Architectural standards and control issues must be balanced to provide consistency and harmony within a common interest community and flexibility to meet changes in the community and the marketplace.

§7.01 SCOPE

What is a "design standard?" Is there a difference between the words standard and controls or requirements? From a policy and enforcement perspective, the choice of word can make a significant difference. The purpose of design standards is to provide a degree of control. However, the normal structure and phrasing of the documents relating to this process strive to strike a middle ground among permissiveness, language requesting compliance, and obligatory language providing only one choice. As the pattern-book process becomes more commonplace, choices become more limited; therefore, even with that process, there are choices. A significant issue, however, is what constitutes a design standard and the degree of specificity required for enforcement.

Who sets the design standards and how may standards change? What factors support change and what factors oppose it? Another area of inquiry concerns differences, if any, between design standards and use restrictions. What is the nature of the differences and how do differences affect enforcement? Design standards and design control are flash points in the structure and operation of common interest communities. Consider why homeowners care so much about the way their home looks and their unfettered right to make the decisions on these subjects. Even when buying into a community marked by interdependence, people still see their homes as their castles. Other people believe that home design is an aesthetic statement of who they are and what they wish to be. Still others believe that design standards and control are very important as applied to the neighbors. The neighbor, after all, might "do something wrong," whereas the proponents of the standards and controls find it unnecessary to apply the rules to themselves. Cases concerning design standards present opportunities not only for legal analysis but also for developing well-tuned people skills.

Design standards and control require both certainty and flexibility. The result is that articulating a standard is a difficult task. Residents need to have sufficient guidance so that they know what is expected, but standards need to evolve to reflect changing styles, materials, and markets. Must all design standards be written down, or may the reviewing authority have wide discretion in interpreting general standards? How does the use of discretion and subjective decision making
affect enforcement? Courts address these issues, and the drafter needs to do so as well.

Creating the standard and the method of communicating it is a challenge. In the early years of common interest development, most guidelines reflected the language in the FHA form, which required that a structure be "in harmony" with its surroundings. There was a great deal of subjectivity in determining whether a structure was acceptable. Increasingly, "pattern books" are available, which specify what is permitted on a particular lot. Times and circumstances change, and the method of determining and applying the standards changes, too.

Consider the relationship between the design review process in the private setting and the zoning and building approval process in the public setting. Note the distinction between public law and private law, and consider how one affects the other. To what extent does one supplement the other? In some situations, public law is more restrictive than private design standards.

The homeowner and the association's design committee are significant parties in this process, but there are others as well. The declarant-developer has an interest in the process and its long-term, uniform application. The merchant-builder (the term most frequently applied to the homebuilder who buys lots or parcels of improved property from the developer for the construction of homes) also has an interest. The merchant-builder not only is concerned about standards, but also is interested in having maximum flexibility to do what is necessary to satisfy the potential buyer of the home. Thus, a potential conflict between two major players is created from the outset.

The interest of the individual owner is apparent, as it pertains to his or her home and to the surrounding homes. The association representing the group of owners has an interest parallel to the developer's in the desire for long-term, widespread uniformity and quality. At the same time, the association becomes the enforcement agent that must resolve any potential disputes. It, therefore, also has an interest in ensuring a procedurally appropriate and judicially understood system for design review.

Often overlooked is the local government, which has a considerable stake in the design review process. Local government can shift responsibility to the association's design process. Most frequently, however, a developer passes on to the association, through the design process, the responsibilities that local government imposed as a part of zoning and permitting. In some cases, the association's design approval becomes a condition precedent for local government's acceptance of applications for building permits. In this way, city officials do not become embroiled in granting approvals and then having work begin without association approval.

Initial considerations in addressing design cases include the economic interests and expectations of the various parties and the balance between conformity and individualism. These considerations vary from party to party, and the lawyer's job in drafting includes developing a system that reflects each party's interests. Decisions about architectural and environmental standards are normally made through a tiered process involving both the design review committee and the board of directors. In large or complex building projects, the committee is often bifurcated, with one committee making architectural and environmental decisions and another enforcing sanctions. Increasingly, the initial decisions are in the developer with no committee involvement at all. This system makes good business sense and results in a less political environment.
The parties affected by architectural and environmental standards are all owners of the properties (individual owners, the developer, or the builder) and, indirectly at least, the lenders who benefit from the enhancement and protection of collateral. In addition to the various principles adduced from an analysis of the cases on restrictive covenants, significant categories of concern involving architectural and environmental standards include minimum due process, reconciling controlling with taking, and ensuring consistency.

Enforcing the adopted standards necessitates compliance with fundamental process principles and requires a reconciliation of issues of waiver, estoppel, previously existing violations or nonconforming uses, laches, and emergence of new standards or new enforcement procedures or commitments as a result of the election of new boards of directors.

§7.02 VALIDITY OF ARCHITECTURAL STANDARDS

Architectural standards must be sufficiently clear so that owners can reasonably determine what is prohibited, what is permitted, and what must be submitted for approval.

At issue in Rhue v. Cheyenne Homes, Inc. was the validity of a covenant to protect present and future values of the properties. The court held that the language was not fatally vague as long as the covenant's intention and purpose was clear. Other courts have upheld the validity of covenant restrictions that were arguably less clear and certain than the covenants in the Rhue case. For example, in Normandy Square Ass'n v. Ells, the Nebraska Supreme Court held that a protective covenant that provided that structures must conform to the harmony of external design and location in relation to surrounding structures was not per se ambiguous and, in the proper circumstances, was enforceable, provided that authority was exercised reasonably within the framework of the covenant's purpose. The court reasoned that the validity of the standard must be applied on a case-by-case basis. A question in the holdings in Rhue and Normandy Square is whether the covenants provided potential purchasers with clear standards relating to construction and modification of their property. Can there be absolute standards while still meeting the need for flexibility as styles, codes, materials, and so on change?

Unlike the general covenants upheld in the Rhue and Normandy cases, some courts find covenants invalid when the covenant lacks sufficient guidelines to enable an owner to determine which structures are acceptable under the covenants. In Prestwick Landowners Ass'n v. Underhill, the court invalidated a covenant that required the architectural design committee's consent before erecting fences and other structures. The homeowner challenged the committee's decision to disapprove a proposed fence. The court held that the covenant was invalid because it lacked de facto guidelines to give notice to a lot owner of the kind of fence that would qualify for architectural committee consent. Minutes from a board meeting showed that the committee would make a case-by-case determination. The court found that such a system increased the possibility that the committee would exercise its authority in an unreasonable, arbitrary, and capricious manner.

In Ross v. Newman, the Nebraska Supreme Court held that a covenant was invalid and unenforceable because the provision lacked clarity. The provision restricted clustered residences from being altered without express written approval by a majority of the owners of townhome lots. The documents provided that the owners look at general appearance, exterior color, harmony of external design and location in relation to surrounding topography, and other
relevant architecture factors (location within lot boundary lines, quality of construction, size, and suitability for clustered residential purposes).

The court noted that the provision was unclear regarding which alterations were subject to the design committee's approval. The court further noted that the owner-appellant, as well as other owners, had installed exterior front doors, beveled glass windows, door knockers, different-colored front doors, and patios, all without vote under the covenant. The language in the Ross provision provides much more guidance than the language in the covenants in the Rhue and Normandy Square cases, yet the court in the Ross case found the language unclear.

Courts have consistently enforced covenants when the committee's enforcement is not arbitrary and capricious.

A finding of arbitrary and capricious application of a restrictive covenant sometimes rests on the fact that the committee did not apply the covenant restriction equally to all lot owners. For example, a court found an amendment to a covenant null and void when the amendment excepted one lot owner from building restrictions placed on the use of land in the subdivision.

An important issue is the equal application of covenants to all types of construction that may fall within a provision, or at least to all property subject to the provision in a specific portion of the development. Consider the following hypothetical. A covenant provides that there will be no changes to the exterior of any structures. The architectural review committee failed to require approval of certain changes to the exterior (for example, changes in door color or door style and installation of windows that vary from the style used in the development). However, when a property owner sought to add a skylight to his unit, the committee protested. See Normandy Square, supra, for a discussion of the question whether these hypothetical facts give rise to a claim of arbitrary enforcement of covenants.

Some courts have approached blanket prohibitions on certain structures by balancing the equities. That is, the court looks at how the proposed modification or addition would affect the overall quality of the development. In balancing the equities, the court can look at the burden imposed on the owner's free use of his or her property, the association's purpose for the blanket restriction, and whether the owner’s proposed changes would be contrary to the restriction's purpose. Consider how else a court might approach blanket prohibitions; recall Narhstedt v. Lakeside Village Condo. Ass'n, and its discussion of different approaches to judicial review of covenant enforcement.

Courts are more likely to uphold the reasonableness of a covenant that bears a relation to the overall development. For example, in one case a homeowner challenged the prohibition of clotheslines in open areas of the development. Although the restriction did not expressly prohibit clotheslines, the court found that the prohibition was reasonable in light of the fact that the overall development plan emphasized the community's aesthetic quality by maintaining open common areas.

§7.03 SCOPE OF ARCHITECTURAL COMMITTEE'S AUTHORITY

The extent of an architectural committee's authority is governed by the documents granting the committee authority and the consistency with which the committee exercises its authority.
An important step in developing a procedure for dealing with architectural and environmental issues is to adopt a policy manual that contains guidelines for the association and for the board and committees operating in this area. The developer normally handles this task and administers the process while the development is being built. This system not only contributes to organizing the process but also enhances its validity and enforceability. The guidelines should discuss the legal basis, the objectives, what must have approval and what has been preapproved, the procedures, and the standards or criteria for approval.

Applications should be processed fairly, consistently, in a timely manner, and in full compliance with the procedures set forth in the association manual. An appeals process should be available. The committee or committees should include diversity within the community and at an early stage should include representatives of the nondeveloper owners. This committee system works best when the developer retains authority over new construction and the association handles modifications subject to the guidelines that the developer has promulgated.

One important consideration in testing the validity of a committee’s action on an architectural control decision is whether the committee acted in a timely manner. In Plaza Del Prado Condominium Association, Inc. v. Richman, the association sued to require a unit owner to comply with certain architectural control provisions. The board sought the removal of porch railings that the defendant unit owners had constructed and that differed in color and material from the railings on other units. The defendants argued that they had the permission of the sales representative who had been on the site during the marketing period and her supervisor and, moreover, that one year had elapsed from the time that the defendants had erected the railing until the board had raised objections. This delay, they argued, estopped the association.

The court determined that there was no uniformity in the exteriors of all units and that other unit owners had made exterior changes. Moreover, based on authority originally granted by the developer, the sales representative’s supervisor had the authority to approve architectural changes. Even were this not so, the court held that the board was under a duty to assert itself sooner and that it was estopped from objecting to the railings after a year had passed.

The discussion in §7.05 concerning The Fountains of Palm Beach Condominium, Inc. No. 5 v. Farkas illustrates that there is no "silent assent" through inaction if a request is improperly made or is directed to the wrong body. The opinions in Heritage Heights Home Owners Association v. Esser and Chattel Shipping and Investment, Inc. v. Brickell Place Condominium Ass'n also illustrate that subsequent action to cure previously ignored violations is not prohibited, particularly when the enforcement body has changed, such as when control is transferred from the developer to the owners. The problem boils down to consistency, which can be affected by the developer’s needs and market changes. Consistency can also be affected by lesser motives, such as inattention, unit owner control, the election of a different slate of directors who seek consistently to enforce in the future all regulations that have been ignored in the past, or other such major alterations in the enforcement body.

The difficulty arises when a board seeks to enforce previously existing violations against a particular owner or to enforce for the first time covenants or restrictions that were previously ignored. Both instances have found judicial support, however, and a board and its counsel should not automatically assume that it is too late to require observance of the regulations. As the Georgia Supreme Court noted, an architectural or environmental decision will be upheld unless
the decision is unreasonable, arbitrary, or capricious. Such a rule should apply to after-the-fact enforcement as well as to initial denials or enforcement. All of the facts and circumstances, including consistency and time delays, contribute to whether a decision is reasonable, arbitrary, or capricious.

Courts often must determine the general scheme or plan of development as an element in the analysis of enforcement cases. This determination is not always easy, particularly when the covenant does not set forth guidelines for defining when a violation exists. A typical example of this problem arose in Beckett Ridge v. Agne, decided by the Ohio Court of Appeals, in which a homeowner installed a clothesline in violation of a typical document provision prohibiting construction of fences, clotheslines, and so on. The homeowner’s clothesline was clearly visible from public areas and was used after the homeowner was ordered to remove it. The homeowner defended on the basis that there were no specific guidelines to assist the association in determining when a clothesline should be removed. The court pointed out that the purpose of the prohibition on clotheslines was to enhance the "aesthetic character" of the project, but that there were no guidelines specifying what that term meant; amorphous language such as pleasing or harmonious was not sufficient. Nonetheless, the court refused to accept the defendant’s position, holding that "the reasonableness of the enforcement of the covenant lies in the fact that it is consistently enforced in the same manner throughout the community."

Generally, an association's authority to enforce a covenant against an owner requires either actual notice or constructive notice that the owner has violated a restriction. The committee can "flesh out" the written restrictions or add restrictions in the nature of interpretation, but this process has met judicial rejection. The better approach is to draft specific language to allow interpretation and variation as changing times and changing markets require. Interpretation is definitely an area for careful drafting.

A number of restrictive covenants provide that the architectural committee is authorized to approve or disapprove modifications to units in a development to protect conformity and harmony of external design. See Winslette v. Keeler, in which the court held that the following harmony covenant was not so vague to render it unenforceable: "No building shall be erected, placed or altered...until the building plans, specifications and plat plan showing the location of such building have been approved in writing by the developer, his agents, successors or assigns as to conformity and harmony of external design and general quality with existing standards of the neighborhood."

§7.04 CONSTRUING DOCUMENT TERMINOLOGY

*The interpretation of design standards and regulations depends not only on the words and phrases in the documents but also on the context of the standards in light of the overall purpose of the documents and the general plan of development.*

The adage that one picture is worth a thousand words is true in the design standards process. The most effective design standards contain considerable illustrative material, often more illustration than text. The text primarily explains and elaborates on the illustrations. Some design standards contain pictures side by side, with a line struck through one or subheadings of "this, not this." This approach allows all concerned to have a greater sense of intended designs.
The design documentation is normally found in two separate instruments. The design standards, design guidelines, pattern books, or other similarly named documents provide the illustrations and architectural and design texts. The CCRs provide the teeth, the obligation to comply. The latter document empowers while the former explains.

Forward-looking documents provide for limited exceptions. Evolution and technology, design excellence, and the unique characteristics of a lot might be examples for which the review process would permit a waiver. Generally, however, the empowering documents make very clear that the final decision rests with the reviewing body, which is granted considerable discretion to decide what is appropriate under the particular circumstances.

In addition to the cases discussed in connection with restrictive covenants, some legal principles specifically apply to architectural and environmental standards. The first area of concern is the need for consistent "standards," as opposed to the predilections of a particular ruling group from time to time. Although such document language as the requirement of submission of plans for "conformity and harmony in external design and general quality with existing standards of the neighborhood" has been upheld, and cases holding that an acceptance of the deed is an agreement to be bound, courts generally look for more definite and precise standards.

Earlier wisdom posited that it was better to draft precise written standards, with little discretion vested in the review or enforcement body. The current wisdom, however, suggests that flexibility is more favorable. Although the "traditional neighborhood" movement and the trend toward pattern books are moves toward more precision, the design review process requires room for judgment. The drafter must incorporate protections for the reasonable expectations of the parties. Sameness does not equate in all cases to quality design.

When the committee acts reasonably to correct a nonconformity in style and design, the court will uphold the committee’s actions and refuse to substitute its own judgment and taste. The key is reasonableness. In a case finding an entire house in violation, a Virginia court held that the standards fixed by the committee were proper because they had been applied "reasonably, uniformly, consistently, and in good faith" over a thirty-year period to preserve architectural standards of the residential community.

In Lakes at Mercer Island Homeowners Ass’n v. Witrak, the court rejected the plain-meaning construction of restrictive covenants in favor of a contextual rule that interpreted the covenant's intent and purpose. The issue in the case concerned views and trees. The trees were not prohibited but other types of animate and inanimate objects that obstructed views were prohibited. The court recognized that the plain-meaning standard might be appropriate in a dispute between the covenant's drafter and an owner, but that the contextual interpretation standard should be applied in a conflict between owners. The court pointed out that the purpose of the covenant was to protect the homeowners' collective interests and that relying on a rule of construction that defeated those interests would be wrong. The court interpreted the purpose of the covenant as protecting the view, thus giving effect to the "overall purpose" of the covenant.

Standards are important. The standard for a community, which is established during the original development stage, is reflected by the documents and in the ambiance created as a part of the overall community. Some types of conduct violate that scheme of development or manifestation...
of the spirit of community and, therefore, are violations without the necessity of a written prohibition. This appears to have been the situation in *Sterling Village Condominium, Inc. v. Breitenbach*, in which the owners of a condominium unit in a high-rise condominium building removed the screens on their porch and replaced them with glass jalousies. The court found this to be a material alteration from the original scheme of development:

Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less. The individual ought not be permitted to disrupt the integrity of the common scheme through his desire for change, however laudable that change might be.

In fact, a unit owner may not use his or her property as an unreasonable source of annoyance to other owners or to interfere with the peaceful and proper use of the property by other owners. Individual rights in a community association may be curtailed to protect the interests of the common group. One court has held that courts should consider this question—whether there is "any use or practice which is an unreasonable source of annoyance or which interferes with the peaceful and proper use" of other owners' property—when testing the requested architectural or environmental change. Unreasonable intrusions and interference may arise in a variety of contexts, including building a wall, planting a bush, or painting a door.

The Court of Appeals of South Carolina grappled with the issue in *Palmetto Dunes v. Brown*, in which the defendant had sought to construct a house with a garage. The building plans could never seem to be depicted in a manner satisfactory to the architectural review committee, which advised the defendant to make the garage "more pleasing and acceptable" and to redraw the prints because the proposal did not "represent the quality [they were] striving for" The committee also stated that the garage "overbalanced" the house. The defendant, using the *Beckett* approach, argued that the provision was unenforceable because there were no standards to measure the permitted construction. The court pointed out that some things cannot be too specific and, having consulted such authorities as St. Thomas Aquinas, Immanuel Kant, and Mortimer Adler (editor-in-chief of the *Encyclopedia Britannica*), pointed out that "judgment [is] of taste [and], therefore, …cannot be other than subjective." The court held that the key was to follow the covenant, and the purpose of the covenant was to vest discretion in the association with the constraint to exercise that discretion reasonably and in good faith. The court pointed out that construction that was permitted must bear a reasonable relationship to other buildings in the community and to the general plan of development.

The general plan thus becomes the touchstone by which the court can evaluate the actions of the board of directors and the architectural control committee. Except in cases of extreme hardship or gross injustice, courts should seriously consider upholding the governing power of the association based on sound policy support for the purposes and objectives that the association seeks to obtain and protect.

Covenants generally require the architectural committee to approve or disapprove proposed changes within a certain period of time. Some courts have held that a committee's failure to respond within the specified time period is tantamount to approval. As a practical matter, consider whether a court should refuse to enforce restrictions when the committee failed to approve or disapprove the submitted plans within the specified time period and the owner began
changes or modifications. If the court refuses to enforce the restrictive covenant and does not enjoin the owner's activities, the owner is free to proceed with changes or modifications that may disrupt the overall appearance and uniformity of the development.

Would a better remedy be to require the association to pay any reasonable costs incurred by the property owner as a result of the committee's delay in acting on the owner's proposal? Should an owner who violates the covenant be able to pay damages in lieu of compliance? Have the rights of the neighbors to enforce the covenants been completely delegated to the architectural review committee?

Courts have reached different conclusions regarding whether the language in a covenant bars certain business activities on premises. The validity of such a restriction depends on the language in the restrictive covenant. In Monigle v. Darlington, the court held that operating a beauty salon did not violate architectural design restrictions. The covenants provided that the property must be used for residential purposes only and prohibited erecting and maintaining any noxious or offensive thing, trade, or business whatsoever.

In contrast, the court in Laux v. Phillips found that operating a beauty salon was barred by a restrictive covenant that stated no structures should be "used for carrying on any business or trade. The language of the two provisions is similar.

Does the term single family residence mean that only one family (mother, father, children) can live in any one residence? Some courts have construed the language to permit a group home in a single-family development. Other courts have held that a residence of eight unrelated college students violated a restrictive covenant limiting the residence to two families at most.

§7.05 JUDICIAL REVIEW OF ARCHITECTURAL COMMITTEE ACTIONS

A court's level of scrutiny with regard to architectural committee actions depends on the committee's procedures, the applicable design regulation, and the manner in which the committee approaches its task.

What is the scope of judicial review? If the property owner is aggrieved by a decision of the design review body, the matter often winds up in court. Which rules should the court apply in testing the design committee's decision? May the court substitute its own judgment for the committee's? Does the court have sufficient information or are there intangible factors to support traditional deference to the committee? Should the court afford to the committee the degree of deference that is given to an administrative agency? If so, what process must the committee follow to justify such treatment?

The design review process is normally administered by an entity that may be called the new construction committee, the design review board, the architectural control committee, or a variety of other names. As noted above, when the design pertains to new construction, the developer normally retains control over the approval process or appoints the members of the community association’s design review committee. As time passes and more homes are sold, the process gradually shifts to the community association.

The association's committee, frequently known as the modifications committee, usually takes
responsibility for changes in existing buildings well before the declarant-developer has completed the development. For example, modifications of existing homes, additions to exteriors, and so on become subject to the jurisdiction of the association's committee. At this point, who has a greater breadth of knowledge: committee members who are a part of the community or a judge? Several courts have indicated that the committee or the board has more complete knowledge of the community and its needs and tastes. Generally, all homeowners have purchased in reliance on some expectations of the existence and enforcement of standards. They have an economic expectation that these standards will be upheld. These expectations and other policy issues are implicit in questions of judicial review and in the action of the design committee itself.

In *Ironwood Owners Ass'n IX v. Solomon*, owners of a unit appealed a judgment in favor of their community association, which granted an injunction to compel removal of eight date palms from the owners’ property. The trial court found that the owners had violated the CCRs because they planted date palms without previously filing a plan with, and receiving the approval of, the association's design committee. Documents that set forth a detailed procedure for application and approval required the owners to obtain approval before making changes on their individually owned property.

The CCRs also contained specific standards for the appropriate committee to disapprove submitted plans. The court held that the CCRs required submission of landscape plans, and it interpreted the language broadly to include any substantial change in the structure or appearance of the buildings and the landscapes. Because there was no factual evidence bearing on the interpretation of the provisions of the CCRs, the appellate court held that interpreting the provisions was a question of law and upheld the trial court decision on that point. However, the request for an injunction was "in effect, a request to enforce an administrative decision on its part," which presented matters of fact for the court to review.

The *Ironwood Owners* case is interesting because it reviews in some detail the administrative review procedure and the process that an association must afford an owner when reviewing submitted plans and specifications. The appellate court pointed out that "despite the Association's being correct in its contention that [the defendants] violated the CCRs while failing to submit a plan, more was required to establish its right to enforce CCRs by mandatory injunction." The court held that the association must satisfy three steps:

- The association must show that it had followed its own standards and procedures before pursuing the injunction.

- The procedures were fair and reasonable.

- The association’s substantive decision was made in good faith and was reasonable, not arbitrary or capricious.

In determining what was reasonable, the court relied on the opinion in *Laguna Royale Owners Ass'n*, discussed in Chapter 5.

The court pointed out that the CCRs "carefully and thoroughly provided for the establishment" of the committee and imposed on it "specifically defined duties, procedures and standards" to be
followed in discharging its duties. The court was persuaded by the fact that the record disclosed that the committee had exhibited a "manifest disregard" for these procedures. The lesson is that when procedures are established, the committee must follow them.

The opinion in Souza v. Columbia Park Recreation Ass'n, Inc., is an interesting counterpoint to the Ironwood case. In the Souza opinion, the property owners argued that the covenant did not contain criteria to evaluate the application and therefore should be declared unenforceable. The trial court and the appellate court disagreed, holding that the covenants were enforceable, provided that the refusal to approve was based on a reason "that bears some relation to the other buildings of the general plan of development; and this refusal would have to be a reasonable determination made in good faith, and not high-handed, whimsical or captious in manner." The Souza case illustrates the fact that the board or committee process can be as important as the language in the recorded document. The court in the Souza case pointed out that the board's decision to disapprove the application was based "upon a desire to adhere to the development plan and to protect the interests of those who had bought lots in the neighborhood and built upon them in reliance upon the plan for the area." As noted above, the general plan of development is an extremely significant consideration.

Some scholars and practitioners find Europco Management Company of America v. Smith to be wrongly decided but it adds an interesting perspective to the due process requirement. The homebuilder made changes without receiving permission while constructing a home, and he disregarded the committee's request to go through the review procedures. The owners, the Smiths, purchased a home in the development and required as a condition of the sale that the builder add a screened porch to rear of the house. The builder did not obtain the developer's approval before completing the addition and consummating the sale. The developer, acting as the enforcing party on the design review process, sought an injunction against the Smiths on the grounds that they had caused an addition to made without first seeking approval as required by the covenants. The court treated the Smiths’ motion for a directed verdict as a motion for involuntary dismissal and granted it, ruling that the Smiths had been denied due process because they were denied an opportunity to appear in person before the architectural review committee. The court of appeals rejected the trial court interpretation of due process and held that there was no right to a hearing except in court. The court pointed out that the Smiths had notice of the restriction, received a demand for compliance, and had a right to go to court to enforce their rights should they choose to do so. The court found that the due process rights rested in the relationship between the individual and the state when that individual was brought before an appropriate court. The court held that the design decisions had to be made in a reasonable manner but also found that the design reviewer need not show a diminution in value or some specific and direct harm, only that the proposed alteration did not comply with the design guidelines.

Last, the appellate court pointed out that the trial court's function is to review that exercise of discretion based on the opinion evidence adduced, not upon a personal opinion formed after review of photographs and application of personal views concerning architectural standards and concepts of aesthetics. In other words, the judge has a role as a reviewer of the process followed, not the substantive decision reached.

Consider whether the decision in the Europco case—that the only requirement of due process is the opportunity to be heard in court—is correct. Why might it be advantageous to deny
homeowners the opportunity to appear before the architectural control committee? Many people believe that confrontation and advocacy do not belong in an aesthetic setting.

In *Valenti v. Hopkins*, the architectural control committee approved the defendants' house plans. The plaintiffs brought an action seeking to enjoin construction, arguing that the defendants' construction would obstruct the plaintiffs' views in violation of the CCRs. The trial court denied the plaintiffs’ request but the court of appeals, reviewing the case de novo, reversed, giving no deference to the architectural control committee's determination. The question for the supreme court was whether the decision of a contractually created private architectural control committee is reviewable *de novo* by the courts, with no deference being given to the committee's interpretation of the enabling restrictive covenants or to its conclusions on the merits. The court determined that such a review was improper and reversed the court of appeals. The opinion is interesting for two reasons: (1) the appropriate review standard for a court in relation to a private administrative hearing agency and (2) how a drafter should create the design review provisions in the CCRs. A lawyer can see the opportunity for drafting standards as well as guidelines for review based on the principles set forth in the Oregon Supreme Court opinion.

The issues in the *Valenti* case were the height of the improvements, their effect on the views of neighbors, and whether property separated by a road was contiguous. The trial court had concluded that the architectural control committee had not acted arbitrarily or unreasonably in approving the plans; in so holding, the court relied on earlier Oregon decisions recognizing a standard of review that required fraud, bad faith, or failure to exercise honest judgment for decisions of private entities such as an architectural control committee. The court of appeals held that it was not required to defer to the committee's interpretation of the covenant or its findings on the merits. That court reviewed the trial court decision de novo and, based on the interpretation of the covenant and the facts, concluded that the trial court had erred. The supreme court granted review to determine the proper role of the courts in reviewing decisions of a contractually created private design committee charged with enforcing its subdivision's restrictive covenants.

The court analyzed various policy considerations and looked at the expectations of the parties in reaching its decision. It held that "a deferential standard" of review was appropriate to avoid costly and time-consuming litigation and to promote finality. In addition, a policy of deference encouraged the private resolution of disputes. The court rejected the argument that the members of the architectural control committee were neither skilled nor neutral and that therefore their decision was not entitled deference. The court pointed out that all owners knew that the committee's members would be owners of lots in the subdivision, that they would be owners such as the complaining owners themselves, and that they would not necessarily have any expertise in the matters asked to be resolved. However, this knowledge reinforced the validity of the process rather than its invalidity.

Looking at the CCRs, the court interpreted the language that said that the committee "shall judge" the suitability of proposed plans to mean that in the context of the broad range of authority granted, the architectural control committee is intended to be the final arbiter both as to the applicable law and the facts, with respect to height restrictions. The court held, therefore, that the standard of review was one of "fraud, bad faith, or failure to exercise honest judgment" and that the court of appeals should have deferred to the decisions of the architectural control committee.
For a regulation to be valid, it must (1) have been adopted in a good faith effort to further a community purpose, as evidenced by the documents and applicable statutes, (2) represent a reasonable means of advancing that purpose, (3) not run counter to superior documents, and (4) be consistent with public policy.

Courts have repeatedly upheld the validity of architectural controls. Although document language requiring "conformity and harmony in external design and general quality with existing standards" has been upheld, precise standards can further restrict a reviewing court's discretion.

Of the potential defenses raised by a violating unit owner, estoppel, laches, and the statute of limitations are the most frequent. The board may be estopped from enforcing architectural rules when an objection is made over a year after the change. If a unit owner spends a considerable sum of money completing a project before an objection is raised, a court may find it inequitable to order removal of the violation under the laches defense. Unless there is a continuing violation, the statute of limitations may also limit the board's right to enforce an architectural standard. These defenses are addressed in more detail in Chapter 8. Note that failure to enforce an architectural violation may trigger a claim against the board for breach of a fiduciary duty.

Architectural standards that are enforced "reasonably, uniformly, consistently, and in good faith," are more apt to survive judicial scrutiny. Consistency problems often arise when there is significant turnover among the members of the enforcement body in a short period of time. However, transition of association control from developer to homeowners does not usually prevent the association from enforcing restrictions that the developer failed to assert. Similarly, dormant restrictions may be enforced by a newly elected board against new or continuing violations (depending on the specific facts and circumstances of each case).

In The Fountains of Palm Beach Condo., Inc. v. Farkas, the defendant-owner's husband attempted to obtain permission to construct a patio on the common elements. The management firm indicated that it had no objection but informed the owner that transition to the unit owner association was underway. The association informed the owner that it did not yet possess the power to grant or deny the request until transition was complete. The owner proceeded with construction and the association filed suit, seeking a mandatory injunction requiring the removal of the patio slab at the owner's expense. Because the declaration required prior written consent before undertaking structural changes, the owner failed to follow the proper procedures and was ordered to remove the improvements.

Courts may scrutinize the board's adherence to established procedure during the regulation-making process to gauge the validity of a regulation.