Rose v. Jasima Realty Corp., 218 App. Div. 646, 219 N.Y.S. 222 (1925); Brighton by the Sea v. Rivkin, 201 App. Div. 726, 195 N.Y.S. 198 (1922); Maples v. Horton, 239 N.C. 394, 80 S.E.2d 38 (1953); Humphrey v. Beall, 215 N.C. 15, 200 S.E. 918 (1939); Price v. Anderson, 358 Pa. 209, 56 A.2d 215 (1948); Keith v. Seymour, 335 S.W.2d 862 (Tex. Civ. App. 1960).

30. HANDBOOK 313 n.16. *See, e.g.*, Gammons v. Kennett Park Dev. Corp., 30 Del. Ch. 525, 61 A.2d 391 (1948); Craven County v. First-Citizens Bank & Trust Co., 237 N.C. 502, 75 S.E.2d 620 (1953).

31. *See* cases cited note 30 *supra*.

32. *See, e.g.*, Wheeler v. Schad, 7 Nev. 204 (1871).

33. Spencer's Case, 77 Eng. Rep. 69 (1583).

both at law or in equity.[34] Without a means for imposing mandatory payments that run with the land and that can be used to support common open spaces and facilities, most of the other restrictions or plans for a subdivision would be pointless.[35]

Courts have long recognized the principle of an "equitable charge" against the land, meaning that "when a person acquired land knowing that a prior owner parted with the land only on condition that certain payments will be made to some designated beneficiary, such person cannot, in good conscience, be suffered to retain the land and fail to make the payments."[36] In enforcing covenants for the payment of annual maintenance assessments, however, American courts use the doctrine of equitable servitude to impose affirmative obligations that run with the land.[37] In *Neponsit Property Owners' Association v. Emigrant Industrial Savings Bank*[38] the Court of Appeals of New York held that a covenant to pay an annual maintenance assessment was an affirmative duty running with the land that could be secured by placing an equitable lien on the land. The court found that the covenant did in fact "touch and concern" the land:

> For full enjoyment in common by the defendant and other property owners of these easements or rights, the roads and public places must be maintained. In order that the burden of maintaining public improvements should vest upon the land benefited by the improvements, the grantor exacted from the grantee of the land with its appurtenant easement or right of enjoyment a covenant that the burden of paying the cost should be inseparably attached to the land which enjoys the benefit.[39]

---

34. For an excellent summary of development problems see HANDBOOK 314-20.

35. *Id.* at 222-32.

36. *Id.* at 316. "An equitable charge can be attached to land not only as an incident of a gratuitous transfer but also as an incident to a conveyance for a valuable consideration. The equitable charge need not be a single lump sum payment, it can be an annual recurring obligation." *Id.* The remedy of the injured party is to place an equitable lien against the land in rem, since the equitable charge is not a personal obligation against the owner of the burdened land. *Id.* at 317.

37. This line of reasoning has been criticized as misleading since the equitable servitude cases apply to affirmative obligations other than the payment of money. The primary problem is that courts of equity are not willing to enforce the affirmative obligation as a personal obligation by issuing a mandatory injunction to require performance of the affirmative duty unless the covenant fulfills the formal requirements at law. For a full discussion of these problems see *id.* at 317-18.

38. 278 N.Y. 248, 15 N.E.2d 793 (1938).

39. *Id.* at 260, 15 N.E.2d at 797. Other state courts have also upheld affirmative covenants for the payment of maintenance assessments as an equitable lien

Although it has long been clear that both the original developer and subsequent purchasers can enforce the restrictive and affirmative covenants, it was not clear until *Neponsit* that a POA could do so.[40] The *Neponsit* court found that the POA possessed no title to any of the lands within the restricted area and hence lacked the technical "privity of estate." It held, however, that the association derived the right to enforce the covenants from the members of the association as their agent or representative.[41] The only apparent flaw in this theory is that the POA is entirely dependent on the right of the property owners to enforce the covenants, and if this right should fail for any reason, the right of the association to enforce will also fail.[42] This result follows from the theory expressed by courts that, even though slight deviations from the uniformity of a common scheme of restrictions will not impair general enforcement,[43] a general scheme of restrictions must be universal to be reciprocal. Unless the restrictions are reciprocal some lots will be burdened without being benefited.[44]

---

against the land. *See, e.g.*, Henlopen Acres v. Potter, 127 A.2d 476 (Del. Ch. 1956); Phillips v. Smith, 240 Iowa 863, 38 N.W.2d 87 (1949); Metryclub Gardens Ass'n v. Council, 36 So. 2d 56 (La. Ct. App. 1948); Wehr v. Rolan Park Co., 143 Md. 384, 122 A. 363 (1923); Mendrop v. Harrell, 233 Miss. 679, 103 So. 2d 418 (1958); Stephens v. Lisk, 240 N.C. 289, 82 S.E.2d 99 (1954); Queen City Park Ass'n v. Gale, 110 Vt. 110, 3 A.2d 529 (1939); Noremac, Inc. v. Centre Hill Court, 164 Va. 151, 178 S.E. 877 (1935); Rodruck v. Sand Point Maintenance Comm., 48 Wash. 2d 565, 295 P.2d 714 (1956); Prudential Ins. Co. v. Wetzel, 212 Wis. 100, 248 N.W. 791 (1933); HANDBOOK 319. There is still reluctance to recognize affirmative covenants running with the land as a personal obligation. *See, e.g.*, Petersen v. Beekmere, Inc., 117 N.J. Super. 155, 283 A.2d 911 (Ch. Div. 1971); Furness v. Sinquett, 60 N.J. Super. 410, 159 A.2d 455 (Ch. Div. 1960). *See also* Merrionette Manor Homes Improvement Ass'n v. Heda, 11 Ill. App. 2d 186, 136 N.E.2d 556 (1956).

40. HANDBOOK 319.

41. 278 N.Y. at 262, 15 N.E.2d at 798. Two other theories are suggested to allow the POA to enforce the covenants: that the association is a third-party beneficiary to the original land sales contract; and that the association is an assignee of the rights of the developer. Both of these theories, however, have been found to be lacking in some respect. *See* HANDBOOK 309-10.

42. HANDBOOK 311.

43. Elliot v. Keely, 121 Ind. App. 529, 98 N.E.2d 374 (1951); Margate Park Protective Ass'n v. Abate, 22 N.J. Super. 550, 92 A.2d 110 (Ch. Div. 1952); Rowe v. May, 44 N.M. 264, 101 P.2d 391 (1940).

44. The court in Kliem v. Sisters of Charity, 101 N.J. Eq. 761, 766, 139 A. 174, 176 (Ct. Err. & App. 1927), expressed the underlying theory as follows:

> A general scheme of restrictions, to be effective and enforceable, must have certain characteristics. It must . . . apply to all lots of like character brought within the scheme. Unless it be universal, it cannot be reciprocal. If it be not

Thus, purchasers of lots in a new development should make sure that the developer has established the proper legal foundation for the POA.

II. Government by Contract and Some Alternatives

The ability to enforce the common scheme of restrictions is essential if a POA is to function successfully. Enforcement of a common scheme of restrictions, however, is not the association's sole function. Once the developer has relinquished control of a project, the POA has the burden of providing necessary facilities and an organizational structure for the community. It is this dichotomous role—the POA serving both as a form of community government and as a means of control by the developer—that poses unique problems for the property owners and members of the association.

POAs are a favored method of organizing subdivisions and new communities since

> . . . pre-existing local governments tend to approve of it because the association performs municipal-type services, assures that common open spaces will be permanent, and guarantees that maintenance will be paid by the benefited properties, rather than from public funds. The developer favors the homes association because it permits him to maintain a large portion of control during the developmental period, while allowing him gradually to develop residential participation and responsibility, so that he may eventually withdraw from the project . . . .[45]

Although other organizational forms are available, the Urban Land Institute has recommended incorporation of the POA as a nonprofit organization.[46] In fact, the Urban Land Institute urges developers to incorporate the POA almost simultaneously with the recording of the declaration of restrictions.[47]

By using the nonprofit corporation as the organizational form of the POA, the developer can allow participation by lot purchasers on

---

reciprocal, then it must as a neighborhood scheme fall, for the theory which sustains a scheme or plan of this character is that the restrictions are a benefit to all. The consideration to each lot owner for the imposition of the restriction upon his lot is that the same restrictions are imposed upon the lots of others similarly situated. If the restrictions upon all lots similarly located are not alike, or some lots are not subject to the restrictions, while others are, then a burden would be carried by some owners without a corresponding benefit. The burden follows the benefit, and, where there is no benefit, there should be no burden.

45. *New Towns* 383-84 (footnotes omitted).

46. Handbook 338-41.

47. *Id.* at 208-09.

a one vote per lot basis, since membership in the association is mandatory by force of the covenants.[48] The developer can retain control of the POA, however, since most non-profit corporation statutes allow different classes of voting membership.[49] The developer can devise a system of weighted voting so that each lot held by the developer will be entitled to a proportionately greater vote than a lot conveyed to a private property owner.[50] Thus the developer's control will be continued until 75% of the lots have been sold.[51] Unless the developer retains control, especially during the initial stages, he may be faced with an organization acting at cross purposes with his development plan.[52]

Retention of control by weighted voting may be desirable from the developer's point of view, but do the property owners have some claim for more equal participation in the decision making? This question becomes especially important as the POA assumes increased responsibilities and becomes less like a private enterprise and more like a municipal corporation in providing community services and facilities. In New Towns that employ POAs the problem, as one author has indicated, has been that

> Unlike the municipal corporation, the homes associations are private; membership, at least in theory, is voluntary. Whereas all residents of a municipality are members of the municipal corporation, only residents with a property interest are members of the homes association. *The constitutional question, therefore,*

48. *Id.* at 386-87.

49. *Id.* at 241.

50. *Id.*

51. *Id.* Although the Urban Land Institute recommends that the developer set a date for termination of the weighted voting power, the developer could retain control of the association for an indefinite period of time by requiring, as a precondition to the sale of a lot on an installment basis, that the purchaser assign his voting rights to the developer until the last installment has been paid.

52. *Id.* at 240-41. The notion of benevolent paternalism has also been used and encouraged in the development of New Towns. As applied to them the argument is as follows:

> If the nation is committed to the building of New Towns by private developers free of regulation, it seems unavoidable that we accept a developmental period during which a "semi-democratic facade" prevails. Indeed, the planning and construction of a New Town is such an expensive, complicated process that there may be no feasible way to combine a developmental period with meaningful resident participation.

New Towns 394.

is whether the similarities of the homes association to a municipal government require the application of constitutional requirements to them, despite their "private" character.[53]

As this same author suggests, the crucial problem is that the courts have applied an equal protection analysis to private organizations only in cases in which first amendment rights have been violated or in which there has been racial discrimination.[54] After discussing Supreme Court decisions dealing with the "public area"[55] and the "public function"[56] approaches, the author concludes "that New Towns should be subject to equal protection standards in allocating the franchise."[57] Applying this theory, if a private organization has all the characteristics of a town and its dominant character and purpose is municipal, then the franchise should be open to all residents of the New Town.[58]

While courts may decide that the one unit/one vote allocation of the franchise is constitutionally required when a New Town has become an established operation, they may nonetheless permit control by weighted voting during the early stages when the developer needs

---

53. *New Towns* at 402 (emphasis added; footnotes omitted).

54. *Id.* at 402-03.

55. *Id.* at 403-04. The "public area" concept states that first amendment rights may not be curtailed by application of state statutes to activity taking place in areas that are essentially public in character. The problem is to decide what characteristics will lead to a finding that a particular area is sufficiently "public" for first amendment purposes. *See, e.g.*, Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Marsh v. Alabama, 326 U.S. 501 (1946). Some doubt has been cast on the continuing applicability of *Logan Valley* by the recent Supreme Court decision in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). *See* Note, *Private Business Districts and the First Amendment: From* Marsh *to* Tanner, 7 URBAN L. ANN. 199 (1974).

56. *New Towns* 404-08. The "public function" doctrine used in racial discrimination cases has two distinct elements: "the character of the conduct by private parties" and "state involvement through delegation, complicity, or inaction." *Id.* at 405. The basic premise of the doctrine is that "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." Evans v. Newton, 382 U.S. 296, 299 (1966). *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

57. *New Towns* 408-09.

58. *Id.* at 409. "Residents" in this situation would have to be equated with persons who are domiciled in the New Town for voting purposes. This distinction may become important in lake community developments in which a conflict may arise between resident property owners and "weekend" property owners. *See, e.g.*, Baldwin v. North Shore Estates Ass'n, 384 Mich. 42, 179 N.W.2d 398 (1970).

to protect his investment.[59] The developer could argue that during the developmental stage only a "semi-democratic facade" is needed, since the POA at that point "is intended to serve not as a general governing body of the residents, but as an administrative device of the developer."[60] A distinction can also be drawn between New Town associations that perform a wide variety of municipal functions, and a limited purpose POA in a subdivision that performs only a single function, such as providing sewers.[61] The criteria used to make the distinction would include: (1) the extent of municipal services performed by the association; (2) the size of the community in population and area; (3) the importance of these services to the community; and (4) whether the community served by the association "looks" like a town.[62] Arguably a limited purpose POA would not be subject to the one unit/one vote requirement. As previously mentioned, most lake community developments are not begun with the intent of creating a New Town. Nevertheless, it is arguable that, at least in some of the larger developments, the variety and complexity of the services and functions performed by the POA are in fact "public functions" performed by a "private government."[63]

POAs in lake community developments are regarded by many as the most effective means of providing community services and facilities. Yet they do not always function as expected.[64] Although there may be few remedies available to individuals who purchase property in a development that already has an established POA, especially during the developmental stage when the developer has virtually complete control, they may eventually find it desirable or even necessary to change their mode of organization. Several alternatives are available. To alleviate the financial inability of POAs to cope with problems of

59. *New Towns* 411.

60. *Id.*

61. *Id.* at 409 n.136.

62. *Id.*

63. Among the many functions that a POA can perform in a lake community development are maintenance of common open spaces and facilities such as boat docks, roads, sewers, recreational facilities, and water systems, and the provision of such services as trash disposal, sanitation and police protection. Kusler 429.

64. POAs, while enabling a lot owner to hold common property and providing services, may not adequately protect the health and safety of subdivision residents or their interest in navigable waters. Litigation, general indifference, or lack of funds, may transform a POA with broad powers into an organization unable to provide adequate services or to prevent health hazards. *Id.*

maintaining or expanding essential services, one commentator has suggested that the lake community be incorporated as a third- or fourth-class municipality.[65] Thus, one lake community near Kansas City, Missouri, found it advantageous to incorporate as a fourth-class city and to shift responsibility for providing water services to the newly created municipality.[66] If the POA is a nonprofit corporation it could enter into a contract with a nearby municipality to provide needed services and facilities.[67] This alternative, however, assumes that there is a local governmental unit capable of performing these functions. Furthermore, making a contract with a nearby government because of the POA's inability to meet the overwhelming capital cost of services does not solve the problem since those in the development will still pay for the services they receive under the contract; only the entity administering the services will have changed.

Another alternative for property owners who find their POA unable to provide the necessary services and facilities is to take advantage of state statutes that allow the creation of special districts with powers similar to those of a POA.[68] If a lake community is established in an undeveloped rural county that cannot provide services and facilities, use of the special district may be the only alternative.[69] In the case of new communities, however, there is the feeling that special districts should be used only as an interim form of government until a municipality can be created.[70] Because special districts are governmental

65. Home owners' associations are needed to provide "private" common services benefiting subdivision residents, but not the general public, such as maintaining privately owned common park areas and club houses. They may provide broader services if local units are incapable or unwilling to assume responsibility. In most instances, however, local general-purpose government units may appropriately assume general responsibilities. In contrast to home owners' associations, whose legal longevity may be perpetual but whose effective life may be limited, the continued existence of local governmental units such as cities, villages, counties and towns is assured. Local units have a public service tradition and an array of statutory powers. They can extend roads, sewers and water. In addition, they may maintain dams and improve lakes.

Id. at 432 (footnote omitted).

66. HANDBOOK 69. *See also* Kusler 430.

67. HANDBOOK 341.

68. *Id.* at 13 n.13. *See also* Volpert, *Creation and Maintenance of Open Spaces in Subdivisions: Another Approach*, 12 U.C.L.A.L. REV. 830 (1965).

69. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, URBAN AMERICA AND THE FEDERAL SYSTEM 77 (1969).

70. ARIZONA STATE UNIVERSITY, NEW TOWNS: POLICY PROBLEMS IN REGULATING DEVELOPMENT 54 (1970). *See also* Mullarkey, *The Evolution of a New Community: Problems of Government*, 6 HARV. J. LEGIS. 462 (1969).

bodies with the power to tax and issue bonds, some developers abuse the system and use special districts as a tool to raise capital for their projects.[71] It is also important to note the distinction made by courts between the ability of special districts to levy assessments for local improvements that benefit specific land and the ability to levy general ad valorem taxes for projects that benefit the entire district.[72]

In spite of these drawbacks, property owners in lake community developments may wish to form special improvement districts that can assume responsibility for maintenance of roads and recreational facilities.[73] Of particular importance to property owners in lake community developments are statutes that permit formation of sanitary districts to provide shoreland maintenance.[74] A Michigan statute allows owners of property abutting a lake to form a special lake improvement district authorized to perform a variety of functions.[75] An effective POA could accomplish many of these same objectives.

III. Policy and Planning Problems

In the initial planning stages, builders of large lake communities must consider a wide range of problems. These include the development's potential effect on the environment and the surrounding community as well as the need to provide adequate services and facilities. If developers do not provide comprehensive plans, property owners may subsequently be faced with solving many of these problems on their own.

---

71. Willoughby, *The Quiet Alliance,* 38 S. Cal. L. Rev. 72 (1965). *See also* Comment, *The Use of Special Assessment Districts and Independent Special Districts as Aids in Financing Private Land Development,* 53 Calif. L. Rev. 364 (1965).

72. When general tax funds are used to support current maintenance, the facilities maintained must be open to use by the general public and can not be confined to the residents of a particular development. A special district can perform the same basic functions as a POA only if the district can tax its own residents for current maintenance of its facilities. Some doubt may yet remain as to the propriety of such an application of tax dollars when the power of government is made available for a purpose that is essentially local and private in nature. Handbook 13. Thus, while assessments for sewers and water may be permissible, assessments for building a public library may be prohibited. *See, e.g.,* Brightwell v. Kansas City, 153 Mo. App. 519, 134 S.W. 87 (1911); Heavens v. King County Rural Library Dist., 66 Wash. 2d 558, 404 P.2d 453 (1965).

73. *See* Clem v. Cooper Communitites, Inc., 344 F. Supp. 579, 581 (E.D. Ark. 1972); Ark. Stat. Ann. § 20-701 (1967).

74. Wis. Stat. Ann. §§ 60.30-.316 (1957); Kusler 430.

75. Mich. Stat. Ann. § 11.419 (1968).

Ecological considerations should be a primary concern of a lake community, since environmental problems will affect not only the quality of the project itself, but also the surrounding countryside.[76] The construction of large-scale lake developments has been opposed by conservationists, land use planners, and the general public because of potential pollution problems, damage to the ecology, and deterioration of scenic beauty.[77] Despite concern for the environment, many people purchase lots in lake community developments because of the desire to build second homes or to have access to recreational facilities.[78] It has been estimated that 625,000 recreational lots were sold in 1971.[79] This rapid expansion concerns land use planners because of the apparent emphasis placed by developers on land as a speculative commodity rather than a natural resource. Compounding this error is the use of improper development methods[80] that culminate in rural slums.[81] Local residents, who should be most concerned with the environmental impact of such developments on their local community, often fail to act because they feel that these developments will have a beneficial impact on the local economy.[82]

Property owners in lake developments need to concern themselves with environmental issues on a more practical level. The owners should be aware that the conversion of a stream valley into an artificial lake has a tremendous effect on the surrounding ecology:[83]

> In contrast, [with natural lakes], water quality problems for artificial lakes may not emerge until after lots are purchased. Purchasers of lots on a newly created lake may observe woods, clear water, few buildings, and much of the shoreland vegetation intact. However, the lake is a new and unpredictable feature on

76. Comment, *Land Development and the Environment: The Subdivision Map Act*, 5 PACIFIC L.J. 55 (1974).

77. Kusler 371.

78. *Id.*

79. THE USE OF LAND 263.

80. *Id.* at 275.

81. *Id.* at 276.

82. [B]ecause large-scale development is new, local residents and officials of rural localities often lack experience in responding to it. They are likely to recognize that new development means income, in purchases at local stores, in construction by local contractors, in mortgages by local banks and services by local lawyers and surveyors.

THE USE OF LAND 279. *See also* Comment, *Preserving Rural Land Resources: The California Westside*, 1 ECOLOGY L.Q. 330, 333 (1971).

83. Kusler 384.

> the landscape. If the stream picked for a reservoir carries a significant loading of silt, the reservoir may be quickly filled and destroyed for recreational use. The damming of a free flowing stream reduces its ability to assimilate large quantities of nutrients. The subdivision of shoreland areas is often at a higher density than for natural lakes and can supply a larger quantity of pollutants.[84]

Even if the site for the lake has been properly chosen, poorly planned roads, destruction of ground cover, and high density settlement can cause erosion and sedimentation of the lakes.[85] Not only will a poorly planned artificial lake affect the future quality of the lake community, the haphazard damming of natural streams will also affect downstream riparian property owners.[86]

Another major problem is the impact of the development on the county in which the development is located or on a neighboring town. The initial reaction on the part of local residents may be pleasurable anticipation of a boosted economy. They may be unaware of future costs—the costs of providing roads, sewers and other services for scattered projects, the personal costs of congestion, changed lifestyles and disruption of the countryside, and the social costs of a new urban and affluent population settling among small town people.[87] Although careful planning by the developer will alleviate much of the financial impact that a new development may have on the local community, a recent study has indicated that in the long run a new large-scale development will cost the surrounding community more to provide services than it receives in additional revenues.[88] A study of Hollymead Phase I, an 800-unit planned development in Albemarle County, Virginia, found that, because of the nature of the development, the tax base, and the political, social and economic structure of the county, the project would cost the county approximately $101,745 annually in services and capital expenditures over the revenues obtained from the development.[89]

---

84. *Id.* at 385.

85. THE USE OF LAND 277.

86. Kusler 422 n.204. Liability for injuries caused by failure of an improperly constructed dam will fall on the association once it has received title from the developer. *Id.*

87. THE USE OF LAND 279.

88. *See generally* T. MULLER & G. DAWSON, THE FISCAL IMPACT OF RESIDENTIAL AND COMMERCIAL DEVELOPMENT: A CASE STUDY (1972).

89. *Id.* at 81-84.

The Hollymead study raises the question of how a developer of a lake community can be compelled to provide services and facilities necessary for the continued existence of the community. The problem is complicated by several underlying considerations. First, a local municipality cannot be compelled to supply services beyond its boundaries to an area where it has not previously extended its services.[90] Secondly, a developer is obligated to pay only the cost of providing facilities needed to service his subdivision.[91] It seems that a developer cannot be compelled to pay for excess facilities required to meet the needs of a rapidly developing area.[92] Thus, the question becomes one of remedies available to local units of government to compel developers to provide adequate services and facilities in neighboring lake communities.

To lessen the negative impact of new developments on existing units of local government, the Hollymead study suggests that a county either attempt to channel new developments into areas where facilities are under-utilized, or require developers to contribute to the cost of providing capital facilities.[93] The second proposal is supported by cases permitting a municipality to require payment of fees or dedication of land to the municipality by the developer as a precondition to approval of the subdivision plat.[94]

A similar statutory approach requires that the developer post a performance bond to guarantee the completion of facilities before local approval of the development plan is given.[95] The purpose of performance bonds is not to punish the developer or to unduly benefit a local government, "but to assure those who purchase homes in a

90. *See, e.g.*, City of Milwaukee v. Public Service Comm'n, 268 Wis. 116, 66 N.W.2d 716 (1954). *See also* D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 398-407 (2d ed. 1971).

91. G. LEFCOE, LAND DEVELOPMENT LAW 346 (1966).

92. *Id.*

93. THE USE OF LAND 229-30.

94. *See, e.g., In re* Lake Secor Dev. Co., 141 Misc. 913, 252 N.Y.S. 809 (Sup. Ct. 1931). *Contra,* Ridgemont Dev. Co. v. City of East Detroit, 358 Mich. 387, 100 N.W.2d 301 (1960). *See also* Comment, *Subdivision Regulation: Requiring Dedication of Park Land or Payment of Fees as a Condition Precedent to Plat Approval,* 1961 WIS. L. REV. 310.

95. *See, e.g.*, CAL. BUS. & PROF. CODE § 11612 (Deering Cum. Supp. 1973); ILL. REV. STAT. ch. 34, § 25.09 (1955); MASS. ANN. LAWS ch. 41, § 81U (1973); MO. REV. STAT. §§ 64.060, 89.410 (1969). *See also* Yearwood, *Performance Bonding For Subdivision Improvements,* 11 CURRENT MUN. PROB. 387 (1970).

new subdivision that they will receive the public improvements that were a large part of the inducement to purchase lots and homes in that development."[96]

The use of performance bonds reflects the trend toward enactment of stricter subdivision control laws in order to regulate land development.[97] Recent Vermont statutes require that a permit be taken out before "a person may sell or offer for sale any interest in a subdivision or before the commencement of development."[98] In reviewing a permit application, a district environmental commission is required to consider certain factors, including the effect of a new development on local educational services and other municipal and governmental services, and the development's conformance with state, regional and local land use plans.[99] Under recent California statutes, a developer is required to submit a tentative subdivision map, comply with local ordinances and then file a final subdivision map.[100] This statute requires that "such street work and utilities to be installed, or agreed to be installed by the subdivider . . . as are necessary for the general use of the lot owners in the subdivision and local neighborhood traffic and drainage needs as a condition precedent to the approval and acceptance of the final map thereof."[101] Although local governments are often reluctant to engage in extensive regulation, many have, on the basis of this language, imposed obligations on developers to complete improvements for future residents of the proposed development.[102]

Although subdivision control laws and performance bonds are potentially effective tools whereby local units of government may compel developers to provide needed services and facilities, these remedies will not greatly aid property owners faced with local governments that are unwilling to enforce regulatory provisions. Most courts have held that the purpose of performance bonds is to ensure that the improvements will not have to be made at the public expense, contra-

96. Yearwood, *supra* note 95, at 388.

97. *See, e.g.*, Freilich & Levi, *Model Regulations for the Control of Land Subdivision*, 36 Mo. L. Rev. 1 (1971).

98. Levy, *Vermont's New Approach to Land Development*, 59 A.B.A.J. 1158 (1973).

99. *Id.*

100. Cal. Bus. & Prof. Code §§ 11531, 11535 (Deering Cum. Supp. 1973).

101. *Id.* § 11511.

102. Comment, *Land Development and the Environment*, *supra* note 76, at 63.

dicting the view that performance bonds are designed for the benefit of subsequent subdivision lot owners.[103] Unless they are specifically mentioned as third-party beneficiaries and obligees of the bond, property owners may not require enforcement of the performance bond.[104] Neither may they proceed against a title insurance company on the theory that perfect fee simple title was not conveyed because the city approved the subdivision map without first requiring a bond to ensure installation of promised improvements.[105]

In the absence of effective state and local regulations, developers may start a project with assets that are insufficient to provide essential facilities, hoping to defer capital expenditures until sufficient revenues have been obtained from the sale of lots.[106] The question then is what means may be employed to insure that developers complete promised improvements and facilities. One suggested method is to require the developer, by means of either public regulation or private contract, to place a portion of the price of each lot in escrow until the improvements are completed.[107] In certain cases purchasers will be able to bring an action under the Federal Interstate Land Sales Full Disclosure Act.[108] The Act lessens the purchaser's burden in proving fraud and deceit in the sale of lots.[109] A purchaser may bring an action up to one year after discovery that the required property report contained untrue statements or omissions, but not more than three years after his purchase.[110]

Although the provisions of the Interstate Land Sales Full Disclosure Act may be adequate to protect a purchaser when the developer has

103. *See, e.g.*, Ragghianti v. Sherwin, 196 Cal. App. 2d 345, 16 Cal. Rptr. 583 (Dist. Ct. App. 1961); Evola v. Wendt, 170 Cal. App. 2d 21, 338 P.2d 498 (Dist. Ct. App. 1959); Gordon v. Robinson Homes, Inc., 342 Mass. 529, 174 N.E.2d 381 (1961); Levin v. Township of Livingston, 35 N.J. 500, 173 A.2d 391 (1961).

104. University City *ex rel.* Mackey v. Frank Miceli & Sons Realty & Bldg. Co., 347 S.W.2d 131 (Mo. 1961).

105. Hocking v. Title Ins. & Trust Co., 37 Cal. 2d 644, 234 P.2d 625 (1951).

106. The problem has been, at least until recently, that land developers have been able to use accounting methods to delay expenditures for capital improvements. For a discussion of the problem and the recent changes in accounting practices see THE USE OF LAND 283-92.

107. *Id.* at 292.

108. 15 U.S.C. §§ 1701-20 (1970).

109. For a full discussion of the remedies provided under the Act see Morris, *supra* note 5, at 349-54.

110. 15 U.S.C. § 1711 (1970).

clearly committed fraud, the greater problem for property owners arises when the improvements made are inadequate to serve the full community. This possibility is particularly acute in lake community developments in which the primary use of the land is recreational, and permanent development by lot owners may be delayed past the statute of limitations provision of the Act.[111] The developer, in a 1500-2000 lot development, may only provide a sewage or fresh water plant that will be adequate for the first 500 families that happen to build homes on their lots. Due to the recreational land use pattern of lake community developments, these facilities may be adequate for some time, and may fulfill the developer's disclosure obligations under the Act.[112] After the developer has finally disassociated himself from the project, however, the property owners' association may suddenly find itself faced with a large capital outlay because of the developer's underplanning.[113]

CONCLUSION

Lake community developments have not always proved to be the peaceful, problem free haven the purchasers hoped for. Far greater attention must be paid to proposals for the creation of these new communities if disruption of nearby residents and the environment is to be avoided. Potential purchasers of lots in such developments must approach the transaction more carefully and be made keenly aware of problem areas. Before investing their money in a new lake community, purchasers should determine whether the developer has established a proper organizational structure for the community, whether he has planned comprehensively, and whether he is willing and able to carry out his obligations. These steps must be taken in order to guarantee that lot owners and the surrounding community

111. Morris, *supra* note 5, at 351.

112. 15 U.S.C. § 1705 (1970).

113. Traditionally, assessments in communities with home owners' associations are designed to generate sufficient revenues to sustain "(1) current expenditures for maintenance, labor, supervision and services, ordinary repairs and debt service on all the common assets and facilities; (2) depreciation; (3) casualty and liability insurance; [and] (4) working capital to meet contingencies as they arise . . . ." LEFCOE, *supra* note 91, at 1138. Whether the assessments charged property owners can meet the above needs, provide for additional capital outlays for new facilities, and still be kept within the limits a middle-income property owner can afford is beyond the scope of this Note.

will not be left with the duty and expense of solving problems that should have been handled by the developer.

One solution lies in the enactment of stricter subdivision control laws and enforcement of their provisions by local governments. Another is to expand state and federal remedies available to lot purchasers. Including property owners as obligees under performance bond statutes, or extending the fraud and disclosure provisions of the Interstate Land Sales Full Disclosure Act, could assure purchasers of complete protection against irresponsible developers. These alternatives can help guarantee the responsible planning and development of new lake communities.

COMMENTS