Condominiums and Preemptive Options: The Right of First Refusal

Edward M. Ross
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By Edward M. Ross*

The advent of condominium development has brought to the fore many problems created by communal living. Paramount among the problems so engendered has been that of developing and retaining a harmonious relationship between the various owners.

Maintaining this harmony in a multi-family dwelling has given rise to the development of many rules respecting the use and occupation of condominium units. Typically, these rules require that the apartment be used for single-family residences only; that the common elements shall be used only for furnishing services for which they are reasonably suited; that no nuisances shall be allowed on the property; that no immoral, improper, offensive, or unlawful use be made of the property, or any part thereof; and that no additions, alterations or improvements be made without the consent of the Board of Governors.

Of major importance in preserving the desired harmony is the problem of controlling use and ownership of the individual condominium units. This article will undertake to analyze the various methods of so controlling the use and transfer of condominiums. Stock cooperatives shall also be discussed to the extent their use parallels that of the new statutory condominium.

Use Restrictions

A typical use restriction will provide that no party may use or occupy the unit without first obtaining the permission of the governing body. While a condition, other than a preemptive provision, which

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1 E.g., Declaration of Covenants, Conditions & Restrictions, art. V, § 12(a) The St. Tropez Condominium, New York, New York.

2 Id. at art. V, § 12(b).

3 Id. at art. V, § 12(c).

4 Id. at art. V, § 12(d).

5 Id. at art. V, § 14.

6 E.g., Declaration of Covenants, Conditions & Restrictions, art. V 400 South Ocean Boulevard, Palm Beach, Florida. This declaration provides:

V Use Restrictions.

In order to provide for a congenial occupation of the Building and to
requires the consent of a grantor or third person to sell or transfer property would be invalid, a condition that such consent is necessary to permit a lease or use of the same property would probably be upheld.

It should be noted, however, that the Restatement of Property takes the position that the validity of a restraint on use or occupancy, even though not a “restraint on alienation” within the technical meaning of that term, does have the effect of curtailing alienability. A restraint on alienation will be upheld only if, and to the extent that it is reasonable. Hence, the validity of a use restriction as a “restraint on alienation” must be determined by consideration of its reasonableness. What is “reasonable,” however, is not always an easy determination. For example, some doubt presently exists as to whether the common restriction prohibiting use or occupancy of a unit by children of a young age would be enforced against a couple who had moved into a condominium unit and thereafter had a child.

provide for the protection of the values of the Apartments, the use of the Property shall be restricted to and be in accordance with the following provisions:

3. No Apartment shall be occupied by any family not approved in advance by the Board of Governors of the Association. The Association shall signify in writing such approval or disapproval within thirty (30) days after the same is requested in writing, provided that simultaneously with such request, there is submitted to the Association the name of the family in question, its residence address and three business and three social references, together with such other information as the Association might reasonably request. Any such approval once given may not thereafter be withdrawn. Failure of the Board of Governors to disapprove within such period conclusively shall be deemed to constitute approval.

Preemptive provisions which are promissory or forfeiture restraints are valid. Restatement, Property § 413 (1944).


§ 406, comment m at 2412 (1944).

§ 406(c) (1944).

Restrictions on Conveyancing

Restrictions on the right of an owner of an apartment unit to convey his unit has been the subject of much study and concern. Two major areas must here be considered: the stock cooperative and the conventional cooperative or condominium.

Stock Cooperatives

The stock cooperative describes a form of ownership embodying the use of corporate stock and long term leases. The legal title to the entire building is vested in a non-profit corporation which operates and maintains the building and facilities. The relationship between the corporation and the stockholders, who own stock in the corporation and who have a proprietary lease from the corporation, is that of landlord and tenant.

Stock cooperatives have generally had no problem in enforcing restrictions on the transfer of stock calling for a first offer to the other stockholders before an offer to the general public. A forfeiture provision, usually in the nature of a right of reentry by the lessor, is upheld on the theory that the interest of a lessor in protecting his reversionary interest is a sufficient reason for upholding the restraint. California specifically allows restrictions against the transfer of stock without the consent of the corporation.

The normal type of stock cooperative restriction allows the corporation a specified period of time in which to decide whether to purchase the interest. If the corporation does not purchase, then the individual

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Section 5. Transfer of Common Stock. Except as provided herein, common stock shall not be transferable.

(a) Death of stockholder. If, upon death of a stockholder, his stock in the corporation passes by will or intestate distribution to a member of his immediate family, such legatee or distributee may, by assuming in writing the terms of the Subscription Agreement and Occupancy Agreement, within sixty (60) days after stockholder's death, and paying all amounts due thereunder, become a stockholder of the corporation. If a
tenant is generally free to sell to a prospective purchaser. Such rights have generally been upheld, although an absolute restriction against the transfer of stock without prior consent of the corporation might well be held invalid as an unreasonable restraint on the property rights of the persons involved; in addition, there is no corresponding social importance to be derived from their validity.

Condominiums and Cooperatives

While the cooperative apartment has engendered litigation for nearly eighty years, the condominium as we know it today is of recent statutory origin. It is believed that the discussion below pertaining to common law cooperative apartments will apply equally well to statutory condominiums, except in those instances where specific statutes have intervened to delineate the rights of the parties.

Ways of Controlling Right of Sale

To accomplish the objective of controlling who may become a neighbor-owner in a condominium project, the developers have generally made the individual owner's right to sell, give, or otherwise control the right to sell to a prospective purchaser. Such rights have generally been upheld, although an absolute restriction against the transfer of stock without prior consent of the corporation might well be held invalid as an unreasonable restraint on the property rights of the persons involved; in addition, there is no corresponding social importance to be derived from their validity.

vey his unit subject to a right of first refusal. This may also be called a preemptive right.  \(^\text{21}\)

In the past, there have been attempts to provide, in a condominium declaration, a requirement that the association or board of directors approve any prospective purchaser.\(^\text{22}\) While it may be possible that such a provision might be upheld in a stock cooperative, based upon the corporate line of reasoning that a closely held corporation may protect itself against hostile and disinterested persons becoming a part of the management,\(^\text{23}\) it would appear that such a provision as applied to a condominium unit would be a direct restraint on the alienation of real property and hence invalid.\(^\text{24}\)

Under the general law, there are three types of restraints on alienation: disabling, forfeiture, and promissory.\(^\text{25}\) An example of a disabling restraint is one which requires the grantee to sell to the grantor only,\(^\text{26}\) or requires him to obtain the grantor's consent to sell to a third person.\(^\text{27}\) This type of restraint is void.\(^\text{28}\) A forfeiture restraint terminates all, or part, of the fee interest in the possessor if he attempts to convey.\(^\text{29}\) This restraint may be valid if (1) qualified to permit alienation to some alienees, (2) reasonable under the circumstances and (3) permitted under the Rule Against Perpetuities.\(^\text{30}\) Promissory restraints impose contractual liability on the grantee if the particular condition is breached.\(^\text{31}\) They may be valid if they meet the three requirements

\(^{21}\) A Powell, Real Property \$ 633.13 (1964). The preemptive right differs from an option in that an option compels the optionee to sell at a stipulated price whether or not he wants to; a preemptive right cannot force a sale but only gives a first purchase right when the owner decides to sell.


\(^{23}\) Cal. Corp. Code \$ 501(g), 2403(c), 9609; Cassady v. Modern Metal Spinning & Mfg. Co., 188 Cal. App. 2d 728, 10 Cal. Rptr. 790 (1961).

\(^{24}\) 6 American Law of Property \$ 26.34, 26.70-80 (Casner ed. 1952); 4 Powell, Real Property \$ 633.13 (1964); Simes & Smith, Future Interests \$ 1112 (2d ed. 1956).

\(^{25}\) Restatement, Property \$ 404 (1944); 6 Powell, Real Property \$ 839 (1958).

\(^{26}\) Maynard v. Polhemus, 74 Cal. 141, 15 Pac. 451 (1887).


\(^{28}\) Restatement, Property \$ 405 (1944); 6 Powell, Real Property \$ 840 (1958).

\(^{29}\) Restatement, Property \$ 404 (1944).

\(^{30}\) Restatement, Property \$ 406 (1944). Cf. 6 Powell, Real Property \$ 840 (1958).

\(^{31}\) Restatement, Property \$ 404 (1944).
delineated above under forfeiture restraints. Therefore, it seems that a restraint, which imposes on the condominium-grantee an obligation to first offer his unit to the governing body before sale to third parties, would be upheld as a promissory restraint. Of the three requirements that the "first offer" restraint must satisfy, that which will likely cause the most trouble is the Rule Against Perpetuities.

Rule Against Perpetuities

Inasmuch as the right of first refusal creates in effect an option to purchase real property, there does not appear to be any real doubt that such a clause creates an interest in real property which cannot vest until the option is, or may be, exercised. Hence, there is a question of a possible violation of the Rule Against Perpetuities. It should be noted that options connected with leases are generally excepted from the operation of the Rule Against Perpetuities, but that an option connected with a fee estate, as created by the normal type of condominium grant, would be squarely within the Rule.

It has been suggested by some writers that although a right of first refusal is, in theory, within the prohibition of the Rule Against Perpetuities, the courts should make an exception to the application of the Rule where condominium interests are concerned. Also, there is some opinion that a right of first refusal does not create an interest in real property but is only a contract right and is thus not subject to the rule.

32 Id. § 406.
34 See Times & Smith, Future Interests § 1154 (2d ed. 1956).
35 5 Powell, Real Property § 771 (1962). See Haggerty v. City of Oakland, 161 Cal. App. 2d 407, 326 P.2d 957 (1958). In Haggerty, the California District Court of Appeal held that a ten year lease of a building, providing that the term of the lease was not to begin until notice to the lessee that the building was substantially complete, violated the Rule Against Perpetuities. There was a "bare expectancy" that the lease would not commence within twenty one years. Id. at 419, 326 P.2d at 965. This holding was apparently overruled in Wong v. Di Grazia, 60 Cal. 2d 525, 35 Cal. Rptr. 241, 386 P.2d 817 (1963) where the California Supreme Court said: "In any event, a reasonable time in the present transaction, in the light of the circumstances, must necessarily be a period far less than 21 years. We cannot accept that position of Haggerty v. City of Oakland which expresses a contrary position and, to that extent, it is disapproved." Id. at 537, 35 Cal. Rptr. at 249-50, 386 P.2d at 825-26.
36 Lewis Oyster Co. v. West, 93 Conn. 518, 107 Atl. 139 (1919); Henderson v. Bell, 103 Kan. 422, 173 Pac. 1124 (1918); Maddox v. Keeler, 296 Ky. 440, 177 S.W.2d 588 (1949); Barton v. Thaw, 246 Pa. 348, 92 Atl. 312 (1914).
38 Vogel & Pollack, Condominium: The Third Dimension in Apartment
A review of the condominium legislation indicates that only a few states expressly exempt condominiums from the application of the Rule Against Perpetuities. The Rhode Island statute provides: “The rule of property known as the rule against perpetuities shall not be applied to defeat any of the provisions of this chapter, or any declaration, by-laws or other document executed in accordance with this chapter.”

Also of some interest is the fact that the statutes of Illinois, Missouri and Nebraska expressly provide that the Rule Against Perpetuities shall not be applied to defeat any of the provisions of their condominium acts, but unlike other statutes, the Illinois, Nebraska and Missouri acts do not contain provisions expressly exempting from the Rule any declaration, by-laws or other necessary document executed in accordance with the acts.

In addition, Massachusetts permits the by-laws to provide:

A right of first refusal by the organization of unit owners in case of the sale of a unit, such right to be exercised within thirty days after written notice of intent to sell is given to such organization, provided, however, that this right shall not be exercised so as to restrict alienation.


The Puerto Rico condominium legislation, which has frequently been cited as the forerunner of the condominium statutes in the United States, Berger supra note 20 at 1004, has a section providing for a right of first refusal, with a ten day limitation on the right of the owners to exercise their options, P.R. Laws Ann. tit. 31, § 1275 (1955). It is of some interest that section 4 of the “Horizontal Property Act,” Laws of Puerto Rico, No. 104, § 4, at 244 (1958), allows the incorporation of apartments into the horizontal property regime. Once the apartments are submitted to the horizontal property regime they may be individually conveyed and encumbered; they are subject to all the incidents of ownership or possession and to all types of juridic acts either inter vivos or causa mortis, entirely irrespective of the building in which the apartments form a part. P.R. Laws Ann. tit. 31, § 1291(b) (Supp. 1965). As a result, it may be that in Puerto Rico the right of first refusal does not apply to the status of the apartment formed by the new act because of the inclusio unius rule of construction, i.e., “the inclusion of one is the exclusion of another.” Black, Law Dictionary 908 (4th ed. 1958).

When the statutes do not expressly exempt the declaration, by-laws, or other document from the Rule there is some question as to the result when a right of first refusal appears in the condominium declaration. See Rohan & Reskin, Condominium Law & Practice § 10.03(2) n.28 (1965).
tion, conveyance, sale, leasing, purchase, ownership and occupancy of units because of race, creed, color or national origin.\textsuperscript{47}

It should be noted that the legislature of Hawaii considered incorporating such a provision relating to the right of first refusal in its condominium act, but did not adopt it for fear that the courts would find it invalid.\textsuperscript{48}

One California case has held an option to repurchase to be within the purview of the Rule.\textsuperscript{49} Other California cases have held that options, in the form of a provision prohibiting sale without consent of the grantor, imposed on fee transfers are restraints on alienation and therefore void as against public policy \textsuperscript{50} The California draftsman will be well advised to limit the time within which any exercise of the right of first refusal may be exercised to that prescribed by the Rule Against Perpetuities.\textsuperscript{51} He should also be careful that the measuring lives used be sufficiently large but ascertamable without too much difficulty.\textsuperscript{52}

Liberal Judicial Treatment of Restrictive Clauses

As background for present California legislation and regulations governing condominiums and stock cooperatives, an analysis of those cases dealing with first option rights in other states would be helpful.

\textsuperscript{47}MASS. ANN. LAWS ch. 183A, § 12(c) (Supp. 1966). Although this statute permits the existence of a first refusal right, it remains questionable whether the existence of such a right, perpetual in nature, would be permissible under the Rule Against Perpetuities. See MASS. ANN. LAWS ch. 184A, § 1 (1953).


\textsuperscript{50}E.g., Bonnell v. McLaughlin, 173 Cal. 213, 159 Pac. 590 (1916); Frey v. Stanley, 110 Cal. 423, 42 Pac. 908 (1895); Maynard v. Polhemus, 74 Cal. 141, 15 Pac. 415 (1887).

\textsuperscript{51}"No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain." CAL. CIV. CODE § 715.2. It should be noted that CAL. CIV. CODE § 715.8, added in 1963, allows an alternative period of sixty years in which an interest may vest. This sixty year period in gross is an alternative to the permissible period under section 715.2. See Note, 16 STAN. L. REV. 177 (1963). Furthermore, under CAL. CIV. CODE § 715.8, which provides that an interest in real or personal property is vested if persons in being can join to convey a fee simple, the right of first refusal as used in condominiums and stock cooperatives may no longer be deemed a violation of the Rule Against Perpetuities since this section apparently eliminates the remoteness of vesting concept. See Simes, Perpetuities in California since 1951, 18 HASTINGS L.J. 247, 256-61 (1967).

\textsuperscript{52}See 5 POWELL, REAL PROPERTY ¶ 766(1) n.51 (1962).
Most of the landmark cases in this field involve the stock cooperative. Because of the fact that the real estate regulations in California apply to both condominiums\(^5\) and stock cooperatives,\(^6\) it is felt that an analysis of these cases would be helpful in understanding the condominium field, as well as the stock cooperative field.

The first litigation arising out of a cooperative apartment involved the right of a tenant to sub-let his apartment.\(^5\) In upholding the right of the corporation to enjoin the proposed sub-lease a New York court intimated that the cooperative apartment was a special arrangement which should be protected by the law. The court upheld the injunction because of the fact that the proposed subletting would violate the cooperative's rules and would result in "an invasion and demolition of the design of construction."\(^6\)

Half a century later, a Massachusetts court had no trouble in upholding a non-assignability clause in a ninety-nine year proprietary lease of a stock cooperative. In 68 Beacon Street v. Sohier,\(^7\) an action for rent, the court upheld a stipulation in a lease restricting assignment of plaintiff's stock against the holder of 152 shares who had acquired the stock by assignment. The ninety-nine year lease was not an alienable estate since it was terminable upon the sale of the property authorized by holders of 87½ percent of the plaintiff's capital stock.\(^8\) The Sohier case points out an important distinction between the terminable interest and the restriction upon a fee. This distinction has been criticized\(^9\) and would not seem to be applicable under the new California regulations.\(^6\)

During the latter part of the depression, when the luxurious cooperative apartment almost disappeared from the American scene,\(^6\) Mrs. Belle Harris assigned her ninety-nine year lease and shares of stock in 1158 Fifth Avenue, Inc. to Penthouse Properties, Inc. 1158 Fifth Avenue, Inc. refused to accept the transfer, refused to take rental payments from the assignee, and sued Mrs. Harris for past-due rent. The operating rules provided that an owner-tenant could only assign

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\(^5\) See text at notes 80, 81 infra.
\(^6\) See text at notes 89-92 infra.
\(^7\) Barrington Apt. Ass'n v. Watson, 45 N.Y. Sup. Ct. (38 Hun.) 545 (1886).
\(^8\) Id. at 548.
\(^10\) Id. at 361, 194 N.E. at 305-06.
\(^11\) "The reasonableness of a restraint ought not to depend on a mechanical distinction between freeholds and leaseholds." Berger, supra note 20, at 1019.
\(^12\) See text at note 92 infra.
\(^13\) Herselman, Operating Problems of the Condominium, Transcript of Symposium on Practical Problems of Condominium 34 (1964).
with the consent of the Board of Directors or two thirds of the owner-
tenants. In a suit brought for declaratory relief,62 a New York court
stated that there was a rule that one could not restrain the transfer of
property but that in the case of a proprietary lease, "the special nature
of ownership of cooperative apartment houses by tenant owners re-
quires that they be not included in the general rule against restraint on
the sale of stock in corporations organized for profit."63 In discussing
the important factors, the court pointed out that the tenant stock-
holders are concerned with the purchase of a home, and therefore "the
residential nature of the enterprise, the privilege of selecting neighbors
and the needs of the community are not to be ignored."64 The court
also noted that "Under the 'Plan of Organization' each stockholder is
entitled to vote upon the choice of neighbors and their financial re-
sponsibility [because] the failure of any tenant to pay his propor-
tion of operating expenses increases the liability of other tenant stock-
holders."65

In Weisner v. 791 Park Ave. Corp.,66 New York was again concerned
with the refusal of a stock cooperative to consent to an assignment
of stock and a lease. The Court of Appeals implied that the discretion
of a cooperative corporation, based on non-discriminatory grounds, was
not reviewable by the courts:

The statute which prohibits discrimination in co-operatives because
of race, color, religion, national origin or ancestry is not involved in
this case. Absent the application of these statutory standards, there
is no reason why the owners of the co-operative apartment house
could not decide for themselves with whom they wish to share their ele-
vators, their common halls and facilities, their stock holders' meetings,
their management problems and responsibilities and their homes.67

The latest landmark case on this point, and the only one not in-
volved a stock cooperative, is Gale v. York Center Community Co-
operative, Inc.68 This Illinois case involved not a statutory condo-
mium but rather a seventy-two unit cooperative housing association.
Under the rules of the association, when a member wished to withdraw
he had to give written notice to the Board of Directors. The Association

63 Id. at 692, 11 N.Y.S.2d at 423.
64 Id. at 691, 11 N.Y.S.2d at 422.
65 Id.
67 Id. at 434, 160 N.E.2d at 724, 190 N.Y.S.2d at 75.
68 21 Ill. 2d 86, 171 N.E.2d 30 (1961).
then had twelve months in which to purchase his membership at any of three prices: (1) the selling price in the notice; (2) an agreed-on price; or (3) impartial appraisal. If the association did not exercise its option within twelve months the membership could be sold on the open market. If the new purchaser was not acceptable to the association, it could redeem from the purchaser within ninety days. If the association failed to redeem within ninety days the purchaser acquired membership in the association upon request. When a member died, if his interest passed to an immediate member of his family, that survivor could become a member. If it went to some other person, the association could redeem within ninety days. Although not a statutory condominium, the individual members were able to finance their units individually and thus were relieved of the financial dependence which is characteristic of the stock cooperative. Despite the exceedingly lengthy period of time in which the association could exercise its option and even though the association differed from a stock cooperative, the Illinois court upheld the restraint on transfer of membership and the restraint on admission of new members. In reaching its decision, the court said:

From the authorities examined, it would appear that the crucial inquiry should be directed at the utility of the restraint as compared with the injurious consequences that will flow from its enforcement. If accepted social and economic considerations dictate that a partial restraint is reasonably necessary for their fulfillment, such a restraint should be sustained. No restraint should be sustained simply because it is limited in time, or the class of persons excluded is not total, or all modes of alienation are not prohibited. These qualifications lessen the degree to which restraints violate general public policy against restraining alienation of property and should be considered to that extent; but they are not, in themselves, sufficient to overcome it. In short, the law of property, like other areas of the law, is not a mathematical science but takes shape at the direction of social and economic forces in an ever changing society, and decisions should be made to turn on these considerations.

We are of the opinion that the utility of the restraints in this agreement outweigh the injurious consequences to the public, if any.60

It is not surprising, in view of the liberality with which the various courts have treated restrictive clauses, that such clauses in actual use have attempted to impose a great deal of limitation upon the right of unit owners to lease or convey their units.

60 Id. at 92-93, 171 N.E.2d at 33.
First Refusal Rights in California

The right of first refusal has had a varied background in California. California, unlike most other states, has been concerned with the problem of dual jurisdiction in the condominium field. With the adoption of the Condominium Bill in September, 1963, the Commissioner of Corporations asserted jurisdiction over the field of condominiums. Because of the possibility that first refusal clauses could be used as a means of discriminating, the Commissioner of Corporations and the Division of Corporations refused to issue any permits for the sale of condominium units which contained any such clause. Prior to assertion of jurisdiction by the Division of Corporations over this area, many by-laws or articles of California stock-cooperatives and common law condominium apartments contained some sort of first refusal right.

These pre-statutory first option provisions ranged from a relatively simple declaration forbidding resale of a unit without first obtaining the written approval of the Board of Governors, as in the Lynch Project, to that requiring the unit owner to notify the Board of Governors of his intention to sell and imposing a time limitation on the exercise of the first option by the other unit owners, as in the Toluca Lake Project, to that, as found in the Las Placitas Apartment Condo-

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72 E.g., By-Laws of Wilshire Ardmore Cooperative, Inc., supra note 17.
73 See, e.g., notes 75, 76 infra.
74 "At any time subsequent to the original sale of any individual dwelling unit, no owner shall sell, otherwise convey, or lease his interest in said real property without first furnishing to the Board of Governors all available information concerning said prospective purchaser, transferee or lessee, and without first obtaining the written approval of the Board of Governors to such sale, transfer or lease." Declaration of Covenants, Conditions & Restrictions, art. X Lynch Condominium, Los Angeles County, Calif.
75 "1. Prior to the sale of any Unit, if said sale is to take place within twenty (20) years of the date of recordation of this declaration, the Unit owner desiring to sell shall submit to the Board of Governors a notice in writing of any intended sale (which notice shall set forth the terms under which the Unit owner intends to make such sale, together with the name of the prospective purchaser) and the Board shall at once give written notice thereof to each other Unit owner. Within fifteen (15) days of receipt of notice from the Board of Governors, the then existing Unit owners either collectively or as individuals, shall have the right to purchase said Unit upon the terms provided in the notice to the Board, or upon such other terms as may be agreeable between the parties.

2. If, within said fifteen (15) days, any Unit owner desires to purchase said Unit he shall immediately send written notice to the Board of Governors and the Unit owner intending to sell, and within ten (10) days thereafter negotiations shall commence between the interested parties. In the event no action is taken as herein provided,
imposing both a ceiling price and a destruction of title as part of its conditions. It is submitted that a restriction such as the one contained in the Las Placitas condominium articles, if adopted today, would be invalid because of the fact that it attempts to destroy title upon a breach of covenant and because of the fact that such a dollar limitation on the right of an owner of realty to convey would probably be an unreasonable restraint on alienation.

The reasonableness of a restraint ought not to depend on a mechanical distinction between freeholds and leaseholds. The balance [of showing reasonableness] is more nicely drawn when the venture is bound to match the offer that it refuses to sanction. Because this resembles the garden-variety right of first refusal, a court is likely to give approval unless its demonstrable purpose be to facilitate discrimination.

The proposal of sale shall be deemed approved by the Board of Governors.” Declaration of Covenants, Conditions & Restrictions, art. 20 Toluca Lake Townhouse, Los Angeles County, Calif.

“Declarants hereon agree that the success of their enjoyment of living in a condominium (under the type of arrangement contemplated herein) is dependent upon harmonious and cordial relationships between the owner occupants of the units in the buildings. Thus, it is desirable that the occupants of the condominium be similar in nature, type and appearance and position in the community as that of the declarants herein. Said unit shall not be sold, or leased or sublet, and such sale, lease or subletting shall be void unless the purchaser, tenant or subtenant shall be first approved in writing by the Board of Governors herebefore referred to. Said Board shall be given notice in writing of any intended sale, lease or sublease (which notice shall set forth in writing the terms under which the owner intends to make such sale, lease or sublease), and said Board shall at once give written notice thereof to each other unit owner. The person or persons desiring to make such sale, lease or underletting shall arrange with the Board for the prospective occupants, whether purchaser(s), Lessee(s) or sub-lessee(s), to be interviewed by the Board and said Board shall have five (5) days following the said interview, exclusive of the day of interview and exclusive of Saturdays, Sundays and Holidays, to approve in writing or disapprove in writing, the proposed sale, lease, or subletting. In the event of the failure of the person desiring to make such sale, lease or subletting to arrange for such interview, the Board shall have 90 days. In the event of a disapproval, the Board shall have 14 days after notice of its disapproval, within which to exercise its first option to purchase, lease or sublet the unit, as the case may be, for and in behalf of the owners of other units on the same terms of sale, lease or sub-lease under which the owner of the said dwelling unit proposes to sell, lease or sublease; save that in no event shall said Board be required to pay more than 10% above the prevailing rents for units of similar size and comparable location in the case of a lease or sublease, nor shall the Board be required to pay more than what the owner originally paid for the unit, plus a sum equal to 5% per year, of the original purchase price, said amount to be prorated and to be computed from the first of the month following the date on which the owner originally takes possession and/or title, whichever occurs first, of the dwelling unit.” Declaration of Covenants, Conditions and Restrictions, art. 20 Las Placitas Condominium, Los Angeles County, Calif.

See Berger, supra note 20 at 1019.
The right of first refusal again became a problem in California with the adoption of the 1965 Condominium Bill. This new law, among other things, excluded condominium developments, as well as other real property developments, from the Corporate Securities Law. Sole jurisdiction was vested in the Division of Real Estate.

The Real Estate Commissioner adopted regulations which dealt, *inter alia*, with the problem of first option rights, both in the fields of usage and sale of condominium units. The regulations, as they apply to interests in condominiums, now read:

Unless unusual and compelling considerations are presented, the commissioner will ordinarily be guided by the following general policies, and will not consider as reasonable:

1. provisions which deny, limit or abridge, directly or indirectly, the right of any owner to sell, lease or rent his unit in a condominium, community apartment project or planned development; except that a reasonable plan may be utilized which sets forth uniform and objective standards and qualifications for the sale or lease. Should the unit owner be unable to find a purchaser or lessee meeting such uniform and objective standards, he may be required to give the governing body an option to purchase or lease said unit before selling or leasing to a person who does not meet such standards provided, however, that any such provisions providing for a right to repurchase by the governing body must be exercised within 15 days of receipt of written notice from the unit owner to the subdivider, governing body or authorized representative thereof.

An analysis of the statutory condominium clauses governing the restrictions on sale or conveyancing of a unit in other states, having legislation similar to that of California, would provide a useful landmark for a California declaration. The common feature found in all these declarations is the right of the association to force a unit owner to offer his unit to the governing body prior to his right to transfer it to any other person.

**Stock Cooperatives in California**

Because of their favored position in the law, the use of a stock cooperative combined with a long term proprietary lease has avoided

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81 Cal. Admin. Code, tit. 10, ch. 6, art. 12, § 2792.10.
82 Appendices I, II, III, IV
83 For a discussion which recommends that the governing body not give itself the power to purchase a unit from the proposed transferor see McClaughan, *The Florida Condominium Act Applied*, 17 U. Fla. L. Rev. 1, 44-45 (1964).
84 See text at notes 14-16 supra.
many of the problems of enforcing a restriction on the right of resale.

Restrains on alienation of the corporate stock and lease have usually taken one of the following forms: (1) the shareholder must give back his stock in return for his initial down payment;\(^{85}\) (2) the shareholder must offer his stock to the corporation at a pre-determined price reflecting book value usually with a cost-of-living index increase;\(^{86}\) (3) the selling member must offer the shares to the corporation at a price equivalent to the transfer value of the stock;\(^{87}\) (4) the corporation must approve the prospective purchaser-lessee.\(^{88}\)

The passage of the 1965 Condominum Bill\(^{89}\) has radically changed this situation in California. The effect of this new law is to broaden the definition of a subdivision to include a stock cooperative.\(^{90}\) The California Corporation Code was also amended to exclude from the operation of the corporate securities law any interest in a subdivision, which now includes a stock cooperative.\(^{91}\)

Pursuant to this new area of authority, the Division of Real Estate promulgated new regulations:

Unless unusual and compelling considerations are presented, the commissioner will ordinarily be guided by the following general policies with regard to stock cooperatives and will not consider as reasonable:

(1) provisions which deny, limit or abridge, directly or indirectly, the right of any member to sell, lease or rent his interest in a stock cooperative; except that a reasonable plan may be utilized which sets forth uniform and objective standards and qualifications for the sale or lease. Should the member be unable to find a purchaser or lessee meeting such uniform and objective standards, he may be required to give the cooperative an option to purchase or lease said unit before selling or leasing to a person who does not meet such standards, provided, however, any such provisions providing for a right to repurchase by the cooperative must be exercised within 15 days of receipt of written notice from the member to the cooperative or its authorized representative.\(^{92}\)

It is submitted that the effect of these statutory changes and ad-
ministrative regulations is to squarely equate the condominium and the stock cooperative in California relative to the right of the governing body to regulate the owner-lessee's power to sell or use his dwelling unit.

Possible Restrictions That Might Be Upheld in California

There is no doubt that a provision giving the Board of Governors the right to refuse a transfer to a party because of race, color, creed, or national origin would be unenforceable. It is submitted that the most prevalent concept running through all of the restrictions examined by this author which would have the greatest possibility of being sustained in California, is that of the approval of the financial and economic stability of the proposed purchaser. This restriction would probably be sustained because financial status is a valid indication of a person's station and status in life, and persons of like financial ability are those most likely to enjoy the same tastes, needs and positions in society.

However, this argument may not be valid under a California statutory condominium where the parties are not financially interdependent. As pointed out by Professor Berger, the stock cooperative tenant and common law cooperative owner were saddled with an undivided liability for mortgages and a single tax assessment. These two items frequently exceed two-thirds of the monthly assessment. In the typi-

93 Shelley v. Kraemer, 334 U.S. 1, 13 (1948); Gandolfo v. Hartman, 49 Fed. 181 (S.D. Cal. 1892). "To qualify for FHA insurance, a mortgagor of a condominium unit must establish that no restriction upon the sale or occupancy of the mortgaged property, on the basis of race, color, or creed, has been filed of record at any time subsequent to February 15, 1950, and prior to the recording of the mortgage offered for insurance." 24 C.F.R. § 234.66. Executive Order No. 11063, 27 Fed. Reg. 11527 (1962) is designed to create equal opportunities in housing regardless of race, color, creed or national origin and applies to privately financed structures where loans are insured, guaranteed or otherwise secured by the credit of the federal government.

94 "It is quite natural that people who have approximately the same level of income should feel more comfortable about each other. They are bound to have the same sort of economic pattern, similar ways of spending and saving, and similar tastes. They are more likely to be able to work together on committees and see eye to eye on how their building's budget should be handled. They are also going to socialize with each other more readily as their personal entertainment budgets will be more or less the same. . Economic and social equality among tenant-owners will make it as sure as humanly possible that any squabbles remain of minor importance." Voce, The Co-op Apartment 49-50 (1960). See also Teitelbaum, supra note 22, at 422.

95 Berger, supra note 20, at 993.

96 E.g., Central Park Towers Cooperative Inc., New York City, Offering Plan, March 1963, pp. 11-12 (estimated at 76.7%); 201 East 79th Street Apartment Corp., New York City, Offering Statement, March 1963, p. 31 (estimated at 69.4%).
cal statutory condominium in California, it would not be surprising to have the common expenses, such as gardening, insurance, roof repair and maintenance of common areas, amount to only ten to fifteen per cent of the total normal carrying charges of each unit. Thus, where there is no joint responsibility for the common expenses of the property the owner of a condominium may not have a sufficient interest in the financial stability of the other owners to justify the validity of a provision restricting transfer until the financial status of the proposed transferee is approved. Likewise, the California courts might hold that credit responsibility should be left to the discretion of the financial institution lending to the purchaser at time of sale or to the FHA in the case of an FHA-insured mortgage.

Conclusion

As a result of recent legislation and regulations, the right of first refusal in California is apparently not in accord with traditional judicial interpretation or with preemptive rights contained in condominium declarations in the rest of the United States. To the extent that discrimination based upon race, color, creed or national origin is prohibited, no objection can be had with the new legislation and regulations. It would appear, however, that the regulations might extend beyond the necessary limit.

Furthermore, the regulations impose upon the developer the burden of proof of showing the reasonableness of any restrictions. What is a reasonable restriction is not clearly delineated by the Real Estate Commissioner; but it is submitted that a developer may be able to impose restrictions precluding transfer to: (1) persons convicted of a felony in California, or an act that would have been a felony, if committed within this state, (2) persons above a maximum age, (3) persons who have been unsuccessful defendants in actions for unlawful

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97 Assuming a purchase price of $30,000.00 with 25% down payment, mortgage payments would approximate $135.00 monthly, taxes would approximate $55.00 per month and common expenses would amount to $21.00 per month, or 10.5% of the total monthly expenses. The Hamilton House, a sixteen unit condominium located in La Jolla Heights, Los Angeles County, Cal., and Brierwood Terrace, a lateral condominium development located in Inglewood, Cal., show common expenses of approximately 10-15% of the total monthly expenses.

98 "Without the strong financial incentive for sustaining the right of first refusal in a condominium, it may be asked whether the courts will sustain it for social reasons alone." Comment, 31 Geo. Wash. L. Rev. 1014, 1028 (1963).

99 Hershman, op. cit. supra note 61, at 35.

100 See text at notes 79-81, 89-92 supra.

101 See text at notes 81, 92 supra.
detained, (4) persons who have been convicted of crimes involving moral turpitude, and (5) persons with a minimal financial position.\textsuperscript{102}

While the new regulations apparently permit some sort of control and are more liberal than the position previously taken by the Division of Corporations, one must wonder whether the rights of first refusal allowed by the Division of Real Estate are fiction, rather than fact. The condominium developer is facing a trial and error period in determining the true nature and extent of preemptive, or first refusal, rights in California.

Appendix I

400 South Ocean Boulevard is a sixty-four unit apartment building located in Palm Beach County, Florida, consisting of four stories plus penthouses. Its declaration reads, in part, as follows:

VI. Conveyances

In order to assure a community of congenial residents and thus protect the value of the Apartments, the sale, leasing and mortgaging of Apartments shall be subject to the following provisions until this Declaration is terminated in accordance with provisions herein elsewhere contained, or until the Building is no longer tenable, whichever first occurs:

1. Sale or Lease. No Apartment Owner may dispose of an Apartment or any interest therein by sale or by lease without approval of the Board of Governors of Association, which approval of the Association shall be obtained in the manner hereinafter provided.

(a) Notice to Association. An Apartment Owner intending to make a sale or a lease of his Apartment or any interest therein shall give notice to the Association of such intention, together with the name and address of the intended purchaser or lessee, such other information as the Association reasonably may require and the terms of the proposed transaction. The giving of such notice shall constitute a warranty and representations by the Apartment Owner to the Association and any purchaser or lessee produced by the Association as hereinafter provided, that the Apartment Owner believes the proposal to be bona fide in all respects.

(b) Election of Association. Within thirty (30) days after receipt of such notice, the Board of Governors of the Association shall either approve the transaction or furnish a purchaser or lessee approved by the Association (and give notice thereof to the person desiring to sell or lease his Apartment) who will accept the transaction upon terms as favorable to the seller as the terms stated in the notice, except that a purchaser or lessee furnished by the Association may have not less than thirty (30)

\textsuperscript{102} This factor is questionable today. See text at notes 93-99 supra. It seems certain that under no circumstances would it be allowable to impose an arbitrary preemptive price, but that any such price may have to match an outside bona fide bid. See text at note 78 supra.
days subsequent to the date of approval within which to close the transaction, and except that the approval of a corporation may be conditioned as elsewhere stated. The approval of the Board of Governors of the Association shall be in recordable form, signed by any two members of the Board, and shall be delivered to the purchaser or lessee. The failure of the Association to act within such 30-day period shall be deemed to constitute approval, following which the Association nevertheless shall prepare and deliver written approval in recordable form, as foreseen. The Apartment Owner giving such notice shall be bound to consummate the transactions with such purchaser or lessee as may be approved and furnished by the Association.

2. **Mortgage.** No Apartment Owner may mortgage his Apartment nor any interest therein without the approval of the Association except to a bank, life insurance company or federal savings and loan association.

**Appendix II**

An even more extensive provision governing the transfer of units is found in the St. Tropez Condominium, a thirty-five story building containing 301 apartments and 4400 square feet of professional offices, located at 340 East 64th Street, New York, New York.

**Article VII. Sales, Leases and Mortgages of Units**

**Section 1. Sales and Leases.** No unit owner may sell or lease his apartment unit or any interest therein except by complying with the following provisions:

Any unit owner who receives a bona fide offer for the sale of his apartment unit together with: (i) the undivided interest in the common elements appurtenant thereto; (ii) the interest of such unit owner in any apartment unit theretofore acquired by the Board of Managers, or its designee, on behalf of all unit owners, or the proceeds of the sale or lease thereof, if any; and (iii) the interest of such unit owner in any other assets of the Condominium, (hereinafter collectively called the “Appurtenant Interests”), or a bona fide offer for a lease of his apartment unit, (hereinafter called an “Outside Offer”), which he intends to accept, shall give notice to the Board of Managers of such offer and of such intention, the name and address of the proposed purchaser or lessee, the terms of the proposed transaction and such other information as the Board of Managers may reasonably require, and shall offer to sell such apartment unit, together with the Appurtenant Interests, or to lease such apartment unit, to the Board of Managers, or its designee, corporate or otherwise, on behalf of the owners of all other apartment units, on the same terms and conditions as contained in such Outside Offer. The giving of such notice shall constitute a warranty and representation by the unit owner who has received such offer, to the Board of Managers on behalf of the other unit owners, that such unit owner believes the Outside Offer to be bona fide in all respects. Within thirty days after receipt of such notice, the Board of Managers may elect, by notice to such unit owner, to purchase such apartment unit, together with the Appurtenant Interests, or to lease such apartment unit, as the case may be, (or to cause the same
to be purchased or leased by its designee, corporate or otherwise), on behalf of all other unit owners, on the same terms and conditions as contained in the Outside Offer and as stated in the notice from the offering unit owner. In the event the Board of Managers shall elect to purchase such apartment unit, together with the Appurtenant Interests, or to lease such apartment unit, or to cause the same to be purchased or leased by its designee, corporate or otherwise, title shall close at the office of the attorneys for the Condominium forty-five (45) days after the giving of notice by the Board of Managers of its election to accept such offer. At the closing, the unit owner, if such apartment unit, together with the Appurtenant Interests, is to be sold, shall convey the same to the Board of Managers, or to its designee, on behalf of all other unit owners, by deed in the form required by section 399-o of the Real Property Law of the State of New York, with all Federal Documentary stamps affixed, and shall pay all New York City Real Property Transfer taxes and all other taxes arising out of such sale. In the event such apartment unit is to be leased, the offering unit owner shall execute and deliver to the Board of Managers, or to its designee, a lease between the offering unit owner, as landlord, and the Board of Managers, or its designee, as tenant, covering such apartment unit, on the terms and conditions contained in such Outside Offer. In the event the Board of Managers or its designee shall fail to accept such offer within thirty days as aforesaid, the offering unit owner shall be free to contract to sell such apartment unit, together with the Appurtenant Interests, or to lease such apartment unit, as the case may be, within sixty days after the expiration of the period in which the Board of Managers or its designee might have accepted such offer, to the Outside Offeror, on the terms and conditions set forth in the notice from the offering unit owner to the Board of Managers of such Outside Offer. Any such deed to an Outside Offeror shall provide that the acceptance thereof by the grantee shall constitute an assumption of the provisions of the Declaration, the By-Laws and the Rules and Regulations, as the same may be amended from time to time. Any such lease shall be consistent with these By-Laws and shall provide that it may not be modified, amended, extended or assigned, without the prior consent in writing of the Board of Managers, that the tenant shall not sublet the demised premises, or any part thereof, without the prior consent in writing of the Board of Managers, and that the Board of Managers shall have power to terminate such lease and/or to bring summary proceedings to evict the tenant in the name of the landlord thereunder, in the event of default by the tenant in the performance of such lease. Except as herebefore set forth, the form of any such lease shall be the then current form of apartment lease recommended by the Real Estate Board of New York, Inc., with such modifications as shall be approved in writing by the Board of Managers. In the event the offering unit owner shall not, within such 60 day period, contract to sell such apartment unit, together with the Appurtenant Interests, or to lease such apartment unit, as the case may be, to the Outside Offeror on the terms and conditions contained in the Outside Offer, or if the unit owner shall so contract to sell or lease his apartment unit within such sixty day period, but such sale or lease shall not be consummated pursuant to the terms of such contract, then should such offering unit owner thereafter elect to sell such apartment unit, together with the Appurtenant
Interests, or to lease such apartment unit, as the case may be, to the same or another Outside Offeror on the same or other terms and conditions, the offering unit owner shall be required to again comply with all of the terms and provisions of this Section 1 of this Article VII.

Any purported sale or lease of an apartment unit in violation of this section shall be voidable at the election of the Board of Managers.

Section 2. Consent of Unit Owners to Purchase or Lease of Apartment Units by Board of Managers. The Board of Managers shall not exercise any option hereinafore set forth to purchase or lease any apartment unit without the prior approval of a majority of the unit owners.

Section 3. No Severance of Ownership. No unit owner shall execute any deed, mortgage, or other instrument conveying or mortgaging title to his apartment unit without including therein the Appurtenant Interests, it being the intention hereof to prevent any severance of such combined ownership. Any such deed, mortgage, or other instrument purporting to effect one or more of such interests, without including all such interests, shall be deemed and taken to include the interest or interests so omitted, even though the latter shall not be expressly mentioned or described therein. No part of the Appurtenant Interests of any apartment unit may be sold, transferred or otherwise disposed of, except as part of a sale, transfer or other disposition of the apartment unit to which such interests are appurtenant, or as part of the sale, transfer or other disposition of such part of the Appurtenant Interests of all apartment units.

Section 4. Release by Board of Managers of Right of First Refusal. The right of first refusal contained in Section 1 of this Article VII may be released or waived by the Board of Managers in which event the apartment unit, together with the Appurtenant Interests, may be sold, conveyed, or leased, free and clear of the provisions of such section.

Section 5. Certificate of Termination of Right of First Refusal. A certificate, executed and acknowledged by the Secretary of the Condominium, stating that the provisions of Section 1 of this Article VII have been met by a unit owner, or have been duly waived by the Board of Managers, and that the rights of the Board of Managers thereunder have terminated, shall be conclusive upon the Board of Managers and the unit owners in favor of all persons who rely thereon in good faith. Such certificate shall be furnished to any unit owner who has in fact complied with the provisions of Section 1 of this Article VII or in respect to whom the provisions of such section have been waived, upon request, at a reasonable fee, not to exceed Ten Dollars ($10.00).

Section 6. Financing of Purchase of Apartment Units by Board of Managers. Acquisition of apartment units by the Board of Managers, or its designee, on behalf of all unit owners, may be made from the working capital and common charges in the hands of the Board of Managers, or if such funds are insufficient, the Board of Managers may levy an assessment against each unit owner in proportion to his ownership in the common elements, as a common charge, which assessment shall be enforceable in the same manner as provided in Sections 6 and 7 of Article V, or the Board of Managers, in its discretion, may borrow money to finance the acquisition of such apartment unit, provided, however, that no financing may be secured
by an encumbrance or hypothecation of any property other than the apart-
ment unit, together with the Appurtenant Interests, so to be acquired by the
Board of Managers.

Section 7. Exceptions. The provisions of Section 1 of this Article VII
shall not apply with respect to any sale or conveyance by a unit owner of his
apartment unit, together with the Appurtenant Interests, to his spouse or to
any of his children or to his parent or parents or to his brothers or sisters,
or any one or more of them, or to an apartment unit owned by the Sponsor, or
to the acquisition or sale of an apartment unit, together with the Appur-
tenant Interests, by a mortgagee hereinafter authorized who shall acquire title
to such unit by foreclosure or by deed in lieu of foreclosure. However, the
provisions of this section shall apply with respect to any purchaser of such
apartment unit from such mortgagee.

Section 8. Gifts and Devises, etc. Any unit owner shall be free to convey
or transfer his apartment unit by gift, or to devise his apartment unit by will,
or to pass the same by intestacy, without restriction.

Section 9. Waiver of Right of Partition With Respect to Such Apart-
ment Units as Are Acquired by the Board of Managers, Or Its Designee, on
Behalf of All Unit Owners as Tenants in Common. In the event that an
apartment unit shall be acquired by the Board of Managers, or its designee,
on behalf of all unit owners as tenants in common, all such unit owners shall
be deemed to have waived all rights of partition with respect to such apart-
ment unit.

Appendix III

The declaration of VILLA D’ESTE, a condominium located at 2665 North
Ocean Boulevard, Gulf Stream, Florida, provides:

12. MAINTENANCE OF COMMUNITY INTERESTS. In order to main-
tain a community of congenial residents and thus protect the value of the
apartments, the transfer of apartments by any owner other than the de-
veloper shall be subject to the following provisions so long as the con-
dominium exists and either of the apartment buildings in useful condition
exists upon the land, which provisions each other covenants to observe:

1. Transfers subject to approval.
   (a) Sale. No apartment owner may dispose of an apartment or any
interest therewith by sale without approval of the Association except to an
apartment owner.
   (b) Lease. No apartment owner may dispose of an apartment or any
interest therewith by lease without approval of the Association except to an
apartment owner.
   (c) Gift. If any apartment owner shall acquire his title by gift, the
continuance of his ownership of his apartment shall be subject to the ap-
proval of the Association.
   (d) Devise or inheritance. If any apartment owner shall acquire
his title by devise or inheritance, the continuance of his ownership of his apartment shall be subject to the approval of the Association.

(e) Other transfers. If any apartment owner shall acquire his title by any manner not heretofore considered in the foregoing subsections, the continuance of his ownership of his apartment shall be subject to the approval of the Association.

2. Approval by Association. The approval of the Association which is required for the transfer or ownership of apartments shall be obtained in the following manner:

(a) Notice to Association.

(1) Sale. An apartment owner intending to make a bona fide sale of his apartment or any interest therein shall give to the Association notice of such intention, together with the name and address of the intended purchaser and such other information concerning the intended purchaser as the Association may reasonably require. Such notice at the apartment owner's option may include a demand by the apartment owner that the Association furnish a purchaser if the proposed purchaser is not approved; and if such demand is made, the notice shall be accompanied by an executed copy of the proposed contract to sell.

(2) Lease. An apartment owner intending to make a bona fide lease of his apartment or any interest therein shall give to the Association notice of such intention, together with the name and address of the intended lessee, such other information concerning the intended lessee as the Association may reasonably require, and an executed copy of the proposed lease.

(3) Gift; devise or inheritance; other transfers. An apartment owner who has obtained his title by gift, devise or inheritance, or by any other manner not heretofore considered, shall give to the Association notice of the acquiring of his title, together with such information concerning the apartment owner as the Association may reasonably require, and a certified copy of the instrument evidencing the owner's title.

(4) Failure to give notice. If the notice to the Association hereon required is not given, then at any time after receiving knowledge of a transaction or event transferring ownership or possession of an apartment, the Association at its election and without notice may approve or disapprove the transaction or ownership. If the Association disapproves the transaction or ownership, the Association shall proceed as if it had received the required notice on the date of such disapproval.

(b) Certificate of approval.

(1) Sale. If the proposed transaction is a sale, then within 30 days after receipt of such notice and information the Association must either approve or disapprove the proposed transaction. If approved, the approval shall be stated in a certificate executed by the president and secretary of the Association in recordable form and shall be delivered to the purchaser and shall be recorded in the public records of Palm Beach County, Florida.

(2) Lease. If the proposed transaction is a lease, then within 30 days after receipt of such notice and information the Association must either approve or disapprove the proposed transaction. If approved, the approval shall be stated in a certificate executed by the president and secretary of the Association in recordable form and shall be delivered to the lessee.
(3) Gift; devise or inheritance; other transfers. If the apartment owner giving notice has acquired his title by gift, devise or inheritance or in any other manner, then within 30 days after receipt of such notice and information the Association must either approve or disapprove the continuance of the apartment owner's ownership of his apartment. If approved, the approval shall be stated in a certificate executed by the president and secretary of the Association in recordable form and shall be delivered to the apartment owner and shall be recorded in the public records of Palm Beach County, Florida.

(c) Approval of corporate owner or purchaser. Inasmuch as the condominium may be used only for residential purposes and a corporation cannot occupy an apartment for such use, if the apartment owner or purchaser of an apartment is a corporation, the approval of ownership by the corporation may be conditioned by requiring that all persons occupying the apartment be also approved by the Association.

2. Disapproval by Association. If the Association shall disapprove a transfer or ownership of an apartment, the matter shall be disposed of in the following manner:

(a) Sale. If the proposed transaction is a sale and if the notice of sale given by the apartment owner shall so demand, then within 30 days after receipt of such notice and information the Association shall deliver or mail by registered mail to the apartment owner an agreement to purchase by a purchaser approved by the Association who will purchase and to whom the apartment owner must sell the apartment upon the following terms:

(1) At the option of the purchaser to be stated in the agreement, the price to be paid shall be that stated in the disapproved contract to sell or shall be the fair market value determined by arbitration in accordance with the then existing rules of the American Arbitration Association, except that the arbitrators shall be appraisers appointed by the American Arbitration Association who shall base their determination upon an average of their appraisals of the apartment; and a judgment of specific performance of the sale upon the award rendered by the arbitrators may be entered in any court of competent jurisdiction. The expense of the arbitration shall be paid by the purchaser.

(2) The purchase price shall be paid in cash.

(3) The sale shall be closed within 30 days after the delivery or mailing of said agreement to purchase, or within 10 days after the determination of the sale price if such is by arbitration, whichever is the later.

(4) If the Association shall fail to provide a purchaser upon the demand of the apartment owner in the manner provided, or if a purchaser furnished by the Association shall default in his agreement to purchase, the proposed transaction shall be deemed to have been approved and the Association shall furnish a certificate of approval as elsewhere provided.

(b) Lease. If the proposed transaction is a lease, the apartment owner shall be advised of the disapproval in writing, and the lease shall not be made.

(c) Gifts, devise or inheritance; other transfers. If the apartment owner giving notice has acquired his title by gift, devise or inheritance, or in any other manner, then within 30 days after receipt from the apartment owner of the notice and information required to be furnished, the Associa-
tion shall deliver or mail by registered mail to the apartment owner an agreement to purchase by a purchaser approved by the Association who will purchase and to whom the apartment owner must sell the apartment upon the following terms:

(1) The sale price shall be the fair market value determined by agreement between the seller and purchaser within 30 days from the delivery or mailing of such agreement, and in the absence of agreement as to price, it shall be determined by arbitration in accordance with the then existing rules of the American Arbitration Association, except that the arbitrators shall be two appraisers appointed by the American Arbitration Association who shall base their determination upon an average of their appraisals of the apartment; and a judgment of specific performance of the sale upon the award rendered by the arbitrators may be entered in any court of competent jurisdiction. The expense of the arbitration shall be paid by the purchaser.

(2) The purchase price shall be paid in cash.

(3) The sale shall be closed within ten (10) days following the determination of the sale price.

(4) If the Association shall fail to provide a purchaser as herein required, or if a purchaser furnished by the Association shall default in his agreement to purchase, then notwithstanding the disapproval such ownership shall be deemed to have been approved, and the Association shall furnish a certificate of approval as elsewhere provided.

4. Mortgage. No apartment owner may mortgage his apartment nor any interest therein without the approval of the Association except to a bank, life insurance company or a federal savings and loan association. The approval of any other mortgagee may be upon conditions determined by the Association or may be arbitrarily withheld.

5. Exceptions. The foregoing provisions of this section entitled “Maintenance of community interests” shall not apply to a transfer to or purchase by a bank, life insurance company or federal savings and loan association which acquires its title as the result of owning a mortgage upon the apartment concerned, and this shall be so whether the title is acquired by deed from the mortgagor or his successor in title or through foreclosure proceedings; nor shall such provisions apply to a transfer, sale or lease by a bank, life insurance company or federal savings and loan association which so acquires its title. Neither shall such provisions require the approval of a purchaser who acquires the title to any apartment at a duly advertised public sale with open bidding which is provided by law, such as but not limited to execution sale, foreclosure sale, judicial sale or tax sale.

6. Unauthorized transactions. Any sale, mortgage or lease which is not authorized pursuant to the terms of this Declaration shall be void unless subsequently approved by the Association.

Appendix IV

The declaration of covenants, conditions and restrictions of Three Fountains Young America Family Townhouses, a lateral or townhouse condominium located in Utah, provides:

21. Sale or Lease Right of First Refusal. In the event any Owner of a
condominium shall wish to resell or lease the same, and shall have received a bona fide offer therefor from a prospective purchaser or tenant, the remaining Owners shall be given written notice thereof together with an executed copy of such offer and the terms thereof. Such notice and copy shall be given to the Management Committee for all of the Owners. The remaining Owners through the Management Committee or a person named by the Management Committee, shall have the right to purchase or lease the subject condominium upon the same terms and conditions as set forth in the offer therefor, provided written notice of such election to purchase or lease is given to the selling or leasing Owner, and a matching down payment or deposit is provided to the selling or leasing Owner during the twenty-one-day period immediately following the delivery of the notice of the bona fide offer and copy thereof to purchase or lease.

In the event any Owner shall attempt to sell or lease his condominium without affording to the other Owners the right of first refusal hereinafore provided, such sale or lease shall be wholly null and void and shall confer no title or interest whatsoever upon the intended purchaser or lessee.

The subleasing or subrenting of said interest shall be subject to the same limitations as are applicable to the leasing or renting thereof. The liability of the Owner under these covenants shall continue, notwithstanding the fact that he may have leased or rented said interest as provided herein.

In no case shall the right of first refusal reserved hereinafore affect the right of an Owner to subject his condominium to a trust deed, mortgage or other security instrument.

The failure of or refusal by the Management Committee to exercise the right to so purchase or lease shall not constitute or be deemed to be a waiver of such right to purchase or lease when an Owner receives any subsequent bona fide offer from a prospective purchaser or tenant.

22. Mortgages Not Affected by Right of First Refusal. In the event of any default on the part of any Owner under any first mortgage made in good faith and for value, which entitled the holder thereof to foreclose the same, any sale under such foreclosure, including delivery of a deed to the first mortgagee in lieu of such foreclosure, shall be made free and clear of the provisions of Paragraph 21, and the purchaser (or grantee under such deed in lieu of foreclosure) of the such condominium shall be thereupon and thereafter subject to the provisions of this Declaration. If the purchaser following such foreclosure sale (or grantee under deed given in lieu of such foreclosure) shall be the then holder of the first mortgage, or its nominee, the said holder or nominee may thereafter sell and convey the condominium free and clear of the provisions of Paragraph 21, but its grantee shall thereupon and thereafter be subject to all of the provisions thereof.

The transfer of a deceased joint tenant’s interest to the surviving joint tenant or the transfer of a deceased’s interest to a devisee by will or his heirs at law under intestacy laws shall not be subject to the provisions of Paragraph 21.

If an Owner of a condominium can establish to the satisfaction of the Management Committee that a proposed transfer is not a sale or lease, then such transfer shall not be subject to the provisions of Paragraph 21.

23. Certificate of Satisfaction of Right of First Refusal. Upon written
request of any prospective transferor, purchaser, tenant or an existing or prospective mortgagee of any condominium, the Management Committee shall forthwith, or where time is specified, at the end of the time, issue a written and acknowledged certificate in recordable form, evidencing:

(a) With respect to a proposed lease or sale under Paragraph 21, that proper notice was given by the selling or leasing owner and that the remaining Owners did not elect to exercise their option to purchase or lease.

(b) With respect to a deed to a first mortgagee or its nominee in lieu of foreclosure, and a deed from such first mortgagee or its nominee, pursuant to Paragraph 22, that the deeds were in fact given in lieu of foreclosure and were not subject to the provisions of Paragraph 21.

(c) With respect to any contemplated transfer which is not in fact a sale or lease, that the transfer is not or will not be subject to the provisions of Paragraph 21, such a certificate shall be conclusive evidence of the facts contained therein.