

VOLUME 1, NUMBER 1, AUTUMN 1974

PROTECTIVE FINANCIAL PLANNING FOR A CONDOMINIUM CONVERSION

"COMMUNITIES OF INTEREST"—THE MEDICAL CONDO: ONE OF A SERIES  
PLANNING AND CONTROLLING THE PROJECT DEVELOPMENT

"PEOPLE"—DAVID CLURMAN

SOLVING SEVEN COMMON PROBLEMS IN SETTING UP A CONDOMINIUM

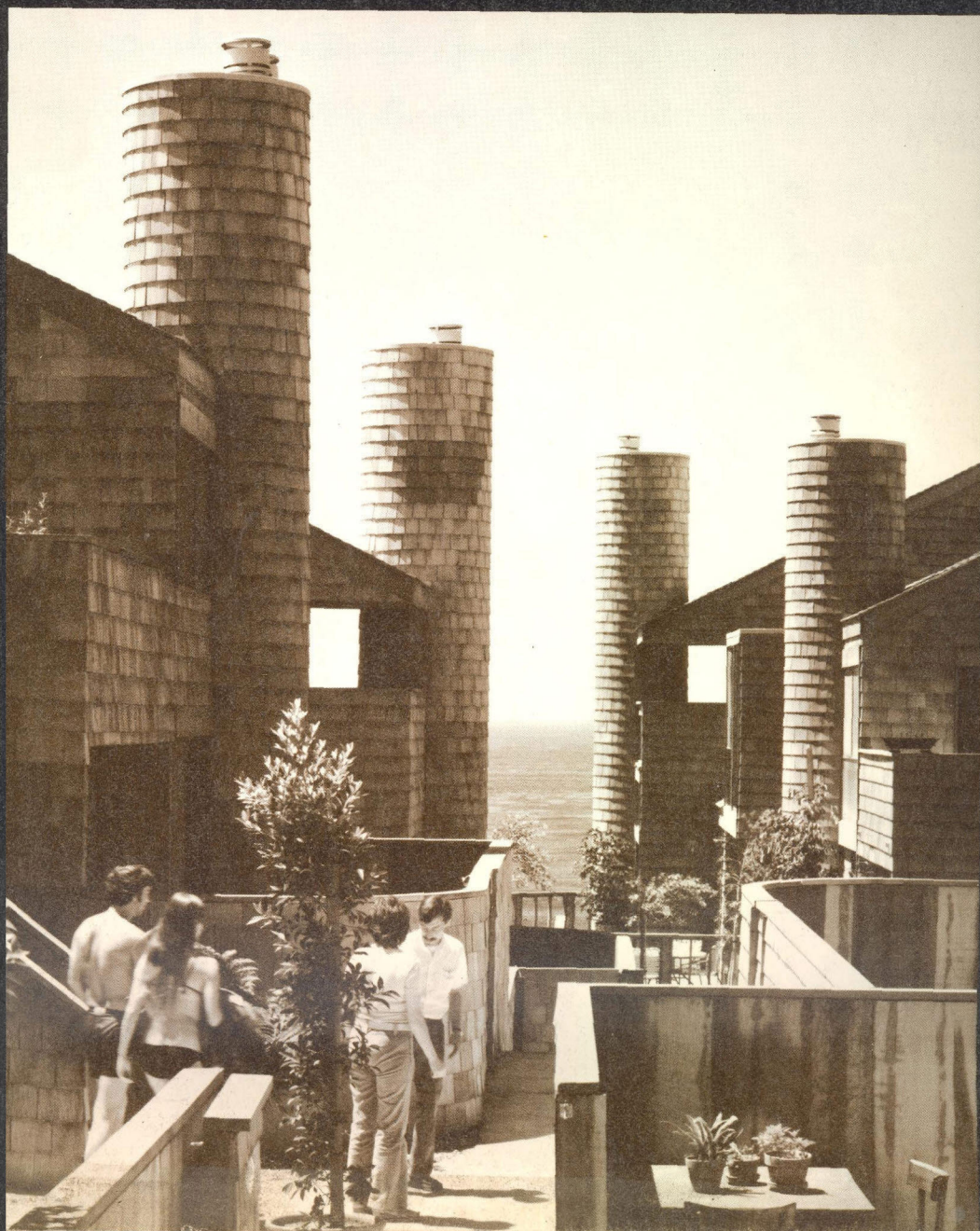
THE FUNCTIONS OF A CONDOMINIUM DECLARATION

"BOOK EXCERPT"—THE U.L.I. REPORT ON CONDOMINIUM OWNERS' LIKES AND DISLIKES

"LOOKING AT CONDOMINIUMS"—SEASCAPE SHORES II; COUNTRY CLUB VILLAS; CENTURY I

FEATURES: WHAT'S GOING ON, LAW, MARKETING, TAX, ADVERTISING,

CONSTRUCTION, INSURANCE, ACCOUNTING, SITE SELECTION AND PLANNING





## "Quiet Enjoyment . . ."

Mr. Halper's "Quiet Enjoyment . . ." is planned as a regular feature of this magazine.

# The Functions of a Condominium Declaration

By Emanuel B. Halper

**T**he first day that new homeowners move into a just-completed condo can be compared to the beginnings of government. One function of the condominium declaration is that, by it, a new self-government is created. Governments are not born tranquilly, but there are ways to keep the declaration from becoming a "bill of frights."

ILLUSTRATED BY THE AUTHOR

I  
All of my clients seem to get extremely busy just before I go on vacation. For fifty weeks each year I'm told that I'm a *lawyer* in a tone which indicates that the word "lawyer" means a dull technician who fills in minor details of a businessman's creation.

One of my clients, a real estate developer named Harry, excels in this ability to make a lawyer look and feel unimportant.

But if this is the way Harry feels, why does he get so nervous every time he hears I'm about to go on vacation. Although he's not a religious man, Harry's first reaction to the news of a forthcoming vacation is, "Oh my God!" Then he advises me that an urgent mortgage closing is scheduled for just the day I plan to leave. Our conversation goes like this:

I: Harry, please be reasonable. A guy's got to get a rest sometimes.

Harry: What's this "rest" stuff. I've got a permanent mortgage loan hanging in the balance.

I: Harry, that commitment is good for another six weeks.

Harry: Sure it's good for six weeks, but it will cost me extra money for my construction loan.

I: Harry, what's really important in life?

Harry: Money!

Harry never threatens that we'll lose the account, but that always seems to be a present possibility in case he gets too displeased. I must explain this business of pleasing Harry. He never does seem to be *pleased* even when we think we've performed extraordinarily well. When a big deal closes advantageously, he'll pick up his check with a poker face. We know things are going well only in the rare periods during which he stops complaining. I judge Harry's mood only within grades of displeasure.

So, I'm sure you'll agree that it took extraordinary courage on my part to insist that I was

going on my vacation trip nevertheless.

Would Harry accept this act of minor defiance? I expected to be nervous about this question every minute of the vacation.

## II

He was strangely silent about the subject during the few days left before the trip. Consequently, I was not surprised when he called on the last day I planned to spend in the office. I expected a last minute plea, or a bombastic threat. Surprisingly, his voice was meek and chirping, and he asked me to explain my itinerary carefully.

When he learned that I planned to drive through Watergate, New Hampshire, on the third vacation day, he gleefully advised me that his summer retreat was there.

Harry: Look, pal, why not spend your third and fourth day as my guest. Irma and I would love to have you over. I've got a beautiful four-bedroom guest house with its own swimming pool and sauna.

I: Is there hot and cold running water in the house?

Harry: Sure, there are three full bathrooms. In fact, the master bathroom has expensive gold trim and a bidet. Listen pal, you'll have the greatest time.

I: I'm overwhelmed, Harry. You've never done anything like this before.

Harry: Don't mention it, pal. Just think of the gold trim in that bathroom, the sauna, and the bidet. It's the life.

Our journey started uneventfully, which is the way I like it. If you're really interested, I want you to know that we spent the first day in a lovely state park where I took my wife on our first date about fourteen years ago. Revisiting the fondly remembered lake and brook and being away from the office for a whole day gave me a sense of vitality I hadn't felt for a while.

Then we packed up for the journey to Harry's summer retreat.

It was a long drive on a hot summer day. At least it was hot until we reached New Hampshire where it seems that a permanent pocket of cold air

always hovers waiting for me to visit.

As sunset began, we reached Harry's estate in Watergate. As I left my car in front of Harry's big house, I was greeted by two of Harry's dogs. One was a Great Dane I called Cerberus, and the other was a Weimaraner named Alex. They were the most vicious, psychotic dogs I had ever seen.

Instinctively sensing the aroma of evil, my children refused to leave the car. This left me and my wife each with one gigantic dog to contend with.

Harry rescued us only moments later but not before my very existence seemed precarious in the presence of Cerberus.

I: Harry, that dog is a monster.

Harry: Why he's just a puppy.

I: Can you lock him up somewhere?

Harry: You'll learn to love him. (I doubted that Cerberus would return any affection.)

Irma and Harry got us settled in the guest house. Inside there was a feeling of luxury everywhere. And outside there were a million trees, a trillion blades of grass, and two dogs barking and howling constantly.

## III

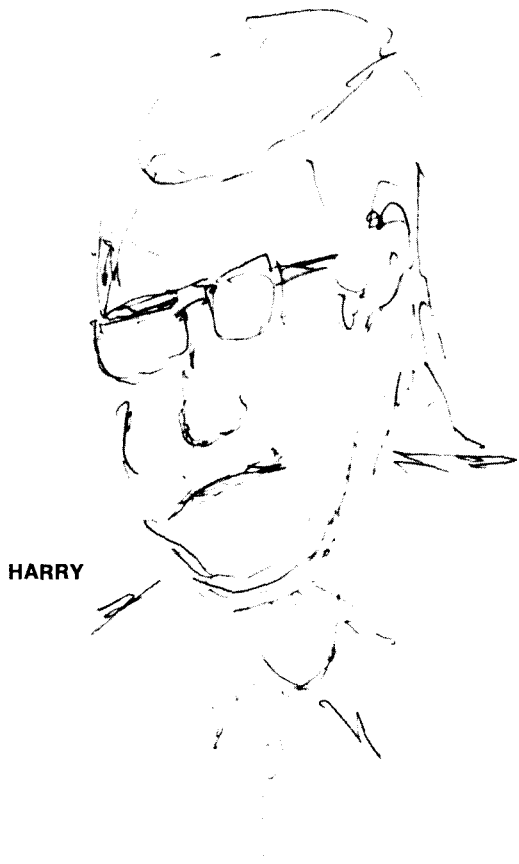
That evening at supper Harry advised me that he and I had plans for the evening. The girls could stay at home and watch TV. Harry wanted me to attend the organizational meeting of the homeowners association of the recreational condominium he had developed just north of Watergate.

The condo was a grandiose community which would ultimately contain 5,000 condominium units and eventually be graced by such amenities as a golf course, four swimming pools, seventy-five tennis courts, and ten bocce courts.

Harry was in a benign mood and wanted to show his first wave of buyers just how much concern he had for their needs.

As developer of the condo, Harry owned or controlled all the units until they were sold. Before the units were sold, he and his family were the only members of the owners association. As sole members they elected Harry and his brothers, Gary and Larry, as the board of directors.

*As sunset began, we reached Harry's estate in Watergate. As I left my car in front of Harry's big house, I was greeted by two of Harry's dogs. They were the most vicious, psychotic dogs I had ever seen.*



Some of the unit owners had complaints. Harry reasoned that the best way to handle the complaints would be to have the homeowners association gather the complaints and try to solve them before he confronted the group. Since he was chairman of the board of the association and his brothers were the only other directors, Harry was determined to resign, have his brothers resign, and turn over leadership of the association to the people who bought units.

Harry clued me in on some of the folks I might expect to see as he raced confidently around sharp curves and jagged intersections in his \$18,000 Bentley. He was especially apprehensive about Kitty Auswurf, consumer affairs editor of the *Watergate Gazette*. Ms. Auswurf bought a unit in the condominium (which Harry named Nirvana Shores) and ever since, she had been churning out a continuous barrage of uncomplimen-

tary literature on Nirvana which appeared in the *Gazette*. Harry wasn't really afraid of Auswurf, but when he discussed her, his revulsion was expressed in incredible contortions of the mouth and eyes.

#### IV

No one noticed us as we entered. We sat in the last row, and I passed the time by sketching each of the people who sat on the dais. Harry keenly evaluated every word that was said. For me it felt wonderful to ignore the controversy going on. (Oh, why doesn't the bald guy with the eyepatch sit still? How can I sketch you in profile, if you jiggle about? I'll have to start all over to get a three-quarter view of his face. Don't move your arm, please.) Suddenly, I realized that the chair next to me was empty. Where was Harry? Oh, there he is. He's at the rostrum. He introduced himself to the crowd and was greeted with an avalanche of cat calls and other disagreeable sounds.

I figured that there was some kind of trouble and began to tune my head into the proceedings. The problem seemed to be that Harry's New Hampshire lawyer had drafted a condominium declaration which was distributed to the homeowners without Harry's approval. Apparently, the declaration was copied from a form book. Originally intended for a high-rise apartment building, the declaration prohibited using the main elevators in the project. (There was no elevator in Nirvana.) Other provisions of the declaration prohibited hanging pictures on the walls of the apartments, dogs, cats, birds, musical instruments, bicycles, baby carriages, and immoral behavior. The unit owners felt that such restrictions didn't seem to make much sense when applied to the project. The homeowners, led by Kitty Auswurf, viewed the proposed declaration as just another example of the developer's callous disregard of their interests.

Kitty was a young woman; I'd say she was thirty. She stood still and erect as she lambasted Harry in her opening remarks. (I was able to sketch her head and shoulders during that time

without significant trouble.) She complained that her house was plagued with leaks and that rain would dribble in when the wind was strong. As a result, a deep pile shag carpet had shrunk. She demanded reimbursement on the spot for the rug. As she described the damage to the rug, she shook her excessively plump torso so much that my sketch of her was completely ruined.

The next speaker was Pierre Croissant-Mangeur who had recently moved to the development. He gesticulated as he announced that he was able to swim on his property. Harry was puzzled by the complaint and asked, "What's wrong with that?" Pierre waved his scrawny arms and informed Harry that his lot had no pool.

Harry was denounced as an intruder from the big city by a classical language professor from a nearby university. A heavyset man who advised us all that he was an accountant in real life was outraged that his neighbors were an unmarried young couple. He complained in such detail about their exceptionally slovenly habits of dress and comportment that I recognized that the "husband" he described was really Harry's black sheep brother, Larry. (Larry eked out his existence by living rent-free in vacant apartments in buildings owned by Harry.) Two elderly sisters denounced a young New York lawyer who went nowhere without his two pet German shepherds, to whom he fondly referred to as his "children."

We heard complaints by single people that there were too many children romping around before noon. Married people were upset that late parties of the young singles of indefinite sex extended beyond midnight. Some of the walls were cracked. Some doors hung poorly. Several water closets needed ball cocks. One newlywed couple irately complained that their unit had no door knobs and no locks.

"To whom shall we look," demanded Kitty Auswurf. "Who is responsible for this quintessential disaster?"

Harry's eyes dropped, and he looked around to see if there was any person he could rely upon to be the repository of all of the sins of which these

nice people were complaining. Who could act as the goat so earnestly employed by the ancient Hebrews to accept the sins of the repentant and leave the community carrying their sins with him? Who?

Harry rose and announced to all, "Wait a minute, I have my *New York lawyer* here tonight!"

## V

I wasn't really listening carefully to the proceedings because I was engrossed in my sketching. Kitty's figure was a fascinating challenge. But when Harry emphasized the words *New York lawyer*, I was jolted from my private thoughts to the depressing reality by which I was surrounded as Harry introduced me to the unit owners. In conclusion, he noted that he was anxious to avoid making specific promises to solve any of the problems. What could I say? What did Harry want me to say? Why didn't he ask the New Hampshire lawyer to stand up? I stood and smiled at the members. Then I sat down, because there didn't seem to be any point in saying anything.

My sitting was followed by an attentive silence. It was the time for someone to do just the right thing. Of course, Harry knew what that was.

He advised the unit owners he had ordered coffee and cake for all and that a coffee break was in order. At Harry's signal, one waiter wheeled out a coffee wagon and another guided a cart offering an elaborate assortment of fancy cakes and pastry.

The presence of abundant and highly caloric food soothed all emotions. The meeting fragmented into small groups who took their refreshments to dining tables located at the side of the hall.

## VI

I sat at a table of ten between Harry and Kitty. In this more relaxed atmosphere Harry asked if I could explain to the good people at our table what was the underlying theory behind condominium declarations and the role of the homeowners association. Kitty, who had taken two

*I wasn't really listening carefully to the proceedings . . . but when Harry emphasized the words New York lawyer, I was jolted from my private thoughts. . . .*

KITTY



philosophy courses in college, thought that would be a good idea. She said that if we could make the owners understand why the condominium declaration was necessary, they could be in a position to agree on an outline for a new declaration to be drafted by the lawyers and submitted to them next month.

Here is the substance of what I said.

It's not hard to understand why so much turmoil can arise from the beginning of a new condominium. The first day that new homeowners move into a just completed condo can be compared to the beginnings of government. Perhaps there was such a day in ancient Athens when Pericles and Cleon faced off against each other. One function of the condominium declaration is that, by it, a new self-government is created.

Condo owners live closer to each other than the people who own homes in a one-family house

development. Living closely together places greater limitations on acceptable behavior of condominium occupants than people whose residences are separated by 30 to 50 feet or more. What's more, the condo owners own a great deal of their development in common. As joint owners, their relationships bear similarities to members of an Israeli Kibbutz or collective farm or members of some African tribes who share ownership of community property.

The owners association created by the condominium declaration is very much like a new level of government. The declaration itself, if negotiated by the homeowners, would be comparable to the proverbial social compact envisioned by Locke and Rousseau. The owners association has the power to tax the owners and has a lien against the units to help enforce collections. The association performs vital services for the homeowners which, under other circumstances, might be performed by governmental bodies. For example, the association arranges for repairs to the parking areas and the recreation areas. It can hire recreation personnel, it can attend to plantings, and it can maintain the physical facilities owned in common.

It is conceivable that the condominium declaration could provide that some disputes among unit owners would be settled by arbitration and designate a panel of owners who could act as arbitrators.

The declaration should delineate clearly which property is owned individually by the various unit owners and which property is owned in common by all of them. With respect to property used in common, the declaration must specify what percentage of individual interest inures to each unit owner.

I see five different types of property in a condominium development. One is the living unit itself. This can be considered the individual property of the owner.

The sidewalks and landscaped areas are common elements, and each owner has an undivided interest in the common elements.

In addition to the elements owned individual-

ly and those owned in common, the declaration may provide for types of ownership which are neither wholly individual nor entirely common. Thus, a unit owner can be assigned an exclusive outdoor parking space, and the condo can provide for semiprivate lawn or garden areas which may be used exclusively by one or more of the owners of a living unit, subject to the regulations of the owners association.

Sometimes the recreational facilities are made common facilities. In other arrangements the developer retains ownership of the recreational facilities and leases them (at a rent which can be quite attractive to the developer) to the association or to a "country club" whose membership is open to unit owners. The "right" to join such a country club is a kind of property right which stems from ownership of a condo unit.

In the case of a condo which consists of attached townhouses, each unit owner shares a party wall unit with at least one other unit owner. The declaration should provide for the joint ownership of the wall solely by the owners sharing the wall.

Very often the question whether ownership is individual or joint is used to determine whether the cost of a repair should be borne by an individual owner or all the owners jointly. Thus, the cost of repairs to a party wall in a townhouse condominium should be borne by the unit owners sharing the wall except where the wall is damaged by only one of them.

If the condo units are attached townhouses, the condominium declaration can specify that the roof is common property or that each unit owner owns a section of the roof. Whether the roof is jointly owned or sections of it individually owned, the declaration can provide that repairs to the roof are to be made by and at the expense of the association. Of course, if roof repairs are made at the expense of the association, the cost is shared by the unit owners. Which way this problem is to be solved deserves careful thought. There's a lot of good sense to a requirement that the association keep roofs of a townhouse condo in good repair.

A leak on the roof section over one unit can

result in rain entering another unit. The roof over a line of townhouses is likely to be constructed as a single roof by the builder rather than as a series of sections. In case the roof is damaged because a unit owner installs an antenna or other equipment on his section, the cost of the repair should be borne by the unit owner who caused the damage.

Of course, some multistory apartment houses are organized as condominium developments. For such a condominium it is wisest for the association to be charged with the responsibility for making repairs to the roof, the structural elements, the ceilings, the floors, and the walls unless the damage giving rise to the repairs is caused by a particular unit owner.

The condominium declaration should provide that each of the unit owners has the right to park in an assigned parking space, use the access and maneuvering lanes of the parking lot, walk through the common footpaths, drive through the common driveways, use the common facilities, and join any organization which may grant the right to use private recreational facilities leased from the developer. Rules governing use of the common areas can be "legislated" by the association's board of directors.

Individual homeowners are accustomed to carrying insurance policies protecting themselves against claims from negligence and other tort liability and protecting their homes from damage by fire and other perils. Each condominium association should consider whether it will be simpler and less expensive for insurance to be carried individually or for the association to carry policies covering all of the facilities of the condo. Where the condominium property is a group of attached townhouses or a multifamily apartment house, it is likely that savings and simplicity can be achieved by having the association carry insurance whenever it can. If each unit owner of a townhouse condo carries his own fire insurance, the insurance companies could have a field day fighting over settlements. They tend to bicker over such questions as where the responsibility of one

*It's not hard to understand why so much turmoil can arise from the beginning of a new condominium. The first day the new homeowners move into a just completed condo can be compared to the beginnings of government.*

insurance company ends and another begins in case several adjoining units are destroyed by fire. If the association insures the buildings against fire, it is the association that should be required to restore damage arising by fire. If separate policies are carried, the obligation to repair fire damage should fall on the unit owner whose unit was damaged.

The declaration should prescribe some standards for behavior of the owners and give the association the power to legislate others. For most condo developments it is appropriate for the declaration to require each unit owner to keep his living unit clean and in good order and repair. If an owner fails to comply with this requirement, the association should have the power to perform this obligation on behalf of that owner and at his expense. Where people live in close quarters such as in adjoining townhouses or in apartment houses, there should be guidelines covering such problems as ownership of dogs and cats, loud noises in the late evening, and noxious odors.

Some condominium declarations attempt to insulate the in-group of owners against "undesirable" outsiders. Perhaps it is justifiable for those who have made an investment in expensive facilities to have a voice in choosing their new neighbors. I find a similarity between this process and the mores of some ancient tribes which tried to prevent "pollution" of the environment or their blood by the entry of a stranger to the community. To maintain some power to prevent a unit from being sold to an "undesirable," the condominium declaration can provide that a prospective sale may be consummated only if the buyer is approved by the association. Such a provision could be unenforceable if considered by the courts to be an unreasonable restraint of alienation. The

declaration can grant the association or other unit owners the right of first refusal in the case of the proposed sale of a unit. Whatever the format, any attempt to restrict ownership in the condo along racial or religious lines would fail in the courts. From a practical point of view, a lawyer drafting a condominium declaration for a developer should consider that a provision restricting future transfers might hinder present sales by the developer.

A residential condominium might want to limit the extent to which living units can be used for business or professional purposes. Doctors and dentists offices should be provided for. It's not that easy to attract physicians and dentists to some communities, and it would be advantageous to have them practice within the confines of the project.

## VII

I must confess that I didn't hold everybody's interest. I spoke so long that some people at my table discreetly left for the pastry wagon to get seconds. Even Harry seemed anxious to get something more to eat. Undaunted, I kept talking to anyone who was willing to listen.

Soon there was none left to listen to me save Kitty. When I rose to get another cup of coffee, Kitty mentioned that she'd like to talk to me privately. I figured something I said might have infuriated her. But the expression on her face was benign. She asked and I answered a few questions about where my office was, what we specialized in, and where I went to law school.

Then, as she gobbled an enormous chunk of cheesecake, she inquired, "That fellow Harry you came with—is he married?" □