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**Department of
Veterans Affairs**

**Information
Bulletin**

April 24, 1995

Loan Guaranty Letter No. 95-6
Construction & Valuation 262-1

SUBJ: PROCESSING ESTABLISHED EXISTING PUD'S (PLANNED-UNIT DEVELOPMENTS)

1. Procedures for processing certain existing planned-unit developments (other than condominiums) are hereby revised to rely on the lender's acceptance of those projects. An established PUD (planned-unit development) project where control of the homeowner's association has been turned over to the unit purchasers for at least 1 year and which meets other defined criteria will no longer be reviewed by VA. As such, it will be the lender's responsibility to determine if the project satisfies VA's eligibility criteria. This policy is similar to that of Fannie Mae regarding lender responsibilities for Type E PUDs. This process will be accomplished by lenders providing a certification in accordance with VA Pamphlet 26-7, VA Lender's Handbook, paragraph 16.13 d. (2) "Lender Certification".
2. We are providing Chapter 16 of VA Lender's Handbook VA Pamphlet 26-7 in its entirety. Section 16.13 has been added to Chapter 16 PROCESSING PLANNED-UNIT DEVELOPMENTS (OTHER THAN CONDOMINIUMS).
3. When requesting an appraisal for a property in a PUD previously approved by VA or HUD, lenders may wish to continue to use the PUD ID number previously assigned by VA. For other established existing PUDs, however, the lender will need to use the ID number "LENPUD". If you are using the VA hotline number, please advise the operator that the property has a mandatory homeowners association and the PUD ID number will be "LENPUD". If you are using the automated modem ordering system, please type in "LENPUD" in the field identified as "PUD ID:".
4. If have any questions regarding the new procedures on Established Existing PUDs, please contact Construction and Valuation Personnel at 303-914-5638.

ROBERT K. SHEARIN
Loan Guaranty Officer

Enclosure

AUTHORITY: DVB Circular 26-80-34, Change 4.

Distribution: All Program Participants

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CHAPTER 16. PROCESSING PLANNED-UNIT DEVELOPMENTS
(OTHER THAN CONDOMINIUMS)

16.01 PURPOSE

Policies and procedures described in this chapter apply to planned-unit developments other than condominiums. Condominiums are discussed in chapter 17.

16.02 DEFINITIONS

a. PUD (Planned-Unit Development). A subdivision of land into lots for use predominantly for owner-occupied homes which contain common land comprising an essential or major element of the development (e.g., usable open space, pool, community building, tennis courts, other recreational facilities), owned by a home association (usually incorporated) to which all homeowners must belong and to which they must pay lien-supported assessments. A PUD is designed and organized for use and operation as a separate entity; or as expanded by annexation of additional land area; or a group of contiguous subdivisions, either operating as separate entities or merged into a single consolidated entity.

b. HOA A nonprofit organization operating under recorded land covenants where (1) each lot owner in a planned-unit development is automatically a member, and (2) each lot is automatically subject to a lien-supported charge for a proportionate share of the expenses for organization activities, such as maintenance of common areas.

c. Common Area. A parcel or parcels of land, together with the improvements thereon, with use shared by owners and occupants of the individual building sites in the PUD.

16.03 REQUIREMENTS FOR SPECIAL PROCESSING CONSIDERATION

a. The requester must apply for VA acceptance of the overall project by submitting applicable documents shown in item 1 of paragraph 16.15.

b. Before a project may qualify as a PUD, documents must meet the requirements shown below, except as noted. The use of VA Form 26-8200, Suggested Legal Documents for Planned-Unit Developments, is not mandatory but is encouraged, as it contains all of VA requirements and expedites document review. Draftsmen who prefer to use different formats and language should use documents that comply with requirements of this handbook. For reference, many of the requirements are followed by a citation to the comparable provision in the VA-suggested legal documents. Deviations from the suggested documents may delay the review, but delay could be minimized by identification of the deviation and an explanation for its use.

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c. In very large projects, it may be necessary for the developer to create an association for the larger area (referred to as an "umbrella" PUD) along with several smaller associations for the various clusters or villages which make up the entire project. The large association provides facilities and services on a broad scale to serve the larger community area. Many of the provisions in the documentation for the umbrella PUD will be in general terms and will lack some of the provisions contained in VA-suggested documents. In this type development, the initial submission generally will not include documentation for the subassociations. Each association level is reviewed and approved separately by VA as submitted. VA regional offices confirm that homeowners are automatically members of each association with representation in each.

d. In staged or phased developments, the initial stage is generally subject to the covenants with provisions for annexation of future stages as construction and sales progress. In these instances, the developer must submit to VA a general plan of the entire proposed development with submission of the first stage. The general plan should contain:

(1) A general indication of size and location of additional developments in subsequent stages and proposed land uses in each;

(2) The approximate size and location of common properties proposed for each stage;

(3) The general nature of proposed common facilities and improvements; and

(4) A statement that the proposed additions, if made, will become subject to assessment for their share of association expenses. The proposed overall general plan must be reviewed and approved prior to approval of the initial development stage (par. 16.05c and VA Form 26-8200, par. 7).

16.04 TITLE

The veteran must receive an estate in realty that meets the requirements of 38 CFR 36.4350. The veteran's estate may not be subject to unreasonable restraints upon alienation which would adversely affect title or marketability of the unit. Restrictions on

normal use and occupancy of property inherent in fee ownership are not acceptable. The following restrictions against an individual unit owner's right to alienate or use and enjoy his or her units are not acceptable to VA:

- a. Right of first refusal unless such right is in conformity to 38 CFR 36.4350(b)(5); and
- b. Leasing restrictions which amount to unreasonable restrictions on use and occupancy of a unit.

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- (1) Right of first refusal applicable to leasing a unit.
- (2) Right of prior approval of either a prospective purchaser or tenant.
- (3) Prohibition against leasing of a unit for a period in excess of 1 year.

16.05 THE PROPERTIES

a. The covenants must contain an adequate legal description of the property, including the common area and the lots, and appropriate language subjecting that property to the covenants (introductory paragraph of VA Form 26-8201, Declaration of Covenants, Conditions and Restrictions). VA prefers that the description of the property be written into the body of the covenants rather than by reference to an attached exhibit. Any exhibit, schedule, or plat referenced or attached as an exhibit must be recorded with the declaration unless it is already on record. If the development plan contemplates annexation of additional land area, it is not necessary or recommended that more than the first stage be initially subjected to the covenants.

b. Annexation of additional properties must have the consent of two-thirds of the lot owners (excluding the developer) except when annexed pursuant to a staged development plan in accordance with subparagraph c below.

c. In a staged development, the developer may annex additional land without the consent of a lot owner only if the annexation is: (1) limited to a stated, reasonable time; (2) limited to a defined area; (3) in accordance with a general plan filed with VA; and (4) approved by VA (VA Form 26-8200, Appendix Form No. 5).

d. The first stage of a staged development must be a self-contained unit capable of independent existence in the event the plan does not progress beyond that point. After each stage is annexed, the development, as enlarged, must be capable of existence without dependence on any proposed additional stages. A dilemma is created when a developer seeks to convey the entire development's recreational amenities to an HOA in the first stage, with support anticipated to be spread over future stages. If development goes no further, the HOA could not survive without a severe economic burden on the early homeowners. The individual characteristics of each PUD determine the developer's solution.

(1) One recommendation might be for the developer to phase sections of the recreational area, sized commensurate with the number of lots bound to its support.

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(2) Another possible solution might be for the developer to place the amenities in a later stage and forego credit in the CRV (VA Form 26-1843, Certificate of Reasonable Value) until such time as there is sufficient HOA membership to support the amenity package. VA regional offices must assure that builders/developers do not advertise facilities included in future stages in the current offering. VA will examine the budget to determine that the homeowner assessment will not be used to support facilities that have not been completed and conveyed to the HOA. If, after VA approval of the general plan, but before completion and sale of those homes equaling the minimum number required to support the amenities, the builder wishes to convey the amenities to the HOA, VA approval must be secured.

(3) A third possible solution might be for VA to establish a presale requirement upon the whole project, based on local market conditions. The regional office must be satisfied that the HOA will have a sufficient number of members to insure proper maintenance and operation of the facilities without developer assistance.

(4) A number of other alternatives may be acceptable if results are feasible.

e. If onsite vehicular parking space is not provided on each lot, provision for offsite parking space must be included. The homeowner should be assured of sufficient permanent exclusive parking space in the common area and that other owners may not claim a right to its use by virtue of their general easement (VA Form 26-8200, Appendix Form No. 3b).

f. It is recommended, particularly in townhouse developments, that the HOA provide exterior maintenance of residences (VA Form 26-8200, Appendix Form No. 2a). If there are exterior features which the HOA would not maintain, such as patios or carports, those features may be itemized. In PUDs where exterior maintenance is not a normal function of the HOA, a provision where the HOA performs maintenance if a homeowner fails to keep his or her residence in a satisfactory manner (VA Form 26-8200, Appendix Form No. 2b) is recommended.

g. In no event should the HOA provide interior maintenance of structures it does not own.

h. Common utility lines in planned-unit developments must not pass over, under, or through any of the units, and none of the connecting lines can run under any unit other than the one it services.

i. Customary use restrictions and easements for public utilities may be included in the covenants. A new article should be employed for this purpose.

16.06 THE COMMON AREA

a. For a development to be considered a PUD, it is necessary that common areas be owned by the HOA and consist of one or more elements other than open flood plain, street lighting, or unusable open space which will not enhance the values of properties in the development. The VA office having jurisdiction makes this determination.

(1) If the use of the common areas has been dedicated to the public, or common areas are privately owned by other than the HOA or the individual owners in common, the planned-unit development will be processed by VA as a standard subdivision.

(2) If a subdivision is subject to a lien-supported assessment and mandatory membership in an HOA or participation as a beneficiary under a trust arrangement, it becomes necessary for VA to determine if there are more than nominal common amenities. If the amenities are nominal only, PUD processing criteria are not applicable. Normally, before a determination can be made that more than nominal amenities exist, other than governmental-type services should be provided. There should also be more than commonly owned minor open green spaces or roadway median or boundary strips. Active recreational facilities would usually lead to a finding that the subdivision is a PUD, provided there are also lien-supported assessments and mandatory HOA membership.

(3) If it is determined that a subdivision is a PUD, a review of all required exhibits by VA will be necessary. However, in existing subdivisions, with no developer involvement, the review is primarily concerned with items that might violate 38 U.S.C. chapter 37, or VA regulations. In addition, VA must determine that there is nothing inoperative under State law. The sufficiency of the budget is considered in establishing value and the amount of the monthly assessment is considered in credit underwriting.

(4) If the VA regional office determines that a subdivision subject to lien-supported assessments is not a PUD, a full legal review of the documents is not required. However, the lender will be advised by appropriate, prominent endorsement to the CRV that there is a lien-supported assessment and that it is the lender's responsibility to assure that the assessment is subordinate to the VA guaranteed mortgage. If the assessment would be superior to the proposed guaranteed mortgage, the lender should seek additional advice from the regional office prior to closing the loan.

(5) Title 38, U.S.C., section 1803(d)(3), requires that a VA guaranteed loan be secured by a first lien on realty. In applying this section, it is important to note that any covenant that establishes a lien superior to the guaranteed mortgage recorded after the effective date of this section (June 6, 1969), the Secretary's approval, if appropriate, must have been secured prior to the recording of the covenants in question.

Failure to secure the approval of the Secretary prior to recording may preclude the acceptance of any subdivision when the assessment lien primes the VA mortgage.

(6) When the covenants were recorded prior to June 6, 1969, and provide an assessment superior to the VA mortgage for governmental-type services, the matter should be submitted by the VA regional office to VA Central Office with an explanation of services, amenities if any, and the regional office's recommendation concerning approval.

b. The covenants must contain a provision granting each lot owner a non-exclusive easement for the use and enjoyment of the common area (except limited or restricted use areas accorded specific units), subject only to temporary suspension from use of recreational facilities for either the nonpayment of assessments or the failure to comply with reasonable HOA regulations governing the use of the common area (VA Form 26-8201, art. II, sec. 1(b)). The right to use the common area must be an easement appurtenant to the residential lots rather than a license held by virtue of association membership.

c. The common area, including all recreation facilities scheduled for the subject stage to be considered in value, must be fully completed and conveyed to the HOA free and clear of all liens and encumbrances prior to the first VA loan guaranty or direct loan in the project. Although VA policy requires a clear title to common areas in the HOA, there may be an occasional extraordinary submission containing a proposal to convey a portion or all of the common area to the HOA subject to existing liens. A developer may also propose to convey the property to the HOA for more than a nominal consideration. In either case the document(s) containing such provisions should be submitted to VA Central Office by the regional office along with an explanation and recommendations. Major common facilities to be completed in a later stage may not be reflected in the current CRV valuation. Title into the HOA must be confirmed by title policy or other locally acceptable evidence. Review of title evidence will be done by VA District Counsel. Appropriate controls will be maintained and revised documents, if required, must insure compliance. Exceptions that would allow a postponement of completion of common area within subject stage are not generally permitted. A VA regional office may not routinely permit postponement of improvements that have a significant influence upon value and for which the homeowner is paying in the sales price. Permission to postpone completion of common areas and facilities within a stage under consideration will be limited to those instances when completion is delayed due to circumstances beyond the control of the builder, such as adverse weather conditions and then only for the period of time deemed necessary for completion. Postponement for the convenience of the builder is unacceptable.

If a cash escrow is accepted, care is taken to see that timely periodic inspections are made by the Department making the compliance inspections (VA or HUD (Department of Housing and Urban Development)) to assure adequate progress toward completion. Extensions of escrow agreements generally will not be granted except for the most cogent reasons. The same principles apply to proposals by builders to submit a letter of credit in lieu of a cash escrow to assure completion of postponed improvements. Acceptable letters of credit must be irrevocable and a valid and binding obligation of the issuing bank. They must be for a term extending at least 90 days beyond the final date for completion of the improvements specified in the escrow agreements. It should be understood that if the builder fails to perform and the issuer of the letter of credit is called upon to pay, the holder of the letter of credit must make demand prior to expiration of the term of the letter of credit. The issuer has no liability after that date. Approval by VA/HUD of any request for an extension of the time for performance specified in the escrow agreement will be conditioned upon receipt of written assurance that the supporting letter of credit is likewise extended for a term ending not less than 90 days after the new date for performance by the builder. The holder of a letter of credit, and the party with the fiduciary responsibility to call upon its terms, must be an HUD-approved mortgagee with no identity of interest with the builder in whose behalf the letter of credit is issued in cases in which the builder is seeking dual financing. If HUD financing is not involved, a supervised lender, which is not an HUD-approved mortgagee, may be accepted, provided it has no identity of interest with the builder. Since VA and HUD both are ordinarily involved in the same PUDs, the two Departments will coordinate about permitting postponement of completion of the improvements located in the common area of a PUD and as to the acceptability of the type of assurance of completion the builder proposes to furnish. Initial maintenance assessments of the homes association will not be reduced because of postponement of completion of improvements to the common area but rather will be computed and levied as though all improvements have been completed prior to conveyance of the first lot. Any surplus funds generated can be used to create or increase the HOA's reserve for contingencies, and any adjustment in amount of future assessments deemed warranted, subsequent to completion of the improvements and takeover of control of the HOA by the property owners, may be made at a future date. The basis for this position is twofold.

(1) A builder should not be permitted to enjoy a competitive advantage in advertising a lower assessment by reason of postponement of improvements for which it is responsible; and

(2) VA deems it important that buyers become accustomed to paying the full amount of the assessment necessary to maintain the fully completed common area from the beginning of their ownership rather than a low assessment for the first year or so and then face the necessity for a sharply increased payment.

d. Any provision for action by the association which could affect the lot owners' easement in the common area (i.e., mortgage, conveyance, or dedication of the common areas; or annexation, merger, consolidation, or dissolution of the association) must have the assent of not less than two-thirds of each class of members. (See VA Form 26-8201, art. II, sec. 1(c); art. VI, sec. 4; and VA Form 26-8202, Articles of Incorporation, art. IV, subsecs. (d), (e), and (f); and art. VIII.) (See par. 16.11.)

e. If ingress and egress to any residence are through the common area, conveyance or encumbrance must be subject to the lot owners' easement.

f. The developer may not reserve to itself the right to mortgage or otherwise encumber the common area.

g. Absolute liability for acts of family, guests, invitees, or licensees should not be imposed in the covenants, bylaws, or otherwise upon individual owners for damage to the common area or lots (including improvements) of others. Liability should be only that for which homeowners would be legally responsible under State law. Note that under the exterior maintenance clause in VA Form 26-8200, Appendix Form No. 2a, if the damage is to one's own property through the willful or negligent acts of the family, guests, or invitees of the owner, the cost of such repair shall be added to the assessment for that lot.

h. Upon dissolution of the HOA, its assets must be conveyed to another HOA or to an appropriate public agency having similar purposes (VA Form 26-8202, art. VIII).

i. When local law does not govern tax assessment procedures, the taxes on the common areas should be assessable against the common areas only and the HOA should be solely responsible for the payment of such taxes, unless the tax base of the individual unit reflects its interest in the common areas without the need for assessment against the HOA.

16.07 HOA ASSESSMENTS

a. The covenants must provide for an annual assessment which is: (1) lien supported; (2) applicable to all lots (except as may be exempt under subpar. g below); (3) in force before the first VA guaranty or direct loan; (4) adequate to both maintain common areas and replacement reserves, if required; and (5) uniform (VA Form 26-8201, art. IV, secs. 3, 6, and 7). If there are different types of property within a project, each with a different benefit to be derived from the association, the assessment for each type may be different, but within each type the assessment must be uniform. As an example, one PUD may have an area of single family detached homes and an area of townhouses. If only townhouses are to have exterior maintenance by the HOA the townhouse assessment may be greater. As another example, some areas may have private streets or parking areas while others do not. Nevertheless, units within a similar grouping must be assessed the same.

b. The lien of any assessment levied by the HOA must be subordinate to the lien of a first mortgage (VA Form 26-8201, art. IV, sec. 9). Generally, the assessment should not be subordinate to any but the first mortgage. This provides greater assurance of assessment collectibility and increases the HOA's chances of remaining viable. Any attempt to condition the subordination to first liens by certain classes of lending institutions or specific lenders is generally objectionable since it may have the effect of prohibiting financing the sale of acquired properties by VA.

c. The annual assessment must be fixed at a given maximum rate to enable purchasers to determine their financial obligation, and for VA to determine whether the amount is reasonable and adequate from a project standpoint, and acceptable from an individuals credit underwriting standpoint. Large PUDs have been allowed to tie assessments to local tax valuation rates, although this is not preferred and must be examined on a case basis. It is not acceptable, however, in proposed or developer controlled PUDs for the covenants to simply provide that the homeowner's assessment will be a proportionate share of the HOA annual expenses. Obviously prospective purchasers and VA do not know what this will be and have no way to protect against developer's control of the budget. For projects in which the developer is out of control and there is a project "track record" for assessments, determinable from past budgets, this requirement may be waived by the VA regional office.

d. The annual maximum assessment may not be increased without the assent of at least two-thirds of each class of members at a meeting called for that purpose with at least 60 percent of the lot owners or their proxies present after adequate notice. If 60 percent do not attend, a second meeting may be called with the same notice and the quorum may be reduced to 30 percent (VA Form 26-8201, art. IV, secs. 3(b) and 5). The board of directors may be permitted to increase the maximum annual assessment without a vote of the members, but such an adjustment should not exceed 5 percent of the previous year's maximum assessment (VA Form 26-8201, art. IV, sec. 3(a), or an amount to be determined by use of the Consumer Price Index formula).

e. The levy of special assessments must require not less than the same notice and approval as the increase of annual assessments, and should be by a vote of two-thirds of each class of members. Local law may be different in some jurisdictions that have statutes governing these voting requirements.

f. The developer may not be exempt from the payment of assessments. It is not acceptable in a developer-controlled PUD that the covenants provide that assessments for any lot be delayed until the lot is improved, or that a dwelling thereon be first occupied, or that the lot itself be conveyed.

If the HOA is to perform services which will not benefit developer's unoccupied units, such as recreational supervision, a covenant provision may provide for a scaled down assessment for lots without an occupied dwelling, provided the financial stability of the association will not be jeopardized. In no event, however, should the scaled down assessment be less than 25 percent of that chargeable to other lots. If such scaled down rate is allowed, a full assessment must immediately and permanently attach to any lot upon the first occupancy of a dwelling thereon, although ownership of that lot is retained by developer. An exception to this requirement may be considered in large projects in which a budget has been established and the developer's responsibility to the HOA is to insure that budget by agreeing to make up any deficits. In such cases the VA regional office must determine the following:

- (1) That the budget is reasonable and will realistically maintain HOA common area;
- (2) That the individual owner's assessment share is reasonable and in proportion to the total number of lots involved; and
- (3) That the developer's obligation creates a lien against land it owns in the PUD. It is most important for the protection of the HOA that the developer's budget responsibility be lien supported.

g. All properties dedicated to, and accepted by, a local public authority and all property owned by a charitable or nonprofit organization exempt from taxation under State law may be exempt from the HOA assessments, except that no land or improvement devoted to dwelling or commercial use may be so exempt (VA Form 26-8200, Appendix Form No. 1).

h. The interest rate chargeable on delinquent assessments generally may not exceed 6 percent per annum in proposed projects. A larger percentage will be acceptable in existing developments when the covenants so provide and cannot be readily changed.

i. Neither annual nor special assessments may be used for the construction of capital improvements during the development period if value is to be given for such improvements.

j. The HOA assessment may not be used to maintain property in which the HOA does not own an interest, except that the association may perform exterior maintenance upon residences (VA Form 26-8200, Appendix Form Nos. 2a, 2b, and 2c).

k. A covenant providing for group or blanket hazard insurance of individual units with premiums paid through HOA assessments in a PUD, or in a specific section thereof, will be acceptable. When the documents provide for group hazard insurance on units, the information brochure in proposed projects must explain that the policy covers losses on the structure only and that the group policy does not provide individual liability or personal contents protection.

1. Homeowners shall not be required by the declaration to rebuild after destruction by fire or other casualty loss unless the units are insured under a group or blanket hazard insurance policy which contains a Replacement Cost Endorsement providing for replacement of a unit from insurance loss proceeds. When a policy with a Replacement Cost Endorsement is to be secured, or there is such a policy already in force, regional offices should recommend but not require that the sponsor or the HOA seek additional endorsements to assure the continuation of full replacement costs of the required reconstruction. The requirement for a Replacement Cost Endorsement to the blanket hazard policy may be waived in an existing project with a mandatory rebuilding clause when the units are already insured under a group policy which does not contain such endorsement. The HOA shall not be empowered by the declaration to rebuild a unit and assess the cost to the unit owner. However, the declaration may provide that any shortfall in funds necessary to rebuild a unit by reason of under coverage through the blanket policy may be obtained through a special assessment levied against all unit owners. In any event, it is permissible for the declaration to require clearance of the lot within a reasonable time after unit destruction.

m. Mortgagees may not be required to collect assessments. Arrangements may be made with mortgagees for the collection of assessments, but such service must be voluntary and may not be a cause for default under the residential mortgage.

16.08 THE HOMEOWNERS ASSOCIATION

a. VA strongly recommends that the HOA be incorporated to avoid problems concerning title, officers' and members' individual liability, and taxation. If an unincorporated HOA, there must be a full explanation by the sponsor of why such a form was used and how each of the named problems is to be handled.

b. Organization documentation must be in compliance with the law of the jurisdiction in which the property is located.

c. The covenants must contain a provision assuring the lot owner of automatic membership and voting rights in a nonprofit association, or other appropriate organization, empowered to levy lien-supported assessments (VA Form 26-8201, art. III, sec. 1). Developments in which legal title to common areas is vested in a trustee who controls the operation of the project are generally not preferred. Homeowners in trusteeship developments ordinarily do not have voting rights and cannot exercise any control over the operation and management of the association. The HOA is considered superior not only because it provides protection to the individual homeowners against tort liability by reason of its corporate structure, but the homeowners also have a greater voice in the management of an association as opposed to a trust.

In some jurisdictions if the beneficiaries of a trust are afforded authority to make binding decisions concerning the rest of the trust, it has been determined that a true trust does not exist. However, the trust format need not preclude approval of existing projects if all of the other factors are acceptable. In proposed projects, developers are encouraged to use the HOA arrangement. Membership must be appurtenant to, and inseparable from, unit ownership. The corporate documents may not permit the association to exercise any discretion in admitting unit owners to membership (VA Form 26-8202, art. V). However, nonvoting membership may be granted to tenants and other persons who make use of the recreational facilities. If the membership in the HOA or the resulting assessment is voluntary, the development must be considered as a regular subdivision for land planning purposes, and the common area may not be considered in the CRV valuation other than the effect it may have on the neighborhood.

d. The developer's control of the association must be limited as to time and extent. A weighted vote of more than 3 to 1, or a retained developer veto right beyond 75 percent sellout, is generally unacceptable. In addition to the automatic transfer of control to the homeowners upon the sale of 75 percent of the lots, an alternate event for the termination of developer's weighted vote must be provided to preclude unreasonably prolonged developer control in a slow sales market. The most common provision is a delimiting date upon which developer's weighted vote will cease should that date precede the event of a 75 percent sellout. The specific date selected should be no later than the estimated time required to complete and market 75 percent of the dwellings in the development (VA Form 26-8201, art. III, sec. 2; and VA Form 26-8202, art. VI). (See par. 16.12.) In very large projects different approaches may be necessary to insure sufficient developer control for completion and marketing, with appropriate safeguards in the event of developer project abandonment. Generally, declarant's special voting rights should terminate if construction is abandoned (e.g., no new unit construction has been initiated for a period of 6 months unless there is evidence of continuing construction). Sponsor's request for variance of this requirement, with explanation of why it was needed, should be forwarded by the VA regional office to Central Office for approval.

e. While the developer controls the association, any action which may affect the basic organization of the HOA or the common area such as merger, consolidation, or dissolution of the HOA; dedication, conveyance, or mortgage of the common area; annexation of addition properties; or amendment of previously approved documents, must be approved by VA (VA Form 26-8201., art. VI, sec. 5; VA Form 26-8202, art. XI; and art. XIII, sec. 1 of VA Form 26-8203, Bylaws).

f. Any rights reserved by the developer of a PUD project must be reasonable and consistent with the overall plan for each submission. The following rights, when reserved by the developer, its affiliates, the sponsor of a project, or any other party, are usually unacceptable:

- (1) Leasing of common areas to the HOA;
 - (2) Accepting leases from the HOA;
 - (3) Accepting franchises or licenses from the HOA for central television antennas or like services;
 - (4) Reserving the right to include in a PUD adjoining land without adequate restriction assuring that its future improvement will be of comparable style, quality, size and cost;
 - (5) Retaining the right, by virtue of continued association control or otherwise, to veto acts of the HOA or to enter into management agreements or other contracts which extend beyond the date unit owners obtained control of the HOA; and
 - (6) Reserving an unlimited right to amend the covenants or to replat lots or common area unless limited to changes specifically required by a reviewing agency to meet its requirements.
- g. If the development includes multifamily or other rental housing, the total vote of the owner or owners of such housing may not exceed 49 percent of the total vote cast.
- h. The bylaws must permit participation by the homeowners during and after the development period. Unless local law provides otherwise, membership meetings should be held at least annually, beginning within 1 year after incorporation. Special meetings of the association should be permitted upon written request of a reasonable percentage of the unit owners other than developers. Quorum requirements for regular business should not be so high as to preclude valid meetings. Nomination for candidates for director from the floor should be permitted. Cumulative voting should not be permitted unless required by State law. Directors and officers should normally serve without compensation. (See VA Form 26-8203, art. III, secs. 1, 2, and 4; art. IV, sec. 4; and art. V, secs. 1 and 2.)
- i. The board of directors must be sufficiently large to permit reasonable representation of the lot owners. A board of three directors should be provided only in very small developments or on the initial board. Most associations should have a board of at least seven or nine directors (VA Form 26-8203, art. IV, sec. 1).
- j. If the association is authorized to suspend a lot owner's right to use recreational facilities or his or her voting rights for infraction of its rules or regulations, the suspension should not exceed 60 days (VA Form 26-8201, art. II, sec. 1(b); and VA Form 26-8203, art. VII, sec. 1(b)). If the suspension of these rights is for failure to pay assessments, it may extend for the time the assessments are delinquent.

k. Each lot owner, as well as the association, must be empowered to enforce the covenants (VA Form 26-8201, art. VI, sec. 1). The developer should not be specifically authorized to enforce covenants. The developer has such authority while it owns a lot in the development and, after all lots are sold, it has no reason to exercise such authority.

1. The books and records of the association must be available for inspection by the members at reasonable times (VA Form 26-8203, art. X).

m. Amendment of the covenants should be difficult, but not impossible. VA recommends a requirement of 90 percent of lot owners to amend the covenants during the first 20 years and 75 percent thereafter (VA Form 26-8201, art. VI, sec. 3). To amend the articles of incorporation (if State law permits) at least 75 percent of the lot owners should assent (VA Form 26-8202, art. X). The bylaws need only a majority vote of the lot owners to amend (VA Form 26-8203, art. XIII, sec. 1). Provisions allowing amendment of the bylaws by the board of directors are generally unacceptable.

n. If any of the foregoing provisions conflict with local ordinances, the local ordinance will govern.

16.09 SUPPORTING DOCUMENTS

a. Plats must either be recorded or in final form ready for recording. Incomplete plats or schematic drawings are unacceptable. Plats must show the area to be subjected to the covenants. The lots and common area locations as well as utility easements should be shown by metes and bounds. There should be a dedication of common areas to homeowners to preclude the implication of public use (VA Form 26-8200, Appendix Form No. 6). Public streets should be designated. There should be an incorporation of the covenants by reference. If map or plat has been recorded, an amendment will not be necessary if the property and the common area can be identified and pinpointed by the description given in the covenants and an acceptable dedication of the common area is contained in the declaration of the project. If the language is unfair, ambiguous or contradictory, the VA regional office will refer the matter to its District Counsel.

b. Many PUDs are small enough and their common areas so minimal that professional management is not necessary. VA does not require professional management of PUDs. The powers given to the HOA by the articles of incorporation and bylaws are fundamentally for "use control" and maintenance of the common areas. These powers normally include management which may be delegated to a professional manager. If a developer or developer-controlled board chooses professional management, the management agreement must be reviewed by the VA regional office and found to be reasonable. The agreement should be terminable for cause or upon reasonable notice, and run for a period of from 1 to 3 years, renewable by consent of the association and management.

c. When a project is submitted by a builder or developer, an information brochure written in simple terms must be prepared for use in the sales program to inform all homebuyers about the HOA and the rights and obligations of lot owners. Specific information to be included in the brochure is set forth on page iii of VA Form 26-8200.

d. When applicable under local law, it is recommended that the deed to the lot owners contain a clause precluding any implication that the grantee takes title to the middle of abutting private streets or common areas (VA Form 26-8200, Appendix Form No. 7).

e. When submission is by a builder or developer, the proposed purchase agreement must avoid unfair contractual features and marketing practices and meet the requirements of 38 CFR 36.4303(j) as to contract purchase price or cost exceeding the VA CRV as well as 38 U.S.C. 1806(a) relating to escrow deposits.

16.10 PRE-SALE REQUIREMENTS

a. The need for a pre-sale requirement must be considered in all cases. The number or percentage of presales required, if any, will vary with the circumstances and may be as high as 80 percent. All bona fide sales agreements; i.e., VA/FHA (Federal Housing Administration), conventional financing, and cash purchases, will be counted to determine whether the presale requirement is fulfilled. When imposed, the presale requirement will be set forth in the initial feasibility letter, in the Special Conditions, and until the requirement has been met, in each MCRV (VA Form 26-1843a, Master Certificate of Reasonable Value) or CRV. Until the requirement is met, no evidence of guaranty will be issued. The pre-sale requirement will be stated as follows:

"Evidence of guaranty will not be issued until receipt of proof that (total number or percentage) of homes have been sold."

b. When the local FHA office is considering acceptance of the development, coordination with that Department will include a decision to impose a presale requirement and, if so, the number or percentage. While VA is not bound to follow FHA's course in this, due weight will be given to its views. If, prior to submission of the development to VA, FHA has already set a presale requirement, VA will normally specify the same presale requirement. To avoid inconvenience to the developer, VA regional offices may accept the statement of the appropriate official in the local FHA office as to the number or percentage of sales attained and will not require a second submission of proof.

16.11 PROCESSING PUD'S WITH MINIMAL COMMON AREA

If part of a homeowner's title grants use and enjoyment to common property owned by an association with a mandatory membership, VA regional offices consider the usual homeowner "trade-off" (common area or lot size) before it decides the common property value in the CRV. If a regional office determines that the PUD common area is not a major or essential element of the development (e.g., open flood plain or berm strip), the project will not be processed as a PUD, but will be treated as a regular subdivision with a mandatory HOA (see par. 16.06a(2) and (4)). VA gives careful consideration to these projects with mandatory HOA's with minimal common areas before waiving PUD review.

16.12 PROCESSING PUD'S WITH MORE THAN MINIMAL COMMON AREA

If there is a mandatory HOA and the VA regional office finds the common area is more than minimal, then it ensures that:

- a. The mandatory assessment and membership are considered in computing the value for the CRV;
- b. The lien of assessments is subordinate to the first mortgage or deed of trust, unless it falls within the exceptions stated in 38 CFR 36.4352;
- c. Title qualifies under 38 CFR 36.4350; and
- d. The organizational documents are not so objectionable to preclude acceptance. The following are usually unacceptable:
 - (1) Lot owners having no vote or control in the management of the HOA;
 - (2) Right to vote delayed for an unreasonably long time;
 - (3) No limitation or control by the lot owners over increases in assessments;
 - (4) No protection against arbitrary or capricious actions by the developer or its successors, including retention of rights by the developer after its ownership interest in the land has ceased; and
 - (5) Lot owners compelled to pay assessments for the use of public facilities and services which are normally paid through taxes.

NOTE: This list is not all inclusive, nor does it imply that the existence of one item will result in disapproval of a project, especially an existing project. A regional office must examine the remainder of the document clauses to determine if, as a whole, they are fair and reasonable, and protect the interests of the lot owners.

[16.13 PROCESSING ESTABLISHED EXISTING PUDS (PLANNED UNIT DEVELOPMENTS)]

a. When a unit proposed as security for a VA guaranteed loan is located in a PUD, it is the lender's responsibility to determine that the PUD has been previously accepted by VA, or accepted by HUD/FHA and is eligible under the reciprocity agreement, or for determining what is necessary to gain acceptance so that the unit will be eligible for VA financing. In the case of an established existing PUD, as defined below, the lender has the responsibility to make the final determination and the project satisfies the defined criteria in subparagraphs c and d below. To make the determination that the project is an established existing PUD, the lender often will need access to certain project information that is not always readily available (such as legal documents, ownership and project status, and/or relationship with overall development). For this reason, the lender may rely on the PUD homeowner's association, the PUD management company, or the fee appraiser as sources for information, although the lender is ultimately responsible and is expected to make a reasonable effort to ensure the accuracy of the information obtained from these sources.

b. Definitions. The definitions in paragraph 16.02 apply to an established existing planned-unit development.

c. Established Existing PUD. For the purposes of this paragraph, a PUD exists where:

(1) Control of the homeowner's association has been turned over to the unit purchasers, other than the declarant or affiliate of the declarant, and the unit purchasers have been in control of the association for at least 1 year.

(2) The declarant or builder is not longer marketing any units in the project for initial transfer to unit owners and all ongoing sales are existing resales.

(3) All common areas and facilities have been completed and conveyed to the homeowner's association free and clear of all financial liens and encumbrances. Title to the association may be confirmed by title policy or other locally acceptable evidence of title or by written confirmation by the president of the homeowner's association. The deed alone is not considered adequate assurance.

(4) The project is not subject to expansion, annexation, or additional phasing by the declarant or a successor. Projects that are a subassociation or part of a larger development with an umbrella or master association or similar arrangement will be considered by local VA offices on a case-by-case basis for eligibility of processing under this procedure. For example, VA offices will give consideration to a subassociation located in a fully developed and sold out or almost sold out master or umbrella association.

d. Lender Certification

(1) When processing a loan for a property in an established existing PUD, the lender must certify that the PUD meets the following requirements:

(a) The project meets the definition of an existing PUD (i.e., the association qualifies as an existing planned community under subparagraph c above);

(b) The documents do not contain any sale or lease restrictions other than a minimum lease term of up to 1 year (38 CFR 36.4350(b) (5)). NOTE: Age restrictions or restrictions imposed by State or local housing authorities which are allowable under 36.4350 (b) (5) (iv) must be reviewed by VA.

(c) The VA guaranteed loan will be secured by a first lien on realty (38 USC 3703 (d) (3)). NOTE: Any covenant that establishes a superior lien must be approved by VA prior to recordation. Consequently, projects with a superior lien must already be accepted by VA or be submitted to the local office for review. Exceptions to this are made for (1) projects whose documents were recorded prior to June 6, 1969; and (2) those States which have adopted the Uniform Common Interest Ownership Act (UCIOA) provision that association assessments which were due in the 6-month period immediately prior to institution of first mortgage foreclosure proceedings prime or become superior to the first mortgage or deed of trust. Projects in which organizational documents satisfy these exceptions do not require prior VA acceptance. It should also be noted that while loans subject to the UCIOA provision will be eligible for guaranty under the VA program, no claim payment will be made to holders for any payments they may have had to make to clear the 6-month primed association assessments.

(d) The association does not maintain a community water or sewer system.

(2) The certification will be on the lender's letterhead signed by an officer of the lender and in the following format:

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"This is to certify that the subject property is located in an established existing planned unit development known as (name of project) and that the project meets the criterion in VA Pamphlet 26-7, VA Lender's Handbook, paragraph 16.13."

(3) Lenders must submit the required certification with each request for guaranty for a unit located in an established existing PUD. VA offices will not maintain or publish lists covering such projects.

e. VA minimum property requirements and other procedures for underwriting and processing guaranteed loans will still apply.

f. Lenders should continue to submit projects with homeowner associations that are not considered as "established existing PUDs to VA for prior approval. In those cases, the submission requirements of paragraph 16.15 will be followed.]

16.14 VA REGIONAL OFFICE IMPLEMENTATION INSTRUCTIONS

a. Loan Guaranty Division - Initial Review

(1) Organizational documents will be reviewed by the Loan Guaranty Construction and Valuation Section for a determination that all necessary documents have been submitted and conform to VA policy. If a submission is incomplete, the sponsor will be requested to supply missing or incomplete documents.

(2) The Regional Office Loan Guaranty Division will then provide written recommendations and requirements for project approval.

(3) Processing Under the Limited Review Procedure

(a) After the Loan Guaranty Division's initial review, each new PUD submission is usually referred to VA District Counsel. However, referral to District Counsel is not required when a complete set of project documentation is submitted, accompanied by a certification from the sponsor or sponsor's attorney that the documents are identical to a previously approved and specifically identified set of documents, except for the name and the legal description of the project. Referral to District Counsel is also not required if the completed set of documents consists of VA Form 26-8200, accompanied by a certification from the sponsor or

sponsor's attorney to that effect. In addition, if it is determined by the Loan Guaranty Officer that the submitted project documents are a complete set of the Suggested Legal Documents for Planned-Unit Developments, properly completed, the project may be approved without District Counsel review even though no certification is submitted. The VA regional office should be contacted concerning limited review procedures.

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(b) If there are variations in the set of PUD documents, other than name and legal description, from the documents of a previously approved project or VA Form 26-8200, each variation must be specifically shown in the sponsor's or sponsor's attorney's certification. Only these variations will be subject to VA District Counsel or Loan Guaranty Division review and approval, as appropriate.

(c) Some documents, such as the plat, public offering statement (information brochure), sales contract for proposed developments, vary from project to project. Regional offices will seek VA District Counsel review and guidance on these documents, particularly as to the sufficiency of the plat. District Counsel assistance will also be sought if there are inconsistencies between project legal documentation; e.g., plat and the description of the common area in the declaration.

(d) The VA Loan Guaranty Officer may elect to have a full District Counsel review of project legal documentation which meets the criteria for a lesser review. Normally, such full reviews would be based on items such as receipt of an incorrect sponsor's or sponsor's attorney's certification, or the belief that the party making the certification lacks the requisite expertise in planned-unit developments and VA requirements.

b. Office of VA District Counsel

(1) District Counsel will review organizational documents to determine that:

(a) The declaration of covenants, articles of incorporation, bylaws, plats, and other related exhibits comply with local statutory and common law. If additional information is required to conform to local law, it will be detailed.

(b) The project scheme for land development is legally enforceable.

1. The uniform scheme must be clearly set forth by the plat and covenants, and must run with the land.
2. The scheme must apply uniformly to all of the lots subject to the covenants. If it is not uniform, it may be unenforceable under local law (see par. 22.3, TB 50, ULI, The Homes Association Handbook, revised edition).
3. Any retained rights in the declarant to modify the covenants may make them unenforceable.

(c) The common area is clearly defined or can be defined by metes and bounds. If recorded plats (or plats to be recorded) are referenced they should be identified (i.e., complete title, date, name of the draftsman, place where recorded, and book and page). The common area may be defined as all of the described property, less the lots and streets as shown on the plat, if the perimeter of the property is shown by metes and bounds, and the lots and streets are described by metes and bounds on the plat.

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(d) Common area for which PUD consideration is based and value given is not dedicated to the public either by an express or implied provision. Conflicting dedicatory provisions of plats and covenants must be interpreted under local law.

(e) Easements granted in plats, covenants and deeds clearly identify encumbered realty. It is acceptable to describe them in the covenants as public utility easements originally programmed, described and/or platted, and existing at the time the common area is conveyed to the HOA. If the easements are too vague, clarification is necessary.

(f) All organizational document amendments and PUD annexations have been properly made in accordance with the procedures in the documents.

(g) Nothing in the documents precludes unit mortgages from establishing valid first liens.

(h) Nothing in the documents precludes veteran-purchasers from acquiring title as specified in paragraph 16.04.

(2) VA District Counsel at each regional office should review VA Form 26-8200, and furnish the Loan Guaranty Division a one-time certification of the legal adequacy under State law of the suggested legal documents in the regional office's jurisdictional area(s).

c. VA Loan Guaranty Division Follow-up

(1) Notice to Sponsor. Regional office's will notify the sponsor of the final determination. The notice will indicate any special conditions which must be met prior to VA guaranty (e.g., presale requirement, completion of common areas).

(2) Draft Documents When the initial review of organizational documents is conducted on the basis of unrecorded draft documents, VA regional offices will establish controls to insure that the organizational documents approved by VA, are recorded without change.

d. FHA Coordination. VA regional offices will forward a copy of final project reviews to the local FHA insuring office.

Submit all documents in duplicate unless otherwise indicated.

Legend: X -- Required
AA -- As Applicable

SECTION 1. Documents and Project Data. One-time submission only for each project or individual request.

Draft organizational documents are acceptable.

SECTION 2. Special Requirements. If applicable, these items must be submitted before guaranty of any loan.

	BUILDER- DEVELOPER	RESALES INDIVID- UAL UNITS
1. Documents and Project Data		
a. Declaration of Covenants, Conditions & Restrictions.	X	X
b. Articles of Incorporation (if applicable).	AA	AA
c. Bylaws.	X	X
d. Documents a and/or b and c above for developments that are subject to more than one set of area use restrictions or require membership in more than one HOA.	AA	AA
e. Declaration of Annexation.	AA	AA
f. Recorded or final form plat or map with all proposed certifications, dedications and other narrative material included or incorporated by reference. Design and size of recreational facilities should be shown.	X	X
g. Developer's general plan and schedule for development if project is staged.	X	
h. Cross-easement.	AA	AA
i. Facilities' Leases.	AA	AA
j. Management Agreement.	AA	AA
k. Service Contracts. AA	AA	

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	BUILDER- DEVELOPER	RESALES INDIVID- UAL UNITS
1. Information Brochure X		
m. Form of purchase contract for individual living unit.	X	
n. Form of grant, deed or leasehold agreement (in those jurisdictions where leaseholds have been previously authorized by VA) to be used in conveying individual living units.	X	
o. Current association budget (proposed budget if project is a proposed submission).	X	X
p. Statement signed by officer of board of directors of HOA specifying any existing or pending special assessments and any pending litigation affecting the association or unit.	X	X

q. State reviewing agency's report.	AA		AA
r. VA Form 26-1805, VA Request for Determination of Reasonable Value (one set for each plan type or individual unit on MCRV applications).	X		X
s. VA Form 26-1852, Description of Materials, Plans and Specifications, for proposed projects.	X		
2. Special requirements			
a. Certified copies of recorded organizational documents must be submitted that conform to previously accepted drafts.	X		X
b. Builder's warranty if unit is less than 1 year old.	X		
c. In proposed projects, VA compliance inspection procedures or VA acceptance of FHA compliance inspection procedure applicable to proposed construction or evidence of enrollment in 10-year protection plan and final inspection.	X		
d. Evidence that recreational facilities have been completed and common area conveyed to approved HOA for stage under consideration.	X		X

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	BUILDER-DEVELOPER	RESALES	INDIVIDUAL UNITS
e. Acceptable evidence that title to common area in HOA is free of encumbrances.	X		AA
f. Lender's certification that pre-sale requirement has been met. AA		AA	
g. Evidence of flood insurance.	AA		AA
h. Termite certification .AA		X	

