

## COMMUNITY LAND TRUSTS: A PROMISING ALTERNATIVE FOR AFFORDABLE HOUSING

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### I. INTRODUCTION

Low and moderate income people across the country suffer from a lack of affordable housing. The "American Dream" of owning a home has faded for those in low or moderate income brackets.<sup>1</sup> Thirty percent of this nation's households earn less than \$15,000 a year.<sup>2</sup> Low and moderate income people represent a cross-section of American society. They are young, middle-aged, elderly, disabled, single, married, widowed, and divorced.<sup>3</sup> While the majority of those with a modest or minimum income work full-time,<sup>4</sup> the combination of low wages<sup>5</sup> and the cost of housing<sup>6</sup> preclude home ownership. Moreover, the number of affordable housing units has dramatically declined.<sup>7</sup> Although the federal government has historically played a significant role in meeting the nation's housing needs, over the last decade almost eighty percent of the Department of Housing and Urban Development's budget has been cut.<sup>8</sup> Consequently, the federal government's reduced participation has required individual states to develop meas-

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1. NATIONAL HOUSING TASK FORCE, A DECENT PLACE TO LIVE 4 (Mar. 1988). Home ownership has declined steadily among first-time buyers since World War II. *Id.*

2. *Id.* at 5 (survey).

3. *Id.*

4. *Id.*

5. *Id.* (25% of all full-time jobs did not pay enough to raise a family of four above the poverty line in 1986).

6. *Id.*; see also DEPARTMENT OF COMMUNITY AFFAIRS, AFFORDABLE HOUSING IN FLORIDA 1990-92 (1990) (listing of counties with the highest rates of housing units costing more than 35% percent of residents' income).

7. NATIONAL HOUSING TASK FORCE, *supra* note 1, at 6. Approximately two million units previously occupied by low and moderate income residents were permanently removed from the nation's housing stock between 1973 and 1983. "Demolitions, conversions, renovations and increased rents" all contributed to the decline. *Id.*

8. *Id.* at 10. In addition, the Tax Reform Act of 1986 had a substantial adverse impact on investment in the housing and real estate markets. AFFORDABLE HOUSING STUDY COMMISSION, AN AGENDA FOR FLORIDA HOUSING POLICY 3 (Dec. 1987).

ures in response to the escalating housing crisis that acutely affects low and moderate income residents.<sup>9</sup>

The Florida Legislature has recognized the importance of community redevelopment<sup>10</sup> and the need for affordable housing.<sup>11</sup> In 1986, the Florida Legislature created the Affordable Housing Study Commission (Commission)<sup>12</sup> to "analyze those solutions and programs which could begin to address the State of Florida's acute need for housing for the very low, low and moderate income persons."<sup>13</sup> The Commission recognized the need to assist low and moderate income first-time buyers in purchasing a home.<sup>14</sup> The Commission found that the combination of higher rent—which makes saving more difficult—and the increased amount of cash required to close a home loan—for the down payment and insurance premium—effectively lock first-time buyers out of the market.<sup>15</sup>

Florida's cities lack the needed number of affordable housing units.<sup>16</sup> Furthermore, many of the available units are considered substandard and suffer from overcrowding.<sup>17</sup> Despite the deteriorating conditions of affordable units, over 720,000 low and moderate income Florida residents pay more than thirty-five percent of their income for housing.<sup>18</sup> Considering that the majority of low and moderate income residents rent instead of own their homes and earn only eighty percent of the median income of their area,<sup>19</sup> the possibility of home

9. AFFORDABLE HOUSING STUDY COMMISSION, *supra* note 8, at 3; see also Welbaum & McSwain, *Community Redevelopment In Florida: A Public/Private Partnership*, 4 J. LAND USE & ENVTL. L. 271 (1989) (state and local governments have taken active roles working with private sector in community redevelopment due to reduced availability of federal loans and grants).

10. See generally FLA. STAT. §§ 163.330-450 (1989).

11. See generally *id.* § 420.6015. The private sector has been largely unsuccessful at providing affordable housing for low and moderate income families. *Id.* § 4.6015(3); see also *infra* note 26 and accompanying text.

12. Ch. 86-192, § 11, 1986 Fla. Laws 1457, 1470-72 (codified in FLA. STAT. § 420.609 (1989)).

13. FLA. STAT. § 420.609 (1989).

14. AFFORDABLE HOUSING STUDY COMMISSION, *supra* note 8, at 13.

15. *Id.* at 12.

16. See, e.g., DEPARTMENT OF COMMUNITY AFFAIRS, *supra* note 6, at 3; AFFORDABLE HOUSING STUDY COMMISSION, *supra* note 8, at 3.

17. DEPARTMENT OF COMMUNITY AFFAIRS, *supra* note 6, at 36, 40. The Florida State University Department of Urban and Regional Planning provided information to the Department of Community Affairs regarding the quality of affordable housing stock in Florida. *Id.* at 36. Because so many units have been constructed within the past thirty years, information on mechanical systems and appliances "incorrectly point to a trend of improve housing quality." *Id.* However, the combination of "economic and social status of the occupants and the aging of [the] housing industry" prevents residents from properly repairing and maintaining the units. *Id.* at 40. Consequently, the percentage of substandard affordable units has increased. See *id.*

18. AFFORDABLE HOUSING STUDY COMMISSION, *supra* note 8, at 2.

19. DEPARTMENT OF COMMUNITY AFFAIRS, *supra* note 6, at 19.

ownership has all but disappeared. The average qualifying income required to purchase an existing single family home in Florida is approximately \$25,682.<sup>20</sup>

Florida does not have the resources to tackle affordable housing needs on its own; private sector involvement is both necessary and desirable.<sup>21</sup> Additionally, the Commission specifically found that non-profit corporations, "while presently not major producers of housing in Florida, can (with effective training and expertise) be successful developers of affordable housing."<sup>22</sup>

The purpose of this article is to discuss the Community Land Trust (CLT) as a viable option for affordable housing for low and moderate income residents, without the typical displacement of residents that normally accompanies privately developed housing projects. To that end, this article explains the structure of a CLT and how this structure is consistent with Florida's goals of meeting low and moderate income residents' housing needs through efforts with the private sector. The main obstacle to the success of the CLT is its restraint on alienation. Thus, this article discusses in depth the different legal rules against restraints on alienation and concludes that, in light of the social and economic policies underlying these rules, the CLT's structure does not illegally restrain alienation. Secondly, this article argues that CLT residents should receive the homestead tax exemption based on the purchase option price stated in the ground lease. Finally, this article advocates that the Florida Legislature enact specific statutory changes if the CLT structure is inconsistent with current property or homestead exemption laws. The Community Redevelopment Act provides the foundation upon which the Legislature can rely to pass such laws.

## II. COMMUNITY LAND TRUSTS

Community Land Trusts (CLT) are usually formed by non-profit, tax-exempt<sup>23</sup> corporations<sup>24</sup> dedicated to providing affordable housing

20. *Id.* at 47 (table 23).

21. See, e.g., FLA. STAT. § 163.345 (1989); Welbaum & McSwain, *supra* note 9; AFFORDABLE HOUSING STUDY COMMISSION, *supra* note 8.

22. AFFORDABLE HOUSING STUDY COMMISSION, *supra* note 8, at 8; see also FLA. STAT. § 420.6075(2)(a) (1989).

23. The Internal Revenue Code exempts from federal taxation "[c]orporations and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . ." provided that no part of the net earnings inures to an individual or shareholder's benefit. I.R.C. § 501(c)(3) (1990).

24. Chapter 617 of the Florida Statutes governs the organization of non-profit corporations. Chapter 607 of the Florida Statutes governs business organizations and applies to non-profit organizations except where any provision conflicts with a provision of chapter 617. FLA. STAT. § 617.002 (1989). Thus, the statutes should be read *in part materia*.

for low and moderate income residents.<sup>25</sup> The purpose of a CLT is to stabilize the market price of land and homes in neighborhoods that will otherwise become increasingly undesirable or unavailable to families of low or moderate income. Housing may become undesirable due to the deterioration of existing structures and neighborhoods. On the other hand, housing may become unavailable due to an escalating market that effectively raises the costs of land and homes out of the price range of prospective and existing residents.<sup>26</sup> Low and moderate income residents cannot afford to pay the market price for real estate. Thus, a CLT's mission is to find a way to make home ownership a reality.

The CLT begins by acquiring land in low and moderate income neighborhoods in order to remove it from speculative market forces.<sup>27</sup> The CLT purchases rundown homes at bargain prices with plans to either rehabilitate the homes or to construct new homes on its land. In either event, the CLT sells the homes to low or moderate income applicants who meet the organization's requirements with regard to income, ability to care for the home and land, and other criteria it deems relevant.<sup>28</sup> The homes are sold for as little above cost as possible so that a low or moderate income will suffice.

The residents do not own the land beneath the homes. Rather, the residents lease the land for the amount stipulated in a ground lease. The ground lease governs the relationship between the CLT and the homeowners.<sup>29</sup> The ground lease term is generally twenty-nine years.<sup>30</sup>

25. INSTITUTE FOR COMMUNITY ECONOMICS, THE COMMUNITY LAND TRUST MODEL: QUESTIONS AND ANSWERS 1-3 (1989). Residents become members of the CLT. They pay a minimal annual fee for membership. This fee is separate from the cost of leasing the land. In addition, non-residents representing broader community interests may be members of the CLT. The members elect a governing board which includes leaseholders and non-resident members. *Id.* (for more information, contact Andrew Baker, Institute for Community Economics, 57 School Street, Springfield, MA 01105-1331; (413)746-8660).

26. "Gentrification" often occurs as a result of developers moving into areas targeted by governmentally sponsored aid programs. Areas become attractive to developers as they improve. The developers renovate properties and sell them to higher-income residents. Consequently, the development drives low and moderate income residents out of their communities. Cook, *Preserving Urban Housing for the Poor*, SAN FRANCISCO EXAMINER & HERALD 37 (Sept. 13, 1987).

27. INSTITUTE FOR COMMUNITY ECONOMICS, THE COMMUNITY LAND TRUST: AN INNOVATIVE MODEL FOR NON-PROFIT AFFORDABLE HOUSING DEVELOPMENT 2 (1990) (for more information, contact Andrew Baker, Institute for Community Economics, 57 School Street, Springfield, MA 01105-1331; (413)746-8660).

28. Individual CLTs set their own standards for income and family size to qualify for a home. In addition, special consideration may be given to people who currently reside in a rehabilitated area. Cook, *supra* note 26, at 37.

29. See generally INSTITUTE FOR COMMUNITY ECONOMICS, COMMUNITY LAND TRUST ICE MODEL GROUND LEASE [WITH OPTIONAL PROVISIONS FOR COOPERATIVE CORPORATION LESSEE]



The residents own the homes, but the ground lease limits their ability to resell the homes. That is, residents may sell the homes only for a limited equity, specified in the leases. Consequently, the homeowners benefit little if the prices of other homes within the neighborhoods begin to escalate.<sup>31</sup> For example, if a resident purchases a CLT home, she is free to make improvements to enhance the home's value, but will not realize more than the cost of improvements, plus inflation, upon resale.<sup>32</sup> The CLT's goal is to preserve access to land and provide "decent, affordable housing and home ownership opportunities for low and moderate income people over an extended period of time and through a succession of owners."<sup>33</sup> Thus, it would defeat the long-term purpose of the CLT to allow residents to sell a home at market value that was purchased at barely above cost. First of all, a resident who pays \$50,000 for a CLT home—assuming no other improvements are made—would receive a windfall if allowed to sell it at market value—assume \$75,000—a few years later. Second, if the resident sells the home at market value, no subsequent low or moderate income person can afford to buy it.

In addition, the ground lease specifically limits the homeowner's<sup>34</sup> ability to sell, transfer, or otherwise dispose of the improvements on the land.<sup>35</sup> The ground lessee may directly transfer, or otherwise dispose of the interest in the land or home—"improvements"—to anyone who qualifies as a "low or moderate income" resident.<sup>36</sup> In

(1991) (for more information, contact Andrew Baker, Institute for Community Economics, 57 School Street, Springfield, MA 01105-1331; (413)746-8660).

30. See D. ABROMOWITZ, LEGAL ISSUES IN COMMUNITY LAND TRUST DEVELOPMENT: A BRIEF OUTLINE 3 (1988). However, in order to comply with the "Florida Uniform Statutory Rule Against Perpetuities," the ground lease term may best be set at 90 years in Florida. See FLA. STAT. § 689.225(2)(a) (1989).

31. Cook, *supra* note 26, at 37.

32. *Id.*

33. See INSTITUTE FOR COMMUNITY ECONOMICS, *supra* note 29, at 3 (emphasis added).

34. Because the homeowner leases the land from the CLT, the terms "homeowner" and "ground lessee" are used interchangeably.

35. See generally INSTITUTE FOR COMMUNITY ECONOMICS, *supra* note 29, art. X, at 20-24.

36. *Id.* § 10.2, at 20. The definitions of low and moderate income residents are as follows: Low Income Residents shall mean a person or group of persons whose combined income does not exceed fifty percent (50%), and Moderate Income Residents shall mean a person or group of persons whose combined income does not exceed eighty percent (80%), of the median income for the [Area] Standard Metropolitan Statistical Area ("SMSA") for such number of persons, as determined from time to time by the Department of Housing and Urban Development (HUD) or any successor thereto, or such lesser percentages of median income as required for eligibility from time to time for the so-called Section 8 rental subsidy program administered by HUD.

*Id.* In addition, section 10.4 of the Model Ground Lease explains the notice provisions the lessee must follow. That section also explains the documentation required to satisfy the CLT that the prospective resident is of low or moderate income. *Id.* § 10.4, at 21.

addition, upon the lessee's death, the lessee's spouse, child or children, or member(s) of the household who resided with the lessee for at least one year prior to the lessee's death may inherit the improvements and assume the lease.<sup>37</sup> Otherwise, the CLT has a preemptive option, or a right of first refusal,<sup>39</sup> to purchase the property if the ground lessee does not have a specific "qualified" person intended or committed to purchase the improvements.<sup>40</sup> In the latter case, if the CLT decides not to purchase the improvements, it will locate an interested purchaser to buy the improvements from the ground lessee.<sup>41</sup> Otherwise, the ground lessee will have permission to sell the improvements to any purchaser at the purchase option price.<sup>42</sup>

#### A. The Limited Equity Provision of the Ground Lease

Perhaps the most important section of the ground lease is the one which provides the formula to determine the improvements' resale

37. *Id.* § 10.3, at 20-21. Most CLTs will want to prevent unrestricted inheritance of improvements to avoid upper income individuals or organizations obtaining ownership and becoming absentee landlords. However, the CLT generally recognizes the importance of allowing the owner some level of control over the improvements. INSTITUTE FOR COMMUNITY ECONOMICS, ANNOTATIONS AND COMMENTS ON THE MODEL GROUND LEASE 12 (1990). Thus, the inclusion of section 10.3 is desirable.

Even if the lessee's heirs earn above the required level of income, the improvements do not revert back to the market because the heir is still subject to the provisions in the lease. *Id.* Furthermore, the CLT concept is not frustrated if an heir earns in excess of the CLT's income cap. Although the primary goal of CLTs is to make home ownership affordable to low or moderate income residents, economic integration is desirable. See AFFORDABLE HOUSING STUDY COMMISSION, *supra* note 8, at i.

38. The CLT may exercise its preemptive option to purchase the property, see INSTITUTE FOR COMMUNITY ECONOMICS, *supra* note 29, § 10.4(i), at 21, at the maximum purchase option price stated in the lease. Telephone interview with Julie Orvis, Technical Assistance Provider, Institute for Community Economics (Oct. 18, 1990) [hereinafter Orvis interview]; see also *infra* notes 45-50 and accompanying text.

39. Even if the CLT does not exercise its option to purchase, it retains the right of first refusal to meet a bona fide offer. The right will usually be exercised where the fair market value is less than the purchase option price. Orvis interview, *supra* note 38. Section 10.7 of the Model Ground Lease provides that in such a case, the lessee and CLT shall obtain separate appraisal which are averaged to determine fair market value, and the CLT may purchase the improvements for the lesser of the two—the purchase option price or average of the appraisals. INSTITUTE FOR COMMUNITY ECONOMICS, *supra*, note 29, § 10.7, at 22. The right of first refusal serves the CLT's goal of maintaining affordability. Orvis interview, *supra* note 38. Moreover, the lessee is not disadvantaged if the CLT exercises its right of first refusal because the lessee would receive fair market value if she sold the improvements on the open market.

40. INSTITUTE FOR COMMUNITY ECONOMICS, *supra* note 29, § 10.4, at 21. Without the option to purchase or right of first refusal, the only way the CLT could prevent a sale at fair market value is by declaring a default, terminating the lease or seeking a judicial injunction. INSTITUTE FOR COMMUNITY ECONOMICS, *supra* note 37, at 12.

41. INSTITUTE FOR COMMUNITY ECONOMICS, *supra* note 29, § 10.4(ii), at 21.

42. *Id.* § 10.4(ii), at 22.

price. The limited equity provision constitutes acknowledgement by the resident and the CLT that the limited equity a homeowner receives upon resale of the property is "appropriate and willingly accepted in this context."<sup>43</sup> The incremental formula and appraisal formula are the two basic formulae employed to determine the purchase option price.<sup>44</sup>

### 1. Incremental Formula

The incremental formula adds the base price—purchase price—, the value of improvements,<sup>45</sup> and an inflator—generally the Consumer Price Index—and subtracts depreciation. CLTs often use the incremental formula because it encourages improvements. On the other hand, the formula requires a consistent monitoring system. That is, the CLT must periodically calculate the value of improvements to avoid conflicts between the CLT and resident regarding the actual costs and value of work completed to determine the purchase option price.<sup>46</sup> Thus, the CLT must be prepared to follow the necessary administrative practices to provide a uniform and consistent valuation of the improvements if it chooses to use the incremental formula.

### 2. Appraisal Formula

The appraisal formula employs two appraisals of the improvements. The first appraisal determines the improvements' fair market value when the CLT sells them to the lessee. The second appraisal determines the improvements' fair market value when the lessee decides to sell them to the CLT or a qualified buyer. The appraisals do not consider the lessee's original purchase price. The lessee receives a percentage—stipulated in the ground lease—of the difference between the first and second appraisals, plus the purchase price when she sells the improvements.<sup>47</sup> The disadvantage of the appraisal formula from

43. INSTITUTE FOR COMMUNITY ECONOMICS, *supra* note 37, at 11.

44. The Model Ground Lease does not offer specific examples for figuring the formula the CLTs may decide to employ. Julie Orvis from the Institute for Community Economics provided information regarding the incremental and appraisal formulas. Orvis interview, *supra* note 38.

45. See INSTITUTE FOR COMMUNITY ECONOMICS, *supra* note 29, §§ 10.9-12, at 22-24 (explaining required documentation and methodology of valuating improvements).

46. Community Land Trusts using the incremental formula generally engage in a biannual equity review so each party understands the value of improvements that will be considered upon resale. Orvis interview, *supra* note 38.

47. For example, assume the CLT sells a home to a qualified buyer for \$80,000. An initial appraisal may determine that the home's fair market value is \$100,000. If the lessee decides to sell ten years later the fair market value may be \$200,000. If the ground lease stipulates that the percentage to be deducted is 25%, the formula requires subtracting the first appraisal (\$100,000) from the second appraisal (\$200,000). The lessee receives 25% of the difference (\$25,000) plus the original purchase price (\$80,000). The resulting sale price would be \$105,000. *Id.*

the CLT's perspective is that it remains conneed to market forces.<sup>48</sup> On the other hand, the appraisal formula does not necessitate the administrative burdens or intrusions that the incremental formula requires.<sup>49</sup>

Whatever formula the CLT decides to use must be specifically stated in the ground lease. This formula determines the purchase option price, which is not a "fixed price."<sup>50</sup> The variables of determining the value of improvements, inflation, depreciation, and appraisals are not constant.

### B. Ground Leases in Commercial Transactions

Ground leases are commonplace in commercial real estate transactions. New York City's Rockefeller Center is perhaps the most famous example of a commercial building on leased land. While the idea of physically connected land and homes owned by two separate entities may seem foreign, CLTs use ground leases that are similar to those used in commercial relationships. Commercial ground leases generally refer to relationships where the owner of the building is not the owner of the land.<sup>51</sup> The commercial ground lease benefits land owners who do not wish to sell their land and tenants who lack the money or desire to gain control of the land.<sup>52</sup> Similarly, the CLT does not want to lose control over its land because it seeks to keep the land available to low and moderate income residents. In addition, low and moderate income residents presumably lack the resources required to purchase the land. They can afford to purchase the home only because the CLT has gained control of the real estate and is in a position to sell the home at as little above cost as possible.

The fee owner in a commercial real estate transaction leases real property to a tenant or developer who seeks to develop the property by constructing improvements or rehabilitating existing improvements.<sup>53</sup> The purpose of the arrangement in the commercial context is to produce income.<sup>54</sup> Moreover, the tenant's interest in the improvements on the leased land is generally independent of the landlord's fee ownership of the land, and so the tenant may lease or sell the im-

48. *Id.*

49. *Id.*

50. See *infra* text accompanying notes 140-147.

51. Schnall, *What is a Ground Lease?*, ADVANCED ISSUES COMMERCIAL REAL ESTATE LEASING 173 (ALI-ABA, 1987).

52. *Id.* at 174.

53. J. WHALEN, COMMERCIAL GROUND LEASES § 1.1, at 1 (198).

54. *Id.*



provements in the most beneficial manner.<sup>55</sup> Nevertheless, the commercial lessor may withhold consent to a tenant's proposed transfer of interest. While consent may not generally be "unreasonably withheld,"<sup>56</sup> the landlord may consider a potential transferee's business reputation, experience in managing similar properties, and financial status before consenting to the lessee's proposed transfer.<sup>57</sup>

The ground lease between a CLT and resident does not produce income. The CLT either purchases or rehabilitates an existing home to provide affordable housing for residents most in need. In addition, the CLT's long-term interest in perpetuating affordability is inextricably bound with the resident's interest in the improvements. Thus, the CLT is likely to be more involved than would be a commercial landlord, where a commercial lessee seeks to transfer her interests in the improvements. If a commercial lessor may consider a transferee's reputation, experience, and financial status before consenting to a transfer, it follows that the CLT should be permitted to consider income level, family size, commitment to owning a home and other relevant information before consenting to a transfer.<sup>58</sup>

At least three major issues overshadow the success of CLTs in Florida. First is whether the ground lease illegally restrains alienation of land under Florida property law. Second is whether CLT residents are entitled to a homestead exemption on their improvements and how the improvements should be valued for property taxes. Finally, if CLTs are inconsistent with present property or tax laws, the question of whether the Community Redevelopment Act<sup>59</sup> provides the basis for the Florida Legislature to enact statutory changes to protect the CLT's unique structure is at issue.

### III. RULES AGAINST RESTRAINTS ON ALIENATION

Whether a Community Land Trust (CLT) ground lease illegally restrains alienation of land<sup>60</sup> must be considered in light of social and

55. *Id.* at 2.

56. See RESTATEMENT (SECOND) OF PROPERTY (LANDLORD & TENANT) § 15.2(1) (1976) (consent cannot be unreasonably withheld absent an equally bargained for provision that allows landlord to arbitrarily withhold consent). Some courts have adopted a "minority" view requiring that consent be reasonable regardless of what the lease provides. See *Fernandez v. Vazquez*, 397 So. 2d 1171, 1173 (Fla. 3d DCA 1981). For a criticism of the "minority" view, see Johnson, *Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Contracts*, 74 VA. L. REV. 751 (1988).

57. J. WHALEN, *supra* note 53, § 6.2.3, at 196.

58. See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 4.4 comment b (1980) (preemptive provisions widely used in residential developments to provide control over selection of residents).

59. FLA. STAT. § 163.330 (1989).

60. This section focuses on whether the ground lease restrains alienation and does not deal

economic policies underlying attempts to prevent restraints on alienability.<sup>61</sup> Not all restraints on alienation are illegal or undesirable. Courts must first define what constitutes a restraint and proceed to determine whether a given restraint is legally valid.<sup>62</sup>

Courts have interpreted restraints on alienation for the past six centuries.<sup>63</sup> Under the feudal system, restraints on alienation were a "natural extension of the caste-like society of the time, here forced heirship, the fee tail and the unchallenged power of the crown generally controlled."<sup>64</sup> The multi-tiered tenure system was abolished in the thirteenth century.<sup>65</sup> By the fifteenth century, English courts recognized that attempted restraints on alienation in conveyances between private persons were void and unenforceable.<sup>66</sup>

The desire to ensure commercial trade of property motivates those who would prohibit any restraints on real or personal property.<sup>67</sup> This desire has led to voiding attempts to wholly prohibit future conveyances.<sup>68</sup> However, the question arises whether the public policy of prohibiting restraints should always trump the freedom of contract and property rights of owners to do with their property as they please.<sup>69</sup> More specifically, the question relating to a CLT is whether the public policy of prohibiting restraints against alienation should prevail over the CLT's potential to provide affordable housing to the whom the market often excludes.

directly with the rule against perpetuities. The rule against perpetuities generally applies where land is freely alienable, but interests vest too remotely. *Leach, Perpetuities: A Nutshell*, 51 HARV. L. REV. 638, 640 (1938); see also FLA. STAT. § 689.225 (1989). Rules against restraints on alienation either prevent an owner from disposing of any of her interest or from disposing of it in particular ways to particular persons, regardless of whether the interest is vested. *Leach, supra*, at 640. Because certain indirect restraints on alienation may actually serve as direct restraints on alienation, the analysis of the ground lease will concentrate on the rule against restraints on alienation, except where indicated otherwise. See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) pt. II introductory note (1980).

61. See *Gale v. York Center Community Coop., Inc.*, 21 Ill. 2d 86, 88, 1 N.E.2d 30, 33 (1960) ("[T]he law of property, like other areas of the law . . . takes shape in the direction of social and economic forces in an ever changing society, and decisions should be made to turn on these considerations.")

62. Comment, *Restraints on Alienation: Placing a 13th Century Doctrine in 21st Century Perspective*, 40 BAYLOR L. REV. 413, 416 (1988).

63. *Id.* at 413.

64. *Id.* at 414.

65. *Id.* at 414-15.

66. *Id.* at 415.

67. *Id.* at 413; cf. L. SMES, PUBLIC POLICY AND THE DEAD HAND 40 (191) (given changes in nature of capital investments and the law, contingent future interests rarely make property unproductive).

68. Comment, *supra* note 62, at 413-14.

69. See, e.g., *id.*; Johnson, *supra* note 56, at 752.

Restraints on alienation that perpetuate a "caste-like" system of property ownership must be distinguished from restraints that attempt to assist the market in providing for societal needs.<sup>70</sup> Often, restraints on the transferability of benefits are the only way an otherwise unresponsive market can meet the needs of low and moderate income families.<sup>71</sup> Although restraints on alienation may impede transferability if they make property unmarketable and serve no social or economic purpose, restraints may serve as the least onerous mechanism for providing affordable housing to those most deserving the benefit.<sup>72</sup> "[R]estrictions on use and transferability . . . can both accomplish redistributive objectives when demand exceeds supply at the subsidized price and encourage neighborhood preservation."<sup>73</sup>

The Restatement (Second) of Property<sup>74</sup> distinguishes between direct and indirect restraints on alienation. Direct restraints result where an entity attempts, by the terms of the transfer or contract, to eliminate a successor or present owner's power to transfer property or to "lessen the likelihood of their exercise of this power by stating adverse consequences of an attempt later to transfer."<sup>75</sup> Indirect restraints, on the other hand, "do not prevent alienation . . . [but] limit marketability as practical restraints on the power to convey."<sup>76</sup> Courts analyze direct restraints under the rules against alienation and indirect restraints under the rule against perpetuities.<sup>77</sup> The rules against restraints on alienation are stricter than the rule against perpetuities.<sup>78</sup> Where the practical limitations of indirect restraints are the same as direct restraints, however, the differential analyses are difficult to justify, and the results should be the same.<sup>79</sup> Thus, restraints on alienation, whether direct or indirect, should be judged on the basis of their practical effects.

70. See generally Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985). For a contrasting view, see Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985) (no justification exists for using restraints on alienation to redress distributional weaknesses within the present allocation of rights).

71. Rose-Ackerman, *supra* note 70, at 959.

72. See *id.* at 960. Professor Rose-Ackerman notes that restraints on alienation may be a more equitable means of providing social benefits than are "first come, first served," lottery selection, or nepotism. *Id.*

73. *Id.* at 961.

74. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 4.4 comment b (1980).

75. *Id.* at pt. II introductory note; see also *Randolph v. Terrell*, 768 S.W.2d 736, 737 (Tex. Ct. App. 1987) (direct restraint on alienation may be defined as an "outright prohibition against alienation").

76. Comment, *supra* note 62, at 424.

77. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) pt. II introductory note (1980).

78. *Id.*

79. *Id.*

#### A. Direct Restraints on Alienation

The Restatement (Second) of Property classifies direct restraints into three separate categories: disabling, forfeiture, and promissory.<sup>80</sup> The classification depends upon the "affect of an attempted conveyance in violation of the restraint."<sup>81</sup> A disabling restraint results when a donative transfer<sup>82</sup> of a property interest seeks to void, either partially or completely, a future conveyance of that interest.<sup>83</sup> A disabling restraint that seeks to make a conveyance impossible for any period of time is always invalid.<sup>84</sup> Disabling restraints are objectionable from a public policy perspective where they "freeze . . . movement of ownership."<sup>85</sup> A disabling restraint may be valid if, "considering the purpose, nature and duration of the restraint, the legal policy favoring freedom of alienation does not reasonably apply."<sup>86</sup> Thus, a grantor must present strong justification<sup>87</sup> for a disabling restraint, even where it does not completely prohibit a future conveyance.<sup>88</sup>

A forfeiture restraint results when the "terms of a donative transfer of an interest in property seek to terminate or to subject to termination such interest in whole or in part in the event of a later transfer."<sup>89</sup> Forfeiture restraints are commonly imposed on tenants where the landlord retains the option to terminate the tenant's interest if the tenant alienates without the landlord's consent.<sup>90</sup> They allow the landlord to reenter and take possession of the leased property if the tenant conveys her interest without consent.<sup>91</sup> Thus, the landlord may either terminate the lease or ratify the transfer and enforce other terms of the lease.<sup>92</sup> Like disabling restraints, a forfeiture restraint is invalid if

80. *Id.* §§ 3.1-3.

81. Comment, *supra* note 62, at 416.

82. The rules that permit restraints on alienation in donative transfers apply equally to non-donative transfers. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) at pt. II introductory note (1980); see also RESTATEMENT (SECOND) OF PROPERTY (LANDLORD & TENANT) ch. 15 (1976).

83. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) 3.1 (1980).

84. *Id.* § 4.1(1).

85. RESTATEMENT (SECOND) OF PROPERTY (LANDLORD & TENANT) 15.2 comment c (1976).

86. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) 4.1 comment f (1980).

87. A justification for limited ability to deny consent to a transfer *i.e.*, reasonable consent, may validate the restraint. Comment, *supra* note 62, at 418; see also RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 4.1 comment f, illustration 11 (1980).

88. Comment, *supra* note 62, at 418.

89. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) 3.2 (1980).

90. See, *e.g.*, *id.* § 3.2 comment a; RESTATEMENT (SECOND) OF PROPERTY (LANDLORD & TENANT) § 15.2 comment b (1976).

91. RESTATEMENT (SECOND) OF PROPERTY (LANDLORD & TENANT) 15.2 (1976).

92. *Id.*



it makes impossible a conveyance for any period of time.<sup>93</sup> Generally speaking, a forfeiture restraint must be "reasonable" to be considered valid.<sup>94</sup>

A promissory restraint results when the "terms of a donative transfer of an interest in property seek to impose a contractual liability on one who makes a later transfer of such interest."<sup>95</sup> Thus, promissory restraints seek to impose contractual liability and arise out of a contract not to convey an interest.<sup>96</sup> "Promissory restraints are most commonly imposed on the tenant in a landlord-tenant situation in combination with a forfeiture restraint under which the landlord at the landlord's option may terminate the lease."<sup>97</sup> Either money damages or an injunction is an available remedy if the grantee breaches the contract.<sup>98</sup> Whether the grantor is entitled to a remedy turns on whether the conveyance does in fact damage the grantor's interests.<sup>99</sup> The grantor may have interests in protecting the value of adjacent properties,<sup>100</sup> protecting her own undivided interests, or protecting the value of her retained interest in the specific property.<sup>101</sup> A promissory restraint's validity is judged upon the same criteria as is a forfeiture

93. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 4.2(2) (1980).

94. *Id.* § 4.2(3). The following factors are most commonly considered in determining whether a forfeiture restraint is reasonable:

- (a) the restraint is limited in duration;
- (b) the restraint is limited to allow a substantial variety of types of transfers to be employed;
- (c) the restraint is limited as to the number of persons to whom transfer is prohibited;
- (d) the restraint is such that it tends to increase the value of the property involved;
- (e) the restraint is imposed upon an interest that is not otherwise readily marketable;
- or
- (f) the restraint is imposed upon property that is not readily marketable.

*Id.*

95. *Id.* § 3.3.

96. Comment, *supra* note 62, at 424.

97. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 3.3 comment a (1980).

98. See Comment, *supra* note 62, at 421; RESTATEMENT (SECOND) OF PROPERTY (LANDLORD & TENANT) § 15.2 comment d (1976). Contractual liability may result in three ways: (1) if the agreement requires the tenant to obtain consent to a proposed transfer, and consent is not obtained; (2) if the agreement requires that the tenant wait a specified period of time before transferring her interest, and she fails to do so; or (3) if the agreement limits alienability to people in a specific group, and the tenant alienates her interest to someone not within that group. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 3.3 comment b (1980).

99. Comment, *supra* note 62, at 421.

100. For example, the grantor's adjacent property interests may be implicated in a condominium or exclusive subdivision. See *id.*

101. *Id.* The grantor may be able to show a potential injury to the commercial value of the life estate vis-à-vis her retained interests in the property if the remainderman can convey the interest to individuals who will intrude upon the enjoyment of the grantor's interests. *Id.* at 421 n.66.

restraint's validity;<sup>102</sup> thus, a promissory restraint must be reasonable.<sup>103</sup>

#### B. Indirect Restraints on Alienation

Preemptive rights in the form of a right of first refusal<sup>104</sup> constitute indirect restraints on alienation.<sup>105</sup> So long as the terms are "reasonable" with respect to the price the grantor must pay and the prescribed time the grantor has to exercise the right, preemptive rights will be enforced.<sup>106</sup> If the preemptive provision inhibits the owner's ability to sell, however, it may be a disabling, a forfeiture, or a promissory restraint on alienation and subject to the rules against direct restraints on alienation.<sup>107</sup>

Additionally, use restrictions constitute indirect restraints on alienation and are frequently employed in commercial and residential leases.<sup>108</sup> Use restrictions indirectly exclude certain classes of grantees from conveyances.<sup>109</sup> Restraints upon uses are not considered restraints upon alienation.<sup>110</sup> Nevertheless, like preemptive provisions, the rules against direct restraints on alienation will govern the validity of a use restriction if its practical effect is to prevent alienability rather than to control the use of land.<sup>111</sup> The grantor may restrict the uses to which the lessee may put the leased premises as long as the restrictions do not serve to create a monopoly, restrain trade, or otherwise thwart public policy.<sup>112</sup>

#### C. Restraints on Alienation and the Ground Lease

Although Florida courts employ a "reasonableness" test in determining the validity of both direct and indirect restraints,<sup>113</sup> separate

102. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 4.3 (1980); see also *supra* note 94 and accompanying text.

103. See, e.g., RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 4.3 comment b, illustration 1 (1980); Comment, *supra* note 62, at 421 (promissory restraint that helps protect or increase property interest's value where consent cannot be unreasonably withheld is valid). *But see* Johnson, *supra* note 56 (leases are consensual agreements and lessor's ability to arbitrarily withhold consent to transfer should be protected under contract law).

104. See INSTITUTE FOR COMMUNITY ECONOMICS, *supra* note 29, §§ 10.4-.6, at 21-22. The CLT's option to purchase is essentially a right of first refusal at a non-market price. *Id.*

105. See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) pt. II introductory note (1980).

106. *Id.* § 4.4.

107. *Id.*; see also *supra* text accompanying note 79.

108. Comment, *supra* note 62, at 427.

109. *Id.* at 428.

110. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 3.4 (1980).

111. *Id.* § 4.4 comment b.

112. 49 AM. JUR. 2D *Landlord and Tenant* § 238 (1970).

113. See, e.g., *Iglehart v. Phillips*, 383 So. 2d 610 (Fla. 1980) (purchase option consisting of

consideration of both restraints facilitates the analysis of the CLT's ground lease restrictions. The CLT ground lease directly restrains alienation because the resident contractually agrees not to convey the leasehold without the CLT's consent.<sup>114</sup> The restraint is not disabling in terms of seeking to void a future conveyance of the interest. The ground lease stipulates what the CLT must consider as a qualified buyer.<sup>115</sup> Thus, if the resident wants to convey the leasehold interest to a qualified third person, the CLT will consent to the transfer. If the resident attempts to convey the interest to an upper income individual or organization without the CLT's consent, the transfer is void.<sup>116</sup> Thus, the CLT ground lease may act as a combination of disabling, forfeiture, and promissory restraints on alienation. The ground lease serves as a disabling restraint because the CLT seeks to partially control future conveyances of the lease by not allowing the resident to transfer her interest to a "non-qualified" purchaser. Consequently, the CLT must show that the legal policy favoring freedom of alienation does not reasonably apply in light of the totality of the restraints within the ground lease.<sup>117</sup> The ground lease serves as a forfeiture restraint because the CLT must consent to any transfer of interests the lessee seeks to make.<sup>118</sup> Finally, the ground lease serves as a promissory restraint because the CLT may seek an injunction if the lessee breaches the contract by conveying her interests without the CLT's consent.<sup>119</sup>

Florida courts have adopted a test to determine the validity of restraints on alienation; the test is one of reasonableness.<sup>120</sup> In *Seagate Condominium Association v. Duffy*,<sup>121</sup> the court of appeal held that a restriction upon the leasing of condominium units did not constitute an unreasonable restraint on alienation. The restriction prohibited residents from leasing their units to other persons, but provided that the board of directors could consent to such an arrangement to avoid

right of first refusal); *Seagate Condominium Ass'n v. Duffy*, 330 So. 2d 484 (Fla. 4th DCA 1976); *Robinson v. Speer*, 185 So. 2d 730 (Fla. 1st DCA), cert. denied, 192 So. 2d 498 (Fla. 1966) (reservation of interest); *Blair v. Kingsley*, 128 So. 2d 889 (Fla. 2d DCA 1961) (option to repurchase).

114. See *supra* notes 34-42 and accompanying text.

115. See *supra* note 28.

116. See INSTITUTE FOR COMMUNITY ECONOMICS, *supra* note 29, § 10.2, at 20.

117. See *supra* notes 82-88 and accompanying text.

118. See *supra* notes 89-94 and accompanying text.

119. See *supra* notes 95-103 and accompanying text.

120. See *Points v. Barnes*, 301 So. 2d 102 (Fla. 4th DCA 1974); *Robinson v. Speer*, 185 So. 2d 730 (Fla. 1st DCA), cert. denied, 192 So. 2d 498 (Fla. 1966); *Blair v. Kingsley*, 128 So. 2d 889 (Fla. 2d DCA 1961).

121. 330 So. 2d 484 (Fla. 4th DCA 1976).

"undue hardship."<sup>122</sup> Noting that the restriction was neither an "unlimited nor unreasonable restraint on alienation," the court reasoned that the restriction should be judged within the context in which it arose.<sup>123</sup> The court found that the "uniqueness of the problems of condominium living and the resultant necessity for a greater degree of control over and limitation upon the rights of the individual owner" justified the restriction.<sup>124</sup> Thus, the court concluded that the goals of inhibiting transiency and ensuring continuity of residence outweighed the "social value of retaining for the individual unit owner the absolutely unqualified right to dispose of his property in any way and for such duration or purpose as he alone desires."<sup>125</sup>

In *Aquarian Foundation, Inc. v. Shalom House, Inc.*,<sup>126</sup> an condominium declaration prohibited any "sale, lease, assignment or transfer of a unit owner's interest" without the board of directors' consent.<sup>127</sup> If the unit owner violated the restriction by selling to an unauthorized buyer, the fee simple title to the unit would revert to the association. The court held that the restriction unlawfully restrained alienation because the association could reject "any unit owner" prospective purchaser for any or no reason.<sup>128</sup>

Nevertheless, the court noted that if the association had an obligation to purchase from the unit owner or procure a purchaser for the property at fair market value, "even an absolute and perpetual restraint on the unit owner's ability to select a purchaser [would be] lawful."<sup>129</sup> Thus, if the corresponding obligation existed, the association would have in effect created a preemptive right that would have precluded the restriction from constituting an illegal restraint on alienation.<sup>130</sup> Although the court found that the restriction in this case was

122. *Id.* at 485.

123. *Id.* at 486.

124. *Id.*

125. *Id.* at 486-87.

126. 448 So. 2d 1166 (Fla. 3d DCA 1984).

127. *Id.* at 1167.

128. *Id.* at 1169. In addition, the court found that the reverter clause did not save the restriction from being an illegal restraint on alienation. The court reasoned that a prospective purchaser would refuse to acquire the property without the association's consent. Thus, there could be no "sale" to violate the reverter clause. Without a violation of the reverter clause, the association would have no obligation to compensate the unit owner. *Id.* Thus, the restraint was absolute. *Id.*

129. *Id.*

130. *Id.* Note that the CLT ground lease provides that if the resident does not have a specific purchaser in mind, the CLT will either locate an interested buyer or allow the resident to sell the improvements on the open market. See INSTITUTE FOR COMMUNITY ECONOMICS, *supra* note 29, § 10.4(ii), at 21-22. The distinction between the CLT ground lease and the court's hypothetical in *Aquarian Foundation*, however, is that the ground lease does not permit the resident to sell the improvements at fair market value.



illegal, it agreed with the court in *Seagate Condominium* that "restrictions on a unit owner's right to transfer his property are recognized as a valid means of insuring the association's ability to control the composition of the condominium as a whole."<sup>131</sup> Generally speaking, a "very strong presumption of validity"<sup>132</sup> attaches to a condominium declaration restriction where the purchaser knows of and accepts the restrictions upon entering the transaction.<sup>132</sup>

The rationale employed by the courts in *Seagate Condominium* and *Aquarian Foundation* applies to the CLT structure. First of all, the resident understands upon entering the ground lease agreement that her ability to alienate her interests in the land is restricted. Furthermore, the CLT clearly has an interest in fostering continuity of residence and protecting the character of its community.<sup>133</sup> The "uniqueness" of the condominium community is similar to that of the CLT community. To allow CLT residents to sell their improvements to any party they choose undermines the purpose of the CLT and threatens the CLT's very existence. The CLT must retain the authority to prevent the resident from selling improvements to an upper income individual or it cannot continue to provide affordable housing to those in need. Similarly, the CLT must retain authority to prevent the resident from selling the improvements to an individual who does not have the ability or desire to properly care for and maintain the improvements. Otherwise, the community will deteriorate.

Furthermore, CLTs do not possess the absolute ability to withhold consent to a proposed sale. If the resident proposes to sell the improvements to a qualified low or moderate income resident, the CLT may either authorize the sale or exercise its preemptive rights.<sup>134</sup> Either way, the lessee who wishes to sell her interest in the improvements will be able to do so at the purchase option price stated in the ground lease. The direct restraints do not in any manner "freeze" movement of ownership. They simply serve to stabilize the cost of land and homes for low and moderate income residents. In addition, the considerations noted above illustrate that, given the uniqueness of CLT neighborhoods, the restraints are reasonable and do not thwart public policy favoring freedom of alienation.<sup>135</sup> Thus, the ground lease should not be construed as an illegal direct restraint on alienation.

131. *Aquarian Foundation*, 448 So. 2d at 1167-68.

132. *Id.* at 1168 n.3.

133. See *Seagate Condominium Ass'n v. Duffy*, 330 So. 2d 484, 486 (Fla. 4th DCA 1976).

134. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 4.4 (1980).

135. See 61 AM. JUR. 2d *Perpetuities and Restraints on Alienation* § 102 (1981) (courts consider justifications for enforcing restraints as well as practical effects restraints have on alienability in determining reasonableness).

As mentioned above, the CLT ground lease also contains indirect restraints on alienation. Preemptive rights such as purchase options and the right of first refusal are indirect restraints on alienation.<sup>136</sup> Indirect restraints are also judged by a standard of reasonableness. The exercise price and period of time the grantor has to exercise a right of first refusal are considered in determining an indirect restraint's validity.<sup>137</sup> If the exercise price does not equal fair market value, the property owner may not make capital investments or improvements because their value cannot be recovered upon resale.<sup>138</sup> Thus, "[w]here . . . the exercise price is not necessary equal to the market value at the time of exercise, [an] option is void under the Rule Against Restraints unless its duration is limited to a reasonable period."<sup>139</sup>

The Florida Supreme Court stated in *Iglehart v. Phillips*<sup>140</sup> that a purchase option consisting of a repurchase option for an unlimited period and for a fixed purchase price constituted an unreasonable restraint on alienation.<sup>141</sup> In *Iglehart*, the grantee sold land and accompanying improvements to the grantor. The deed contained a restrictive covenant running with the land. The restriction provided that the grantors would have the right of first refusal to purchase the land and improvements for the amount the grantees paid for the property plus the cost of all permanent improvements the grantees placed on the land.<sup>142</sup> The court was concerned that, because "the option price would never include appreciation of the property or improvements . . . there would never be a sale."<sup>143</sup> Thus, the court concluded that the restrictive covenant operated as a fixed-price option of unlimited duration, which is an unreasonable restraint.<sup>144</sup>

136. Comment, *supra* note 62, at 426. Although the ground lease essentially provides the CLT with a right of first refusal at a non-market price, the policy against purchase options arguably applies insofar as the resident may hesitate to make improvements because she has agreed to the limited equity previously described. See *supra* notes 43-50 and accompanying text.

137. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 4.4 (1980).

138. Powell, *Florida's Statutory Rule Against Perpetuities*, 11 FLA. ST. L. REV. 767, 789 (1984). Generally the owner of improvements may not offer for sale property that has increased in value because the option holder has the right to purchase the improvements at less than fair market value. *Id.* This reasoning does not apply to the CLT structure because the resident may not sell her interests to any party for an amount exceeding the purchase option price.

139. *Id.* (citing *Iglehart v. Phillips*, 383 So. 2d 610 (Fla. 1980)).

140. 383 So. 2d 610 (Fla. 1980).

141. The grantors would have 60 days within which to exercise their option. If they failed to exercise the option within that time, the grantee would have the right to sell the property to another party. *Id.* at 611.

142. *Id.*

143. *Id.* at 616.

144. *Id.*

The court's rationale does not apply to CLTs because the resident is not dissuaded from selling his interests in the improvements. Whether he sells the improvements to the CLT or another purchaser, the purchase option price remains the same. Moreover, the value of added improvements plus an inflationary index are included in the purchase option price under the incremental formula.<sup>145</sup> Similarly, the purchase option price is determined by two independent appraisals under the appraisal formula.<sup>146</sup> Thus, the purchase option price does not serve as a disincentive to improvements. This is especially true given that the CLT resident, in most cases, has the financial ability to purchase the home only because the CLT can sell it at barely above cost. Thus, the resident does not actually "lose" by not receiving the fair market value when she sells the improvements at the purchase option price because she did not initially pay fair market value. Furthermore, "in any form of cooperative housing, rights of preemption should not be tied to the market price of land, . . . [because] to do so 'encourages speculation, promotes instability of residence, and destroys the cooperative aspects of the enterprise.'"<sup>147</sup>

In addition, the court in *Iglehart* noted that the option was independent of the lease. The court found that a deed containing a provision which prohibits a grantee from selling property without the grantor's consent violates the rule against unreasonable restraints on alienation because the grantor may arbitrarily deny a sale.<sup>148</sup> The CLT's option to repurchase the improvements is stated in the ground lease. The CLT may not arbitrarily withhold its consent to a proposed sale to a qualified buyer if it chooses not to exercise its option to purchase the improvements.<sup>149</sup>

Although the purchase option price is of unlimited duration, a court should find that the ground lease is a reasonable restraint on alienation. Furthermore, the restraint is not absolute.<sup>150</sup> The court in *Iglehart* noted that both the rule against perpetuities and the rules against unreasonable restraints on alienation "share a common public

145. See *supra* notes 45-46 and accompanying text.

146. See *supra* notes 47-50 and accompanying text.

147. Browler, *Restraints on the Alienation of Condominium Units (The Right of First Refusal)*, 1970 U. ILL. L.F. 231, 245 (quoting U.S. BUREAU OF LABOR STATISTICS, DEPARTMENT OF LABOR, ORGANIZATION AND MANAGEMENT OF COOPERATIVE AND MUTUAL HOUSING ASSOCIATIONS, Bull. No. 858, at 4 (1946)).

148. *Iglehart*, 383 So. 2d at 615 (referring to holding in *Davis v. Geyer*, 151 Fla. 362, 9 So. 2d 727 (1942)).

149. In addition, the ground lease permits the lessee to sell the improvements on the open market at the purchase option price if the CLT does not exercise its option within 60 days. INSTITUTE FOR COMMUNITY ECONOMICS, *supra* note 29, § 10.4(ii), at 22.

150. See *Seagate Condominium Ass'n v. Duffy*, 330 So. 2d 484, 485 (Fla. 4th DCA 1976).

interest and purpose."<sup>151</sup> The purpose is to "ensure that property is reasonably available for development by prohibiting restraint that remove property from a beneficial use for an extended period of time."<sup>152</sup> The CLT ground lease does not thwart the public interest and purpose over which the Florida Supreme Court expressed concern. The CLT ground lease does not operate to prevent the sale of improvements; instead, the CLT ensures that property remains available to low and moderate income residents. Thus, although the CLT structure does not produce income and is not geared toward increasing the value of property, it serves important social and economic policies by providing affordable housing.

Many exceptions to the rule against restraints on alienation have been carved out due to competing policy concerns.<sup>153</sup> Florida courts have "traditionally undertaken to determine the validity of restraints by measuring them in terms of their duration, type of alienation precluded, or the size of the class precluded from taking."<sup>154</sup> Florida courts hold that the CLT concept is incompatible with Florida property law, the Legislature should enact a statute specifically providing that the ground lease does not unreasonably restrain alienation. The "balance" between the harm the restraint has on "marketability"<sup>155</sup> and the benefit the CLT serves in terms of providing affordable housing clearly weighs in favor of permitting restraints in this context.<sup>156</sup>

#### IV. THE TAX DILEMMA: THE HOMESTEAD TAX EXEMPTION AND VALUATION FOR PROPERTY TAXES

##### A. The Homestead Tax Exemption

All personal and real property belonging to Florida residents is subject to taxation.<sup>157</sup> The question with respect to a Community Land

151. *Iglehart*, 383 So. 2d at 613.

152. *Id.*; see also *Gale v. York Center Community Coop., Inc.*, 21 Ill. 2d 86, 89, 71 N.E.2d 30, 34 (1960) (restraints do not produce injurious consequences where member of cooperative not prevented from liquidating interests); cf. *Kershner v. Hurlburt*, 277 S.W.2d 61, 626 (Mo. 1955) (fixed price constituted invalid restraint because restraint not justified by "socially or economically desirable objective"; sole purpose of arrangement was to prevent sale of land).

153. *Seagate Condominium*, 330 So. 2d at 485.

154. *Id.*

155. See *Iglehart*, 383 So. 2d at 610.

156. See generally *Gale*, 21 Ill. 2d at 86, 171 N.E.2d at 30; *Rose-Ackerman*, *supra* note 70.

157. FLA. STAT. § 196.001(1) (1989). See also *Parker v. Hertz*, 544 So. 2d 249, 20 (Fla. 2d DCA 1989) (quoting *Williams v. Jones*, 326 So. 2d 425, 435 (Fla. 1975)) ("all property is subject to taxation unless expressly exempt and such exemptions are strictly construed against the party claiming them").



Trust (CLT) becomes: which entity pays tax on the land and the home, the non-profit organization or the homeowner? The ground lease generally provides that any real estate taxes will be included in the amount the lessee pays for the monthly ground lease fee.<sup>158</sup> The CLT then has the obligation to pay "all taxes or assessments owed for its ownership of the Land with the proceeds generated from the Ground Lease Fee . . . ."<sup>159</sup> Consequently, the low or moderate income resident is contractually liable for paying tax on both the land and the home.<sup>160</sup>

The Florida Constitution<sup>161</sup> and the Florida Statutes<sup>162</sup> provide a homestead exemption from taxation. Under section 196.031(3)(d), Florida Statutes, permanent residents receive a \$25,000 exemption from the assessed valuation of their homestead. Consequently, the homestead exemption reduces the amount of *ad valorem* taxes that a homeowner must pay. Both the constitutional and statutory exemptions require a person to have legal or equitable title to real property and to make that real property a permanent residence in order to be entitled to the homestead exemption.<sup>163</sup> Since the CLT members are lessees and not owners of the land, a technical reading of the homestead provisions would suggest that they do not qualify for the homestead exemption.<sup>164</sup> Residents of condominiums and cooperatives are deemed to have legal or beneficial and equitable title to the property upon which their residences are situated and are entitled to the homestead exemption.<sup>165</sup> Neither the constitutional nor the statutory provi-

158. See INSTITUTE FOR COMMUNITY ECONOMICS, *supra* note 29, art. V, § 5.1(c), at 6.

159. *Id.* art. VI, § 6.1, at 8.

160. This conclusion is based upon the assumption that the CLT is not exempt as a charitable non-profit corporation from *ad valorem* taxation under section 196.192, Florida Statutes. The homestead exemption should apply to CLT members instead of exempting CLT owned land from taxation altogether. It is politically important for CLTs to share in the expense for services enjoyed by their neighborhoods. INSTITUTE FOR COMMUNITY ECONOMICS, *supra* note 25, at 7. Moreover, it is unlikely that CLTs would be exempt from *ad valorem* taxation under section 196.192. See FLA. STAT. § 196.193(1)(a) (1989) (no property "shall be exempt which is rented or hired out for other than religious, educational, or other exempt purposes at any time").

161. FLA. CONST. art. VII, § 6. The homestead exemption from taxation must be distinguished from the homestead exemption found in article X, section 4 of the Florida Constitution, which applies to homestead exemption from forced sale. See also In Re Duque, 33 Bankr. 201, 202 (Bankr. S.D. Fla. 1983).

162. FLA. STAT. § 196.031 (1989).

163. See FLA. CONST. art. VII, § 6(a); FLA. STAT. § 196.031(1) (1989).

164. The homestead exemption requires that the homeowner own real property. See BLACK'S LAW DICTIONARY 1096 (5th ed. 1979) (defining real property as land and any improvements affixed to the land).

165. FLA. STAT. § 196.041 (1989). Condominium parcels are defined in chapter 718 of the Florida Statutes. A cooperative resident is defined as "a tenant-stockholder or member of a cooperative apartment corporation who is entitled solely by reason of his ownership of stock or

sions directly allow the homestead exemption to be extended to CLT residents.<sup>166</sup>

Unlike a condominium or cooperative resident, a CLT resident possesses full ownership interests in the home and improvements, but does not have title to the land. Similarly, mobile home owners have title to the mobile home itself, but often do not have title to the land beneath the mobile home. The general rule is that a mobile home constitutes real property only when the owner of the mobile home owns the land on which the mobile home is situated, and then the mobile home is permanently affixed to that land.<sup>167</sup> Nonetheless, in many instances, a mobile home may be considered real property. Ownership of land is not necessarily limited to possession of legal title.<sup>168</sup>

In *Mikos v. King's Gate Club, Inc.*,<sup>169</sup> a non-profit corporation with fee simple ownership of real property sold membership that entitled mobile home owners to park in a designated site.<sup>170</sup> The corporation's charter specified that its purpose was to operate the mobile home park for the use and benefit of its members. Members paid a monthly maintenance fee and did not own any interest in the land. In determining whether the property appraiser correctly assessed the mobile homes as real property, the court considered whether the members could be deemed owners of the land for purposes of the statute.<sup>171</sup> Finding that the members were entitled to a homestead exemption based on their relationship to the corporation and the land, the court held the members owned the land.<sup>172</sup> Thus, the land was subject to *ad valorem* taxation.

membership in the corporation to occupy for dwelling purposes an apartment in a building owned by the corporation . . . ." *Id.* See also *Ammerman v. Markham*, 2 So. 2d 423 (Fla. 1969) (upholding constitutionality of section of statute granting homestead exemption to condominium and cooperative apartment owners).

166. Article VII, section 6(a) of the Florida Constitution provides that "real estate may be held by legal or equitable title, . . . or indirectly by stock ownership or membership . . . in a corporation owning a fee or a leasehold initially in excess of ninety-six years." Section 196.031(2), Florida Statutes, focuses upon the "cooperative apartment corporation." FLA. STAT. § 196.031(2) (1989) (emphasis added). Thus, it is unclear whether the homestead exemption would reach CLT members. Moreover, the question of how the land and home would be valued would remain unresolved. See *infra* notes 174-88 and accompanying text.

167. FLA. STAT. § 320.015 (1989).

168. *Mikos v. King's Gate Club, Inc.*, 426 So. 2d 74, 75 (Fla. 2d DCA 1984).

169. 426 So. 2d 74 (Fla. 2d DCA 1984).

170. *Id.*

171. *Id.* at 75. The property appraiser sought to tax the mobile homes as real property under section 320.015. FLA. STAT. § 320.015 (1989).

172. *Mikos*, 426 So. 2d at 76. The court referred to the language in article VII, section 6 of the Florida Constitution, which exempts real estate "held by . . . equitable title . . . indirectly by . . . membership representing the . . . member's proprietary interest in a corporation owning a fee." *Id.*; see also 1975 FLA. ATT'Y GEN. ANN. REP. 159. Cf. *Nordbeck v. Wilkinson*, 529 So.

A CLT's structure is similar to the mobile home park discussed in *Mikos*. CLT homeowners possess dominion over the land and own the improvements upon it. The homeowner's inability to enjoy unfettered use or alienability of the property does not foreclose ownership of the land.<sup>173</sup> When a non-profit corporation is created specifically to conduct a cooperative association, and there is an established nexus between the right of occupancy and membership, the homeowner should be entitled to the homestead exemption.<sup>174</sup> CLTs generally stipulate in their articles of incorporation that the residents constitute "members" of the trust.<sup>175</sup> The members pay a nominal initial membership fee and have voting rights concerning the CLT's activities.<sup>176</sup> Consequently, if the CLT residents are members of the land trust, reside on the land under a lease agreement, and own the improvements upon the land, the nexus between occupancy and membership is established. Thus, CLT members should receive the homestead exemption.

However, CLT members and mobile home owners are neither constitutionally nor statutorily entitled to the homestead tax exemption. The Florida Attorney General has written that the Legislature intended to extend the homestead exemption only to condominium and cooperative apartment owners and "no others."<sup>177</sup> Thus, although case law addressing mobile home owners who are members of a non-profit corporation that owns the land upon which their mobile homes are permanently affixed should apply equally to CLT residents, a specific statute entitling CLT residents to the homestead exemption is needed. Without a specific statute, property appraisers from county to county may grant or not grant CLT residents the exemption based on nothing more than their own discretion.<sup>178</sup>

2d 360, 361 (Fla. 2d DCA 1988) (mobile home owner holding membership certificate in corporation holding legal title to land upon which home is located constitutes owner of land for purposes of taxation).

173. See *Parker v. Hertz*, 544 So. 2d 249, 250 (Fla. 2d DCA 1989).

174. Cf. 1980 FLA. ATT'Y GEN. ANN. REP. 32 (when land title is held by a corporation which is not organized as a cooperative association, and which requires a mobile home owner to buy a share of the capital stock entitling the owner to dwell on a site, such an owner who might otherwise meet the statutory requirements for a homestead exemption is not entitled to such an exemption).

175. See *supra* note 25.

176. *Lawyerling to House the Homeless: Creative Tools* (American Bar Association Video-tape Series 1989).

177. 1980 FLA. ATT'Y GEN. ANN. REP. 81, 83.

178. See, e.g., FLA. STAT. § 196.031(4) (1989) (property appraiser compiles list of taxable properties); *Id.* § 196.151 (property appraiser has initial authority to grant or refuse homestead exemption); cf. 1980 FLA. ATT'Y GEN. ANN. REP. 81 (property appraiser has initial responsibility to make factual determinations or determinations of mixed questions of law and fact to decide whether a mobile home owner receives homestead exemption).

#### B. Valuation According to the Purchase Option Price

The Florida Legislature should not stop at statutorily granting the homestead exemption to CLT residents. The problem actually valuating the land and improvements must also be addressed. The CLT resident will be taxed on both the land and the improvements.<sup>179</sup> Thus, regardless whether the valuation is for *ad valorem* tax under section 196.001, Florida Statutes, or for the homestead exemption under section 196.031, the CLT's unique structure must be considered. The CLT resident does not own the land and cannot sell its fair market value. In addition, the limited equity provision of the ground lease restricts to the purchase option price the amount for which she can sell the improvements. Thus, assume the fair market value of the property is appraised at \$35,000, the fair market value of the improvements is appraised at \$50,000, and the purchase option price is \$35,000. The resident will either pay *ad valorem* taxes of \$85,000, or \$60,000 if the resident receives the homestead exemption. Either way, the valuation will exceed the resident's actual interest in the land and improvements, which is \$35,000. Given that the residents are of low or moderate income, the difference in taxation may determine whether they can afford to buy a home on the CLT's land.

The CLT cannot directly reduce property taxes.<sup>180</sup> Residents may request an assessment based on the purchase option price rather than the market value of the property.<sup>181</sup> County property appraisers are responsible for valuating property to be taxed.<sup>182</sup> The Florida Supreme Court stated in *Walter v. Schuler*,<sup>183</sup> that the property appraiser is charged with arriving at a "just valuation" of the property for purposes of granting the homestead exemption. The court held that just valuation is fair market value.<sup>184</sup> The court reasoned that "valuations less than 100% . . . cannot be tolerated even though uniformly applied for the reason that the amount of the homestead exemption not being fluctuant a lower than 100% . . . assessment amounts to the unfair advantage of homestead over non-homestead property."<sup>185</sup>

179. See *supra* note 157 and accompanying text.

180. See *supra* note 160.

181. INSTITUTE FOR COMMUNITY ECONOMICS, *supra* note 25, at 4. While valuing the improvements at the purchase option price might appear to be an onerous task, the formula stated in the ground lease would facilitate the process. Whether either the incremental formula, see *supra* notes 45-46 and accompanying text, or the appraisal formula, see *supra* note 7-50 and accompanying text, is used, the formula would be easily ascertainable by the property appraiser.

182. See generally FLA. CONST. art. VII, § 4; FLA. STAT. § 196.031(4) (1989).

183. 176 So. 2d 81 (Fla. 1965).

184. *Id.* at 85.

185. *Id.*



Furthermore, a county property appraiser does not have "unbridled discretion" in valuing property for taxation.<sup>186</sup> Thus, even if a CLT resident in Florida requests and is granted a valuation based on the purchase option price, a court may find that the valuation is illegal and unconstitutional. On the other hand, even if the reduced valuation remains unchallenged in a specific county, property appraisers in other counties may refuse to value the improvements and property at the purchase option price. Thus, whether a CLT resident is entitled to a valuation based on the purchase option price would vary from county to county.

Article VII, section 10 of the Florida Constitution presents another obstacle to valuing CLT residents' property at the purchase option price rather than fair market value. It provides that "[n]either the state nor any county, school district, municipality, special district, or any agency of any of them, shall . . . use its taxing power or credit to aid any corporation, association, partnership or person."<sup>187</sup> This language is directed toward prohibiting the state from using its taxing power for private benefit.<sup>188</sup> But to permit CLT residents to be taxed on the purchase option price stated in the ground lease is consistent with the public benefit served by providing affordable housing. States can and do use their taxing power to facilitate community redevelopment.<sup>189</sup> "Integrating these techniques with a comprehensive development plan deflects challenges that special privileges or burdens are directed toward particular citizens."<sup>190</sup>

#### V. THE COMMUNITY REDEVELOPMENT ACT

In 1969, the Florida Legislature enacted the Community Redevelopment Act (Act).<sup>191</sup> The Legislature recognized that blighted and slum areas "decrease the tax base and reduce tax revenues," thereby threatening the social and economic stability of the State.<sup>192</sup> Rehabilitation of such areas may be accomplished by "cooperation and voluntary action of the tenants of property in such areas."<sup>193</sup> The Legislature noted that redevelopment of distressed areas will result in an enhanced

186. *Id.*; see also *Cassady v. McKinney*, 296 So. 2d 94, 96 (Fla. 2d DCA 1974).

187. FLA. CONST. art. VII, § 10.

188. FLA. CONST. ANN. art. VII, § 10 (West 1970) (Commentary).

189. Davidson, *Tax-Related Development Strategies for Local Government*, 13 REAL EST. L.J. 121 (1984).

190. *Id.* at 122.

191. Ch. 69-305, 1969 Fla. Laws 1075 (codified at FLA. STAT. § 163.330 (1989)).

192. FLA. STAT. § 163.335(1) (1989).

193. *Id.* § 163.335(2).

tax base,<sup>194</sup> and the State may use its police powers to promote redevelopment.<sup>195</sup> Important to note is that the Legislature specifically recognized the severe shortage of housing for low and moderate income residents as an obstacle to community redevelopment.<sup>196</sup>

Although the Act defines a "Community Redevelopment Agency" as a public entity,<sup>197</sup> it specifically encourages private enterprise to become involved with community redevelopment.<sup>198</sup> Community Land Trusts (CLT) can assist the State in rehabilitating neighborhoods that have steadily deteriorated as a result of neglect and absentee landlords. Moreover, CLTs can help counties and municipalities in providing home ownership for low and moderate income families. Thus, CLTs, by working directly with community redevelopment agencies, serve a public purpose as private organizations.<sup>199</sup>

Further, the CLT structure focuses specifically on providing affordable housing for low and moderate income residents. Most private developers target middle and upper income areas for redevelopment.<sup>200</sup> Even where private developers choose to redevelop deteriorating areas, gentrification<sup>201</sup> usually results. Consequently, low and moderate income residents are often displaced as their rental units are converted into expensive condominiums and cooperatives. The Act provides a basis upon which the Legislature can justify carving out an exception to rules against illegal restraints on alienation if the CLT structure is not compatible with Florida property law.

The Act does not specifically permit private enterprise to receive special tax considerations in terms of reduced valuation of real or personal property. However, a county, municipality, or Community Redevelopment Agency may "sell, lease, dispose of, or otherwise transfer" to a private person real property that is subject to any restrictions or conditions in order to carry out the purpose of the Act.<sup>202</sup> The property must be disposed of at fair market value.<sup>203</sup> In determin-

194. *Id.* § 163.335(4).

195. *Id.* § 163.335(3).

196. *Id.* § 163.335(5); see also *supra* notes 10-15 and accompanying text.

197. See FLA. STAT. §§ 163.356-357 (1989).

198. *Id.* § 163.345.

199. The CLT would need to work directly with the municipality, county, or community redevelopment agency because the CLT's targeted area must first be designated as a slum or blighted area, or an area in need of affordable housing. See FLA. STAT. § 3.358 (1989). Furthermore, its plans would need to be consistent with the municipality or county's general plan. *Id.* § 163.345(1).

200. See *supra* notes 11 & 26 and accompanying text.

201. See *supra* note 26.

202. FLA. STAT. § 163.380(1) (1989).

203. See *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875, 8 (Fla. 1981).

ing fair market value, the county, municipality, or Community Redevelopment Agency must consider the uses for which the property is intended and any restrictions, covenants, or conditions placed upon the property.<sup>204</sup> Thus, the Act implicitly recognizes that the "fair market value" is subject to limitations on the property's alienability and uses.

As previously noted, the Community Redevelopment Act does *not* provide an explicit basis upon which to reconcile valuing CLT property at the purchase option price with the constitutional prohibition noted above.<sup>205</sup> Nevertheless, the CLT can directly contribute to the public benefit derived from community redevelopment under the Act. Consequently, the Legislature should enact a statute entitling CLT residents' property to be valued at the purchase option price. While the State will forego tax revenues if the land and improvements are not taxed at fair market value, the areas in which the CLTs become involved are either blighted or suffer from a severe shortage of affordable housing. These areas already suffer from a decreased tax base and reduced tax revenues. Moreover, counties and municipalities could require CLTs to develop only in areas designated as "slum" or "blighted" under the Act before residents would be entitled to have their property valued at less than market value.

#### VI. CONCLUSION

The Community Redevelopment Act underscores Florida's concern for the lack of affordable housing and community redevelopment. A Community Land Trust (CLT) can contribute to both of these goals by providing a means for low and moderate income residents to achieve the "American Dream" of owning a home, while at the same time rebuilding deteriorating neighborhoods within a county or municipality. A CLT can achieve these goals by purchasing a segment of land and homes in an area in need of restoration. By retaining ownership of the land, a CLT can offer to low and moderate income residents a restored residential unit at an affordable price. In exchange, the CLT resident obtains the benefits and pride of private home ownership.

Key to the CLT's continuing ability to serve low and moderate income residents' needs is the ground lease agreement. The ground lease agreement serves as a mechanism through which the CLT limits the amount a CLT resident may receive upon the sale of improvements,

204. FLA. STAT. § 163.380(2) (1989).

205. See *supra* text accompanying notes 202-04.

while keeping the land away from speculative market forces. Because the purchase option price provides recovery to the resident for all improvements, plus a fair return on the investment, the purchase option price does not serve as a disincentive to further improvements or sale of the owner's interests. In essence, the owner forgoes market appreciation on resale in exchange for the benefits of private home ownership. Furthermore, the ground lease guarantees the continuity of the affordable home ownership by restricting the resale of CLT homes to low and moderate income residents.

The greatest threat to a CLT is that a court will declare the ground lease void because it constitutes an illegal restraint on alienation. However, a CLT's ground lease restrains alienation of land similar to the way in which condominium and cooperative apartment restrictions restrain alienation. Both often require consent or a right of first refusal upon resale by the owner. Moreover, courts have continually determined whether restraints on alienation are reasonable in light of the social and economic policies they serve. The only additional restraint a CLT imposes on the residents is that market appreciation is discounted. This restraint is reasonable given the opportunities the CLT provides to low and moderate income residents and the benefits the CLT offers toward furthering community redevelopment.

CLTs will benefit greatly if their residents receive the homestead tax exemption. CLT residents are entitled to the homestead exemption in every respect, except that CLT residents do not technically own the land. The Florida Legislature should create a statutory homestead exemption for CLT residents. Furthermore, the exemption should not be based on the fair market value of the land and improvements. Rather, the homestead exemption should be based on the purchase option price. The reduction would come at little cost to tax revenues because the CLT will create a greater tax base in deteriorating neighborhoods.

CLTs can work successfully with community redevelopment agencies toward restoring blighted areas and rehabilitating deteriorating neighborhoods. Low and moderate income residents who would otherwise be precluded from home ownership will be provided affordable housing. CLTs can serve Florida's goals of community redevelopment and provision of affordable housing and should be given the opportunity to do so.