1. Please provide an Analytical Overview of the Topic.

This reading focuses on common interest communities relative to servitudes. This reading also provides an introduction to various types of property ownership developments, the planned community (or subdivision), the condominium, and the cooperative.

2. How are common interest communities regulated?

Almost every state has adopted a statutory scheme for organizing a common interest community. Some of these are modeled after the Uniform Common Interest Ownership Act (1982, 1994). They require a declaration of rules governing the community which must be disclosed to (original) purchasers (what about subsequent purchasers?). In most common interest communities, a homeowners association, in which all homeowners are automatically members, enforces the servitudes set forth in the declaration establishing the common interest community. The association, governed by a board elected by its members, may adopt new regulations reasonably necessary to manage the common property, administer the servitude regime, protect community members from unreasonable interference in the enjoyment of their individual property, and carry out other functions set forth in the declaration establishing the common interest community.

3. What rules relative to servitudes apply to common interest communities?

The rules about servitudes already covered are generally applicable to common interest communities, the homeowners association has power to raise funds reasonably necessary to carry out its functions. This includes the power granted to it by its members to levy assessments (fees), enforceable by fines and a lien on the individual property (a secured property interest on the title) for failure to pay assessments (ala Neponsit).

4. What are the various types of common interest communities?

Homeowner associations, condominiums, and cooperatives. A condominium has become very prominent over the last few years. In a condo, each unit (or interior space) is owned separately in fee simple by an individual owner. The exterior walls, the land beneath, the hallways, and other common areas are owned by unit owners as tenants in common. Because each unit is owned separately, each owner obtains mortgage financing by a separate mortgage on the owner’s individual unit. Real estate taxes are assessed or allocated to each unit separately. The failure of one unit owner to pay mortgage interest or taxes does not
jeopardize the other unit owners. Condo can be residential (homes) or commercial (offices). The declaration of condominium, filed before the first sale is made, will provide for an association of unit owners to make or enforce rules, to manage the common areas, and to set maintenance charges levied against unit owners. Each purchaser, by accepting a deed, becomes an association member and must abide by its bylaws. All 50 states have some form of condominium statute governing this type of shared ownership.

Each condo unit owner is liable for a monthly charge to maintain common facilities and insure against casualty and liability. The condo documents fix the fraction of each unit owner’s pro rata burden of common expenses. This fraction also may govern the unit owner’s voice in management and may be used by the tax assessor in apportioning the project’s total value among the separate units. The association may also have the right to make improvements and assess the unit owners their fractional share (a “special assessment”). Enforcement of condo obligations may be covered by the state condo statute or the condo declaration.

Any requirement of horizontal or vertical privity is met because the original purchasers are in privity with the developer and subsequent purchasers are in privity with the original purchasers. Any requirement that a covenant touch and concern the land is usually satisfied. Negative covenants restricting use are almost always held to touch and concern, as are affirmative covenants to pay dues to a homeowners association. But because the rules of a common interest community and the powers of the association can adversely affect the interests of individual members, courts have been called upon to determine whether individual members shall be protected from imposition by those who control the association. The emerging issue is by what standards the common interest communities’ rules and regulations are judged.

5. What issue, rule, rationale, application in the Nahrstedt case (1994)?

Plaintiff sued over the condo restriction against dogs, cats, and other animals in the development. Trial court for the Association. Court of appeals reversed. And the Supreme Court for the Association. Decision: as a matter of law, the recorded pet restriction prohibiting cats or dogs but allowing some other pets is not arbitrary, but is rationally related to health, sanitation, and noise concerns legitimately held by residents of a high-density condo project of 530 units. 

Rule: California, common interest use restrictions are “enforceable unless unreasonable;” and in states lacking legislative guidance, courts have adopted a standard under which recorded use restrictions will be enforced as long as they are “reasonable.” Others will assume the restrictions to be reasonable if in the original recorded declaration or if passed by a majority of the owners or by their duly authorized board. But all use restrictions are subject to public policy limitations. The dissent found the restriction to be patently arbitrary and unreasonable, and devoid of humanity. What if
Nahrstedt were a subsequent bona fide purchaser who has no notice of the pet restriction?

6. What was the aftermath of the Nahrstedt decision?

Natore Nahrstedt moved out with her three cats (after incurring a $50,000 legal bill). California enacted in 2000 (p. 809) a statute stating that no governing document (common interest community) shall prohibit the owner of a separate interest from keeping at least one pet within the development, subject to the rules and regulations of the association. Pet means domesticated bird, cat, dog, aquatic animals kept within an aquarium, or other animal as agreed to by the association and the homeowner. If the association implements a rule or regulation restricting the number of pets an owner may keep, the new rule or regulation shall not allow to prohibit an owner from continuing to keep any pet that the owner currently keeps in his or her separate interest if the per otherwise conforms with the previous rules or regulations relating to pets. Does this change the ruling in Nahrstedt or codify it? Should the condo owner pay the association legal fees for the cost to defend the challenge rule or regulation? See Noble and Mountain View (p. 810, note 2). Should the condo owners ever pay for the costs of the challenging claimant? See Riss (p. 810).

7. What servitudes impose an indirect restraint on alienation (permitted by the law) versus those that are a direct or absolute restraint on alienation?

A direct restraint is valid if “reasonable.” Some common, acceptable direct restraints on alienation include prohibitions on transfers without the consent of the association, rights of first refusal, and requirements that transfers be made only to persons meeting certain eligibility requirements. An indirect restraint is invalid only if it “lacks rational justification,” a less demanding requirement than “reasonableness.” Indirect restraints include use restrictions or other restrictions (such as pet, paint color, or planting restrictions) that limit the potential market for the property. These restrictions do not clearly interfere with the free functioning of the market in land. Servitudes created in commercial transactions seldom lack rational justification. Reasonableness requires balancing the utility of the purpose served by the restraint against the harm that is likely to flow from its enforcement. What is the standard of review for judging associations’ actions, reasonableness (in the development and enforcement of equitable servitude vs the “business judgment rule” in economic decisions? (See notes 4 and 5, p. 811). Does it matter if a use restriction was in the original, recorded declaration or approved later by the board of the association pursuant to a recorded rule allowing the Board to adopt new rules, or modify, existing rules? (See pp. 812-13).

8. What are cooperatives?

In a housing cooperative, the title to the land and building is held by a corporation; the residents own all the shares of stock in the corporation and
control it through an elected board of directors. Each resident also has a long-
term renewable lease of an apartment unit. Hence, residents are both owners of
the cooperative corporation and tenants of the corporation. The property is
usually subject to a blanket mortgage. If one cooperator fails to pay his share of
the mortgage interest or taxes, the other cooperators must make it up or the entire
property may be foreclosed upon. Thus, in a cooperative more than a condo, the
investment of one person depends upon the financial stability of others. There is
usually both financial and social screening. New York courts have held that
coooperative boards can deny entry to anyone for any reason and without giving
any reason, provided the board does not violate federal and state civil rights laws.
Weisner (p. 815). If the applicant can prove racial or ethnic discrimination, the
coooperative will have to admit the applicant or pay damages. Broome, p. 815.

9. Is it reasonable to restrict residence against Tier 3 sex-offenders?

Mulligan (N.J., p. 815) apparently said no, against public policy, even though sex-
offenders are not a protected class. And may constitute state actions, because the
association provides essential services. (See p. 817)

10. Do you believe that Heaven is a gated community and if so what criteria for
entry? Would cats and other pets be allowed?