

EMBRACING NEW URBANISM: REPRESENTING DEVELOPERS IN A CHANGING DEVELOPMENT CLIMATE

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This article examines the principles of New Urbanism, its increasing importance in today's "smart growth" development climate, and the impact it is having on development of retail, office, restaurant, entertainment, and other commercial uses, as well as housing. It addresses the challenges to implementation as well as issues unique to community governance and administration of new urbanist communities.

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I. What is New Urbanism and Why Do We Care?

A. It's Happening Whether You Like It or Not.

A quick search on the Internet for the "New Urbanism," "smart growth," or "TND" brings up dozens of articles and websites devoted to the topic of New Urbanism.¹ Many include ever-expanding lists of projects across the country, on both coasts, in big cities, small towns, and in remote areas, that are incorporating the principles of New Urbanism and traditional neighborhood development in their design and implementation. These projects include new "towns" on greenfield sites, as well as brownfields, suburban town centers, and urban infill and redevelopment projects. They incorporate retail, office, restaurant, entertainment, and other commercial uses, hospitals and other medical uses, civic uses and a variety of housing.

The principles of "New Urbanism" are spreading far beyond the urban growth boundaries of Portland, Oregon and beyond the boundaries of the quaint Florida seaside resort community around which early debates were often centered. It is no longer just a design trend being pushed by a few land planners. As calls for "smart growth" become louder and more prevalent across the country, New Urbanism is increasingly being touted as the antidote to sprawl. Builders and developers of all types of residential and commercial uses are looking at a new way to develop, whether prompted by market demand, pressure from various interest groups, requirements of local government, or simply a desire to be "cutting edge." Like it or not, their lawyers need to be prepared to embrace New Urbanism and assist their clients in implementing it.

B. It Means Doing Things Differently.

Whether applied to a small-scale urban infill project or a large-scale mixed use community, New Urbanism promotes the creation and restoration of mixed-use, pedestrian-friendly neighborhoods that contain a range of housing choices within easy walking distance of work places, retail and entertainment opportunities, services, schools, parks and other gathering spots, and public transportation. Development is designed to minimize environmental impact, emphasize quality architecture and design, and maximize quality of life. This is accomplished through such features as:

¹ For a few examples, see www.smartgrowthnews.com; www.ntba.net; www.cnu.org; www.newurbanism.org; www.preservenet.com; www.nationalgeographic.com/earthpulse/sprawl/p_resources.html and related links.

- Walkability - proximity of various uses within a 10-minute walk and pedestrian-friendly street designs (*e.g.*, narrower streets with low speed traffic, on-street parking with garages and parking lots in rear);
- Connectivity - a network of interconnected streets to disperse traffic and reduce walking distances;
- Mixed uses - a variety of uses within the same building, block and neighborhood to create activity, promote interaction, and reduce reliance on automobiles;
- Housing Choices - a mix of housing types, sizes and price ranges to encourage diverse communities, provide affordable housing near jobs, and permit aging in place;
- Quality Architecture and Urban Design - an emphasis on aesthetics, human scale, and special placement of art, civic features, and public gathering places to encourage interaction and promote a sense of place;
- Activity Center - a clearly delineated "main street," "town center" or similar area in which commerce, culture, and civic activities come together
- Higher Density - location of buildings in a compact area to enable more efficient use of services and resources and to promote walkability;
- "Smart" transportation options - a variety of safe and efficient options for daily transportation, including walking, bicycling, and use of public transportation, to reduce reliance on and the environmental impact of automobiles.

None of these principles is really new or different -- there are hundreds of examples of each in cities and towns across the country. What is new and different is the growing recognition that (1) these things are important to enhancing quality of life and creating sustainable communities for the future; (2) that development over the last several decades, by and large, has not focused on or incorporated these principles; and (3) it doesn't just happen without careful planning and implementation. Whether representing a developer in community forums, before planning boards, or in deals with end users, the lawyer has a role to play in helping all stakeholders understand the benefits and overcome the challenges to implementing New Urbanism.

C. It Has Real Benefits, Regardless of Perspective.

Developers may quickly realize that developing a higher density, mixed-use project with new urbanist principles has the potential for generating more income as it provides more leasable or saleable square footage as well as higher property values and selling prices. In addition, the developer may realize significant cost savings on land and on development of infrastructure due to a more compact area, and may experience faster sellout or lease up due to a wider range of product offerings and the uniqueness of the product in the marketplace.

However, as with any proposed real estate project, there are likely to be those who do not share the developer's vision or understand the benefits of a new urbanist development. Community opposition is not uncommon, particularly when word spreads that the developer is proposing higher density than what the community may be accustomed to seeing. The lawyer should be prepared to assist the developer in winning community support through "town hall" meetings that emphasize the benefits to residents, to businesses, and to the community at large.

Likewise, for every local government that has taken a lead in implementing growth management initiatives, flexible zoning ordinances, and building codes to encourage "smart growth" and new urbanist developments, dozens have little or no understanding of the concept or its benefits and may resist any proposal that appears to draw community opposition. The lawyer must understand and be able effectively to communicate the benefits of New Urbanism to government officials at all stages of the development approval and permitting process.

For residents, New Urbanism means a higher quality of life, less time spent commuting to work, higher and more stable property values, close proximity to neighborhood shops, restaurants, and services, a better sense of place and community identity, more open space and aesthetic appeal, and more efficient use of tax dollars for police and other public services, school buses, utilities and roads.

For businesses, it means a variety of options for leasing or owning space; more "walk by" traffic and less money spent on advertising and signage to attract customers; increased sales due to greater and more consistent levels of activity in the area; easier recruiting of employees with less concern about long commutes and parking issues; and a closer connection to the community in which the business is located.

For the local government and community at large, new urbanist developments offer a higher initial tax base due to their density and a more stable, appreciating tax base over time; lower per capita spending on infrastructure and municipal services; lower crime rates due to greater presence of people day and night; greater opportunities for civic spaces; less traffic congestion; and a better overall community image and sense of place, leading to greater community involvement.

II. What are the Challenges to Implementation?

A. Market Segmentation.

Development and implementation of new urbanist projects involves a fundamental change in the mindset typical of many real estate developers, lenders, and brokers over the past several decades. Market segmentation and specialization has become the norm within the real estate industry -- developers only develop certain types of products, lenders only lend on certain types of products, and brokers only know how to sell certain types of products. Increasingly, their lawyers are equally specialized. Yet mixing of uses and ownership structures within a single project demands a combining of experience and talents from different market segments to

address new issues and new layers of complexity at each stage of project implementation, from market feasibility to financing to sales and marketing.

B. Approval and Entitlement.

While an increasing number of local governments are adopting flexible zoning ordinances and building codes that permit and promote traditional neighborhood design (or "TND") concepts,² it is still far more common to encounter conventional zoning ordinances that separate land uses, control density, and dictate dimensional requirements such as building height, lot size, massing, and setbacks, in a manner that discourages creativity and creates stumbling blocks for those seeking approval for new urbanist projects. Ordinances that provide for overlay districts, planned unit developments, and specific or special area plans offer some relief from the rigidity of conventional zoning and may help avoid the need for a multitude of variances (typically requiring a showing of hardship), but still fall short of providing the level of flexibility desired to implement new urbanist principles.

In contrast, TND zoning ordinances typically permit housing over shops, encourage buildings to be set close to the street, require parking behind buildings, allow mixing of lot sizes, housing types, and price ranges, and permit accessory dwellings such as garage apartments and guest cottages in order to promote diversity and provide affordable housing within the community.³ The good news is that, as local governments learn more about the benefits of New Urbanism, they are increasingly looking for ways to facilitate it and are becoming more receptive to amending their existing ordinances or adopting new ordinances to encourage this type of development.⁴

C. Financing.

Financing of both infrastructure and vertical development in a new urbanist project can be a major challenge for a number of reasons. First, the multiple land uses within the project pose multiple risks that result in a higher level of overall risk to a lender than in a single use project. As mentioned earlier, many institutional investors focus on specific types of properties and banks tend to departmentalize; as a result, they both lack the relevant expertise or willingness to bring together the necessary expertise to properly evaluate projects that mix land uses.

² For a list of jurisdictions that have adopted TND zoning guidelines and information on obtaining copies, see www.worldideanet.org/win/winindex.nsf/htmlmedia/research.html.

³ See, for example, the TND zoning ordinances adopted by the City of Austin, Texas, at www.review.ci.austin.tx.us/tnd/defaulttnd.html; the Town of Belmont, North Carolina, at www.ci.belmont.nc.us/Belmont/zoning.htm; and the City of Portland, Oregon, at www.europa.com/pdxplan.

⁴ At the same time, a variety of resources are being made available to facilitate the amendment process, ranging from model zoning ordinances to "tool kits" offering guides and strategies to implementing "smart growth" solutions. See, for example, www.georgiaqualitygrowth.com; www.ite.org/tnsguide.htm; and websites previously cited.

Another financing challenge lies in the fact that standard methods of accounting and of evaluating returns on investment favor short-term and rapid depreciation over the long-term increase in value and quality more typical of new urbanist projects. That is compounded by the fact that large, multi-use projects often require substantial equity to fund front-end infrastructure costs for things such as structured parking, transit improvements, and the like. That type of equity is more likely to come from institutional investors.

One possible solution to these financing challenges may be to carve off pieces for short-, mid-, and long-term investors by dividing the various cost elements of the project into three categories: land, land development, and building development. Each piece would have a different cost associated with it as a percentage of the total development cost. These pieces of debt, called "traunches," could then be divided according to the risk associated with each, with "A-traunch" (shortest term/lowest risk) having lowest yield, and so on.

D. Marketing and Sales.

Marketing and sale of properties within a new urbanist project also pose some challenges that are often avoidable in typical developments with segregated land uses. There is the obvious necessity of coordinating brokers accustomed to dealing with different market segments and educating brokers and prospective buyers and tenants on issues of governance, administration and use discussed below. In addition, the lawyer and his or her client may have to deal with compliance issues under the federal Interstate Land Sales Full Disclosure Act⁵ ("ILSFDA") and similar state laws regulating the leasing and sale of subdivided lands.

Section 1703(a) of the ILSFDA makes it unlawful to use any means or instruments of interstate commerce to sell or lease a lot unless the lot is either registered by filing a Statement of Record with the Department of Housing and Urban Development or exempt from registration under one of a number of exemptions provided by the statute and regulations. The term "lot" includes traditional subdivision lots and parcels of land as well as condominium units and undivided interests in real property. It includes property intended for residential use as well as commercial and industrial properties.

One of the more commonly relied upon exemptions from registration under the ILSFDA is the "improved lot exemption,"⁶ which exempts lots improved with a residential, commercial, or industrial building, or lots sold or leased under a specifically enforceable contract that obligates the seller or lessor to construct such a building within 2 years. Another commonly used exemption is the "builder exemption,"⁷ which exempts the sale or lease of a lot to a licensed contractor engaged in the business of constructing residential, commercial, or industrial buildings for resale or lease. When these exemptions are not available, developers often turn to the "single family residence exemption"⁸ for residential lots and the "business park exemption"⁹

⁵ 15 U.S.C. §1701, *et seq.*

⁶ 15 U.S.C. §1702(a)(2)

⁷ 15 U.S.C. §1702(a)(7)

⁸ 15 U.S.C. §1702(b)(5)

⁹ 15 U.S.C. §1702(a)(8)

for commercial parcels. However, because of the nature of new urbanist developments, there are likely to be lots that do not qualify for either of these exemptions.

In order to qualify for the single-family residence exemption, a lot must be situated within a jurisdiction that specifies minimum standards for subdivision lots, the subdivision must meet all local codes and standards, and the lot must be restricted by applicable zoning to single family residential development (not to exceed four dwellings per building). New urbanist developments in jurisdictions with conventional zoning will typically incorporate narrower streets, smaller setbacks, and less parking than dictated by local codes and ordinances in reliance on variances, making the residential lots ineligible for this exemption. Even where TND zoning ordinances are in place to permit these features of New Urbanism without the necessity of a variance, the zoning rarely restricts lots to single family residences, and residences over offices or retail shops are common. As a result, it will likely be necessary to register with HUD and comply with the anti-fraud provisions of the ILSFDA for some, if not all, of the lots in the development.

In order to qualify for the "business park" exemption, a parcel intended for commercial development must either be zoned for industrial or commercial development or be restricted to such use by a recorded declaration of covenants, conditions and restrictions. The mixing of land uses typical of a New Urbanist development would be inconsistent with such zoning or restrictive covenants. As a result, the sale of any unimproved lot intended for mixed use would likely be subject to registration and the anti-fraud provisions of the ILSFDA unless the developer/seller is constructing the mixed-use building on it or sells to a contractor who will be constructing the building for resale or lease, rather than personal use.

Compliance with the registration and anti-fraud provisions of the ILSFDA can be time-consuming for the developer and the developer's lawyer, so both should anticipate and plan for it early in the implementation process. The ILSFDA requires that marketing materials and sales and leasing documents contain specific language and disclosures. The marketing team should be familiar with the disclosure requirements in order to ensure that buyers and lessees get the necessary documentation in a timely manner. The lawyer should advise the development team of the need for updates to the Statement of Record whenever there are material changes in the matters previously represented in filings with HUD.

E. Affordability.

Another challenge to implementing New Urbanism lies in ensuring continuing availability of housing for a range of households and income groups and commercial space for a range of commercial ventures. If the development is to be a true live/work community, it must provide affordable housing to attract and retain school teachers, police officers, restaurant workers, retail clerks and others to work in the community. That housing should include both purchase and leasing opportunities to introduce people to the community and allow them to have a sense of permanency. If the developer is to be successful in providing the mix of uses that make up a vibrant activity center and serve the needs of the community, it must also offer large spaces and small commercial spaces, for lease and for sale, that local entrepreneurs can afford.

Moreover, those housing options and commercial opportunities must remain affordable throughout the life of the community.

One approach to the housing challenge is for the developer to provide a range of lot types and sizes that dictate varying house types and sizes, mixing large and small detached homes with duplexes and town homes. Another approach is to establish design guidelines and architectural controls that encourage, rather than proscribe, accessory housing such as garage apartments and guest cottages, along with covenants that permit leasing to singles, small families, the elderly and others. Likewise, covenants that permit certain business uses in conjunction with a residential use can create and help to maintain affordable office space for professionals, artists and home-based business people, and other entrepreneurs.

While it is relatively easy for a developer to provide product designed to be affordable at the outset, the challenge lies in keeping it affordable as property values in the community escalate over time. The lawyer can assist in meeting this challenge through covenants or deed restrictions recorded on residential and commercial lots which the developer has identified as "affordable." The covenants can help control resale prices by capping the appreciation permitted on resale or by providing for appreciation in excess of a pre-determined limit (perhaps tied to increases in the Consumer Price Index) to go into a pool to be used to "buy down" prices on future resales.

III. What are the Implications for Governance and Administration?

A. Selecting the Appropriate Legal Structure.

Due to the market segmentation prevalent in the real estate industry, financing considerations, and other factors, the developer of a new urbanist project will not likely develop and build everything itself. In most cases, it will obtain the necessary entitlements and approvals, subdivide the land, install the community infrastructure, and sell or lease parcels to other specialized builders and developers who will undertake the vertical construction. In light of this, the master developer must put in place mechanisms to ensure that the various players work together to implement its vision for the community. In addition, it will need mechanisms to control land use, design and construction, and ongoing maintenance and administration to ensure the long-term success and viability of the community.

1. Municipality or Association?

The tendency among many new urbanist developers is to want to incorporate the community as a municipality with its own town council, its own zoning, and its own taxing and regulatory authority. Another option is to rely upon community development districts, metropolitan districts, or similar special taxing districts to own, operate and maintain infrastructure and provide municipal services. However, in most cases neither of these options will provide an adequate scope or level of control to implement and protect the developer's vision over the long term.

Municipalities and special taxing districts are creatures of state law and, as such, the registered voters of the municipality or district are entitled to elect their governing officials on a one person, one vote basis. All eligible residents of the municipality who register are entitled to vote, while non-resident property owners have no vote, notwithstanding that they are paying the property taxes to fund its operations. As a result, this approach does not allow the developer to retain the control that it needs during the development process, even though it may be the largest landowner for an extended period of time. The developer would be at the mercy of the municipality or district when it is time to dedicate property and amenities such as open space and civic facilities, particularly if the town counsel perceives them to be liability-prone or costly to maintain. Likewise, the developer would have no control over the level of maintenance which the town provides to, or the level of operation of, previously dedicated properties and facilities, which could have a significant impact on marketing.

In a project where the developer subdivides the land and sells various parcels for further development, the necessary controls can best be established through a system of recorded covenants that provide for the long-term ownership, maintenance and operation of common areas and civic spaces; provide mechanisms for regulating use; obligate property owners to contribute to the costs of providing shared facilities and services; provide for participation of all property owners in project governance; and establish procedures and standards for design control and aesthetic matters. Such covenants provide for each property owner to be a mandatory member of one or more property owners associations that are given responsibility for administering and enforcing the covenants.

2. How Many Associations?

There are a variety of association governance structures that can work well for a new urbanist project. Some of the more commonly used structures include:

- a single association with jurisdiction over all land uses within the project;
- a single association with jurisdiction over the predominant land use within the project, in conjunction with a covenant obligating minority land uses to share in the costs of shared infrastructure, amenities and services;
- dual associations (one for residential uses and one for nonresidential uses), with a cost sharing arrangement between them; and
- dual associations with an umbrella entity to administer all shared properties and services.

While a primary goal should be simplicity, the structure chosen must be adequate to meet the needs of the project and the future owners, must be perceived as fair and, above all, must be *workable*. A clear understanding of the particular project and its needs is critical to selecting the most appropriate mechanism and tailoring it to the project.

There are a number of factors to be considered in determining the most appropriate mechanism for administering a mixed-use community, including:

- the types, acreage and locations of planned uses and the number of different parcels;
- the nature of amenities and extent of shared benefits and services;
- the extent of control desired over various land uses; and
- the target market.

In concept, the very nature of a new urbanist project suggests that a single community association with jurisdiction over all land uses most closely fits with the developer's vision of creating an integrated, mixed-use community in which the relationships between diverse users and uses creates the activity and energy that makes the community special. It may be the simplest structure for brokers to explain and for prospective buyers and tenants to understand, as it most closely resembles the governance structure of a real town. However, a single association approach requires great attention in the governing documents to issues of allocation of control and balancing of interests among land uses, allocation of liability for common expenses, and regulating use.

Unless the developer has very concrete and well-thought out development, marketing and operational plans at the outset, it may be difficult to anticipate and address these issues up front in a manner that will be acceptable to all parties as the project is built out and sold. In such cases, it may be less risky and provide greater certainty to proceed with a different association structure that requires a very limited relationship of easements and cost sharing between land uses.

B. Allocation of Control.

1. Multiple Associations.

If the governance structure will involve multiple associations, the covenants will need to address allocation of responsibility and control over shared facilities and services between the associations. If residential and nonresidential properties share only minimal infrastructure, such as passive parks and landscaping along a public right-of-way, the impact on minority land uses and the dollars involved are likely not substantial enough to require that minority land uses be given significant input into decision making. On the other hand, if the shared amenities include parks, lakes, fountains, roving security patrols, or similar amenities and services, it may be more important for each land use type to have a meaningful voice in decision-making regarding the level of maintenance, operation and service to be provided.

The target market and its desire, or lack of desire, to control the administration of the community and shared amenities and services is also a factor to consider in the drafting process. If the predominant commercial users are expected to be neighborhood retail or other small businesses, there may be no desire among the commercial owners to be responsible for, or even provide input regarding, the provision of shared services or the maintenance of shared property. Placing responsibility on such owners may result in failure to achieve the desired level of service or maintenance. On the other hand, apartment developers, major corporations and commercial

buyers purchasing property for large facilities may have a much greater interest in controlling, or at least having a meaningful voice in, the decision making process.

2. Single Association.

If the governance structure calls for a single association, the drafter will need to consider very carefully the issue of voting rights and representation for each land use within the association and then incorporate adequate protections for each class of membership to ensure that neither land use can materially alter the rights and responsibilities of the other without its consent. If the project includes a significant residential component and secondary mortgage market approval is critical to marketing of the residential properties, it may be necessary to vest control in the residential owners, but that should not preclude material participation by nonresidential owners.

Although there is rarely any legal requirement to allocate voting rights or control in any particular manner, for the sake of simplicity and perceived fairness, votes are often allocated among property owners within an association using the same or a similar methodology to that used in allocating shared expenses. As a result, the issue of allocating control should not be decided without also giving careful consideration to the appropriate allocation of common expenses.

C. Allocation of Common Expenses.

Determining the appropriate formula for allocating shared costs among the various land uses, and among owners within a particular land use type, is perhaps one of the most difficult aspects of drafting covenants for a new urbanist project. Often, that decision must be made before the project is sufficiently built out to know exactly what land uses will exist and what portion of the total project they will represent and before there is an adequate operating history to have even a reasonable estimate of what the total shared expenses will be. To cloud the issue even further, the developer and its marketing team often have internal conflicts over which land use should bear the greatest burden, as each marketing team wants to minimize the cost for its prospective buyers or tenants.

Historically, shared expenses have been allocated among the different land use types within a mixed use project according to a formula based on one or more of the following factors:

- type of use;
- area of land;
- area of improvements;
- appraised value;
- ability to pay/impact on marketability; or

- intensity of use.

In determining which factors should comprise the formula for allocating expenses within a particular project, it is necessary to look at the administrative mechanisms selected and the nature of the expenses to be shared, as well as the anticipated amount of such expenses.

If there is to be a single association administering the project, it is generally desirable to separate those expenses which benefit all land uses from those expenses which benefit only particular areas or land uses within the project and then apply the selected formula for allocating expenses between land uses to only the first group of expenses. For example, all property owners might share the expenses of maintaining the "town square" and fountain, right-of-way landscaping, and community signage, while only residential owners would share expenses of maintaining recreational facilities such as pools, tennis courts, and similar amenities. However, it is often quite difficult to segregate expenses in this manner (*e.g.*, who benefits from street lights in the town center?), particularly when the allocation decision must be made before all of the expenses have been determined. Inevitably, some expenses will benefit some land uses more than others, but most will benefit all land uses to some degree. Thus, it becomes a hair-splitting exercise to segregate the expenses in this manner.

In such cases, it may be simpler to develop a formula that allocates all but a few specified expenses in the same manner. This would be analogous to property taxes that property owners pay to their local government, where all funds collected go into a general operating fund to cover various expenses that benefit some more than others and some not at all. This type of formula needs to be based upon some factor common to all land uses, such as acreage or appraised value, or make use of an "equivalent unit" system by which various factors are converted to a common denominator.

There is clearly no "one size fits all" formula for allocating expenses within new urbanist projects. The formula used for each project must take into account the unique aspects of that project, reflecting the land uses, nature of expenses, and target market.

D. Regulation of Use.

Regulation of use in a new urbanist project requires an understanding of the types of uses that should be encouraged in order to create the excitement and activity that is part of the developer's vision for the community, as well as great sensitivity to the needs and expectations of various types of users. For that reason, it is important to involve the marketing team for each land use in the process of determining initial restrictions on use and ongoing regulations. It is also important to establish a process for ongoing regulation that protects the divergent interests of various users, including certain "inalienable rights" as well as rights of approval over future changes.

Use restrictions should encourage the types of uses in activity centers that add to the ambience and activity that the developer is trying to create and prohibit uses at street level that are inconsistent with that vision. For example, restrictions should be designed to encourage restaurants, boutiques, book and other retail stores, art galleries, banking services, travel services,

barber shops and hair salons, while prohibiting office and residential uses, pawn shops, and other uses at street level that tend to create "dead" or undesirable space on the streetscape.

Restrictions should also take into account zoning ordinances that could impair the developer's ability to attract desirable businesses to its activity center. For example, if zoning prohibits selling or serving alcoholic beverages within 1000 feet of a place of worship, it may be beneficial to restrict use of property within 1000 feet of the activity center as a place of worship in order to maximize the ability of restaurants that serve alcoholic beverages to locate within the activity center.

Regulations applicable to common areas within a new urbanist community should also be designed to permit and promote the types of activities that create and channel excitement and activity. For example, the drafter should reconsider typical prohibitions of on-street parking and commercial activities on common areas in favor of permitting parking in front of businesses, use of sidewalks for outdoor dining and sidewalk sales, and use of squares and other "public" spaces for market day or festivals. The drafter may also want to establish a procedure for permitting vendors to use pushcarts or kiosks within such areas. Restriction on use of parking spaces shared by residential and nonresidential properties should be sensitive to the need to accommodate public access to businesses and assure convenient parking for residents.

E. Architectural Control.

It is critical to the success of a new urbanist project to reserve to the developer control over architecture within the project until the last parcel is developed and to provide continuing controls over modifications and improvements thereafter. The clustering of buildings, uses, and product types that is a hallmark of New Urbanism and the emphasis on creating a pedestrian friendly streetscape demands far greater attention to details of design and architecture than may be common in other types of developments which have more uniformity of design. Moreover, residential builders and commercial buyers will want assurances that their design approval will not be subject to the whims of a group with potentially adverse interests. Thus, the covenants for a new urbanist project should establish a detailed design review process, vesting control in the developer during the development and sale period and then in a committee or committees representative of the various land uses within the association's jurisdiction.

The recorded covenants should authorize and reference, but not necessarily include, a separate set of design guidelines to facilitate the review and approval process. The design guidelines should be flexible enough to accommodate innovative design and amendable by the developer without owner consent. The design guidelines should not be represented as an exhaustive list of rules that, if followed, guarantee approval, but rather as merely a guide to facilitate the review process. The developer needs the discretion to reject plans that, although in full compliance with the design guidelines, do not fit with the developer's vision for the community or work in the proposed location.

F. Creating "Community."

The governing documents for a new urbanist development are fundamental to the process of creating a true sense of "community." They should set the tone for the community, educate and inform, encourage participation in community affairs, and present the community as a desirable place to live and work. They should be viewed, and used, much like a "constitution" for the community, a living document that forms and guides the community as it evolves and changes over time.

The developer of a new urbanist community wants property owners and residents to be motivated by community pride and neighborliness, not by restrictions and fear of sanctions. Yet the governing documents for typical planned communities are commonly referred to as "restrictive covenants," and contain page after page of prohibitions and restrictions. If developers are to repeat the success of the older communities they are attempting to model, there needs to be a change in mindset--in both documentation and practice--from one of restrictiveness and control to one that focuses on empowerment and participation.

The governing documents should include only those restrictions that are important to implementing the developer's vision for the community. The documents should then empower the board of directors and the membership to adopt regulations and to modify them so that the regulations can be tailored to the particular needs and desires of the community as it changes and evolves. The documents should include appropriate provisions to provide comfort to owners and residents that certain fundamental rights will not be impaired by future regulation.

The association should have broad enforcement powers and an array of possible sanctions, in addition to legal action, to address violations. However, the association's board of directors should have the authority to use its judgment in determining *not* to take enforcement action under circumstances where the board determines, in the exercise of its business judgment, that the violation is minor in nature and would not be objectionable to a reasonable person, that the nature of the violation does not justify expending the association's resources to enforce compliance, or that the association's legal position is tenuous.

When the board determines that enforcement action is appropriate, the documents should provide for notice to the violator and an opportunity to cure the problem, if appropriate. They should also provide the violator with an opportunity to be heard before a final decision is made regarding imposition of sanctions.

Enforcement problems and other conflicts can often be traced to a lack of understanding, a lack of sensitivity or miscommunication. The governing documents can help to avoid the financial and emotional costs to those involved in such conflicts and to the community by providing mandatory procedures for negotiation and mediation of disputes to help resolve such conflicts without litigation.

The governing documents should encourage residents' participation in the community and its governance, not only through voting and service on committees, but also in other ways. Technology available today can help to overcome the problems of apathy, misinformation, and

feeling out of touch that often detract from the developer's and the association's efforts to create a sense of community. Community intranets and home pages on the Internet can greatly enhance the opportunities for communication between the board of directors and the property owners and residents on community issues; disseminate information regarding the community, its administration, and its activities; and encourage participation in special events, committees, schools, and volunteer efforts. The governing documents can facilitate this process by providing for ownership and operation of a community intranet and by authorizing notices to be sent to members by e-mail and voting by e-mail, subject to any limitations that may exist under state corporate law.

New urbanist developers know that creating "community" requires more than just installing streets and utilities and constructing buildings. Residents want opportunities for recreation, social interaction, and community involvement. This may require expanding the traditional role of the community association to include provision of recreational and educational programs and sponsorship of clubs, civic and charitable organizations; environmental and conservation programs; the arts; and cultural activities. Alternatively, the developer may wish to create one or more tax-exempt organizations to perform these roles, separating them from the traditional business and governmental roles of the community association and providing tax benefits as well. In either case, the governing documents should address the authority to engage in these activities and provide a source of funding.

One method that is increasingly being used to fund such activities, whether provided by the association or through a separate, tax-exempt organization, is a transfer fee. In addition to assessments which an association regularly levies to fund expenses incurred in fulfilling its traditional responsibilities, the governing documents may authorize the association to collect fees from the transferring owner upon resale or other transfer of property in the community to help fund community enhancement activities. Such fees might be based upon a percentage of the resale price or appraised value of the property, returning to the community a portion of the appreciation in value that the seller realizes on resale. This approach recognizes that such appreciation is enhanced by the desirability of the community in which the property is located and that the community is made more desirable by the types of activities that such fees support.

IV. So What Do We Do Now?

Representing a developer in today's "smart growth" climate calls for sensitivity to the issues that dominate the agendas of local and regional governments, that energize environmentalists, and that consume the energies of anti-sprawl groups. Whether it is quality architecture and urban design, walkability, diversity, social interaction, civic involvement, or transportation, the lawyer must understand the goals of New Urbanism and be able to assist his or her client in meeting its challenges in order to satisfy the demands of the local regulatory agencies, community groups, and the marketplace. Finally, the lawyer must recognize that New Urbanism is more than just a design trend and must be willing to adapt the necessary legal documents and approaches to facilitate the creation of "community" consistent with the goals of New Urbanism and the developer's vision.