
Campbell Law Review

Volume 30

Spring 2008

Number 3

Drafting Common Interest Community Documents: Minimalism in an Era of Micromanagement

PATRICK K. HETRICK¹

“I should see the garden far better,” said Alice to herself, “if I could get to the top of that hill: and here’s a path that leads straight to it – at least, no, it doesn’t do *that* – ” (after going a few yards along the path, and turning several sharp corners), “but I suppose it will at last. But how curiously it twists! It’s more like a corkscrew than a path! Well *this* turn goes to the hill, I suppose – no, it doesn’t! This goes straight back to the house! Well, then, I’ll try the other way.”

And so she did: wandering up and down, and trying turn after turn, but always coming back to the house, do what she would. Indeed, once, when she turned a corner rather more quickly than usual, she ran against it before she could stop herself.²

I. INTRODUCTION

*“I predict a bright future for complexity.”*³

The term “minimalism,” according to Merriam-Webster, describes “a style or technique (as in music, literature, or design) that is characterized by extreme spareness and simplicity.”⁴ Minimalism is also “a literary or dramatic style or principle based on the extreme restriction of a work’s contents to a bare minimum of necessary elements, nor-

1. Professor of Law, Norman Adrian Wiggins School of Law, Campbell University. A special thanks to Walter Webster, Articles Editor, for his expert assistance on this Article. Many thanks to Campbell law students Ashley Black, Crystal Dawn Hairr, and Julie Shore Weissman for their helpful comments on the manuscript, excellent research assistance and encouragement.

2. LEWIS CARROLL, *THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE* 21-11 (Centennial ed., Random House 1965) (1872).

3. E.B. WHITE, *QUO VADIMUS? OR THE CASE FOR THE BICYCLE* (Garden City Publishing 1946).

4. Merriam-Webster Online Dictionary, <http://www.merriam-webster.com> (last visited on March 8, 2008).

mally within a short form.”⁵ While the contemporary minimalism movement has influenced artists, musicians, film producers, interior designers, and authors of fiction, it has not caught the attention of members of the legal profession. When it comes to the drafting of real estate contracts and documents, the trend in the digital millennium has been in the opposite direction. Through the wonders of word processing, including the all-too-convenient “copy” and “paste” functions, the basic legal documents of yesteryear have been transformed into protracted book-length manuscripts.

Part I of this Article suggests a minimalist approach to the drafting of documentation creating a common interest community. It assumes that the common interest community will be located in a jurisdiction that has passed some form of a comprehensive uniform act.⁶ Part II then analyzes the issue of “promises” (covenants, restrictions, and rules) and addresses issues that include the unfortunate contemporary trend toward micromanagement of communities. It goes on to suggest that a legislative and judicial reaction to private community governance is developing. Part III of this Article explains why existing consumer protection devices are little more than mirages in terms of effectiveness. As a solution, it advocates combining minimalist drafting techniques with concise, meaningful, voluntary disclosures to consumers. Part IV wraps things up with a brief conclusion.

II. THE MINIMALIST DECLARATION

A. *The Problem with Verbosity*

“What, then, is to be done? For starters, the Legal Writing Committee believes lawyers in all their capacities, corporate law firms, judicial, regulatory and legislative, will have to learn to streamline what they write.”⁷

5. Oxford University Press.

6. The term “uniform act” refers generically to the Uniform Planned Community Act, the Uniform Common Interest Community Act, and the Uniform Condominium Act.

7. Duncan McDonald, Esq., Remarks at the American Bar Association Annual Meeting: “Lost Words: The Economical, Ethical and Professional Effects of Bad Legal Writing” 5 (August 5, 1993). Mr. MacDonald also commented: “Ambiguity and verbosity in laws, contracts, judicial decisions and other legal writings also all too often can end up favoring those with wealth and power, those who can afford to pay the cost to find the meaning in a written work, or even worse, to manipulate words to create new unintended meanings, or to intimidate those who are vulnerable. In the worst case, bad writing can weaken the bonds between a people and their government.” *Id.* at 4.

For many modern common interest community developments, the declaration document alone often exceeds fifty pages, and there are, of course, other important documents that bring the page count into the hundreds. For example, a prospective purchaser of a very basic patio home in North Carolina recently received two loose-leaf binders packed with governance verbiage when she asked for all governing documents, covenants, rules and regulations. True, many modern common interest communities are complex and sophisticated and must be written to properly establish and maintain them, but the gradual increase in the length of documents appears to be blindly accepted as a necessary improvement over the quaint, brief subdivision documents of simpler times. One proponent of “plain English” writes:

We lawyers do not write plain English. We use eight words to say what could be said in two. We use arcane phrases to express common place ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences twist on, phrase within clause within clause, glazing the eyes and numbing the minds of our readers. The result is a writing style that has, according to one critic, four outstanding characteristics. It is “(1) wordy, (2) unclear, (3) pompous, and (4) dull.”⁸

In an article dealing with comparative law titled “Verbose Contracts,” Thomas Lundmark observed:

Written agreements drafted by English and especially American lawyers are often much longer than those written by their Continental European colleagues. Critics attribute this verbosity variously to the inclusion in Anglo-American contracts of three classes of extra clauses: (1) recitations of applicable law, commonly referred to as “boilerplate,” (2) provisions for contingencies in performance, and (3) detailed specifications of business terms.⁹

Lundmark continues by identifying features in the Anglo-American legal culture that give rise to verbosity.¹⁰

Lundmark’s article focuses on business transactions, and he distinguishes American real estate contracts and residential leasing contracts as “shorter in English-speaking countries than on the Continent.”¹¹ In this regard, he is obviously not referring to common

8. RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 4 (5th ed. 2005) (citing DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 23 (1963)).

9. Thomas Lundmark, *Verbose Contracts*, 49 *AM. J. COMP. L.* 121 (2001) (citations omitted). See also Claire A. Hill and Christopher King, *How Do German Contracts Do as Much with Fewer Words?* 79 *CHICAGO-KENT L.REV.* 889 (2004).

10. Lundmark, *supra* note 9, at 122.

11. *Id.* at 122, n.6.

interest community documentation, nor to many standard forms real estate sales contracts in use today.¹² By advocating a minimalist drafting approach, I am not suggesting that the current work product of practicing attorneys, many of whom are leading experts in real property law, is inadequate or wrong. As a young associate at an excellent law firm, I was often directed to “get out the Jones file” for such-and-such a document or form. Those carefully prepared documents served as excellent templates for the new drafting project. Rather, by advocating this minimalist approach, I am suggesting that a downsized format for a declaration is possible, and I am challenging myself and readers to think outside of the proverbial Jones file. Furthermore, I am not trying to reinvent the “how to draft a contract” wheel. Excellent resources are already available on the topic of good legal writing,¹³ one of the best is *The Legal Writer* by Judge Mark Painter.¹⁴

12. For example, the standard form used in the vast majority of North Carolina residential real estate sales transactions, titled “Offer to Purchase and Contract,” is seven pages long, and can often grow to a dozen or more pages when standard form addenda are added. Forty-nine words can be eliminated from the first four lines of text on that form and replaced by only five words without sacrificing meaning. Standard Form 2-T, Revised 7/2007 © 2007, North Carolina Association of Realtors®, Inc. This form is identical to Form 2, jointly approved by the North Carolina Bar Association and the North Carolina Association of Realtors®, Inc.

13. See e.g., KENNETH A. ADAMS, *A MANUAL OF STYLE FOR CONTRACT DRAFTING* (ABA Section of Business Law 2004); CHARLES M. FOX, *WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU* (Practising Law Institute 2002); PETER BUTT & RICHARD CASTLE, *MODERN LEGAL DRAFTING* (2d ed. 2006); MICHELE M. ASPREY, *PLAIN ENGLISH FOR LAWYERS* (3d ed. 2003); RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (5th ed. 2005); HOWARD DARMSTADTER, *HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING* (American Bar Association 2002). The *Scribes Journal of Legal Writing* contains a wealth of excellent and concise articles. See, e.g., Wayne Schiess, *What Plain English Really Is*, 9 *SCRIBES J. OF LEGAL WRITING* 43 (2003-04) (responding to David Crump, *Against Plain English: The Case for a Functional Approach to Legal Document Preparation*, 33 *RUTGERS L.J.* 713 (2002)); Mark Mathewson, *A Critic of Plain Language Misses the Mark*, *SCRIBES J. OF LEGAL WRITING* 147 (2001-02) (responding to Richard Hyland, *A Defense of Legal Writing*, 134 *U. PA. L. REV.* 599 (1986)); Maria Mindlin, *Is Plain Language Better? A Comparative Readability Study of Court Forms*, 10 *SCRIBES J. OF LEGAL WRITING* 55 (2005-06) (reporting on a quantitative readability study of plain-language court forms in California).

14. Judge Mark Painter, *THE LEGAL WRITER* (3d ed. 2005). Painter's many tips for plain-language legal writing include a rule for writers of law reviews: “Use no talking footnotes.” He explains:

Don't let footnotes swallow the page from the bottom, as in a law review article. Law reviews sometimes have about five lines of text with the rest of the page in footnotes. And the footnotes talk to one another - in one article I read, footnote 20 referred to footnote 320. I was happy that I would not run

The nature, scope and complexity of the common interest community can have an obvious impact on the length and detail of the declaration and other governing documents. An even more complicating factor is the multiple audiences that the drafting attorney must satisfy. Those audiences include the developer, other investors, regulators (including municipal and county planning departments), lenders, title insurers, real estate agents, initial purchasers, subsequent purchasers, and the homeowner association. But even the largest, most complex community can benefit from a minimalist drafting philosophy. At the same time, large-scale developments—including those with multiple owners associations, a master association, mixed-uses, and a substantial list of amenities—will require comprehensive governing documents, documents that almost all purchasers of homes within the development will never read or even attempt to read. There is no way to avoid these drafting “facts of life.” The best materials and discussions of drafting techniques for these large-scale developments can be found in ALI-ABA continuing legal education manuscripts.¹⁵

On the other hand, there are thousands of common interest communities created each year that are not complex in format and that, therefore, do not require tome-length documentation. The homogeneous single-association residential subdivision—with its private roads, open-space common areas, and, perhaps a swimming pool and several tennis courts—is a prime candidate for a minimalist drafting approach. In drafting for these basic communities, the signature theme should be simplicity. In North Carolina, for example, a residential subdivision of 21 or more lots is a “planned community” if lot owners are obligated by the declaration to pay for expenses of the community.¹⁶ Because uniform acts deal with these non-complex residential subdivisions in comprehensive, across-the-board fashion, there is a decrease in the utility of lengthy governing document verbiage added by the drafting attorney.

out of footnotes. Your goal is to communicate, not to build a resume. If you make your document look like a law review article, it will be just as unreadable, and as unread.

[This footnote, of course, violates Judge Painter’s rule.]

15. See, e.g. ALI-ABA Course of Study, *Resort Real Estate and Clubs: Formation, Documentation, and Operation* (2007); ALI-ABA Course of Study, *Drafting Documents for Residential and Mixed-Use Condominiums and Planned Communities* (2007).

16. N.C. GEN. STAT. § 47F-1-103(23) (2007) defines “planned community” as meaning “real estate with respect to which any person, by virtue of that person’s ownership of a lot, is expressly obligated by a declaration to pay real property taxes, insurance premiums, or other expenses to maintain, improve, or benefit other lots or other real estate described in the declaration.”

A limited empirical study of recorded declarations, covenants and restrictions of recently created common interest communities suggests that there is a great deal of mimicry going on in the drafting of specific covenants and rules.¹⁷ Residential developments of different types and price levels—subdivisions that would appear to have fundamentally different personalities—often have similar covenants or rules dealing with very specific aspects of community governance. This planned community boilerplate suggests that the source of some language dealing with minute details of community living is the lawyer and not the developer. Such boilerplate language turns the notion of the community on its head, for the process of drafting governance documents for a new community ought to be centered on the developer's concept of the nature and personality of the new community. Mimicry of well drafted covenants and restrictions might be a good starting point, but it also has the unfortunate effect of bypassing a healthy process of ascertaining and then capturing in appropriate language the developer's unique vision.

A minimalist drafting philosophy finds indirect support from experts on legal writing, including such notables as Richard A. Posner and Irving Younger. Writing on the topic of judicial prose and persuasive writing generally, Judge Posner mentions "a lack of economy of expression" and "the tendency to overkill, to repetition, to tedium . . . and boilerplate."¹⁸ In an article titled "Skimming the Fat of Your Writing," Younger suggests that the writer "let it drain" and "boil down."¹⁹ He attributes the "letting it drain" approach to a writing technique of Rudyard Kipling:

When Rudyard Kipling finished a story, he would put the manuscript away in a drawer. After a month or so, he took it out, read it over, and struck out every word he then saw to be unnecessary. Kipling called this "letting it drain," and Kipling's "letting it drain" is among the chief assurances of persuasive writing.²⁰

17. The author teaches a "Common Interest Communities Seminar" that focuses on case studies and community documentation. Over fifty sets of common interest documents have been analyzed over the past three years of seminars. In addition, the author has scrutinized over twenty additional sets of contemporary planned community documents.

18. Richard A. Posner, *Legal Writing Today*, 8 SCRIBES J. OF LEGAL WRITING 35 (2001-02) (discussing writing by federal judges and the lawyers who appear before them) [Part of Scribes' "The 'Best of Series.'"]

19. Irving Younger, *Skimming The Fat Off Your Writing*, 8 SCRIBES J. OF LEGAL WRITING 125 (2001-02) [Part of Scribes' "The 'Best of Series.'"]

20. *Id.*

Contemporary advice for aspiring fiction and non-fiction writers echoes the same theme.²¹ While there are material differences between the role of persuasive writing or creative writing and the writing of documents designed to create and govern a common interest community, the theme of brevity and clarity transplants well.

B. *The Prototype Minimalist Declaration*

“As far as the bar is concerned, I think that the practicing bar ought to start concentrating on rewarding brevity and clarity.”²²

I propose a “minimalist declaration” template to be used as a starting point to create a common interest community under any uniform act.²³ Clarity comes with brevity. Less can be more. The North Carolina Planned Community Act is used for convenience, and the drafting approach and concepts suggested are readily adaptable to other uniform acts and extensive statutory codes dealing with common interest communities.²⁴ After setting forth the proposed minimalist declaration, I will dissect the document and explore issues raised by both the proposed minimalist declaration and the much more extensive declarations so prevalent in real property practice.

C. *Analysis of the Minimalist Declaration*

The sample declaration below is the minimalist starting point for a Declaration of Laurel Mountain. The following is a brief analysis.

21. See, e.g., Betty Garton Ulrich, *Words . . . Tools of Our Trade*, 28 WRITERS' J. 57 (May/June 2007) (“Once you know what you want to say, then try rewriting and saying it the best way you know how - and finally, try to tighten it to the fewest words possible.”)

22. The Honorable Abner J. Mikva, Remarks at the American Bar Association Annual Meeting: “Lost Words: The Economical, Ethical and Professional Effects of Bad Legal Writing” 31 (August 5, 1993). Judge Mikva continues, in part: “I go back to my practicing days - I don't remember ever congratulating an associate for giving me a nice, short memo, even though I prefer short memos.”

23. I emphasize the concept of a “starting point.” My prototype minimalist declaration is not intended to be complete. Attorneys experienced at drafting common interest community documents will recognize the need to add provisions to the prototype. On the other hand, each added provision should be justified as important to the needs of the client.

24. While the North Carolina Planned Community Act deviates in some important respects from the Uniform Planned Community Act, the differences between the two acts are irrelevant to this discussion.

Declaration Creating a Planned Community

This Declaration Creating A Planned Community for Laurel Mountain is made on March 15, 2008, by High Ridge, LLC, a North Carolina limited liability company ("Declarant") in conformity with the North Carolina Planned Community Act ("Act").

Vision Statement

Laurel Mountain will be a safe, friendly residential neighborhood that nurtures a sense of mutual respect, cooperation and community. Laurel Mountain will encourage responsible land development, the preservation of the natural beauty of its open spaces and common areas, and fiscal responsibility in the long-term operation and maintenance of the community.

Article I - Definitions

- 1.1 The following key terms are defined in G.S. 47F-1-103: "Allocated interests," "Association" or "Owner's association," "Common elements," "Common expenses," "Declarant," "Declaration," "Executive board," "Limited common element," "Lot," "Lot owner," "Master association," "Person," "Planned community," "Purchaser," "Real estate," "Reasonable attorneys' fees," and, "Special declarant rights."
- 1.2 **Additional Definitions.** The following definitions are not defined in the PCA and are necessary for an understanding of various planned community documents:
"Act" means the North Carolina Planned Community Act, Chapter 47F of the North Carolina General Statutes. All statutory references in this document are to that Act
"Laurel Mountain Property" is real estate described in Exhibit A of this Declaration.
"Promises" are covenants and restrictions that describe and restrict the use of land in Laurel Mountain. They are described in Exhibit B.

Article II - Owners' Association

- 2.1 **Purpose.** The Laurel Mountain Owners' Association, Inc. ("Association") is organized as a nonprofit corporation to promote the common interests of all members, to maintain and operate all common elements, and to encourage policies and activities consistent with the vision statement.
- 2.2 **Powers.** The Association has the powers mentioned in Section 47F-3-102. In the event of merger or consolidation of Laurel Mountain into a new planned community, exercise of any of the powers enumerated in Section 47F-3-102 may be delegated to a master association in compliance with Section 47F-2-120.
- 2.3 **Responsibility for Upkeep.** The Association's responsibility for the maintenance, repair and replacement of common elements is governed by Section 47F-3-107.
- 2.4 **Power to Assess.** The Association's powers to assess members to recover the costs of maintenance, repair or replacement of the common elements are governed by Sections 47F-3-107, 47F-3-107.1, 47F-3-115, 47F-3-116 and 47F-3-120.
- 2.5 **Meetings.** Meetings of the Association are governed by Sections 47F-3-108, 47F-3-109, and 47F-3-110.
- 2.6 **Insurance.** The Association shall fully comply with the insurance guidelines in Section 47F-3-113.
- 2.7 **Records.** The Owners' Association shall keep records in compliance with 47F-3-118.

Article III - Alteration, Merger and Termination

- 3.1 **Amendment of Declaration.** This Declaration may be amended by complying with Section 47F-2-117.
- 3.2 **Merger or Consolidation.** Laurel Mountain may be merged or consolidated into a new planned community after compliance with Section 47F-2-121.
- 3.1 **Termination.** Laurel Mountain may be terminated after compliance with Section 47F-2-118.

The “Title”

The sample declaration has been titled “Declaration Creating A Planned Community,” tracking the language of Section 47F-2-101.²⁵ Popular titles in traditional declaration documents include: “declaration of covenants and restrictions;” “declaration of covenants, conditions and restrictions;” and “declaration of protective covenants.” These traditional titles are, of course, acceptable and appropriately descriptive. My critique of them, however, is that they suggest the primary theoretical context for the current declaration and common interest community is a pre-Uniform Act package of documents and law. Traditional covenants language tends to steer attorneys and judges into a “common law of covenants” mind-set. This is inappropriate because, when problems or issues concerning common interest communities arise in future years, the initial reference point should not be the morass known as the common law of covenants and restrictions; rather, it should be the straightforward statutory framework of the uniform act. The common interest community’s legal foundation should be statute-based, not common law-based. Of course, covenants and restrictions are necessary components of any common interest community, but the public policy blessing that legislatures have bestowed on common interest communities by passing Uniform Act legislation should trump, rather than merely supplement, the common law.

Consider the situation when a developer is creating a condominium development. The declaration in that instance is likely to read “Declaration of Condominium.” Condominium developments, like other forms of common interest communities, are based in significant ways on the common law of covenants and restrictions, yet appellate courts reviewing condominium disputes steer immediately to the Uniform Condominium Act, not the common law. In terms of later disagreements and legal disputes, the nomenclature and focus of the parties and the courts is first on the statutory foundation of the common interest community and only second, if necessary, on the common law of covenants and restrictions.

Another issue is triggered by choice of title and language in declarations. If we view the declaration as a short story, what is the story about? If we substitute “declaration language” for the popular term “body language,” what message is being sent? Will the document be viewed in a negative way as something that restricts and coerces every-

25. N.C. GEN. STAT. § 47F-2-101 (2007). Of course, “Declaration Creating a Common Interest Community” will be the appropriate title in a jurisdiction that has adopted the Uniform Common Interest Community Act.

day life and land use? Or, might the story line present a composite picture of “community” and the many positive features that planning, cooperation and mutual respect provide for future members of the planned community? The declaration is made “in conformity with” the North Carolina Planned Community Act. This is a softer, more reader-friendly version of the perfectly acceptable, but more lawyer-sounding “pursuant to” language.

The “Vision Statement”

The sample declaration avoids legalese and standard boilerplate. The “vision statement” is nothing more than a snapshot of the developer’s aspirations for the new community. The usual convention of setting forth a list of “whereas this” and “whereas that” with still more “whereases” followed by the traditional “now therefore” has been dropped in favor of a concise, positive introductory paragraph. The vision statement is concise, because the developer’s vision of the mission and nature of the community can thereby be communicated more effectively by brochure and web-page –documents and e-documents that the consumer is likely to take the time to read and understand.

Article I - Definitions

Cross-references to the statutory definitions save space and simplify the document. It is a rare consumer who carefully pours over and dissects the definitions in any contract, let alone the many definitions in common interest community documentation. Definitions in this context are not negotiable, and they will not take center stage until a question or controversy arises later in time.

Another common drafting convention is avoided. “Laurel Mountain Property” is described in Exhibit A, but there is no real need to remind the reader that it is “attached hereto and made a part hereof.” Language in Exhibit A will clearly refer to the same community and declaration. “Gobbledegook” vignettes like “attached hereto and made a part hereof” send a message of deterrence to the layperson consumer that goes something like this: “This is a legal document that only a lawyer can understand.”

Articles II & III

The doctrine of incorporation by reference has been a part of both contract and property law for centuries. It recognizes the elementary proposition that where a writing makes a clear reference to all or part of another document, statute or regulation, the portions referred to are

interpreted as part of the writing.²⁶ A recent North Carolina Bankruptcy Court decision involving the incorporation of the portions of the Statutory Short Form Power of Attorney notes that the parties “had an unfettered right” to incorporate statutory definitions into their personal power of attorney.²⁷

Articles II and II of the declaration rely exclusively on the doctrine of incorporation by reference. The drafting of documents for common interest communities often takes place on a parallel track with the applicable uniform act. The attorney drafts the document package with continual side glances at the requirements and contents of the act, but often does not use the uniform act language as the foundation for document design and construction. The minimalist draft of a declaration is based on a philosophy that, in many instances, the uniform act language constitutes an excellent verbatim source for the language of the declaration. In this sense, the uniform act language can be the starting and ending point for drafting on many Article II and III issues. By this act-centered drafting approach, an attorney wishing to deviate from, eliminate, revise, or add to the default statutory language should answer at least the following questions:

1. What is the precise reason why the uniform act language does not suit the client’s needs on any specific point?
2. Does a proposed deviation from, deletion of, revision to, or addition to the applicable uniform act language serve the client’s needs in a material way? Why?
3. Is the proposed deviation from the uniform act language a substantive, meaningful improvement on a point or issue?
4. Does the change or added language deal with a fact situation likely to come up in real life?
5. Is the departure from the uniform act language required by a lender, title insurer, or local government planning board? Why?

The longer the document, the greater the possibility of errors, including inadvertent punctuation disasters.²⁸ There is a fine line

26. RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 30:25 (4th ed. 2007) (“Where a writing refers to another document, that other document, or the portion to which reference is made, becomes constructively a part of the writing, and in that respect the two form a single instrument.”) (citations omitted).

27. *In re Doerfer*, 2006 WL 3253482 (Bkrcty. M.D.N.C. slip copy) (“When a contract incorporates a statute by reference, that statutory section becomes a part of the contract for parties’ indicated purposes ‘as if the words of that regulation were set out in full in the contract.’” (quoting, *inter alia*, *U.S. v. Ins. Co. Of North American*, 131 F.3d 1037, 1042 (D.C. Cir. 1997)).

28. *See, e.g.*, *THE WRITER MAGAZINE* 12 (December 2006). “One little comma will cost a company more than \$2 million,” The author describes a contract provision

between an exquisitely crafted but lengthy document and one replete with prolixity and redundancy.²⁹ The quest for certainty and clarity in document drafting reaches a point of diminishing returns as the clauses, cross-references, and pages accumulate to the point of wearing out the reader. The author recently encountered a document that was represented to be an option contract, but the lengthy and unnecessarily complex document was confusing, and a legal dispute developed concerning whether the document was, in reality, a contract to convey and not a mere option.

Using language that tracks the Uniform Act will allow attorneys for that planned community to be guided by appellate court opinions interpreting identical language. Some may see this as a mixed blessing where the interpretation is not a favorable one, but there is a value in predictability and certainty in the law that should outweigh any negatives. After all, one of the primary purposes of a “uniform” act is to provide a degree of predictability and certainty.

The advantages of brevity and clarity gained by a drafting technique that cross-references uniform act provisions will be lost, however, if the drafting attorney also feels compelled to “protect” the developer-client at every opportunity possible by inserting substitute language where the uniform act allows the drafter to provide other-

stating that the agreement “shall continue in force for a period of five years from the date it is made, and thereafter for successive five year terms, unless and until terminated by one year prior notice in writing by either party.” The Canadian Radio-Television and Telecommunications Commission ultimately decided that the second comma allowed termination of the contract at any time, without cause, upon one-year’s written notice. *See also* Grant Robertson, *A \$2-million Comma? Au contraire, Rogers Tells Aliant*, *THE GLOBE AND MAIL*, October 16, 2006, at B1.

In her New York Times best seller book on, of all things, punctuation, Lynne Truss observes that “lawyers eschew the comma as far as possible, regarding it as a troublemaker.” *EATS, SHOTS & LEAVES: THE ZERO TOLERANCE APPROACH TO PUNCTUATION* 81 (Gotham Books 2006).

29. *See, e.g.*, THEODORE A. REES CHENEY, *GETTING THE WORDS RIGHT* 24 (2d ed. 2005) (defining prolixity as “the mention of things not worth mentioning” and discussing “redundancy” in part as follows: “Redundancy doesn’t just mean repetitiveness; it’s the umbrella term for superfluity and excess. Redundancies are words you can eliminate from a piece of writing without changing the significance of the passage.” *See also* ROBERT C. DICK, *LEGAL DRAFTING IN PLAIN LANGUAGE* 6 (3d ed. 1995) (“Good drafting has deceptive simplicity. What is rejected is probably just as important for the document as what is included.”); Lundmark, *supra* note 9, at 122-23 (identifying “four key but interrelated causes of the prolixity of at least some Anglo-American agreements” as “(1) the limitation of remedies for breach of contract to an award for compensatory damages, (2) the informal, oral tradition of the common law business and legal culture, (3) jurisdictional diversity, and (4) a level of legal practice manifesting a preference for the private structuring of one’s affairs.”).

wise. An invitation to provide otherwise does not require that one provide otherwise. There is a penchant for drafters to feel that even an infinitesimal and unlikely advantage theoretically possible by providing otherwise makes their substitute language worthwhile. In truth, the practical long-term benefit to the developer is often close to nonexistent. A critic of uniform act-centered drafting will suggest that the minimalist approach will as a practical matter require that the various attorneys and laypersons involved in common interest community living and governance carry the uniform act with them at all times. After all, the declaration will not be fully decipherable without the act. Against his better judgment, the author recently served two terms as president of a board of directors of a planned community in the beautiful mountains of North Carolina.³⁰ Based on that experience, he can attest to the reality that each board member, the association operations manager, and many community members who are active on committees and at board meetings, already have the North Carolina Planned Community Act in their package of community information and on their association web page. Board members and active members of the association also have some familiarity with key portions of that act. Regardless of the length and complexity of association governance documents, the need for familiarity with the applicable uniform act is a fact of life. Therefore, the minimalist drafting approach does not add an additional burden.

III. PROMISES, PROMISES (COVENANTS, RESTRICTIONS AND RULES)

A. *To Micromanage or Not to Micromanage . . . That Is the Question*

A close relative recently looked at a new residential development. The part of the development that she was interested in is comprised of small homes built on small lots. At my request, she asked the sales agent for a copy of the declaration, bylaws, covenants and rules. The sales agent informed her that very few prospective purchasers ask for this information, but he cheerfully accommodated her by promptly displaying two loose-leaf binders full of the requested materials. I reviewed the covenants and restrictions and made a list of items that might be of no consequence to some purchasers but of major concern to others. I pointed out a few of the restrictions to my relative and our conversation went something like this:

30. He is currently completing a three-year term on the board of a homeowners association, with no time off for good behavior. See Powder Horn Mountain, <http://www.powderhornmountain.com> (last visited April 17, 2008).

Do you realize that you can only have one bird feeder? (You see, my relative is a bird lover and has numerous feeders at her present home.)

Why only one?

I don't know, perhaps because this development takes care of all outdoor maintenance and too many bird feeders can impede lawn mowing.

Then you could have additional feeders on windows?

Perhaps, but a literal reading of the covenant appears to be anti-bird.

How about a hummingbird feeder hanging from the eaves?

Same answer. Also, your present yard fountain will be nonconforming in the new development because it is made of white fiberglass and the covenants there require natural materials.

You're kidding!

No, I'm serious. You'll need to get rid of the fiberglass fountain. In fact, I'll take it. We can have any kind of fountain we want in our neighborhood.

Anything else I should know about?

Yes, in fact, there is. You ought to read these five or six pages stuck in the middle of these materials. There are more very specific covenants and rules related to your yard. Many of them are understandable; others amount to somebody's obsession with details.

Like what?

Well, it looks like most yard objects, even if they meet the aesthetic and materials requirements of the development, must not be visible from the road in front of your house. In plain English, you will need to hide yard objects from the public by keeping them behind your house. Nothing in the side yard, for example, and the front yard objects are also strictly regulated.

My relative decided not to purchase in that development, and her decision will go completely unnoticed by the developer because that subdivision, located in a very popular suburb, will enjoy a fast sale of every home and unit. At what point in the future, however, will land use micromanaging negatively impact "community" in that development?

The direction and style of covenants, restrictions and owner association rules and regulations appears to be in the direction of micromanagement.³¹ An obsession with detail is necessary in a well

31. Michelle Crouch, *Battle for Turf Pits Man's Best Friend Against Homeowners Board*, CHARLOTTE OBSERVER, August 24, 2005, at 1A (reporting on a threat by an association to fine a homeowner every time her two Shih Tzus urinate on any common area in violation of an association rule designed to prevent "brown circles all over the place."); Ken Little, *To Some, it's a Miserable Day in the Neighborhood*, STAR-NEWS, April 25, 2004, at 1A (reporting on instances of tension in homeowner associations, including a prohibition against window air conditioning units); Jeffrey S. Solocheck,

planned development, but there is a line to be crossed beyond which one might conclude that a control freak has commandeered the word processor. One online dictionary appropriately defines “micromanagement” and its consequences as follows:

a style of management where a manager becomes over-involved in the details of the work of subordinates, resulting in the manager making every decision in an organization, no matter how trivial. Micromanagement is a euphemism for meddling, and has the opposite effect to empowerment. Micromanagement can retard the progress of organizational development, as it robs employees of their self-respect.³²

Similarly, it is predictable that covenants, restrictions and rules that over-involve the homeowners’ association in the details of community living will diminish the concept of community and retard the simple goal of creating a place where friends and neighbors live together in a neighborhood founded on trust and mutual respect.

The governance of minutiae abounds in covenants and restrictions.³³ Consider the following random examples:

Mailboxes.

Mailbox location and color standards are common place, including font type and size of the address numbers. Recently, the homeowners’ association of suburban development decreed that the numbers and font-type of mail box numbers needed to be replaced. A strict deadline was set, and certain vendors of mailbox numbers were specified. When hundreds of homeowners dutifully attempted to comply, they found the local inventory of the correct font and size depleted. Warning notes from the homeowner association ensued. This real life game of mailbox trivial pursuit increased tensions in the neighborhood and generated mistrust of the micromanaging homeowners’ board.

Mad about Mulch, ST. PETERSBURG TIMES, at 13 (residents required to have Florida-friendly front yards with no lawn in light of Florida drought conditions).

32. BNET Business Dictionary, <http://www.dictionary.bnet.com/definition/micromanagement.html> (last visited on March 8, 2008).

33. The examples that follow are taken from recorded covenants and restrictions of common interest communities in Raleigh and Virginia. The author has the sources in his research but does not wish to single out certain developments by name when so many others also have the same unfortunate language in their governing documents and rules.

Some covenants talk trash.

One subdivision requires homeowners to place the receptacles at the curb no earlier than six hours prior to pickup and requires removal within six hours after pickup. Hopefully, trash pickup in that subdivision will be at noon. The author lives in a development with a weekly pickup that takes place at about 8:00 a.m. on Fridays. Presumably, he would set his alarm clock for 2:00 a.m. to comply with the first requirement and then leave the office prior to 2:00 p.m. to comply with the second.

Put away your toys.

All toys located on residential property are required by a covenant in one planned community to be removed each evening to an area not exposed to view from any other property or street. (Hopefully, these homeowners have large garages or basements.)

Tents.

One subdivision prohibits the placement of a tent on a homeowner's property at any time, either temporarily or permanently.

Guests.

One development has a general covenant that allows the homeowners association to limit the number of guests that a homeowner may have.

Garages.

A covenant in one development specifies that garages shall be used primarily for the storage of vehicles.

Curtains and Blinds.

It is not uncommon to find covenants or rules requiring that curtains and blinds be approved by an architectural committee.

Clotheslines.

Clotheslines in any form (including reels, poles, frames, etc.) are prohibited in many subdivisions, aesthetics apparently taking precedence over a concern for the environment.

Hanging Plants.

At least one set of restrictions prohibits hanging plants unless they are approved in advance by an architectural committee.

Wading Pools.

Some developments either prohibit or restrict the use of wading pools of any size.

B. *Drafting for “Community”*

A sermon-like story that speakers have used for at least a century involves three bricklayers working on the same project. When one is asked what they are doing, the first replies that he is laying bricks, the second responds that he is building a wall, and the third reports with pride that he is helping to build a beautiful cathedral. As they sit at their keyboards, drafters of governing documents for common interest communities can likewise see themselves at different levels of involvement. Some are meticulously crafting words and paragraphs, others are drafting declarations and covenants that will be as air tight as possible, and still others are helping to create an enduring residential community. Beyond satisfying the legitimate legal needs of the initial developer and the various other players in the land development process, does the attorney have a professional obligation to the community itself? If so, how does that attorney draft for “community?” What is “community?”

With the exception of some planning courses, the law school property law curriculum, with its case method of instruction, is packed with examples of neighborhood battles, homeowner association meltdowns, and serious, honest disagreements over the enforcement and interpretation of rules governing land use and self-governance in residential subdivisions. By definition, most of the covenants and equitable servitudes cases in the first-year real property courses are classic examples of a breakdown of community. I have the privilege of teaching a planning course titled “Common Interest Communities Seminar.” A dozen enthusiastic and serious students co-teach this seminar every academic year, and we have the luxury listening and learning together. Each seminarian immediately commences work on a research project that must include a practical “hands on” investigation of a common interest community development. Some students, for example, visited and then developed reports on resort communities, hotel condominiums, dockominiums, green communities, historic preservation/condominium conversion projects, and large residential

planned communities. Developers, homeowner associations and attorneys have accepted these law student investigators with open arms. Indeed, some students have been invited to annual meetings, groundbreaking ceremonies, and other events.

The field work required by the seminar is not in lieu of legal scholarship. Students must also identify a specific issue related to the development they are studying, research the law, and prepare both a presentation and extensive written report on both the practical and theoretical results of their inquiry. In recent academic years, the student reports and papers have included the following themes: the developer's perspective, ethical issues faced by the developer's attorney, special declarant rights, transition from developer control, document critiques, historic preservation, fair housing legislation, consumer protection, and, each year, one student has focused on various concepts of "community" and whether a drafter of documents can lay the foundation for community. This means that, during a typical fifteen week semester, one two-hour class will be devoted solely to an exploration of community, but the theme quickly becomes the leitmotif of the entire course.

Studying notions of what "community" means invites thinking outside of the legal box. In *Civility in an English Village*,³⁴ for example, the author of a field study of a small English village identifies "instructive good examples" of "small communities which have worked out a satisfactory design for living together."³⁵ Some of the attributes of civility are identified as follows:

- The advantage of smallness.³⁶
- An atmosphere of tolerance and civility, safety and trust.³⁷
- Social harmony.³⁸
- Neighbors who take care of each other.³⁹
- Cooperation flowing from system trust.⁴⁰
- People follow the rules.⁴¹
- Hospitality and politeness.⁴²

34. WILLIAM STEPHENS, *CIVILITY IN AN ENGLISH VILLAGE* 11 (Severn Books 2000). The author is a visiting American researcher who looks for and finds what he terms British-style answers to American problems of today.

35. *Id.* at 13.

36. *Id.* at 17.

37. *Id.* at 15.

38. *Id.* at 25.

39. *Id.* at 12.

40. *Id.* at 114, 117.

41. *Id.* at 78.

42. *Id.* at 57.

- Social events, newsletters, and events raising money for charity.⁴³
- Group memory in the village.⁴⁴
- Social custom, cultural rules, particular ways for keeping the peace.⁴⁵

There are many aspects of British culture and life that do not transplant easily into the suburban, bedroom community personality of many new American residential developments, but it is also true that the British emphasis on community holds practical lessons and worthwhile objectives for American developers

IV. CONVERSATIONAL CONSUMERISM

*“What we’ve got here is failure to communicate.”*⁴⁶

A. *The Mirage of the Protected Consumer*

Contrary to popular belief, effective, practical and meaningful consumer disclosures are not available in most areas of real property law, including common interest community law.⁴⁷ Although appellate decisions pay lip service to the demise of caveat emptor, the practical position of consumers dealing with real property today is only slightly better than it was a century ago. Consumers harbor a false sense of security when purchasing real property and relying on real property professionals. They are passive participants with little bargaining power or interest in modifying the terms and conditions of the transaction.

The modern myth of the protected consumer is reinforced intentionally or innocently by federal and state legislation and regulation, the organized bar, influential vested interests that include real estate professionals, developers, lenders, and even consumer groups.⁴⁸ Most recent examples of legislative reform—legislation heralded by many as important advances in consumer protection—have had at best only a

43. *Id.* at 20.

44. *Id.* at 17.

45. *Id.* at 211.

46. DON PEARCE, *COOL HAND LUKE* 36 (Buccaneer Books 1995) (1965).

47. Most consumers appear oblivious to provisions like the following found in a recently recorded condominium declaration:

Waiver of Rights under Article 4 of the Act. Each Owner of a Unit by acceptance of a deed therefore, hereby waives, to the extent permitted under applicable law, all rights of Unit Owners under Article 4 of the [North Carolina Condominium] Act.”

48. *Et tu, Brute?*

de minimus practical beneficial effect on consumers. In too many instances, the consumer has been placed in an inferior legal position by a combination of little or no bargaining power, real estate broker disclosure forms, seller disclosure forms, lengthy standard-form real estate sales contracts and addenda, 30-page-long mortgage forms, warranty and inspection forms, and tome-length common interest community governance documents. Add several so-called consumer disclosure forms (and at least a half dozen more forms handed across the table at the real estate closing) and even a savvy consumer exits the real estate closing in a fugue-like state, a disturbed state of consciousness in which the consumer performs acts of which he or she appears to be conscious but of which, once finally recovered, has no recollection.⁴⁹

An analysis of consumer-oriented disclosure forms and the manner in which consumer complaints and theoretical rights subsequently play out in real life reveals that the real property consumer has few meaningful and practical rights or remedies. Ironically, consumers may think that, throughout the home purchase process—including the signing of the real estate sales contract and then the litany of forms at the closing—they have been placed in “good hands” and are protected by important federal and state legislation and regulation.

The major examples of consumer legislation in the real property area were destined to fail in terms of effectiveness for many reasons. First, most “consumer-oriented” laws and regulations were founded on the ideal that disclosure to the consumer is meaningful and will affect the consumer’s judgment and decision. This notion ignores the effect of the myriad of disclosures with which the typical home purchaser is bombarded. Second, the remedies provided in consumer reform legislation are often little more than “sounding brass, or a tinkling cymbal” from the consumer’s standpoint.⁵⁰ Third, real property consumers pay their own attorney fees, and those fees too often render the game not worth the candle.⁵¹

49. WEBSTER’S NEW COLLEGIATE DICTIONARY 464 (G. & C. Merriam Co. 1977).

50. 1 Corinthians 13:1 (King James) (implying the ineffectiveness of such things as compared to “speak[ing] with the tongues of men and of angels”).

51. Self-help is sometimes more effective than the quiver full of pointless arrows provided by consumer legislation. My youngest son and daughter-in-law experienced difficulties with a large corporate builder who for some reason could not or would not complete the “punch list” on a dozen or so items that needed completion in their new home located in a large, new planned community. After oral and written complaints failed, they placed a large sign on the front porch of their new home that read: “___ days and [Builder] has not yet completed our home.” Each day, they updated the days portion of the sign. After a month, one of the builder’s executives drove through the new development and became upset when he saw the sign. The young couple

We live in an age of consumer disclosure. Disclosure constitutes a major component of the American consumer movement. A myriad of legislative and regulatory initiatives rely heavily on the need to disclose certain important matters to consumers. There is a strong belief among consumer advocates in the value to the consumer of disclosure, but “consumer forms” join one expert’s list of documents “where legalese is thickest and the need for reform is greatest.”⁵²

B. The Consumer Doesn’t Read the Document

“This place is so crowded, nobody comes here anymore.”⁵³

Section 211 of the Restatement (Second) of Contracts, titled “Standardized Agreements,” provides one possible explanation of why consumer protection provisions in real estate contracts are so ineffective. After summarizing the public policy utility of contract language standardization,⁵⁴ the comment to Section 211 hits the nail on the head in terms of the reason why consumerism rests on a fragile foundation in residential real estate transactions. The comment reads, in part, as follows:

b. Assent to unknown terms. A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standardized terms. One of the purposes of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms Customers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated. But they understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose.”⁵⁵

informed him of their problems, and he promised them that, if they would take the sign down, he would have the items completed. They refused, noting that the items had to be completed first. One week passed, and the items were still not completed. The executive returned, terminated the employment of a construction supervisor, gave the couple a gift certificate, and took care of the punch list.

52. JOSEPH KIMBLE, *LIFTING THE FOG OF LEGALESE: ESSAYS ON PLAIN LANGUAGE* 12 (Carolina Acad. Press 2005).

53. Quote attributed to Yogi Berra, who is credited with saying many things that he has not necessarily said. He may have also stated: “This form is so full of disclosures, warnings and legalese, that nobody reads it anymore.”

54. Restatement (Second) of Contracts § 211 cmt. a.

55. Restatement (Second) of Contracts § 211, cmt. b. This section of the Restatement is, of course, not a perfect fit for the contracts and documents discussed

In addition, consumers rarely take the “consumer advice” provided so often on standard forms. The first piece of advice given to consumers on the standard form “Offer to Purchase and Contract”⁵⁶ is ambitious indeed. It reads:

Note: Prior to signing this Offer to Purchase and Contract, Buyer is advised to review Restrictive Covenants, if any, which may limit the use of the Property, and to read the Declaration of Restrictive Covenants, By-Laws, Articles of Incorporation, Rules and Regulations, and other governing documents of the owners’ association and/or the subdivision, if applicable. If the Property is subject to regulation by an owners’ association, it is recommended that Buyer obtain a copy of a completed Owners’ Association Disclosure And Addendum (standard form 2A12-T) prior to signing this Offer to Purchase and Contract, and include it as an addendum hereto.

Remember, the consumer is not represented by an attorney in the vast majority of residential real estate sales transactions until after the consumer has entered into a binding contract. It is almost silly to suggest that the typical layperson is going to pour over the documents listed above or, if he or she elects to enter that voluminous morass of legalese, understand them.⁵⁷

While straightforward and clear, boilerplate in capital letters at the very end of the standard form before the signature lines is not effective. The last sentence reads in all capital letters: “If you do not understand this form or feel that it does not provide for your legal needs, you should consult a North Carolina real estate attorney before you sign it.” This advice is rarely taken, and the admonition to seek legal advice can come back to haunt the buyer as consumer in a later dispute.

C. *A Sampling of Typical and Atypical Neighborhood Issues*

Some disputes in planned communities are predictable, some not. The common interest community power to tax, assess and exact attor-

in this article. Yet, the idea of a form—even a consumer form—that is rarely read or understood by the consumer rings true and helps explain the shallowness of consumer protection in this area.

56. See Discussion, *supra* note 9. Perhaps the consumer should also be advised to review the zoning ordinances of the municipality and the immunization record of neighborhood dogs and cats.

57. The consumer advice actually places the buyer in a weaker position in the event of a subsequent dispute over these matters. “Weren’t you advised to read these documents before signing?”

ney fees in disputes will always be on the front burner.⁵⁸ The author has attended an annual homeowner association meeting where a resident living in a half million dollar home practically went berserk over an annual dues increase of less than fifty dollars. Increases in the cost of liability insurance alone swallowed up most of that increase. In contrast, another annual meeting had residents justifiably upset over a substantial dues increase and special assessment brought about by poor financial planning by the association board and management. All costs and potential costs associated with any residential community should be disclosed up front in the clearest language to prospective purchasers.

America is a “pampered pet nation,”⁵⁹ and whether the facts involve a wolf-dog or a rooster, issues involving “pets” seem to never go away.⁶⁰ Rules prohibiting all pets are particularly unpopular in a society where the vast majority of Americans own pets,⁶¹ and disputes can reach minutiae such as the permitted length of leashes.⁶² The author was recently involved in a matter where a subdivision resident had

58. See *Morgan v. Goodsell*, 108 P.3d 612 (Or. Ct. App. 2005) (holding homeowners not responsible for attorney’s fees incurred by homeowners’ association); *Armstrong v. Ledges Homeowners Ass’n*, 633 SE.2d 78 (N.C. 2006) (stating that homeowners’ association’s amendment to allow virtually unlimited power to assess was unreasonable and contrary to intent of original parties). *But see* *Jet Black, LLC v. Routt Cty. Bd. of Comm’rs*, 2006 Colo. App. Lexis 1653 (2006) (holding that assessment of common areas is proper to individual lot owners).

59. See, e.g., David J. Jefferson and Mary Carmichael, *A Pampered Pet Nation*, NEWSWEEK, MAY 24, 2007, <http://www.msnbc.msn.com/id/18846816/site/newsweek/> (last visited May 31, 2007).

60. See, e.g., Jim Getz, *Breeder to Move, Ending Battle with Kaufman: Neighbor Got Court Order Barring Sale of Wolf-dog Puppies*, THE DALLAS MORNING NEWS, Mar. 20, 2007 at 1B (lot owner’s wolf-dog breeding operation violates deed restrictions in rural subdivision); Daphne Sashin, *Feathers Flying in Dispute over Man’s Pet Duck; A Home Association Told Chucky’s Owner He Can’t Keep Him; A Theme Park May Hold Hope*, ORLANDO SENTINEL, Feb. 10, 2007 at B3 (lot owner’s pet duck not allowed via subdivision rules prohibiting farm animals); Amanda Reimherr, *Backyard Chickens Cause Flap in Local Neighborhood*, SAN ANTONIO EXPRESS-NEWS, Oct. 18, 2006 at 1SE (resident association complains to city neighborhood services department about lot owner’s pet roosters and chickens); Amy Lee, *Neighbors Cry Fowl; When Farm Animals Call Suburbs Home, it Gets People’s Goat*, THE DETROIT NEWS, Sept. 19, 2006 at 1A (neighbors complain about lot owner’s pet rooster).

61. Rebecca J. Huss, *No Pets Allowed: Housing Issues and Companion Animals*, 11 ANIMAL LAW 69 (2005). See, e.g., *Riverside Park Condo. Unit Owners Assoc. v. Lucas*, 691 N.W.2d 862 (N.D. 2005) (involving unit owner’s unsuccessful claim that his high blood pressure entitled him to a dog in spite of restriction prohibiting pets);

62. See, e.g., *Weldy v. Northbrook Condo. Assoc.*, 2003 WL 22481018 (Conn. Sup. Ct. 2003) (involving unit owner’s challenge to the validity of a rule requiring dogs to be restrained by leashes up to 20 feet).

accumulated nine outdoor, constantly barking dogs. The resident loved this breed of dog and could see no reason why the nearby neighbors and the homeowner association were seeking to enforce a covenant on point. Complete private restriction bans on domestic pets are likely to face increasing legal challenge in spite of the clarity of the restriction on point. Once again: the admonition is to clearly disclose such matters to consumers before they purchase!

While it's nice to be home for the holidays, home decorations may run afoul of restrictions and rules.⁶³ The right to fly flags has, of course generated legislative support but can still be an issue,⁶⁴ and the related issue of freedom of expression through the display of political signs and other symbols will continue to arise with frequency.⁶⁵

Other predictable issues include vegetation and trees,⁶⁶ driveways and parking,⁶⁷ rental and occupancy,⁶⁸ common areas and promised

63. See, e.g., John Ingold, *Wrath Brought by Peace Wreath: Pagos Springs-area HOA Not OK with it but the Couple Keeping the Holiday Decoration Up—Despite a \$25-a-day Fine—Are Getting a lot of Support Nationwide*, THE DENVER POST, Nov. 28, 2006 (involving claim that homeowner's wreath on door violated homeowners' association rule against displaying signs and advertisements); Jennifer Chambers & Brad Heath, *It's Away with the Manger; Novi Subdivision Tells Family to Get Baby Jesus Off Lawn; Homeowners say Christ Belongs in Christmas*, THE DETROIT NEWS, Nov. 29, 2005 at 1A (describing neighborhood association's orders to lot owner to remove nativity scene from yard); Jeffrey S. Solochek, *Entrances Will Have Sedate Holiday Cheer*, ST. PETERSBURG TIMES, Sept. 16, 2005 at 3 (involving dispute arising from extravagant holiday decorations at entrance of subdivision).

64. See, e.g., N.C. GEN. STAT. § 47C-3-121 (2007); N.C. GEN. STAT. § 47F-3-121 (2007) (Freedom to Display the American Flag Act of 2005, P.L. 109-243, 120 Stat. 572 (HR 42)). See also Elizabeth F. Grussenmeyer, *The Right To Display The American Flag In Common Interest Developments: Restrictions By Homeowners' Associations Not Tolerated*, 34 MCGEORGE L. REV. 516 (2003); *Property Rules Put Pinch On Patriotism*, ST. PETERSBURG TIMES, Feb. 25, 2008 at 1.

65. See, e.g., N.C. GEN. STAT. § 47C-3-121 (2007); N.C. GEN. STAT. § 47F-3-121 (2007).

66. See, e.g., *Nelson v. Fife*, 128 Wash. App. 1066 (2005) (involving lot owner ordered to cut down trees that blocked his neighbor's view and violated restrictive covenants); Eileen Schulte, *Leaning Trees Felled Near Leader's Home*, ST. PETERSBURG TIMES, Aug. 20, 2005, at C1 (describing lot owner ordered to remove hazardous leaning trees after neighbor complained).

67. See, e.g., *Todd Dev. Co. v. Morgan*, 862 N.E.2d 116 (2007) (holding common driveway maintenance restriction unenforceable because driveway was not exclusive public access); Anthony Colarossi, *Court Sides with Rabbi in Home Worship Battle*, ORLANDO SENTINEL, June 7, 2005 at B1 (involving neighbors that sued rabbi who held religious services at his home causing parking problems in subdivision); Allen Powell, *LaPlace Limos Drive Dispute; Residents Want Them Out of Neighborhood*, TIMES-PICAYUNE, Jan. 7, 2005, at M1 (describing how neighbors complained when lot owner

amenities,⁶⁹ recreational vehicle parking and use,⁷⁰ and, with apologies to Robert Frost, fences.⁷¹

D. *Why Developers Should Disclose the Good, the Bad, and the Ugly*

It is easy to criticize, but the critic should also propose a solution. One suggestion rests on the premise that the consumer of residential housing is unlikely to make a selection between competing subdivisions based on the scope, nature and extent of the covenants, restrictions and other governing documents of the common interest community. The reputation of the suburb, track record of the developer, quality of the school system, amenities in the planned community, and property tax rate rates are likely to be more important than the details of covenants and restrictions. Therefore, the purchase deci-

parked his limo outside his home in alleged violation of subdivision's homeowners covenant).

68. See, e.g., *Lowden v. Bosley*, 909 A.2d 261 (Md. 2006) (holding short-term rental of homes does not violate single family purpose restriction); Ann Weaver, *Judge Set to Rule on Shawnee Neighbor' Dispute; At Issue is Whether Residential Covenants Affect Couple's Home for Korean Students*, THE OKLAHOMAN, Feb. 4, 2006 at 1D (describing neighbor's claim that lot owner's use of home as a boarding house for foreign students violates covenant restricting businesses and roomers).

69. See, e.g., *Lee v. Puamana Cmty. Ass'n*, 128 P.3d 874 (Haw. 2006) (involving dispute arising from "popouts" on individual units that encroached upon common areas of subdivision); Robert J. Smith, *Housing Covenants Include and Exclude to Stabilize Neighborhoods; Homeowners Learn Associations Profitable when Promises are Kept*, ARKANSAS DEMOCRAT-GAZETTE, Mar. 11, 2007, at Northwest Arkansas. (stating neighbors become angry when developers fail to provide amenities promised such as a pool and clubhouse); Yolanda Rodriguez, *'The Whole Thing is a Mess'; Trail Not What Builder Promised, Homeowners Say*, THE ATLANTA JOURNAL-CONSTITUTION, June 8, 2006, at 12JH (covering homeowners' complaint that nature trail in subdivision is not what builder promised).

70. See, e.g., *Powell v. Washburn*, 125 P.3d 373 (Ariz. 2006) (considering neighbors who seek an injunction prohibiting the use of an RV as a single family residence within a subdivision).

71. See, e.g., Florence Shinkle, *The Great Wall of . . . VISTA GLEN COURT; Good Fences Might Make for Good Neighbors, But a Trellis in Violation of Association Rules Proves to be the Final Straw for Two Feuding Couples in Eureka*, ST. LOUIS POST-DISPATCH, June 5, 2005, at C1 (covering feuding neighbors who erect partition between homes despite petition from other neighbors praying for removal). Cynthia Billhartz Gregorian, *PIQUED BY FENCES-And the People Who Love or Hate Them; Those Wrought-Iron/Chain-Link/Whatever Enclosures Can Be a Boon or Bane, Depending on Your Point of View*, ST. LOUIS POST-DISPATCH, Apr. 29, 2007, at E1 (describing how various subdivisions prohibit fences much to lot owners' dismay); *Pet Owner Finds Way Around No-Fence Rule*, CHICAGO TRIBUNE, Apr. 1, 2006, at 1 (describing how lot owner puts small picket fence around doggy door, despite subdivision's restriction against fences).

sion will often be based solely on personal considerations and preferences. For example, a real estate broker recently related an incident in which she sold a new home as the prospective purchasers walked through an impressive foyer into an even more impressive great room. "This is just what we have been looking for," was the first feedback from one of them. After a quick tour through the rest of the home and lot, the prospects made an attractive offer and now own the home. They were not particularly interested in the details of the standard form sales contract, nor were they concerned about the potential effect of covenants, restrictions, rules and regulations.

Let's face it, a prospective purchaser of a residence will be buying into a comprehensive set of private governing documents no matter where that purchaser ultimately buys. While each common interest community has its own personality, emphasis and unique features, the ever-present packages of standard forms and extensive tomes of governing documents amount to nothing but fungible, generic, legal blah-blah-blah to most consumers. In a real sense, therefore, the main role of disclosure has little or nothing to do with consumer choice. Then why disclose at all? Of course, disclosures protect to a certain degree the developer, builder, and real estate professional from potential liability after the sale. There is nothing wrong with using disclosures as a means of risk management, but the main purpose of disclosures ought to be something far more basic: the prevention of future frustrated expectations. To the extent possible, disclosures should be designed to educate prospective purchasers about their membership in a community—their citizenship in a private government. I suggest that this be accomplished in a frank web-page disclosure and brochure that both accentuate the positive and also highlight certain covenants and rules that have a track record of producing misunderstandings and resentment.

CONCLUSION

By one national institute's estimates, there were 2.1 million residents living in 10,000 association-governed communities in 1970 compared to 57 million residents living in 286,000 in 2006.⁷² Twenty percent of the value of all United States residential real estate is governed by community associations, and the total annual operating revenue for all community associations is \$35 billion.⁷³ North Carolina

72. Community Association Institute, <http://www.caionline.org/about/facts.cfm> (last visited May 21, 2007).

73. *Id.*

has an estimated 11,000 community associations,⁷⁴ and it is close to impossible to purchase a new home in an attractive neighborhood that is not in some form of common interest community regime.

Complex, lengthy, micromanaging legal language found in all of the documents related to the residential real estate sales transaction should be avoided. It dilutes the effectiveness of consumer disclosures. It confuses rather than clarifies issues in subsequent homeowner disputes. It can have an adverse effect on long-term good will and cooperation between homeowners and the homeowners' association. Its complexity and prolixity create a less democratic private governance structure and destroy "community."⁷⁵ It is usually unnecessary.

74. N.C. REAL ESTATE COMM'N, CMTY. ASS'N MGMT. ADVISORY COMM. REPORT 3 (2007), <http://www.ncrec.state.nc.us/bulletin/bulletin.htm> (last visited April 17, 2008).

75. Duncan MacDonald, Esq., Remarks at the American Bar Association Annual Meeting: "Lost Words: The Economical, Ethical and Professional Effects of Bad Legal Writing" 4 (August 5, 1993) ("The more Byzantine the structure the less democratic it will be.").

