

§ 6.20 Developer's Duties to the Community

Until the developer relinquishes control of the association to the members, the developer owes the following duties to the association and its members:

(1) to use reasonable care and prudence in managing and maintaining the common property;

(2) to establish a sound fiscal basis for the association by imposing and collecting assessments and establishing reserves for the maintenance and replacement of common property;

(3) to disclose the amount by which the developer is providing or subsidizing services that the association is or will be obligated to provide;

(4) to maintain records and to account for the financial affairs of the association from its inception;

(5) to comply with and enforce the terms of the governing documents, including design controls, land-use restrictions, and the payment of assessments;

(6) to disclose all material facts and circumstances affecting the condition of the property that the association is responsible for maintaining; and

(7) to disclose all material facts and circumstances affecting the financial condition of the association, including the interest of the developer and the developer's affiliates in any contract, lease, or other agreement entered into by the association.

Cross-References:

Section 6.13, Duties of a Common-Interest Community to Its Members; § 6.14, Duties of Directors and Officers to an Association; § 6.19, Developer's Duty to Create Association and Turn Over Control.

Comment:

a. Nature of developer's relationship to community. The relationship between the developer, the association, and the consumer purchasers of the lots or units in the development involves several elements. The primary relationship between the developer and the people who purchase the lots or units is vendor-purchaser. From one perspective, the association, and the membership in the association, is simply part of the product sold by the developer. As a seller, the developer has some duties with respect to the purchaser, but the developer does not occupy a fiduciary relationship to the purchaser.

However, the developer also creates the association, ordinarily a not-for-profit corporation, and then controls the association through election or appointment of the directors and officers. Corporate promoters, directors, and officers have fiduciary duties to the corporation and to the stockholders or members. The developer's relationship to the association is a fiduciary relationship during the period that the developer controls the association. The Uniform Common Interest Ownership Act requires that officers and members of the governing board appointed by the developer exercise the degree of care and loyalty required of a trustee, at the same time providing that officers and directors not appointed by the developer must exercise the degree of care and loyalty required of an officer or director of a nonprofit corporation.

Treating the developer and its appointees to the board as trustees overstates the fiduciary component of the relationship. The developer cannot be expected to act solely in the interests of the association and the homeowners. Conflicts of interest are inherent in the developer's role while it retains control of the association. Instead of broadly characterizing the developer as a fiduciary, the rules stated in this section identify areas where protection of the members is particularly needed and can be afforded without unduly limiting the developer's flexibility, or ability to realize a profit on its investment. The stated rules are consistent with the duties generally required of both corporate directors and trustees.

b. Duty to use care and prudence in managing and maintaining the common property. Managing and maintaining the common property is the primary business of the association. Its proper management and maintenance is of great importance to the lot or unit owners. To protect their interests during the period when the developer has control of the common property, either directly or through control of the association, the developer has a duty to use reasonable care and prudence in managing and maintaining the common property. What is reasonable depends on the circumstances, including the financial resources available.

Illustrations:

1. The common property of Green Acres includes a clubhouse and swimming pool owned by the association. During the period of developer control, the association failed to carry liability or property insurance on the common property even though insurance was available. The clubhouse was destroyed by fire. In the absence of other facts or circumstances, the conclusion would

be justified that the developer is liable for the loss to the association due to the failure to carry insurance.

2. Same facts as Illustration 1, except that the fire occurred before the developer transferred title to the clubhouse to the association. In the absence of other facts or circumstances, the conclusion would be justified that the developer is liable for replacement of the clubhouse.

A developer that is unwilling to carry the responsibility for managing and maintaining the common property can relinquish control but retain development rights sufficient to protect its interests in completing the project.

c. The duty to establish a sound fiscal basis for the association and disclose the amount of any subsidy. The value of the homebuyer's investment is affected by the fiscal health of the association. When they buy into a common-interest community, purchasers legitimately expect that the common areas and promised association functions can be maintained. They also gauge the price for the property on the basis of the assessments in force at the time of their purchase. They are likely to expect that assessments will rise with inflation, but they are unlikely to foresee that large increases or special assessments may be necessary in the future. To meet their expectations, the developer has a duty to establish a sound fiscal basis for the association, among other things; by imposing and collecting assessments on a realistic basis to provide the association with funds. This duty also requires that reserves or other means be established for the replacement of common property and for anticipated periodic large future expenditures that cannot be accommodated except by substantially increasing assessments in the year of the expense or by a special assessment.

During the period when the developer is actively marketing units, it may be to the developer's advantage to establish an artificially low level of assessments to attract buyers and to lower the income required to qualify for mortgages. The developer can maintain the appearance of a high level of quality in the project by subsidizing the operation of the association through provision of services or otherwise. Unless the developer is required to disclose the level of subsidy involved, purchasers may be misled about the financial obligations they are undertaking in the common-interest community.

Illustrations:

3. The Developer of City View Condominium set initial assessments at \$150 per month, which were inadequate to cover

the common expenses of the condominium association. Developer provided maintenance services to the association during the period of developer control. After control was relinquished to the unit owners, they discovered that assessments of \$350 per month per unit would be required to maintain the same level of services. In the absence of other facts or circumstances, the conclusion would be justified that the Developer breached its duty to the purchasers by failing to disclose the level of subsidy provided during the period of developer control.

4. The common property of Green Acres included a clubhouse and parking lot that belonged to the association. During the period of developer control, no reserves were established for major repairs or periodic restoration of the clubhouse. Shortly after control was relinquished to the members, the clubhouse roof required replacement and the parking lot required resurfacing for a total expenditure of \$100,000, which would require a special assessment. In the absence of other facts or circumstances, the conclusion would be justified that the developer breached its duty to the association by failing to establish reserves for replacement and major repairs.

d. Duty to maintain records and account for the financial affairs of the association. When the members eventually gain control of the association, they will need accurate membership and assessment records to carry on the functions of the association. Records are also essential to determine whether the association and developer have fulfilled their responsibilities during the period of developer control. Records of enforcement actions and actions on design-review matters may be important to resist claims of waiver or selective enforcement of the servitudes or rules.

e. Duty to comply with and enforce the terms of the governing documents. The developer and the association should operate within the framework of the governing documents from the time the first lot or unit is conveyed. If the developer fails to collect assessments, it will increase the burdens that fall on the other members, and may jeopardize the financial health of the association. If the developer fails to enforce, or engages in selective enforcement of, design controls, this may jeopardize the association's future ability to enforce them by creating a basis for a claim for modification or termination under the changed-conditions doctrine (see § 7.10). At the least, the association may face claims of unfairness when it later undertakes uniform enforcement, even though it has not lost its enforcement rights under the rules stated in § 6.13(1)(c), § 6.9, and § 8.3(2).

f. Disclosures concerning the condition of the property and the financial condition of the association. The association requires accurate information about material facts concerning the property and the future condition of the association in order to engage in sound fiscal planning and to provide prospective purchasers information necessary to estimate their liability to the association. This information is within the control of the developer, difficult to discover by the purchaser, and highly relevant to the decision to invest. Information about the developer's conflicts of interest is required for the association to make a decision whether to exercise its power of avoidance under § 6.19.

REPORTER'S NOTE

Nature of developer's relationship to association and owners, Comment a. *B & J Holding Corp. v. Weiss*, 353 So.2d 141 (Fla. Dist. Ct. App. 1977) (developer-appointed directors who failed to collect assessments from developer liable for breach of fiduciary duty even when assessments were to pay for litigation against director).

Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Co., Inc., 67 Ohio St.3d 274, 617 N.E.2d 1075 (1993) (relationship between developer and condominium buyers and owners is more like relationship between sellers and buyers or creditors and consumers; developer does not owe fiduciary duty to owners and purchasers; 1978 amendments to Ohio Condominium Act obviate need for court to impose some sort of fiduciary duty to protect owners and purchasers; amendments recognize that developers and owners and purchasers have different and often competing financial interests, and adopt specific measures to protect purchasers and owners; protective provisions include setting time for initial meeting of owners, a timetable for gradual transfer of control to owners, requiring disclosure of all material circumstances affecting the development, and permitting cancellation of man-

agement contracts; Act creates regulated commercial relationship; developer has no fiduciary duty absent an understanding by both parties that special trust and confidence have been reposed in the developer).

Goddard v. Fairways Dev. Gen. Partnership, 426 S.E.2d 828 (S.C. Ct. App. 1993) (developer had duty to insure that common areas were in good repair at the time they were conveyed to association and that the association had sufficient funds to maintain them; prior to creation of association, developer is like promoter of a corporation who should be expected to use good judgment and act in utmost good faith to complete the formation of the organization).

The position of the developer with respect to the future association is in some respects comparable to that of a promoter, as discussed in Harry G. Henn & John R. Alexander, *Laws of Corporations* (3d ed. 1983), *Promoters' Duties and Liabilities to Corporation*, pp. 239-240:

104. Promoters owe fiduciary duties to the corporation, including duties of good faith, fair dealing, and full disclosure. To avoid secret profits, full disclosure must be made to an independent board of

directors and to all persons interested in the corporation. Where there is full disclosure to all persons presently interested but other investors are contemplated as part of the promotional scheme, there is a split of authority, but the trend appears to allow recovery of the promoters' profits. The measure of recovery depends upon whether the property transferred to the corporation was acquired by the promoters during their fiduciary relationship to the corporation or prior thereto.

... For violation of such duties, such as the promoter's pocketing of secret profits, the corporation has a cause of action which it, someone standing in its stead, or a shareholder in a derivative action, may assert. . . .

105. Promoters are liable, apart from any liability to the corporation, to any defrauded shareholders and creditors, who would recover either individually or in behalf of their class and not derivatively in behalf of the corporation.

Duty to use care and prudence in managing and maintaining the common property, Comment b. Munder v. Circle One Condominium, Inc., 596 So.2d 144 (Fla. Dist. Ct. App. 1992) (developer held liable for damages for failure to insure clubhouse; since developer had failed to create governing board for association, developer retained full control of and responsibility for the association's duties).

Chesus v. Watts, 967 S.W.2d 97 (Mo. Ct. App. 1998) (developer liable for breach of contract and fraud for failure to provide common areas, facilities and amenities promised to purchasers who relied on sales brochure, oral representations of devel-

oper, and appearance of model used in sales presentations; developer owed duty to association to turn over common areas that are not substandard and in good repair).

Goddard v. Fairways Development Gen'l Partnership, 426 S.E.2d 828 (S.C. Ct. App. 1993) (developer owed duty to lot owners to turn over common areas in good repair and ensure that association had sufficient funds for their maintenance; relation of developer to association is like that of corporate promoters to investors: duty to use good judgment and act in good faith to complete formation of the organization; it would be unfair for developer to burden owners with substandard or deteriorated common areas requiring immediate expenditure of funds without a plan or reserve fund to cover the expenditures). (Only 5 units built of planned 93; developer retained undeveloped parcels, which were not subject to assessments until subdivided, and only 1 lot subject to assessment; developer retained controlling votes through ownership of class B stock that receives 50 votes for each lot owned and 1,500 votes for undivided parcels. As each parcel is subdivided, each lot receives 50 votes. Dual stock continues until number of class A votes (1 per lot) equals Class B. Lot owners not entitled to dissolve PUD without 100% consent; one owner can prevent dissolution. Developer can transfer common areas (roads and all land except that under buildings) to association and shift liability for maintenance to association; developer elected president and developer not liable for failure to assess lot owners at a level necessary to maintain sufficient reserves to maintain common areas adequately where lot owners wanted to keep assessments low; business-

judgment rule controls the decision. Liability of developer for turning over substandard common areas limited to cost of bringing them up to standard at date of conveyance to association.)

The duty to maintain common elements may be limited by the willingness of the owners to approve or pay assessments:

Anchor Point, Inc. v. Shoals of Anderson, Inc., 424 S.E.2d 521 (S.C.Ct.App.1992) (developer will not be required to operate recreational facilities until condominium association has paid its pro rata portion of costs to open and operate the facilities where poor condition of facilities is due to failure of residents to pay fees necessary for operation and maintenance).

It does not include property that was not intended to be part of common property:

Palm-Aire Country Club Apts. Condominium, Inc. v. FPA Corp., 559 So.2d 277 (Fla.Dist.Ct.App.1990) (developer's ability to convert recreational facilities from annual-membership or daily-use fee basis to equity-membership basis not subject to fair or reasonable limitation where facilities were not part of condominiums and no representations had been made that facilities would remain available to condominium purchasers).

Duty to establish sound fiscal basis for the association and disclose the amount of any subsidy, Comment c. Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co., Inc., 114 Cal.App.3d 783, 171 Cal.Rptr. 334 (1981) (property-owners association has standing to sue for damages to common areas and individual units from defective landscape construction

in representative capacity regardless of statutory authority; directors of property-owners association have fiduciary duty to act in good faith and exercise basic duties of good management; directors are individually liable for failure to act to assess units to establish maintenance and reserve funds and for acting with conflict of interest).

Assessments and Reserves

Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co., Inc., 114 Cal.App.3d 783, 171 Cal.Rptr. 334 (1981) (developer-appointed directors have fiduciary duty to act in good faith and exercise basic duties of good management; directors are individually liable for failure to act to assess units to establish funds for maintenance of common areas and reserves, and for acting with conflicts of interest).

RIS Inv. Group, Inc. v. Dept. of Business & Prof. Regulation, 695 So.2d 357 (Fla.Dist.Ct.App.1997) (developer's liability to pay assessments is based on ownership of "units," which does not include raw undeveloped land).

Duffett v. E & W Properties, Inc., 430 S.E.2d 858 (Ga.Ct.App.1993) (covenant interpreted to impose assessment obligation only on lots owned by persons other than developer).

Marshall v. Pyramid Dev. Corp., 855 S.W.2d 403 (Mo.Ct.App.1993) (developer's liability under declaration to pay assessments on lots does not commence until lots are conveyed or occupied).

Dunes South Homeowners Ass'n v. First Flight Builders, Inc., 451 S.E.2d 636 (N.C.Ct.App.1994) (provision that "with the exception of First Flight Builders, Inc. [developer], its successors and assigns, with respect to

Dwelling Units and Unit Weeks remaining unsold, each Time Share Owner shall pay, in addition to assessments for maintenance and improvements to the Common Areas, a prorata share ... of all other costs..." ambiguous with respect to developer's liability to pay assessments on units and weeks reacquired by developer after initial sale; summary judgment for defendant reversed).

*Offsets of Assessments
and Maintenance*

PJNR, Inc. v. Dep't of Real Estate, 230 Cal.App.3d 1176, 281 Cal.Rptr. 673 (1991) (to extent developer failed to fund reserve account provided for in public report, no offset or credit for funds expended on items chargeable to association allowed; settlement agreement between association and developer cannot excuse developer from past violations of law prohibiting material changes in subdivision's operational procedures without notification of department of real estate).

Gabriel Builders, Inc. v. Westchester Condominium Ass'n, 645 N.E.2d 453 (Ill.Ct.App.1994) (developer's failure to provide association with accounting required by statute does not deprive developer of standing to sue association for unjust enrichment for sums expended on behalf of condominiums for common-area expenses).

LaFreniere v. Fitzgerald, 669 S.W.2d 117 (Tex.1984) (developer-owner of apartment building entitled to offset funds advanced on behalf of owners association against unpaid maintenance assessments).

Bradley v. Mullenix, 763 S.W.2d 272 (Mo.Ct.App.1988) (developer not entitled to offset expenditures against unpaid maintenance assessments

without proof of the amount of expenditures and the amount of the assessments that would have been payable by other unit owners if they had been properly assessed).

Battery Homeowners Ass'n v. Lincoln Fin. Resources, Inc., 422 S.E.2d 93 (S.C.1992) (successor developer entitled to set off against assessments due association only amounts paid to association; other expenses claimed were paid as developer and not on behalf of association).

Richard Gill Co. v. Jackson's Landing Owners' Ass'n, 758 S.W.2d 921 (Tex.Ct.App.1988) (developer not entitled to offset expenditures for painting, replacement of poolside furniture, or landscaping where accounting practice charging other expenses to association showed that developer must have considered these as construction and marketing expenses).

Duty to comply with and enforce the terms of the governing documents, Comment e. Hartung v. MBA Dev., Inc., 716 So.2d 1212 (Ala.Ct.Civ. App.1997) (homeowner precluded from suing developer for permitting construction of houses violating restrictions by exculpatory provision in covenants that developer shall not be liable to lot owners for manner of exercise or failure to exercise any right or authority granted to it, for failure of any lot owner to comply with restrictions, or for failure to enforce covenants).

Cohen v. S & S Construction Co., 151 Cal.App.3d 941, 201 Cal.Rptr. 173 (1983) (developer liable for breach of fiduciary duty for failure to act in good faith to enforce the declaration during period when developer controlled association and architectural-review process; exculpatory provisions do not shield developer from

liability as a matter of public policy; homeowners are particularly vulnerable to mismanagement or carelessness of developer).

Orange Grove Terrace Owners Ass'n v. Bryant Properties, Inc., 176 Cal.App.3d 1217, 222 Cal.Rptr. 523 (1986) (it is unfair for developer to burden owners with substandard or deteriorated common areas requiring immediate expenditure of funds without a plan or reserve fund to cover the expenditures).

Taylor v. Wellington Station Condominium Ass'n, Inc., 633 So.2d 43 (Fla. Dist. Ct. App. 1994) (summary judgment holding director who was 25% shareholder in developer liable for developer's failure to deliver \$39,352 in reserve funds to association set aside because factual issues existed as to willfulness and whether director had engaged in actual wrongdoing in the form of fraud, self-dealing, or unjust enrichment; since Taylor was one of only 3 directors, was minority shareholder, and lost his initial investment, issue remains as to self-dealing).

Saunders v. Thorn Woode Partnership, L.P., 462 S.E.2d 135 (Ga. 1995) (developer violated architectural approval covenant by building 41 units without submitting plans to association for approval that external design conformed with and was in harmony with 24 pre-existing town homes; approval by 41-24 vote of unit owners after court ordered post-construction submission of plans entitled developer to grant of summary judgment; trial court did not abuse discretion in considering the conveniences of the parties and fashioning the least oppressive means of remedying the violation).

Markey v. Wolf, 607 A.2d 82 (Md. Ct. Spec. App. 1991) (because of preference for free use of property, approval of plans by developer calls for less stringent review than disapproval; in both cases, decision must be reasonable and in good faith, but more deference is given to decision to approve plans; approval of plans for smaller houses selling for less than \$160,000 price advertised for original homes in subdivision was reasonable).

Viola v. Millbank II Assoc., 688 N.E.2d 996 (Mass. Ct. App. 1997) (developer entitled to construct phases II and III of condominium pursuant to master deed; reduction of phase I owners' percentage interests in common areas does not require unanimous consent because clearly provided for in master deed).

Richard Gill Co. v. Jackson's Landing Owners' Ass'n, 758 S.W.2d 921 (Tex. Ct. App. 1988) (fiduciary relationship between condominium developer and association because developer assumed responsibility for managing condominium until owners' association could be formed).

Disclosures concerning the condition of the property and the financial condition of the association, Comment f. Park East Apartments, Inc. v. 233 East 86th St. Corp., 139 Misc.2d 806, 529 N.Y.S.2d 674 (1988), aff'd, 543 N.Y.S.2d 610 (N.Y. 1989) (under Condominium and Cooperative Conversion Protection and Abuse Relief Act, developer must make full disclosure of details of self-dealing and other leases so that purchasers may make informed decisions whether to purchase condominium or cooperative units).

2 Tudor City Place Assoc. v. 2 Tudor City Tenants Corp., 924 F.2d 1247 (2d Cir. 1991), cert. denied, 502

U.S. 822 (1991) (disclosure of rent and long-term nature of lease of parking garage made in the midst of 607-page Offering Plan for cooperative conversion did not disclose the disparity between the fair-market rent of the garage and the rent called for in lease and said only that the developer's affiliate expected "to make a profit with respect to the Garage Lease in the future" (rent was \$340,000 per year; sublessee was paying affiliate \$775,000)).

Knight v. City of Albuquerque, 110 N.M. 265, 794 P.2d 739 (Ct.App.1990) (developer's retention of right to change use of golf course or other open spaces shown on plat will not be given effect where developer has used the golf course as a selling tool; permitting the developer to induce purchases by pointing to present or planned existence of a park or golf course while retaining the power to alter the use would be patently unfair and violative of public policy).

Suits for Construction Defects

Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc., 406 So.2d 515 (Fla.Dist.Ct.App. 1981) (damages for defective or substandard fencing and ceiling roof assemblies not apportionable among original purchaser protected under implied warranty and subsequent purchaser because apportionment would penalize original purchasers).

Starfish Condominium Ass'n v. Yorkridge Service Corp., 458 A.2d 805 (Md.Ct.App.1983) (retroactive application of statute giving standing to association did not deprive developer of vested rights because any one of original purchasers could have sued and recovered entire damages to common elements).

Young v. Kolkmeier Dev., Inc., 901 S.W.2d 257 (Mo.Ct.App.1995) (subsequent owners of lots surrounding lake damaged by development company can maintain action for damages for permanent nuisance even though they acquired their interest subject to the damage; there is only one cause of action for permanent nuisance, which belongs to owner at time damage occurs, but if owner's interest is transferred, new owner can properly be substituted) (case does not address issue of transfer before suit brought).

Stony Ridge Hill Condominium Owners Ass'n v. Auerbach, 410 N.E.2d 782 (Ohio Ct.App.1979) (developer liable for negligent construction and fraudulent representations as to roofs; provision in declaration that developer is not liable on any claims not binding on association or unit owners; apportionment of damages among unit owners not required; each owner is entitled to have whole damage to common area remedied).

Meadowbrook Condominium Ass'n v. South Burlington Realty Corp., 565 A.2d 238 (Vt.1989) (implied warranty of good workmanship applies to common areas of condominium; implied warranty applies only to defects latent at time of sale; unit owners as tenants in common of common areas are entitled to recover only for injury done to their proportionate interests; remanded for apportionment of damages between those purchased before and after defects became apparent; apportionment not unfair because owners who bought after defects became apparent presumably paid lower price).

Southcenter View Condominium Owners' Ass'n v. Condominium Builders, Inc., 47 Wash.App. 767, 736 P.2d 1075 (1986) (provision warranting against defects in workmanship and

materials in condominiums and limiting the time for bringing actions to 1 year from date of issuance of certificate of occupancy as to common areas and 1 year after closing and recording of deed as to individual units was not unconscionable and barred suit brought 3 to 4 years after sales of the units for damages for negligent design, selection of materials, and construction; requirement for disclosure of material circumstances is absolute; plaintiff need only prove failure to disclose and damages; reliance is not necessary).

Jaffe v. Huxley Architecture, 200 Cal.App.3d 1188, 246 Cal.Rptr. 492 (1988) (after paying \$2,000,000 to settle association's claim for construction-defect damages, developer is not entitled to sue members of association's board of directors for equitable indemnity on ground that board's acts and omissions contributed to damage caused by original defects; because board's acts are acts of the association, developer could have defended association's suit on grounds of contributory negligence or doctrine of avoidable consequences; fairness does not require indemnification).

Long-Term Contracts

Cloud v. Association of Owners, Satellite Apt. Bldg., Inc., 857 P.2d 435 (Colo.Ct.App.1992) (developer did not breach fiduciary duty while serving as corporate officer of association, as well as president and one of two shareholders of declarant when arrangement in which 10% of gross receipts from 80 guest rooms included in common elements were reserved to declarant and its assigns; arrangement was unambiguously set forth in the declaration, and arrangement was not unconscionable because it benefit-

ed unit owners by providing a source of revenue for common expenses).

Association of Golden Glades Condominium Club, Inc. v. Security Management Corp., 557 So.2d 1350 (Fla. 1990) (rent-escalation clauses in condominium leases of recreation property were declared void as against public policy by legislature in 1975; statute amended in 1988 and 1989 to prohibit enforcement of escalation clauses in declarations recorded after June 4, 1975, and to enforce any escalation clause after October 1, 1988).

Penthouse North Ass'n, Inc. v. Lombardi, 461 So.2d 1350 (Fla.1984) (cause of action against developer-directors who executed a 99-year recreation lease in 1966 between themselves as lessors and association as lessees, which contained a rent-escalation clause, did not accrue until lessees were damaged when escalated rents were demanded).

Avila South Condominium Ass'n, Inc. v. Kappa Corp., 347 So.2d 599 (Fla.1977) (officers and directors of condominium associations who contract on behalf of the association with themselves or another corporation in which they are or become substantially interested, or with another for their personal benefit, may be liable to the association for the amount by which they were unjustly enriched as a result of the contract, unless the funds were received with the consent of the association; subsequently admitted members may demand an account of profits made earlier when directors have profited in some secret way).

Olympian West Condominium Ass'n, Inc. v. Kramer, 427 So.2d 1039 (Fla.Dist.Ct.App.1983) (principals of corporate developer-builder who serve as directors of condominium as-

sociation prior to assumption of control by unit owners are not personally liable to the association for the existence of or failure to correct construction defects; case distinguished from *Avila* and *B & J Holding Corp. v. Weiss*, 353 So.2d 141 (Fla. Dist. Ct. App. 1977) because no cognizable breach of a common-law, statutory, or contractual duty is alleged).

Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Co., Inc., 67 Ohio St.3d 274, 617 N.E.2d 1075 (Ohio 1993) (condominium statute has preempted common-law liability of developer to unit owners for breach of fiduciary duty; relation of developer to unit owners and association is regulated commercial relationship rather than fiduciary relationship; statutory duty to disclose all material circumstances or features affecting the development imposes strict liability, imposing absolute requirement that developers disclose relevant fi-

nancial information about the development).

The right to sue the developer to enforce these duties may be lodged in individual lot owners during the period of developer control of the association:

Siller v. Hartz Mountain Assoc., 93 N.J. 370, 461 A.2d 568 (1983) (individual unit owners may maintain derivative suit for damage to common areas if association fails to act; unit owners may sue association for breach of fiduciary duty in pursuing or settling claims for damages to common areas; unit owners may sue for defects in construction or other damages to common areas during period of time developer is in control of association; inherent conflict of interest is such that the association would not be in a position to resolve conflicts with the developer).

STATUTORY NOTE

(All statutory citations are to WESTLAW, as of April 1, 1999)

UCIOA: Section 3-103(a): In the performance of their duties, officers and members of the executive board appointed by the declarant shall exercise the degree of care and loyalty required of a trustee.

California: Cal. Civ. Code § 1368.4 requires a 30-day notice prior to filing any civil action by the association against the developer for damage to common areas, or certain other actions.

Cal. Bus. & Prof. Code § 11012: Developer may not materially change set up of offering of subdivided lands without notifying department of real estate of proposed change

Florida: Fla. Stat. Ann. § 718.112(f): Developer-controlled association may vote to waive reserves for first two years of association's operation; thereafter approval of majority of nondeveloper voting interests present at duly called meeting is required.

Fla. Stat. Ann. § 718.3025 requires disclosure of any financial or ownership interest of the developer in a party contracting to provide maintenance or management services to the association while the developer is in control of the association.

Fla. Stat. Ann. § 718.4015 prohibits the inclusion or enforcement of escalation clauses in land leases or other leases for recreational facilities or other commonly used facilities serving residential condominiums, declaring them void for public policy.

Ohio: Ohio Rev. Code Ann. § 5311.26: No developer or agent, directly or indirectly, shall sell or offer to sell a condominium ownership interest in a condominium development unless he fully discloses to each prospective purchaser of the interest all material circumstances or features affecting the development. The statement shall not intentionally omit any material fact or contain any untrue statement of a material fact.

§ 6.21 Developer's Power to Waive Provisions of the Declaration

A developer may not exercise a power to amend or modify the declaration in a way that would materially change the character of the development or the burdens on the existing community members unless the declaration fairly appraises purchasers that the power could be used for the kind of change proposed.

Cross-References:

Section 3.1, Validity of Servitudes: General Rule; § 6.10, Power to Amend the Declaration; § 6.20, Developer's Duties to the Community.

Comment:

a. Rationale. The character of a common-interest community as indicated by the existing housing and promotional materials is frequently one of the most important considerations for prospective purchasers. People generally believe that a developer will continue to build housing of a similar quality and character, and anticipate that the value of the property they buy will not be undercut by future construction in the project. In reaction to changing market forces, however, developers may find it desirable to build less expensive housing, or otherwise substantially change the character of the development. To retain their flexibility to make changes, they frequently build projects in phases, subjecting each phase to servitudes as it becomes ready for development, but keeping the balance of the land free from servitudes. So long as the phasing is apparent to purchasers, reciprocal servitudes that would prevent the developer from changing the character of the development will not be implied on property that has not yet been subjected to recorded servitudes (see § 2.14 for discussion of the general-plan doctrine).

In addition to phasing development, however, developers may retain powers within a particular phase, or within an entire project, to