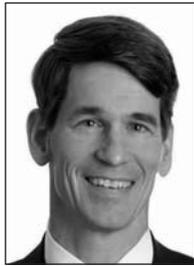


## Avoiding the Dry Rot of Restrictions that Stop Redevelopment



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The subdivision is partly built-out, the houses are similar to what the builder plans to build and the price of the lots is below market, so what's not to like? The project should be successful, proceed rapidly and be profitable, unless, of course, the project has restrictions imposed upon it that change the rules of the game for construction. Restrictions found in Declarations of Covenants or Trust Indentures can pose roadblocks that convert profits into lawsuits.

Whether governed by an association under a Declaration or Trustees under an Indenture, the key for the builder is determining who controls the association and for how long, and whether the Declaration contains restrictions on building and protections for construction and sales activity.

To answer the question regarding control, the builder should examine the Declaration for provisions setting out the procedure and timing for the election or replacement of directors or trustees. The absence of resident directors or trustees on the board is not a guarantee that an election should not have been called. In addition, residents in failed subdivisions may claim authority to act through appointment by the local governing body or by default.

Architectural review restrictions found in Declarations are problematic and vary widely, from detailed, specific provisions to broad restrictions vesting approval of plans in the sole discretion of the directors or trustees and for aesthetic reasons. While a sole discretion standard means exactly that – the plans can be turned down for any reason – Missouri courts have held that the discretion must be reasonably exercised.

Some Declarations exempt the builder entirely from architectural review, which is clearly desirable, but the builder should examine the Declaration to be certain that this exemption flows to the successor builder and, if so, that the exemption cannot be amended without the builder's con-

sent. Whether exemptions and other builder-favorable restrictions, commonly referred to as Declarant or Developer rights, flow to a successor builder depends upon the language of the Declaration. While such rights are considered to be personal rights that do not run with the land, the rights should transfer without a separate conveyance if the Declaration sets out a clear intention to transfer the right to another person without further action or manifestation of intention by the original holder of the rights. To avoid a challenge by home owners regarding the transferability of such rights, a builder would be strongly advised to require the seller to execute and deliver at closing a transfer of the Declarant rights.

Construction and sales may include activities that in the absence of a specific exception would violate the restrictions in the Declaration. For example, sale, promotional and directional signage and the maintenance of a display home may violate prohibitions against commercial activity or signage. The maintenance of one or more construction trailers may also violate a restriction forbidding trailers to be placed on a lot. The Declaration may contain yard maintenance covenants regarding height of grass or other lawn maintenance that are not compatible with a construction site. Prior to closing, the builder should consider amendments to the Declaration to permit such activity by the builder during construction.

With careful review and forethought, the roadblocks posed by Declaration restrictions can be removed to allow the successful build-out of a subdivision. **Bn**

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