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CONTROL AND MANAGEMENT OF COMMON ELEMENTS BY COVENANT

By ALFRED V. CONTARINO* and RICHARD D. KINER*

THE concept of the condominium involves certain areas in the building or buildings that will be for the use and benefit of the occupants as a group. These areas are generally referred to as the "common elements" and include such portions as land, roofs, main walls, elevators, staircases, lobbies, halls, parking space, and community and commercial facilities.¹ Although some areas may be "restricted" common elements, that is, areas limited to a particular number of family units, this article discusses only the "general" common areas of a condominium and how they may be managed for the common benefit by means of mutual covenants binding the various tenant-owners in the condominium.

Tenancy in Common

The fee owner of a unit in a condominium also owns, as a tenant in common, an undivided interest in the unrestricted common elements.² The proposed California condominium legislation so provides,³ and apparently no other type of interest has been suggested which would be more suited to the communal nature of the condominium. This is because each tenant-owner is equally entitled to the use, benefit, and possession of the common property, the principal limitation of this right being that he is bound to exercise his rights in the property so as not to interfere with the rights of his cotenant.⁴ Neither may exclude the other from any part of the common areas.⁵

But it is desirable to provide for control of the common areas by means other than mere reliance on the inherent rights, duties, and liabilities characteristic of a tenancy in common.

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¹ FEDERAL HOUSING ADMINISTRATION, FACT SHEET No. 491, FHA MORTGAGE INSURANCE ON CONDOMINIUMS (1962).

² Lawyers Title News, Sept. 1962, p. 2.

³ Condominium Ownership Act § 1350(b) (3).

⁴ 86 C.J.S. *Tenancy in Common* § 20 (1954).

⁵ *Zaslow v. Kroenert*, 29 Cal. 2d 541, 176 P.2d 1 (1946).

Delegating Management by Covenant

"Control" is defined as "power or authority to manage. . . ."⁶ One compelling reason to make express provisions for this power or authority to manage is that a cotenant is not ordinarily entitled to compensation for managing or taking care of the common property⁷ in the absence of an agreement, express or implied.⁸

By means of covenants included in the grantor's deed, or in a recorded declaration, control can be established in a manager and/or a management body which is given the power to enter into binding agreements relating to maintenance of the common areas and ordinary operation of the building. Also to be set out in the declaration should be provisions for the central management's power to assess and pay the cost of operating the property, its means of enforcing payment of the assessment, and the authority of the management board to adopt house rules for the condominium.⁹

As to the ability of cotenants to delegate authority to manage the commonly owned property, California cases as well as the weight of authority indicate that cotenants may deal with each other as adverse parties with respect to the common property, that they may therefore enter into agreements with each other as to the disposition, use, and income of the property, and that their agreements will be binding on them, their heirs, personal representatives, and assigns.¹⁰ Since unity of possession is the only unity required in a tenancy in common,¹¹ the legal relations involved should not be adversely affected by mutual covenants of the tenant-owners establishing a central management. No particular language is necessary to create these covenants, for any words which show an agreement and express an intent to create a contractual obligation will be sufficient.¹² It is merely an engagement by the parties to do or not to do certain things.¹³

Two basic methods for establishing these mutual covenants are used in multiple lot restriction.¹⁴ One is to set forth the restrictions in full in the deeds to each lot in the tract. The second method is to record the restrictions in the form of a "declaration of restrictions" which is

⁶ BLACK, LAW DICTIONARY (4th ed. 1951).

⁷ *Steeve v. Yaeger*, 145 Cal. App. 2d 455, 302 P.2d 704 (1956).

⁸ *Combs v. Ritter*, 100 Cal. App. 2d 315, 223 P.2d 505 (1950).

⁹ THE APPRAISAL JOURNAL, October 1962, p. 460.

¹⁰ 86 C.J.S. *Tenancy in Common* § 71 (1954); *Spahn v. Spahn*, 70 Cal. App. 2d 791, 162 P.2d 53 (1945).

¹¹ *Dabney-Johnston Oil Corp. v. Walden*, 4 Cal. 2d 637, 52 P.2d 237 (1935).

¹² *O'Sullivan v. Griffith*, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323 (1908).

¹³ *Hunt v. United Bank & Trust Co.*, 210 Cal. 108, 291 Pac. 184 (1930).

¹⁴ MacEllven, *Land Use Control Through Covenants*, 13 HASTINGS L.J. 310 (1962).

incorporated in the master deed by reference and thereby impresses the restrictions on the land.¹⁵ The acceptance by a grantee of a deed containing these covenants is equivalent to an agreement on his part to be bound by them.¹⁶ A formal promise by the grantee is not required, for if he accepts the deed his intention to assume liability for covenants contained within it may be presumed.¹⁷ Therefore the original conveyance, using either of the methods mentioned above, is sufficient to bind the original owners in the condominium development.

Will subsequent transferees be bound by these covenants in a like manner? It is well settled law in this country that subsequent owners will be bound if the covenants can be found to run with the land.¹⁸ At common law, covenants that imposed any burden or obligation on the land were not incident to it and were incapable of passing with it to an assignee.¹⁹ In California, the *statutory* provision that covenants in a grant of an estate in realty which are for the direct benefit of the property will run with the land means that burdensome covenants of no benefit to the property conveyed are not binding on the grantee's transferees.²⁰ In other words, the benefit of a covenant contained in a deed runs with the land, the burden does not.²¹ Therefore covenants contained in the condominium deed or declaration of restrictions, if they impose burdens and affirmative obligations, must be regarded as personal covenants not having a binding effect at law beyond the immediate parties to the instrument.²²

However, such covenants may be enforceable in equity against subsequent transferees with notice.²³ In a proper case equity may enforce a covenant or agreement relative to land as effectually as would a court of law had the covenant been one clearly running with the land.²⁴ This doctrine of enforcement, the equitable servitude, is based on the theory that a subsequent grantee cannot in good conscience refuse to perform²⁵ where certain prerequisites are present, the most essential of which is notice, either actual²⁶ or constructive.²⁷ It has been held

¹⁵ *Ibid.*

¹⁶ *Marshall v. Standard Oil Co. of California*, 17 Cal. App. 2d 19, 61 P.2d 520 (1936).

¹⁷ *Hopkins v. Warner*, 109 Cal. 133, 41 Pac. 868 (1895).

¹⁸ 14 AM. JUR. *Covenants* § 19 (1938).

¹⁹ 14 CAL. JUR. 2d *Covenants, Etc.* § 11 (1954).

²⁰ *Marra v. Aetna Constr. Co.*, 15 Cal. 2d 375, 101 P.2d 490 (1940).

²¹ CAL. CIV. CODE § 1462.

²² *Lyford v. North Pacific Coast R.R. Co.*, 92 Cal. 93, 28 Pac. 103 (1891).

²³ 14 CAL. JUR. 2d *Covenants, Etc.* § 25 (1954).

²⁴ *Hunt v. Jones*, 149 Cal. 297, 86 Pac. 686 (1906).

²⁵ *Marra v. Aetna Constr. Co.*, 15 Cal. 2d 375, 101 P.2d 490 (1940).

²⁶ *Hunt v. Jones*, 149 Cal. 297, 86 Pac. 686 (1906).

²⁷ *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 93 Pac. 858 (1908).

that the recording acts provide constructive notice where there is a recorded declaration of restrictions.²⁸

But even *express* notice to a subsequent grantee will not suffice by itself.²⁹ There must also be four indispensable elements in the deed: (1) a statement to the effect that the covenant is executed for the benefit of the lot owners in the area; (2) a clear description or designation of the dominant, or benefiting tenement; (3) an express reference to a general scheme or plan of development; and (4) an express covenant that the restriction is on the land conveyed and is an incident to its ownership, so that the purchaser acquires the lot subject to the burden.³⁰

In order that such restrictions be effective as between one lot owner and the other lot owners, as well as between the original parties, it must appear that they were inserted in the deed by the original grantor to effect the creation of what amounts to a servitude, to the burden of which the lot was subjected as the servient tenement, and to the benefit of which the remainder of the tract was entitled as the dominant tenement.³¹ Such mutual equitable servitudes are enforceable by each owner in the tract,³² but prompt assertion and enforcement against one claimed to be affected because of constructive notice is essential.³³ Thus tenant-owners in a condominium would have an enforceable right against another tenant-owner who acted in violation of such a covenant. If the management provisions provide only for a manager who is not a tenant-owner this right might be enforced by a suit in the name of any or all other tenants.

As experience often shows what theory has overlooked, in creating the condominium's mutually restrictive covenants, there is little doubt but that the need will arise to amend the arrangement or declaration. There is California authority supporting the idea that an agreement by a member of a co-operative organization to be bound by its by-laws and *subsequent amendments* is a valid provision.³⁴ But such subsequent amendments must be reasonable, and the power of amendment may not be used to avoid obligations or to prejudice a member.³⁵

²⁸ *Wayt v. Patee*, 205 Cal. 46, 269 Pac. 660 (1928).

²⁹ *Murry v. Lovell*, 132 Cal. App. 2d 30, 281 P.2d 316 (1955).

³⁰ 14 CAL. JUR. 2d *Covenants, Etc.* § 102 (1954).

³¹ *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945 (1919).

³² *Wayt v. Patee*, 205 Cal. 46, 269 Pac. 660 (1928); *Werner v. Graham*, 181 Cal. 174, 183 Pac. 945 (1919).

³³ *Whitney v. Union Ry. Co.*, 77 Mass. (11 Gray) 359, 71 Am. Dec. 715 (1858).

³⁴ Such contracts between members of a mutual benefit association are commonly enforced. See *East-West Dairymen's Assn. v. Dias*, 59 Cal. App. 2d 437, 138 P.2d 772 (1943).

³⁵ *Power v. Sheriffs' Relief Assn.*, 57 Cal. App. 2d 350, 134 P.2d 827 (1943).

Common Expenses

Major provisions in the deed or the recorded declaration will deal with an assessment for common expenses and its enforcement. These common expenses are to be shared proportionately by all the owners, and include expenses of administration, maintenance, repair, or replacement.³⁶ Each tenant-owner's share of the common expenses will be based upon his percentage of ownership of the common elements which, in turn, will be based on the value of the individual unit in relation to the value of the units as a whole.³⁷

Liens

The major concern is for a practicable method for enforcing the assessment for common expenses where an owner's payment is delinquent. Because the enforcement of covenants in a court of law may take an extremely long time, other means to supplement enforcement should be available. The deed or recorded declaration should therefore include covenants subjecting units to a lien for any unpaid assessments. A covenant to pay a certain amount of money for the maintenance of land has been held effective to create a lien upon the property as security for its payment.³⁸ But such a covenant should express the intention of the parties both to create a lien upon the land and also to have the covenant run with the land.³⁹ It should also be expressly binding on subsequent transferees of the property.⁴⁰

However, a lien alone may be inadequate. A judicial foreclosure sale may take up to eighteen months to accomplish. Furthermore, a lien on an interest in real property is a mortgage, and the owner is therefore protected by mortgage law.⁴¹ He cannot waive the right to this protection by contract.⁴² In order to overcome these obstacles, a power of sale can be attached to the lien.⁴³ A private sale can then be made effective in three months and twenty days.⁴⁴ Although this length of time may still appear to be quite long, it must be remembered

³⁶ THE APPRAISAL JOURNAL, October 1962, p. 463.

³⁷ *Ibid.*

³⁸ *In re Bangle*, 54 Cal. App. 415, 201 Pac. 968 (1921).

³⁹ *Fresno Canal & Irrigation Co. v. Dunbar*, 80 Cal. 530, 22 Pac. 275 (1889); *Fresno Canal & Irrigation Co. v. Rowell*, 80 Cal. 114, 22 Pac. 53 (1889).

⁴⁰ *California Packing Corp. v. Grove*, 51 Cal. App. 253, 196 Pac. 891 (1921). See CAL. CIV. CODE § 2881. The underlying obligation need not be in existence at the time the lien is reserved. CAL. CIV. CODE § 2884.

⁴¹ *Dingley v. Bank of Ventura*, 57 Cal. 467 (1881). See CAL. CODE CIV. PROC. § 725a (assuring the mortgagor of a one year period of redemption).

⁴² CAL. CIV. CODE § 2953.

⁴³ CAL. CIV. CODE § 2932 expressly allows this.

⁴⁴ See CAL. CIV. CODE § 2924 (three months notice of default and 20 days notice of sale).

that the owners in a condominium will probably be owners of a fee simple and that the main purpose of the condominium is to give "home ownership" benefits to apartment residents.

A lien has many purposes and advantages. Foreclosure on the lien to obtain the assessment fees is the least of these. The dispossessing of an owner is an unpleasant task, and is done only as a last resort. However, the lien is an effective "club" to force an owner to pay his share of the common expenses. The power of sale adds a barb to that club in that, faced with a notice of sale, the owner would certainly hasten to meet his obligation. Since the lien is a charge on the property, being an incident to title, it is effective against any subsequent owner.⁴⁵ Also, the lien may be foreclosed for assessment fees left unpaid by a former owner.⁴⁶ Although the board of owners may prefer to make this lien the first charge on the unit, this is not advisable since lending institutions are limited by law to first mortgages.⁴⁷

The Threat of Partition

Another problem area is the need to preserve the integrity of the commonly owned property. The law allows every co-owner of real property the right to seek partition and if it cannot be achieved through a voluntary arrangement of all parties concerned then an owner may seek a forced sale through judicial proceedings.⁴⁸ In California the right to partition is provided for by statute.⁴⁹ However it is well settled that the right to have partition is not absolute and may be waived by contract.⁵⁰

A New York case indicates that an agreement between the owners of real estate that none of them will sue for partition without the consent of the others does not suspend the power of alienation, for it is only suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.⁵¹ Some courts have adopted the limiting period of the Rule Against Perpetuities as a basis of determining whether the agreement is unreasonable in duration.⁵² Other cases hold that the agreement is good if limited to a reasonable time but have been reluctant to define exactly what is a reasonable

⁴⁵ Fresno Canal and Irrigation Co. v. Dunbar, 80 Cal. 530, 22 Pac. 275 (1889).

⁴⁶ Madera Canal & Irrigation Co. v. Arakelian, 103 Cal. App. 592, 234 Pac. 971 (1930).

⁴⁷ FHA will insure only a first mortgage. 24 C.F.R. § 234.1(a), 234.25 (1962).

⁴⁸ Ramsey, Condominium: The New Look in Co-ops, Nov. 30, 1961, p. 22.

⁴⁹ Asels v. Asels, 43 Cal. App. 574, 185 Pac. 419 (1919).

⁵⁰ Teutenberg v. Schiller, 138 Cal. App. 2d 18, 291 P.2d 53 (1955).

⁵¹ Buschmann v. McDermott, 154 App. Div. 515, 139 N.Y. Supp. 314 (1913).

⁵² Rosenberg v. Rosenberg, 413 Ill. 343, 108 N.E.2d 766 (1952); Roberts v. Jones, 307 Mass. 504, 30 N.E.2d 392 (1940).

time.⁵³ In one case an agreement not to partition for a period of eight years was held to be enforceable and a legal defense to an action for partition.⁵⁴ At most, whether an agreement in restraint of partition will be effective is uncertain. However, where an agreement of this type was formed because it was necessary in order to preserve the relationship of the co-owners with respect to the operation and management of the property it was held not to be repugnant to public policy.⁵⁵ In view of the complexities and uncertainty of trying to avoid the Rule Against Perpetuities, enabling legislation should be enacted to permit an agreement in restraint of partition to be effective for the life of the building or for the duration of its use as a condominium.

Conclusion

The condominium purports to fulfill a social need by providing "home ownership" benefits to apartment residents. Yet a number of restrictions are necessary. There must be a balance struck between the controls which are desirable and necessary in apartment house living and the freedoms which are ordinarily an essential part of ownership of a fee simple interest in property. The success of the condominium lies to some extent in how well this balance is struck.

The restrictions outlined in this comment are the ones most commonly imposed on the condominium. They are necessary and beneficial in many respects. Whether they can be enforced in all cases is another matter. In general, there is good reason to believe that they will be enforced, both as against the original owners, and as against their successors. Legislation in the area of restrictions would be of great value. It could help to standardize restrictions and to remove any doubt as to their enforceability. However, it appears that present law may nevertheless be adequate to make the restrictions enforceable.

⁵³ *Roberts v. Jones*, *supra* note 52.

⁵⁴ *Brown v. Coddington*, 72 Hun. 147, 25 N.Y. Supp. 649 (1893).

⁵⁵ *Rosenberg v. Rosenberg*, 413 Ill. 343, 108 N.E.2d 766 (1940); *Hill v. Reno*, 112 Ill. 154, 161 (1883).