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Legal Planning for New Urbanist Communities

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Legal planning for new urbanist communities begins with examining the master plan and envisioning the community that will be built from it. The design of the new urbanist community—the size of the community, the mixture of housing types, the type and amount of retail, street design, placement of common areas and even physical barriers—directly influences the legal structure of the associations. Structure is also influenced by financial objectives, such as who is anticipated to be the ultimate owner, or owners, of the commercial center; the requirements of state and local law, and the personal preference of the developer.

Unlike zoning issues or other governmental regulation to which the developer must react, the creation of private governance allows the developer to act proactively to achieve the potential of the master plan. This article outlines the innovative use of covenants and restrictions tailored to the new urbanist community and offers suggestions for structuring the community to achieve both design and financial objectives.

1 How New Urbanist Communities are Different

• **New urbanist communities have a mixture of uses.** New urbanist communities differ from conventional subdivisions primarily due to the close proximity—and intermingling—of commercial and residential uses. New urbanist communities bring together a variety of housing types as well as commercial and mixed-use buildings, all within walking distance. Documents must pay attention to the special uses, and particularly the mix of uses, that occur in a well-designed new urbanist community. To do this, all documents need both *protection* for the varied uses, and *flexibility* to accomplish the dynamic, vital streetscape that the planners intend.

Open space functions differently in a new urbanist community. A new urbanist community's open space works hard. In a conventional subdivision, open space is often used as a buffer between one subdivision and the next. In contrast, new urbanist

community open space is centrally located, in the form of squares, plazas and small parks where people can meet and mingle.

Often, particularly near the center of town, plazas, squares or greens will be intended as open-air marketplaces, with farmers' markets, pushcarts, kiosks or other small, semi-permanent store buildings. While standard covenants and restrictions prohibit commercial use of common areas, documents for a new urbanist community should anticipate commercial use of certain open space, particularly that in the town center.

The plat is another potential source of problems if conventional labels are used. Case law suggests that labeling open space as a "park" prohibits any commercial use.

New urbanist communities have civic buildings. Most new urbanist community ordinances and architectural codes require that a certain amount of land be set aside for civic buildings, to provide a gathering place where residents come together. Usually constructed of a distinctive style or color, civic buildings are a visual focal point and terminate vistas or anchor public squares.

Lawyers and government officials usually consider civic buildings to be governmental buildings. However, architects, planners and even some zoning codes have a specialized definition for the term "civic building" in the new urbanist community setting, which may include such diverse uses as churches, fire stations, museums, meeting halls, theaters, art galleries, public and private schools and daycare centers.

The declaration, plat and other documents should not inadvertently label all civic use lots as not-for-profit enterprises, require their maintenance by the association or automatically release such lots from property owners' association assessments. Instead, each such parcel needs to be examined individually.

New urbanist communities don't wall people out. Unlike gated communities, new urbanist communities invite the public in. Its streets are meant to interconnect with neighboring communities, providing alternative routes and shortcuts for both pedestrians and drivers. Its open space, in the form of plazas or greens, looks like a public park, even though it most likely is owned and maintained by an owners' association.

This may require an adjustment in perspective for some property owners and their board of directors, who have been conditioned to stick to their own subdivision and their own common areas. If kids from the next subdivision join a pick-up flag football game in the new urbanist community's park, it's a sign of a successful new urbanist community.

On the other hand, if the plat allows street ends to be connected in the future and the neighboring property is later developed in a way that does not allow for connectivity, the developer should reserve the right to recover and use the street ends, usually as additional lots.

New urbanist communities have strict architectural control. The success of the new urbanist community depends in part on adherence to the architectural vision, which is communicated through architectural codes. New urbanist community codes combine aspects of zoning codes and conventional architectural codes. As further discussed in section 8, the documents must establish an architectural review process and enforcement provisions.

2. Owners' Associations and Private Covenants

• While new urbanist communities look quite different from conventional subdivisions, they usually share a common legal structure: the property owners' association. Property owners' associations have evolved from real estate, contract and corporate law as a way to maintain private streets and other commonly owned amenities and to enforce use restrictions.

A property owners' association is almost always incorporated as a nonprofit corporation under state law. Under this corporate structure, the elected board of directors makes most decisions for the corporation. While there are some alternatives, as discussed in sections 3 and 4, none of them seem likely to replace the property owners' association, which has proven to be readily adaptable to new urbanist communities.

Owners' associations are fundamentally different from towns. Although they have many of the functions of town governments, owners' associations are in some ways more powerful, and in some ways less powerful, than municipalities.

Because property owners are deemed to have willingly accepted the recorded covenants and restrictions when they buy property, the covenants and restrictions can contain restrictions that would be unacceptable if imposed by a municipality. For instance, the U.S. Supreme Court has held that a town's law prohibiting the posting of "for sale" signs violates the First Amendment protections of free speech. *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977). However, a restrictive covenant prohibiting homeowners from posting "for sale" signs in their yards was later held by the Florida Supreme Court not to violate the First Amendment. *Quail Creek Property Owners Association, Inc., v. Hunter*, 538 So. 2d 1288 (Fla. 1989).

Furthermore, many of the powers that are normally assumed by municipalities can be provided to property owners' associations through private covenants and restrictions. Because there is room for creative drafting, recorded covenants and restrictions can be a powerful tool for shaping the community. However, poorly drafted documents can fail to provide flexibility needed to deal with the community's problems in the future and, as they typically require a super-majority vote, can be hard to amend.

Note that property owners' associations, although nonprofit, are not tax exempt, and assessments to property owners' associations are not tax deductible. At the corporate

level, a qualified homeowners' association that makes an election under Section 528 of the Internal Revenue Code is not taxed on assessments paid by its members. However, mixed-use associations, or associations with properties that have vacation rentals, may not be eligible for Section 528 and will need careful tax planning.

3 Alternatives or Adjuncts to Owners' Associations

- Several other entities or actions may supplement, or in rare cases, replace, the property owners association:

Municipal Incorporation. Although very large new urbanist communities may actually be incorporated as independent towns, this is rare. Some states require a substantial minimum population for municipal incorporation. In addition, because towns operate on a one person, one vote principal (rather than the per-lot vote for owners' associations), the developer cannot control a municipal government, even during the development stage. Accordingly, these communities rarely start life as an incorporated town, although a few may choose to incorporate later.

Special Taxing Districts. An alternative to municipal incorporation available in many states is a community development district or other special taxing district which has some but not all of the powers of a town. Districts are sometimes used as an alternative to conventional development financing, as districts can issue tax-exempt bonds for constructing infrastructure improvements, which are then repaid by assessments on the lots. Furthermore, the debt for the infrastructure becomes the obligation of the district, and does not appear on the developer's books as debt. Districts can be used for building the entire community infrastructure, or can have specialized purposes, such as the construction of parking garages in an urban setting. While useful for maintaining common areas and providing basic services, districts may not have any zoning or permitting powers. Even when a district is used for common area maintenance, a new urbanist community developer may want to impose some type of recorded declaration to allow architectural control and covenant enforcement, both during development and long-term.

Dedication of Common Areas. Many new urbanist communities dedicate their parks as well as their streets to the general public, when the unit of local government is willing to accept them for maintenance. Since new urbanist communities, by definition, are not gated, this is often quite appropriate. However, even when parks and streets are publicly maintained, the developer almost always forms a property owners' association as well. As in the case of the special taxing district, the property owners' association and recorded declaration offer definite advantages, particularly in the area of architectural control. When properties are dedicated to the public, the association should include among its powers the ability to provide additional maintenance to supplement that provided by the governmental entity. Some common areas such as alleys may not be accepted for dedication and may need to be maintained by the association.

4 Tax Exempt Organizations

● Many new urbanist developers have created institutes or other voluntary membership organizations to provide cultural activities, education and other community-building services. Like the alternatives described in Section 3, these supplement rather than replace the property owners' association. Like the property owners' association, tax-exempt organizations are organized as nonprofit corporations. Unlike property owners' associations, however, these organizations seek tax-exempt status under §501 (c) (3) of the Internal Revenue Code.

Benefits to the Developer. Charitable organizations qualified under 501(c)(3) of the Internal Revenue Code are not only themselves exempt from taxation, but contributors are allowed to deduct most contributions they make to such an organization. This makes them a powerful tool for the developer whose project aligns itself with a 501(c)(3)'s exempt purposes. Expenses that would otherwise have to be capitalized and recovered bit by bit as each lot is sold may, instead, be deducted currently. Moreover, having a charitable organization associated with a community can improve the development's appeal by providing concerts, festivals, classes and other community-building activities. Developers who have created institutes describe great satisfaction with the intangible benefits the institute brings to the community.

There are two ways for a development to benefit from a charitable organization—import a well-established organization, or grow its own.

- Import a Tax-Exempt. Tax-exempt organizations that are often invited into a community at the master plan stage include YMCA's, churches and private non-profit schools. Choosing the right tax-exempt organization can add value to the development. For example, donating land or a building to a Montessori school can be a good investment if lot buyers are likely to be young families to whom that kind of education would appeal. (Any such conveyance should be deed restricted to ensure that the property isn't re-conveyed for other purposes.)

Importing a 501(c)(3) can offer immediate tax benefits. A developer who builds a community center and gives it to the owners' association must capitalize the cost. A developer who donates land to a YMCA may be able deduct the cost currently. Furthermore, the deduction may be for the fair market value of the land, not the developer's basis.

- Grow Your Own. Some developers are creating their own tax-exempt organizations, which are named after and identified with their community, although most of its activities are open to the public. Usually these organizations have a primarily cultural mission that enhances the community. Often the meeting house or other civic building, or land for such a building, is donated or sold at a

discount to the institute, which can generate revenue from renting the space for weddings and other events to help pay for other activities.

Qualifying as a 501(c)(3). Organizations achieve exempt status through an application process with the IRS, and advance rulings are available to new organizations. The articles of incorporation of the corporation must limit the organization to an exempt purpose, or combination of purposes, and its assets must be permanently dedicated to exempt purposes. As stated in an IRS publication,

The exempt purposes set forth in IRC Section 501(c)(3) are charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and the prevention of cruelty to children or animals. The term charitable is used in its generally accepted legal sense and includes relief of the poor, the distressed, or the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening the burdens of government; lessening of neighborhood tensions; elimination of prejudice and discrimination; defense of human and civil rights secured by law; and combating community deterioration and juvenile delinquency.

Most 501(c)(3) organizations associated with new urbanist communities have an interest in the arts, which, although not listed above, is generally recognized as a charitable purpose. To be a 501(c)(3) organization, the activities must be open to the larger community, not just those within the real estate development. A private community can form a “social welfare organization” under 501(c)(4) of the Code to offer community-building activities, but this does not offer the same tax benefits to the developer.

Coordination with Owners’ Association. A 501(c)(3) organization operates independently of the owners’ association. Its board of directors will attract individuals with interests and personality different from the owners’ association board and may draw at least some directors from outside the community.

Qualifying a 501(c)(3) as a Publicly Supported Organization. In order to achieve the most tax benefits, the 501(c)(3) organization must avoid private foundation status by affirmatively showing to the IRS that it is a publicly supported organization. One of the ways to do that is to demonstrate that over a five-year period, on average, the organization receives at least one third of its income from small contributors or the government, rather than from the developer or other related entities.

Sources of Revenue. Tax-exempt organizations can receive contributions or may have revenue relating to their activities, such as concert tickets. Some communities require a payment by homeowners to the community’s 501(c)(3) organization, either as a regular annual assessment or as a fixed amount or percentage paid upon each conveyance and reconveyance of the property. Such payments, which are written into the recorded declaration, are generally well tolerated by buyers. There is mixed opinion among tax professionals as to whether such assessments are contributions that can be counted

toward the public support test or if, conversely, such contributions are not counted and make it harder to meet the public support test.

This article is intended to give some suggestions how tax-exempt organizations may benefit a new urbanist community but should not be relied upon for tax advice. It is very important that any developer who is considering forming a 501(c)(3) or making significant donations to a 501(c)(3) consult with a competent tax professional. .

5 Special Considerations for Town Center

• Many new urbanist communities have areas that are primarily residential, and a town center that is mixed use, with live/work units and residential space above commercial space. Governance of town center is far more complex than the residential portions and requires specialized documents.

Town center commercial areas should usually be separate from the residential association. Although an integral part of the functioning of the community, town center should usually be governed separately from the residential association for the following reasons:

- Maintenance Standards. The interests of commercial and residential owners tend to be different. Commercial areas invite the public in. They get a lot of traffic and must be maintained to a high level of care.
- Use of Common Areas. Squares and plazas in town center are likely to be used for farmers' markets, festivals and commercial activity, while greens and other common areas within the residential portions are less likely to be used for such activities.
- Statutory Regulation. In most states, residential property owners' associations are subject to laws regulating such matters as developer turnover, participation in meetings, and similar consumer rights. The trend toward such legislation is increasing. A commercial property owners' association is usually not subject to the same kind of legislative intervention, and could be controlled by the developer for an extended time.
- Restrictive Covenants. The town center documents contain detailed provisions concerning commercial operation, such as hours of operation and merchants' associations, and have a different assessment scheme. Containing these provisions in a separate document allows the residential documents to be relatively conventional, improving acceptance by residential buyers and their lenders.
- Tax Concerns. As mentioned in section 2, homeowners' associations generally rely on Section 528 of the Internal Revenue Code, which exempts the association from paying taxes on assessment income, even when it is accrued from year to year in reserve accounts and is not offset by expenses. To qualify under Section

528, substantially all (85% or more) of the units, lots, or buildings must be used by individuals for residences. Mixing commercial property into a homeowners' association can cause it to lose the Section 528 exemption. Associations can usually compensate with accounting methods, but must be aware of the need to do so.

- Human Nature. Perhaps most importantly of all, the interests and perspectives of commercial and residential owners are irrevocably different. Setting up any kind of a situation where residential owners have any say over the commercial operation is a fundamental error.

On the other hand, identifying and separating residential and commercial property is not easy; an essential characteristic of new urbanism is the seamless integration of residential and commercial uses. The town center will usually include live-work units, as well as scattered residential units above the stores. As discussed further in the following section, these units may be sold as condominium units, or leased to residential tenants. If there is a separate residential association, these owners or tenants should be assured access to recreational facilities, either through membership in the residential property owners' association or by other means. Membership in the residential association may also assist in establishing a sense of community. The task of creating a legal description that includes all the residential uses is further complicated by the fact that uses may change over time.

As an alternative to carving out a separate, completely residential association, a new urbanist community may be developed with a single association, and a single declaration, for the whole property, or for the residential portions and the fringes of the town center that contains the live/work units. However, in such a case, the declaration should specifically exempt commercial properties from regulation by the association—and ensure that this provision can't be amended by the residential majority. In addition, commercial property should be assessed differently than residential property.

Whether or not the homeowners' association includes some or all of the commercial property, a new urbanist community will almost certainly need a separate entity for town center. This entity must maintain and manage such commercial common facilities as parking lots, plazas, benches, trash collection, lighting and seasonal decoration. The entity may also regulate merchant mix and hours of operation and operate a merchants' association.

Either a management entity or a commercial property owners' association may manage town center's commercial common areas. The choice between a management entity or by a commercial property owners' association depends in large part upon the developer's long-term commercial objectives:

- Management Entity. Where the developer or a third party is interested in retaining a long-term financial interest in town center, a management entity may be considered. The management entity owns the town center common areas, and usually owns and leases out most or all of the commercial properties. The

management entity charges common area maintenance charges similar to CAM charges in a shopping mall, and may strictly control the mix of tenants.

- Owners' Association. Where the developer would rather sell town center as individual building parcels, a property owners' association, in conjunction with a merchants' association, may be established to own and maintain the common areas. It is very important that any such association exclude, by definition, any residential property, in order to avoid being regulated as a residential homeowners' association under various statutes.

6 Specialized Building Types

• New urbanist communities typically generate certain building types not found in typical subdivisions. This section discusses some special considerations for successful operation of these building types.

Mixed-Use Buildings. Mixed-use buildings, which occur primarily in the town center, usually have the following characteristics:

- Layered Uses. A typical town center building might have commercial space on the first floor and residential units on the upper floors. Office space is sometimes placed on the second floor, where it serves as a good buffer between commercial and residential uses as it is generally quiet at night and on weekends. While residents need to appreciate that some noise and activity are to be expected, certain uses, such as full-service restaurant or nightclub, may not be compatible with residential units unless there is some ability to buffer the uses.
- Few Common Elements. Typically, residential units in a mixed-use building have no recreational facilities of their own and may not even have their own parking. Instead, these amenities are part of the community facilities and are maintained by the property owners' association or town center association.
- Small-Scale. Except in highly urbanized areas, buildings in a new urbanist community, including its town center, are usually modest in scale, both in height (rarely more than four stories) and footprint. This can create financing challenges for lenders who are not accustomed to this intermediate size.

Flexibility in both building design and legal documentation allows uses to change with the market. In particular, upper-floor flats can be converted easily from office to residential space and back again. Usually, only commercial uses are permitted on the first floor to encourage a lively streetscape.

Mixed-use buildings can be owned by a single owner, or ownership may be divided between the commercial and residential units, depending on the developer's objective. Here are some possibilities:

- Sell Off Residential Units. Often, the developer wants to retain control of the commercial space while selling off the residential units for cash. Form of ownership is highly dependent on state law, but typically choices include either formation of a single mixed-use condominium, or creation of an airspace condominium that submits only the residential upper floors of the building to condominium ownership. Particularly for buildings with a single unit upstairs, it may in some instances be possible to divide the building horizontally, by use of maintenance and easement agreements, without forming a condominium. Any time ownership is divided within a building, it adds a layer of complexity and administration that needs to be weighed against the financial advantage.
- Commercial Ownership. If a developer or commercial property manager has the financial strength to retain ownership of the entire building, commercial and residential units can be rented. This gives the owner the considerable advantage of total control over the building, including the ability to convert residential to commercial space if needed.
- Investor Ownership. To raise cash while retaining control of the commercial portions of small-scale mixed-use buildings, the developer may sell a small building to a private investor. In one such scenario, the investor would be able to use or rent out the residential unit upstairs, and would give the developer the right to manage the commercial portion for a stated number of years. The developer would control the choice of tenant and amount of rent to be charged, and would pay the investor a percentage of the rent.

Live-Work Units. Live-work units are a special type of small-scale mixed-use building that often forms a transition between the town center and the residential portions of the community. Often constructed as townhomes, live-work units usually combine a shop, studio or office at ground level and a single residential unit above. Generally, both portions of the live-work unit are intended to be occupied by the same individual, who is usually the owner as well. It may be desirable to allow live-work units to evolve over time to more commercial usage depending on the market. If so, covenants and restrictions need to recognize the potential for changes in use, and may allow residential or commercial to occur on either floor.

Townhomes. New urbanist development encourages the use of attached homes, known as townhomes or row houses. There are two main types of townhomes, based upon construction. Although they may not be recognized as distinct types in the design code for the community, each type has separate legal considerations:

- Shared Roof Structure. Often, especially at lower price ranges, townhomes are built together and share a roof structure. Although such townhomes are usually sold as noncondominium, fee simple ownership, some type of special provision is required for at least a minimum amount of common maintenance. Especially at lower price ranges, this should include establishment of reserve funds so that the

money will be available when the roof needs to be replaced. Where the townhomes are intended to present a uniform facade, common maintenance of the exterior is also necessary. In addition, townhomes that share a roof or other structural elements must be adequately insured, so that the townhome will be promptly rebuilt after a casualty loss. Otherwise, the structural integrity of other homes within the block can be affected. To assure adequate insurance, a unified policy, purchased by an owners' association, may be recommended.

- Separate Structures. Townhomes or live-work units are sometimes constructed as entirely independent structures, built to the side lot line. In such cases, special townhome maintenance provisions are not necessary, but specialized easements to allow one building to secure flashing onto the next are helpful.

Side-Yard Houses. To allow most efficient use of narrow lots while complying with governmental setback requirements, side-yard houses may borrow space on one side, and lend space on the other, through the use of specialized easements. In addition, for certain building types, such as side-yard houses, which are to be built along a property line, easements may permit roofs, gutters, soffits and downspouts to overhang the property line, and may allow footings and rain leaders to intrude below the surface of the property line.

7 Making Association Documents Work

- Several principles are useful in writing association documents:

Keep development issues separate from association issues. To establish a vibrant community, owners should take an active role in managing the association relatively early. Furthermore, most states have enacted laws requiring the developer to turn over control of the association to the owners at some defined stage during development. However, certain developer rights, most notably architectural control, are best retained by the developer until the end of the development process. Some rights are retained to the developer indefinitely.

Developer rights need to be identified and strongly protected. To put as much distance as possible between the developer rights and the association rights, consider putting all the developer issues in a separate document, the Master Deed Restrictions, to be recorded ahead of the declaration. In any case, specified developer rights should never be subject to amendment without the consent of the developer.

The following are some developer rights to consider:

- Architectural Control. The first and most important development issue is architectural control. The developer must keep architectural control to the very end in order to accomplish his vision, so architectural control and the association should be clearly separated. The architectural review board is appointed by the

developer and exists separate, apart and independent from the association. The developer can add a provision that the right to appoint the architectural review board is assigned to the association once development is complete. More neighborhood participation may also be appropriate for modifications. See section 8 for more information about architectural codes.

- Marketing and Development Rights. The Master Deed Restrictions should reserve for the developer the right to have a sales office and models, and to put sales signs on the developer's property and the common areas. The Master Deed Restrictions should also reserve appropriate easements and development rights to complete this phase and adjacent property, whether or not the property is built as a subsequent phase.
- Use of Name. The developer must decide whether to trademark the name of the community. In addition to federal trademark registration, many states offer a simple, economical registration process. Trademark protection has proven valuable, and defensible, even when the new urbanist community name became so well known that it was printed on maps. However, one could also argue that new urbanist communities are town-like, and should have a name that belongs to the community, rather than the developer. If the developer decides in favor of trademark protection, the Master Deed Restrictions should provide additional notice of the trademark and limit others' commercial use of the new urbanist community's name.
- Photography. New urbanist communities tend to be rather photogenic. Who should get the location fee—the association or the developer? If the developer so chooses, the Master Deed Restrictions may reserve to the developer the right to allow commercial photo shoots on the common areas, and to collect a fee.
- Mandatory Building Requirements. One unusual contract provision that is often employed in new urbanist community communities requires the purchaser to build an approved building on the lot within a limited period of time, usually two years. The purpose is to encourage the development of streets and neighborhoods, and to discourage speculation. The streetscape can't be appreciated if it's pock marked with empty lots. The requirement should be prominently noted in the purchase and sale agreement and should also appear on the deed or the recorded documents, or both.

The requirement to build is usually enforced with some kind of a developer buy-back at a price close to the original purchase price to be fair to all the parties. The developer's right to repurchase the property should also have a time limit, both to prevent title problems and to improve enforceability. A straight forfeiture is punitive and probably not enforceable. The construction lender also needs reasonable protections.

Give the association the tools it needs. Once legitimate developer issues are protected, the developer is free to structure the association in a way that makes it work for the owners in the long term. The association needs to have processes and procedures in place to help it make decisions, and it should have all the powers it needs to run effectively.

Within the corporate structure, here are some examples of useful powers of the association:

- Rules Enforcement. The procedure to hear violations of the association's rules and regulations should focus on dispute resolution and problem solving. At a minimum, owners must always be given notice and the right to be heard. Along with the right to impose fines and other penalties, the association should be given the right to suggest or approve agreements and withhold the requirement of paying a fine if the agreement is honored.

In addition, give the association the authority in the documents to deal directly with tenants who violate the rules, including the right of eviction if the violation continues after a hearing.

- Capital Improvements. Give the association the power to make capital improvements. Without such a specific grant of power, property owners' associations are usually restricted to repair and maintenance of original improvements. Consider giving the board the ability to make most capital improvements without membership approval unless it exceeds a certain percentage of the annual budget.
- Additional Services. Allow the association to take on additional duties other than simply maintaining the common areas. One way is to provide a broad list of possible services the association could offer, such as utilities, garbage and trash collection, transportation, cultural programs, newsletters and other services. However, except in an emergency, there's a 60-day delay before the new service starts, during which the owners can ask to have a community meeting and repeal the service by majority vote.
- Maintenance of Non-Association Property. Particularly useful is the power to maintain easement areas, public rights-of-way and other public or private properties within or immediately adjacent to the new urbanist community. For instance, street trees are usually located within the right-of-way of a dedicated street. If the city doesn't properly maintain the trees, the association should have the power to do so, even if the trees are not within association common areas. The same would apply to parks within the community that are dedicated to the public but that the city may fail to properly maintain.
- Citizen Recall Power. Put in some escape valves, so that if the board makes a decision that is wildly unpopular, people can get together and veto a particular board decision. For instance, the board should have the right to make rules and

regulations, but if 10% of the owners ask for a special meeting to discuss the rule, and they get a quorum, then the rule can be repealed by majority vote of the owners.

- Redevelopment. Consider a provision that allows orderly redevelopment and creation of a new master plan if there's ever an overwhelming casualty loss or if a defined period of time elapses, *and* at least two-thirds of the owners agree. This should include a buyout of dissenters at fair market price.

Insist on Readable Documents. Property owners should be able to read and use their declaration and other association documents without having to consult an attorney on every issue. “Readable legal document” is not an oxymoron. The following factors contribute to readable documents:

- Set the Stage. Consider reciting some of the history and purpose of the community in the introduction to the documents. Just as the architects and planners create a sense of place with their designs, documents can create a sense of place as well. Explain the concept of new urbanism, and that there will be a lively mixture of uses. Describe the charette, if there was one, and some of the particular design considerations that went into the property—how the streets were oriented to particular views, how existing trails were incorporated into the plan, how the design is based on regional tradition. Putting these stories in the recorded documents makes them available to each generation of buyers, so they aren't forgotten.
- Pay Attention to Function and Appearance. Scan the beautiful logo that has been designed for the community and insert it at the head of the first page. To help the title index for the recorded public records, retype the name of the community underneath the logo, because the name embroidered into the logo may not be picked up otherwise. Choice of typefaces, and the way that paragraphs are broken up and numbered, can add dramatically to a document's ease of use.
- Use Clear Language. Documents do not need to be written in legalese to be enforceable. Most of the legal cases involving enforcement of covenants and restrictions are not about arcane legal issues, but instead are about the interpretation of ordinary English language. The more clearly the documents state what is intended, and communicate that to owners, the more enforceable the documents are.
- Explain Yourself. Explain in the text the reasons for a certain provision, especially if the provision is unusual or seems harsh.

8 Making Architectural Codes Work

- New urbanist developments are highly dependent on architectural codes, whether they are graphic, textual or in the form of a pattern book. Making

codes work depends on all four of the following steps:

Draft Codes Carefully. Architectural codes must communicate well for two reasons:

- Enforceability. Architectural codes are enforceable—if they are clearly written.
- Effectiveness. A code should guide people into building what the developer and planner want them to build. The best way to do that is to communicate effectively.

New urbanist community codes are particularly complex because they regulate a lot of things that ordinary architectural codes for a residential subdivision don't regulate, such as uses. In particular, the code needs to very clearly spell out for each lot type exactly how each floor of the main building and the outbuilding can be used, and how many total dwelling units are permitted.

Provide Assistance. Code enforcement begins with code education. Especially at the beginning, developers should be prepared to put time and money into assisting architects and builders design appropriate buildings.

Enforce the code. Conflicts with builders who want to cut corners are inevitable. Developers must be prepared to enforce the code, in court if necessary. Properly drafted architectural codes are enforceable, but failure to consistently enforce one violation sets up a legal defense for others.

Allow Codes to Change over Time. In addition to review, appeal and enforcement provisions, the Master Deed Restrictions might establish a “town planner” or “town architect” or other mechanism to revise the architectural codes as necessary over time.

About the Author: *Doris Goldstein is an attorney primarily representing developers of new urbanist communities, beginning in 1986 with Seaside. She has been closely involved with the growth of Seaside, including the development of its town center. Her practice includes property owner associations, architectural standards, commercial property sales and leasing and the formation of condominiums and air-space townhouses in mixed-use buildings. In addition to her ongoing representation of Seaside, Ms. Goldstein currently represents, or assists local counsel with, more than a dozen developers of new urbanist communities in Florida, and, in cooperation with local counsel, in Alabama, North Carolina, South Carolina, Texas, Colorado and New Mexico. She has also formulated and licensed model documents for new urbanist communities that are intended to be customized by local attorneys in consultation with Ms. Goldstein.*

Ms. Goldstein has lectured at seminars presented by the American Bar Association, the Congress for the New Urbanism, the Urban Land Institute, the Seaside Institute, Florida Bar Continuing Legal Education, and the University of Miami School of Law Continuing Legal Education.

As a volunteer, Ms. Goldstein participated in the Technical Review Panel for the North St. Lucie County Master Plan and assisted in the drafting of a Traditional Neighborhood Development ordinance for her own community of Jacksonville, Florida. She is a member of the Congress for the New Urbanism, the Florida Advisory Council of the Trust for Public Land, and the Florida Bar's Committee on Condominiums and Planned Developments.

Ms. Goldstein graduated with high honors from the University of Florida, College of Journalism and Communication, in 1975 and cum laude from Harvard Law School in 1982. She has been a member of the Florida Bar since 1982 and is AV rated by Martindale-Hubbell.