

Balancing *Community* and *Governance*:
Reforming the Community Association

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BALANCING *COMMUNITY* AND *GOVERNANCE*

INTRODUCTION

Nothing will ever be attempted if all possible objections must first be overcome. Samuel Johnson

Much has been written and spoken about the need for restoration of community in the United States. There have been excellent articles discussing community theory, the dynamics of the group and the individual, the effects of individualism, and many other related topics. Moreover, there is a body of excellent literature on traditional neighborhood design and its consequences upon the development of community. However, there is little focus upon one of the key components of the process: residential development utilizing a mandatory membership association. These associations are called *community* associations; but are they really creating and fostering community, or are they impeding the very concept?

This paper discusses concepts of community association structure and governance and proposes new approaches for the creation of *community* in planned communities. The concepts discussed are designed in large part to "build community" among residents by encouraging interaction and participation rather than simply imposing restrictions and providing amenities.

These concepts represent and call for change and growth in community association structure. Much change has occurred in response to changing markets, expectations, and negative perceptions of common interest communities. Certain guiding principles help frame the discussion. One principle is that any proposed course of action be theoretically sound and complete, yet non-legalistic. The course of action must be well-premised in case and statutory law with regard to both problems and solutions. It is meaningless to hypothesize about ideas that clearly are not legally enforceable.

Another principle is that the discussion must have a foundation in reality. The discussion must reflect the fact that evolution in community association formation and operation must not be so daring as to make developments unmarketable, nor should it be so complex as to make projects unmanageable. Moreover, after evolution, "ordinary people" must understand the end product. Evolution must produce a synergy between governance needs and governance capacity.

The final, related, principle is that any structure proposed and any technique for implementing such a structure must be balanced against the obvious, fundamental, and primary interest of developers in protecting real estate assets and reputation.

ENVIRONMENT FOR CHANGE

Philosophy of Change

"Community"

The nature of planned communities has changed, and each word in the term "common interest community" has gained new meaning. The development industry and professionals supporting it seek to "build community" through creation of "social infrastructure." But when and how does community exist in a "planned community?"

Redefinition of the term "community" as applied to the creation of new common interest communities seriously calls into question old applications and justifications for restrictive governance. The following brief discussion of "community" and of how that term might be defined anew is based upon common interest communities in place and those being created. It is, however, an affirmation that markets, design innovations, and consumer preferences have produced an opportunity to create a different type of real estate development, one that has a different emphasis.

Communities are marked by sharing. There is a sharing of tangibles and intangibles. The latter includes values, goals, and interests, as well as relationships. A community's activities are not entirely boundary specific but frequently encompass people from adjacent areas. Communities are diverse. That diversity is reflected in activities, population, demographics, and architectural character.

There are, in healthy communities, places and opportunities for interaction, coming together, decision making, and participating in those choices. In successful communities, there is an acknowledgement of the social tensions inherent in balancing people and property, the group and the individual.

While local government can too easily and too often refute this, communities should not be autocratic or corporate in mindset even if they be corporate in legal structure.

Regrettably, too many common interest communities fail to meet these standards. Too many development teams fail to make the effort to embed them into the project planning.

Challenges

Communities are built upon and from "social capital,"¹ a term that "refers to those stocks of social trust, norms and networks that people can draw upon to solve common problems."² The term

¹ While this term is most popularly attributed to Robert Putnam, who certainly has given it greater immediacy and impact today, sociologist James Coleman contributed to much of the thinking and Jane Jacobs used it in her much earlier work. We are indebted to them all.

"implies sharing... not just a feeling... but participation in the social life of a place, and often also the political and economic life, because of a sense of shared destiny within the territorial community."^b

But creating and maintaining social capital requires effort and "a common commitment." The capital, moreover, "tends to cumulate when it is used and be depleted when not..."^d Maintaining community, therefore, requires community developers to be more willing to permit the association and its members to become engaged in governance, both within and beyond the development's boundaries.

The community association also has new purposes and responsibilities and, consequently, is evolving in several significant ways. As forward-looking, creative developers build upon the existing experience, the evolution accelerates. Yet the subject has not received the depth of coverage that is required to assure that the legal evolution will keep pace with the practical evolution.

As community associations reach beyond their geographic boundaries to become more involved in the broader community, as they perform more services for their own members, and as they build public and private alliances to provide services that were formerly public services, the legal, political, social, and economic consequences and effects increase. There are also significant legal and public policy concerns. Thus, there is a challenge to craft policy and operational solutions even as one addresses new legal questions and needs.

Those calling for change in community associations face two initial challenges. The first challenge is to reconcile or to resolve community associations' negative aspects. This requires a candid admission that negative aspects exist. Too many in the industry have for too long resisted this admission and have refused to engage in constructive dialogue with those who assert otherwise. It is time, however, to acknowledge those negative aspects so that meaningful discussions and change can occur.

The second challenge is to anticipate the future needs of community associations and to develop responses to those needs. Inherent in such an analysis is a fair amount of intellectual risk-taking because the future is always uncertain, and the primary players in the game are risk-averse attorneys and community managers. Also required is acknowledgment that community association law as it predominately is practiced may buckle under its own success because that law has been almost exclusively regulatory and controlling. There is a limit to the acceptable extent of control and to its productive results.

As unprecedented numbers of Americans look to common interest communities for services traditionally supplied by private government, many will be irritated by restrictions on property rights that the government traditionally protects. Residents will expect rights and processes as experienced in the

² Carmen Sirianni & Lewis Friedland, *Social Capital and Civic Innovation: Learning and Capacity Building from the 1960s to the 1990s* (1995).

³ Edward J. Blakely & Mary Gail Snyder, *Fortress America* (1997) at 32 (hereinafter Blakely & Snyder).

⁴*Supra* note 2.

public realm. As community associations seek to create and to maintain community, there will be a need to balance (a word not frequently used in today's political or social debates) the interests of the individual and the group. Examples of the need for this balance are obvious and numerous. One is the "intergenerational insensitivity" many association boards exhibit in decision making. Another is the often seen tendency of boards to become closed and dictatorial.

One must also find means to reconcile the effects of the "compression factor" in neighborhood or community development. In earlier years, neighborhoods developed over a period of many years; traditions reflected decades of community life. Now the effort is to do it all in a selling season, thus compressing the time for "community" to develop. Moreover, the mobility of today's population makes the creation process even more difficult.

The community's history is an essential component in the development and retention of a sense of community itself. Does the new developer "create" history for her community? Some have tried with mixed results. It seems, however, that the emphasis should not be on faux history, but on a viable, vibrant future. While time is an element in developing threads of community, it is more important to begin from an honest base in the creation of values and a sense of purpose, the goals toward which people can work together.

Criticisms - Calling for Change

It would be wrong and intellectually dishonest to assert, however, that all is paradise in "privatopia."⁶ It is not. There are problems, but there are also opportunities. There is a genuine need for honest questioning and realistic responses. Those involved in community development must participate in the discussion and in the creation of a range of options to meet the challenge of evolution and reinvention. They must be ever mindful that just as communities and the people in them vary, so will the challenges, ills, and solutions. Just as all criticisms do not fit all communities, all innovations will not work in all communities.

Criticisms - Calling for Change

- 👉 Current concepts do not further community
- 👉 Associations are coercive
- 👉 Individual rights override group rights
- 👉 Association can serve only limited "business" purpose
- 👉 Corporate structure leads to rigidity
- 👉 Associations are financed mostly from monthly assessments from the members

The criticisms of common interest communities reflect certain basic arguments or perceptions. First, there is the argument that current concepts do not further community. The compression issue discussed above is part of that argument, but more serious issues exist as well. The common interest community is persistently depicted as an elite enclave behind gates excluding the public at large. There are concerns about diversity and disparity in services. Most significantly,

⁵ Evan McKenzie first used the term in his book, *Privatopia* (1994) at 12.

perhaps, is that there is no consensus on what is meant by "community."

Second, there is the argument that common interest communities are coercive, and not voluntary. This argument contends that because the range of housing choices is limited, individuals become subject to community association governance by necessity rather than by fully informed choice. This argument has been significant for many years and is closely tied to the next theme, that of the individual. In approaching the issue of coercion or free choice, one is confronted first by the difficulty of adequately confirming or denying the premise.

It seems a bootstrap argument to assert that because common interest community housing has more in facilities, services, value enhancement, and protection, it is coercive. What happened to the idea of "building a better mousetrap?" The second responsive question to this theme is "so what?" Assuming that there is an element of coercion, the challenge is to determine its effect. A more serious issue is the question of the degree of the buyer's comprehension of the effects of the governance structure and the nature of that structure. A recent Community Associations Institute ("CAI") survey found one of the top three causes of association problems was that owners did not know about the restrictions before buying, and 87% said that had they known, they still would have bought.⁶

The third theme is that of the individual and the group. It is very much related to the preceding theme. At its root is society's preoccupation with the individual's "rights" and disregard for the group's rights. While most of the writings on this issue focus on the larger community, many of the writings have relevance to the current discussion. Materialism and individualism contribute to a limited focus, one concerned with "getting mine and getting it now" rather than a spirit of cooperation and trust so necessary for people to work together for common objectives.

An aspect of this theme is that of expectations. One of the core sources of the individual/group divergence is the lack of understanding of the community association and resulting expectations that are inconsistent with its governance reality. Much of the blame for this goes to the developer-builder-seller and her attorney. Some of the blame, however, must be shared by the management and brokerage communities, some rests with societal norms, and some rests with the individual. Much of the problem also reflects a skewed view of American history and the "rugged individual."

Fourth, it should require no citation in support of the proposition that community association law practitioners are change-averse and precedent-bound. Much enforcement litigation is the result of the unwillingness of the association manager and attorney to refrain from enforcing association rules for fear of setting "a precedent." The result often is an overly restrictive environment that the basic governance structure does not require. Clients must become active in changing this attitude.

⁶ Doreen Heisler & Warren Klein, *Inside Look at Community Association Homeownership-Facts/Perceptions* (1996) at 30.

Fifth, there is a perception of a limited "business" purpose for community associations. That business purpose is seen as property management solely or property management and value protection: the "command and control" functions. This perception is in part the result of early government-produced and required document forms and in part the result of the nature of community development in its first 20 or so years. The issue today is to address how these purposes are changing and the effect of those changes.

The sixth theme deals with the association's structure and the potential for rigidity resulting from a corporate structure as opposed to a participatory democratic structure. There have long been discussions about the characterization of the community association and whether that characterization had an impact on the legal rules applicable to the association's or its board's decisions. A question for now is how to formulate a governance structure to minimize the negatives and to optimize the potential for community activities.

Finances comprise a seventh theme. In the past, the association has paid its way by general or special assessments, most paid monthly, from the members. In some cases, there are user fees for particular services. The question becomes whether these monetary sources are adequate for the future roles and activities of the evolving common interest community.

An eighth theme is the significant effect design has on the subject of community and is best seen in the "New Urbanism movement that... addresses many of the ills of our current sprawl development pattern while returning to a cherished American icon: that of a compact, close-knit community."⁷ It is a term that applies to a planning philosophy that has far more significance than just land planning. Part planning and part political theory, part social structuralist and part environmentalist, this movement has had and will have a profound impact on the way developers and local governments look at the creation of communities.

The new architect-planners do not believe that the architectural and land plans alone will create community or a renewed sense of community. What they do believe, with substantial justification, is that these plans produce a place and a structured opportunity for community and interpersonal interaction, the "architecture of engagement." A byproduct of this planning, therefore, is that non-planners on the development team are focusing more upon ways and means to create and to sustain community. That is where the common interest community and its community association enter the process.

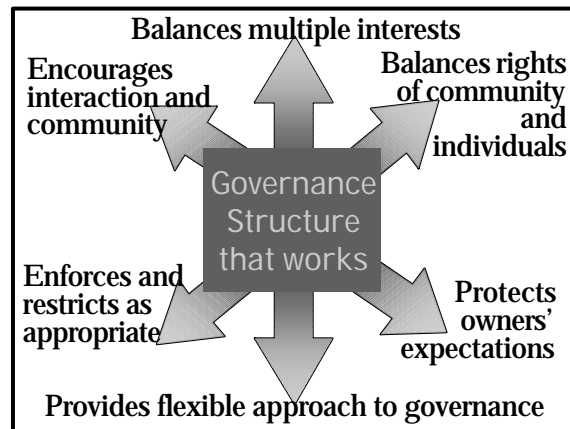
The Way Things Are

If there is anything the nonconformist hates worse than a conformist it's another nonconformist who doesn't conform to the prevailing standards of non conformity. Bill Vaughn

⁷ Peter Katz, *The New Urbanism* (1994) at ix.

The real estate development industry has taken the lead in reinventing the common interest community. The next step is to assume responsibility for change in governance structures to accommodate new developments. In other words, the process must keep pace with the product.

When discussing governance systems, it is important to recognize the impact governance has on various facets of community association activity. First, there is the obvious concern of balancing the rights of the community with the rights of individuals residing in that community. Although simplicity and flexibility are highly desirable qualities from the association's perspective, the individual expects a degree of certainty that provides both a sense of what the rules are and a reasonable assurance that the rules will not change so drastically as to make ownership undesirable.



Community association governance also presents broader societal concerns. Should the public become convinced that community association living is a lifestyle of conformity, control, and constraint, buyers will avoid it. This concern, in turn, will reduce the available housing stock significantly to the detriment of developers, consumers, and local governments.

The concern, then, for community developers and for those drafting governing documents, should be to develop systems that work. Within the context of this discussion, "what works" is a governance mechanism that balances multiple interests, preserves the community association's functions, protects flexibility, provides the powers necessary to permit an association to remain dynamic during periods of change, and yet reasonably protects the property owners' reliance interests and their expectations for an appropriate degree of certainty. It is not a simple task; it is not susceptible to simplistic solutions.

Change is not easy, nor does it come in a smooth and linear way. Practical and structural obstacles must be overcome. Some of these obstacles can be dealt with quickly through determination and imagination. Others require changes in the law. Still others require a cultural change in long-held ideas of how things are done. Those who seek to make changes in association governance must deal with all of these factors.

What is wrong with the way things are and why is there a need for organic, structural change in the way community associations are organized? What issues require resolution in order for this evolution to occur? Those who would create innovative projects embodying community must grapple with these issues.

Purpose and Plan of this Paper

The purpose of this paper is to identify and to explore the potential for change and growth in community association law and practice in response to the forces and demands underlying the arguments and perceptions of common interest communities. It seeks to articulate what may be, not just what is. At the same time, its arguments and contentions are rooted in experience and the appreciation that predictions must be given an opportunity to work. Addressing many criticisms and concerns, this paper seeks to demonstrate that viable responses exist.

Rather than seeking to resolve policy debates, this paper seeks to focus the analysis on the future and to suggest some substantive and procedural approaches for practical solutions to theoretical problems; it takes an approach of "theoretical pragmatism." In utilizing this approach, the paper asserts that the solutions should be fitted to the new developmental realities and should come from drafters who are strongly influenced both by scholarly commentary and the nature and needs of the evolving common interest community. The paper deals with the particular topic in some detail because it must do so.

This paper's suggestions are not applicable to every project. Not all developers have the time or financial resources or can make the required personal and personnel commitment. Not all developments have the facilities, the critical mass of population, or the infrastructure. All developers worry, justifiably, about the consequences of loss of control and the economic and intangible costs of surrendering their rights over everything from budgets to the vision for "their" development; they are concerned, in part, because they, better than anyone, know the potential effects upon the millions of dollars at stake.

This paper's suggestions are not easy to implement or to sustain. First, surrendering its power over the association is a difficult, emotional, risky proposition for the developer and her team. It is counterintuitive. Second, while there is much popular and scholarly talk about community, America remains a land of and dedicated to the individual. "Problems" in community associations are, in many cases, society's problems, or merely reflect society's realities. Change requires more than an alteration in design, de-emphasis upon cars, or innovation in project structure. Third, time is an essential element; one can make instant coffee, but not instant community. The goal is, or should be, true, not contrived, community.

Finally, the paper sets forth some suggestions as a blueprint for change. The objective is not only to make suggestions but to begin constructive, creative dialogue seeking an array of theories and techniques that meet the needs of the common interest community of the future and that truly represent "community."

Forces Impeding Evolution

Institutional Inertia

Subtle but significant factors impede evolution. The people most involved, attorneys, property managers, owners and board members, are most often the impediments. They are reluctant or unwilling to change because of concerns over the effects of change. Perhaps fear of the unknown is a human characteristic, but there is more involved. There is a regrettable degree of self preservation and preservation of the "old ways" because both are easy and well-known. There is also the sense that if one always follows the same route, there is no need to exercise judgment in selecting an alternative. This is institutional inertia. In creating the development, the development team and particularly the developer must take responsibility for changing this attitude. It is not easy, and many do not have the will or the ability to undertake what is seen as a risky step.

Reliance upon Precedent

Another impediment to evolution is legal inertia, partially resulting from sound legal training and partially from baser motives. This results from the reliance upon precedent and the fear of waiver. In many instances, community associations enforce rules, make decisions, or take other actions because there is a fear that if they do not, they will "set a bad precedent."

There is an obvious need to be concerned about these legal issues. At the same time, such formalism produces bad cases and bad law. This formalism exacerbates the negatives of covenant enforcement by impeding creative thought and solutions. It encourages conformity and control and a perception of an overly restricted, regulated living environment. The exercise of judgment and an analysis of factual situations can cure many of the problems that might otherwise fall into this "precedent trap."

This is not as much a developer problem, though it certainly still is in part, as it is a problem of the operational side of the community association. In that setting it is more the province of the community manager and association attorney. They are the front line players able to affect change in this area. The law supports the effort if they have the will to undertake it.

Reliance upon Forms

Reliance upon form documents is another impediment to evolution. Simply stated, as long as attorneys and clients are content to use and reuse the same forms and to expect maximum return for minimum intellectual investment in the process and the project, there will not be positive evolution on a wide-scale basis. The problems originate because the client wishes to have the job done at the lowest fee and sees no real need for anything different from the last time. The client and attorney, however, are at a competitive disadvantage from the more innovative developments competitors are achieving. This

results in a desire for new approaches but does not necessarily reduce the reliance on forms; it merely results in the use of someone else's forms.

The goal of building community necessitates that there be a departure from past practice. This is true for the simple reason that old forms do not build community and are not designed to do so. Old approaches with new labels will not produce the desired results and may indeed produce an even more dysfunctional project as the traditional community association is tasked with greater yet less property based responsibilities.

Societal "Norms"

Society has a role in impeding evolution: the emphasis on rights often overwhelms the need for collective solutions, especially in enforcement cases. This apparent conflict between individual rights and common, community rights is made more difficult by a significant trend in American society toward a "language of rights" in which an individual's desire or predilection is arguably transformed into a justiciable right.

In *Rights Talk*, Professor Mary Ann Glendon points out that in American society there is a "tendency to frame nearly every social controversy in terms of a clash of rights [which] impedes compromise, mutual understanding, and the discovery of common ground."⁸ Quoting the United States Supreme Court, she further points out that "we must not forget that the community also has rights, and that the happiness and well being of every citizen depends on their faithful preservation."⁹

Professor Glendon points out that "American political discourse generally seems poorly equipped to take into account social 'environments' - the criss crossing networks of associations and relationships that constitute the fine grain of society."¹⁰ She argues that "[o]ur legal and political vocabulary deal handily with rights-bearing individuals, market actors, and the state, but they do not afford us a ready way of bringing into focus smaller groups and systems where the values and practices that sustain our republic are shaped, practiced, transformed, and transmitted from one generation to the next."¹¹ On the same theme, another widely respected commentator, Professor Deborah Tannen points out in her book, *The Argument Culture*, "[c]ommunity is a blend of connections and authority, and we are losing both."¹²

⁸ Mary Ann Glendon, *Rights Talk, The Impoverishment of Political Discourse* (1991) at xi.

⁹ *Id.* at 26 (quoting *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 548 (1837)).

¹⁰ *Id.* at 115.

¹¹ *Id.* at 120.

¹² Deborah Tannen, *The Argument Culture* (1998) at 24.

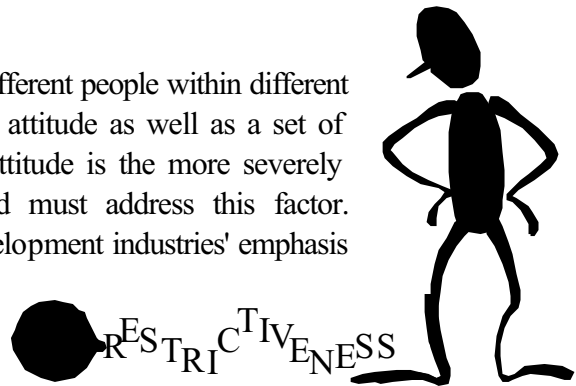
Restrictiveness

The culture of critique works stealthily, chipping away at the human spirit. Deborah Tannen

Common interest communities are restrictive; the very name of the instrument that creates a common interest community, a declaration of covenants, conditions, and *restrictions*, makes clear that there is a restrictive character to the development. That common interest communities are restrictive and that this restrictiveness has had an impact on the sale and operation of such communities and upon the rights and quality of life of those who live in them is an issue, however.

What does restrictive mean?

Certainly "restrictive" means different things to different people within different contexts. For present purposes, however, it means an attitude as well as a set of recorded rules and regulations. In many cases, the attitude is the more severely limiting of the two. Innovative developers can and must address this factor. "Restrictive" is a reflection of the management and development industries' emphasis on "people and property management" as the hallmark of the "community management" business. This attitude sees conformity as simplicity, while it sees using judgment as risky and taxing.



"Restrictive" also means document provisions that restrict an individual's ability to act. The objective of the restriction is the protection of some perceived common good that necessitates this limitation on individual "rights." Two concerns are immediately apparent: first, too many Covenants, Conditions and Restrictions (CCRs) are forms containing too many unnecessary or overly broad restraints and "protections"; and second, too often characterization of these documents and their implementation is exaggerated for effect in order to make an argument having more to do with one's bias, academic discipline, or school of thought than with resolving the real issues.

Why is restrictiveness an issue?

Restrictiveness is an issue for a number of reasons. First are the social and political concerns. These include individualism and group needs and prerogatives, and the balance between the two. That balance requires an acknowledgment that there are tangible and intangible benefits from residing in a common interest community, and that many of these benefits are obtainable only through the vehicle of group ownership and structure. At the same time, there is a social cost to overly protecting the group and too severely limiting the individual.

Just as it is appropriate to examine the limits on the individual, it is imperative to avoid rhetoric that disregards the fact of mutual obligations *and* benefits and that prevents constructive change. Ignoring the advantages the individual realizes from group structure and economic bargaining power and focusing solely on "rights" is self-defeating. It is also all too common. May Ann Glendon notes:

A tendency to frame nearly every social controversy in terms of a clash of rights (a woman's right to her own body vs. a fetus's right to life) impedes compromise, mutual understanding, and the discovery of common ground. A penchant for absolute formulations ("I have the right to do whatever I want with my property") promotes unrealistic expectations and ignores both social costs and the rights of others.¹³

This focus applies equally to the common interest community discussion as to other social contexts.

There are legitimate concerns as to the relationship of the individual within the group and the responsibilities of each to the other. This relationship requires legal treatment that includes resolution of the fact that the community association is much like a government and, thus, must, to some extent, properly balance the individual and the group. Balance is difficult, if not impossible, if there is an inalterable bias in favor of the more idiosyncratic.

An important component of these concerns is buyers' expectations. That which the buyers expect is what they have a right to receive. Creating and identifying what that expectation is and how to give it effect become the essential components for analysis. If the community is to be less restrictive in fact and in attitude, there must be a lowering or a re-channeling of those expectations. Until a re-channeling is done, however, the argument in favor of the more idiosyncratic behavior ignores that the other owners have a "right" to be free of the complained of behavior.

The second reason restrictiveness is an issue is the market. Highly regimented, non-community focused developments do not sell as well as those that are less restrictive. Restrictions must have a perceived rationale and benefit. Moreover, the paradigm communities of the next cycle have practices and procedures to increase participation and involvement in governance and community activities.

The third reason that restrictiveness is an issue is the opportunity costs that may also result in loss of market value. Developers, community managers, and association members are realizing that there is more to life than enforcement and regimentation. This realization is the hallmark of the new communities that are becoming involved in programs and activities that enliven and revitalize not only the common interest community itself but the greater public community. An excessive focus on "pets, parking, children, and trash" is inappropriate in places where people have something more important and valuable to do. This excessive focus takes time and resources from these more productive activities.

¹³ *Supra* note 9.

The fourth reason restrictiveness is an issue is the real costs in excessive enforcement. Management and legal costs can be overwhelming. Those who suggest that the supervision of community associations should rest with the courts fail to realize not only how ill equipped the courts are for that role but how costly and inconsistent the results would be. Associations are increasingly cost conscious, and this, coupled with the increasing awareness that there is no obligation to sue in all cases, gives rise to an appreciation for the problems inherent in an overly restrictive community.

A fifth reason that restrictiveness is an issue is its effect upon apathy and participation. In communities in which conformity and control are the watchwords, there is little reason for membership participation unless a member is "into" control. The creative developer and the wise manager both look beyond "control"; they see opportunities for successful community involvement and offer participation that is more constructive.

Unmistakably, there has been an historic perception that restrictions added value to property. Regrettably, in some cases it is just as clear that some of these restrictions fostered a sense of exclusion and elitism. However, many of the reasons that common interest communities became restrictive have changed or are changing. The question is what will these changes produce.

Changes in the law and in industry practice contribute to the evolution both of the products available and to the ways the community association process is structured and operated. These "new realities" serve to override factors that have given rise to the negative aspects of the common interest community. In addition, the new realities justify, if not compel, constructive change. Finally, these new communities are being created with broader statements of purpose. These communities have a purpose other than property management, and their activities are specifically authorized to reach beyond their borders.

The drafter's role is to set this environment in motion and the developer's and association members' roles are to nurture it. Then there can be community.

PROPOSALS FOR CHANGE

The perpetual obstacle to human advancement is custom. John Stuart Mill

The following suggestions are offered in no particular order of priority. Some are not revolutionary, others are, or one may so consider them. Many of the ideas are already under discussion or being carried out. They cover a broad spectrum, but the list is not exhaustive. In every case the list awaits expansion through project-specific additions and modifications.

Role and structure of association governing boards

Governing boards need to have a more flexible approach to governance, and the initial governing documents need to create and to institutionalize rule-making as a dynamic rather than a static process. A legal framework is needed that permits the board and the association to implement the development's covenants in a manner that allows the governance process to evolve with the needs, desires, and changes within the community. At the same time, there should be procedures for owner involvement and owner protections.

An alternative governance approach involves the creation of a more legitimate governance structure than the current corporate model and recognizes the difference between regulation and prohibition. Such a new structure contemplates that the initial governing documents will contain only a limited number, perhaps a severely limited number, of prohibitions and restrictions, including only those restrictions that the developer believes to be vital to the overall community development plan. Coupled with these initial provisions would be a method for permitting changes and for the adoption, modification, or abrogation of regulations through the community's "legislative process" as time passes and circumstances change. Members' rights to initiate and to participate in this process are vital.

In addition to the initial restrictions or prohibitions, there would be several general but clearly stated standards of conduct, maintenance, and design. These standards would operate to establish ranges of expectation and permitted activity without being overly restrictive or disruptive of individual choice within articulated, accepted norms.

In a system that provides simplicity, flexibility, and balance, it would be unnecessary to promulgate initial restrictions and prohibitions that might, in the final analysis, be inconsistent with the development plan and the reality of the community as it takes form, grows, and changes. Rather, the governing body, first the board of directors and, secondarily, the membership, would have the power to make or to change these provisions, according to a defined procedure. In other words, the goal would be to create a truly responsive governance system, one that is realistically empowered to govern. For

this to work, the practitioner and the developer, indeed the development team, must not be change-averse and precedent-bound.

At the same time, the governance system must provide checks and balances, disclosures of potential consequences from operation of the system to purchasers, and specific protections for the owners and for the individual owner. If one argues, as I do, that there is a great need for recognition of the importance of the group and a moderation of the emphasis upon the individualism and "rights," it is important not to forget that the individual's interests do exist and need both recognition and protection. Too frequently, boards of directors become autocratic and ignore these interests, deny members information and fair hearings. Civility applies at all levels and the rights of the minority *and* of the majority need respect.

For this reason, the community association governing documents should contain not only empowering sections but also language establishing a "bill of rights" for owners, establishing boundaries to the board's powers. These boundaries provide some degree of certainty to the purchaser and aid in enforceability by showing a court that there are limits both to the acceptable degree of control and to the powers that support that control. It is also appropriate for there to be an obvious cost to directors who act in flagrant violation of these standards. Periodic reevaluation of restrictions also will ensure that those in force have application in the community. Finally, this format would address concerns regarding the applicability of the corporate model to the political and social needs of the community as well as establish an appellate mechanism.

The board's business role will increase as new and greater powers are required to meet new needs, especially as some forms of privatization take place. Examples include the provision of services of a municipal nature, social and educational activities, technological services, and a wide variety of other activities as discussed in the section on changes in market demands. Issues of capacity, delegation, provision of individualized services, and use of technology will all be important. The nature and purpose of the association will become more significant, and courts should look to those considerations in determining the appropriate degree of autonomy to afford to the board.

The powers and methods of operation of the board should be clarified, providing guidance as to what activities fit into each role, how the board should operate, and standards or training requirements for qualifying for office. Training will be formal and informal, and the community association will pay for it as a common expense of all owners.

Quality training promotes better job performance and job satisfaction by providing needed skills and maturity of judgment. It also increases respect for the position and the person holding it. Better-trained boards result in fewer problems and better association governance.

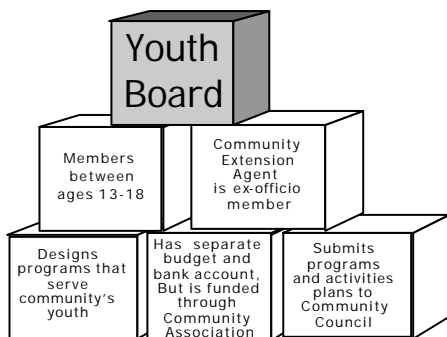
Board composition is problematic in this day and age. As owners' time and demands conflict, member involvement in community policy decisions, as such decisions involve an ever increasing range

of issues, will take on even more importance than we see today. Associations may also need procedures to create boards that are balanced in terms of the members' understanding of and experience in corporate governance.

The possibility of having professional board members is real and should not be rejected out of hand. The owners' desire and need to participate, however, should not be overlooked. An association might hire professional officers while owners continue to serve in policy-making roles. The important point is that professionalism and compensation are possible components of the future of board operations. Current management professionals must be willing to accept and to lead change.

Youth Board...with real authority

"Bored youths"¹⁴ are a significant cause of community disruption. Young people who feel isolated, talked down to (if talked to at all), and told what they want and what they can do will not be good citizens. Teenagers want to be heard but, by and large, they also look for guidance, if properly given, and respond to trust when it is given.



A Youth Board, which its initial members should be able to rename, would be composed of and selected by community residents under 18. It should have authority and responsibility for facilities and services and programs for the youth of the community. Working with the Community Extension Agent, it would have funding through the community association or a community council. Most importantly, it should have genuine, recognized capacity to influence positively the community and its young people.

Community Extension Agent

Borrowing an idea from Robert Putnam, this suggestion calls for the creation of a specifically designated, funded position for the creation and enhancement of community. The person filling the position would do more than coordinate events and activities; like the extension agent of rural America, he would educate and facilitate, as well as coordinate. He would seek out opportunities to build community life and spirit and would be available as a resource to mediate, to listen, and to guide groups and individuals in the right direction for matters ranging from problem/dispute solving to promoting events and sports leagues. He or she is, however, far more than an activities director.

¹⁴ *Supra* note 3 at 94-95.

The Community Extension Agent (CEA) would be the person responsible for providing leadership for the overall planning, development, execution, and evaluation of the community creation and maintenance program. Working with both volunteers and staff, the CEA would administer, on a day-to-day basis, the community building apparatus. As an educator, the CEA would conduct one level of education programs and would contract for and coordinate programs at a higher, more specialized level.



To be successful as a CEA, one must be capable of and enthusiastic about hands on working with people. Although tasked with important executive functions, the CEA must be a motivator, one who can convert problems and people into productive participants and who teaches leadership by exercising it. The developer will create an attractive place to live; the CEA will play a key role in making it an interesting place to live.

This position may encompass an ombudsman role, or the two can be separate yet cooperative positions. The ombudsman would be a conflict alternative facilitator, one who is skilled in and can teach "nonadversarial communication." Deborah Tannen tells us what should be obvious: "apologies are deeply important to many people,"¹⁵ yet in too many situations there is neither will nor way for the apology to happen. As stated in the best seller, *The Death of Common Sense*, "Seeking balance has become difficult because we have misplaced the vocabulary of accommodation."¹⁶ The ombudsman and the training sessions can help restore this vocabulary.

In addition to intra-association, owner-to-owner disputes, the ombudsman can play a significant role in facilitating communication and problem solving between the association and the developer and third parties. Currently, this role is often that of the association's lawyer, and, as such, it frequently fails. "But," as Tannen tells us, "to Americans, a lawyer is a lawyer is a lawyer. As a result, the warlike stance associated with litigation can be carried over to other contexts in which lawyers do their work."¹⁷ The result is that even the transactional attorney or the "community association servicer" who does not do litigation is tainted. The attorney finds it harder to problem solve because of perceptions of problem maximizer.

¹⁵ *Supra* note 13 at 148.

¹⁶ Philip K. Howard, *The Death of Common Sense: How Law Is Suffocating America* (1995) at 120.

¹⁷ *Supra* note 13 at 134.

The community manager is equally incapable of fulfilling this function. The owners see the manager in most situations as *the* command and control coordinator, the person who collects assessments and demands rule compliance. If roles are to be separated, the key positions of each must be as well.

The key ingredient for the Community Extension Agent is that he or she is a dedicated person who understands and accepts the community vision and who is sufficiently talented and empowered to execute it. As noted earlier, symbolism and "making it special" are very important steps in the creation of community and in making the people believe that it is not just a marketing ploy. Both empowering and allowing mistakes to be made in the name of participatory progress are vital.

Renters as voters and participants.

In the traditional community association structure, only owners vote. This has sparked considerable debate with a number of recognized authorities contending that the exclusion of renters is unfair and contrary to the development of community. Conversely, there are those who argue that it is the property owners who are the stakeholders and thus should have the vote and decision making power.

This argument rests in part upon the premise that tenants do not have a real economic interest in the community and thus will either not participate or will do so in a manner that is inconsistent with value protection. They are seen as more transient with "different attitudes." The argument against tenant participation includes concerns over lack of stability, perceptions of risks of block votes, and an unarticulated but nonetheless real concern that tenants tend to be young and short timers.

Whether these arguments are valid or whether there are exceptions in particular common interest communities is beyond resolution in this paper; however, it is important to note that even if the arguments be valid, there are benefits to be realized from allowing participation at least at some level. There are different levels of volunteer service that can open to the nonowner in order to make that person feel a genuine part of the process.

Interaction with other organizations

Organizations that are tax exempt under Internal Revenue Code Sections 501(c)(3) and 501(c)(4) will increasingly be used to provide social, educational, environmental, wellness, transportation, and other services.

As developments reflect the evolutionary trends discussed throughout this paper, association governing documents can and will authorize and empower the association to be involved in such activities, while tax-exempt organizations undertake some of these activities with tax-deductible financing. These tax-exempt activities will range from direct involvement in management, such as a

transportation management association, to education. These tax exempt organizations are especially well equipped to reach out to the local or regional community and to become involved beyond the community association boundaries.

Numerous innovative common interest communities are utilizing trusts and foundations in today's market. These tools are used for many purposes, including preservation and maintenance of open space and parks, environmental concerns of many types, health and wellness programs, and promotion of the arts. Trusts and foundations also meet significant societal needs. Perhaps the greatest current and potential use is in the support of public education through community foundations, often called public education trusts.¹⁸ In some cases, these trusts are created and funded in conjunction with the common interest community.

The developer will, in appropriate cases, shift some activities away from the community association to a Section 501(c)(3) or (c)(4) organization. As developmental innovation calls for the community association to assume more public and community building activities, the civic league structure in Section 501(c)(4) becomes a viable alternative or addition to the association. Not only does the civic league have positive financing considerations, but it also, by definition, is structured to serve a broad, community-wide constituency. The civic league's permitted activities coincide with developmental objectives.

While the tax-exempt organization serves many desired functions, it cannot perform private property maintenance, regulation, and other needed management functions. The association and the tax-exempt organization, however, can work together to achieve the maximum community return. The association may create the tax-exempt organization, have simply a working relationship with it, or have no direct relationship with it at all. The results can be greater public trust and acceptability of the common interest community itself.¹⁹

Houses of worship are essential components in developing community values and cohesiveness. There should be land set aside for these institutions and there should be a council that is representative of a cross section of religious interests. This should really be a catalyst for diverse yet cohesive interaction.

¹⁸ Community foundations are being created throughout the country to provide financial and other resources to support what many believe to be inadequate and even failing public schools. The foundations are frequently formed by concerned citizens or parents in support of local schools. However, some such foundations have actually been created by the school districts themselves, and other foundations focus their efforts on statewide educational improvement. The increasing prevalence of the public education foundations is evidenced by a 1996 study which found that 38 of Washington's 296 school districts had foundations operating as 501(c)(3) entities to raise money for school improvements which the districts could not otherwise afford. Richard Clayton, "Foundation Seeks Second Chance for B.G. Schools," COLUMBIAN, June 24, 1997, at B1.

¹⁹ The author is aware that the discussion of tax-exempt organizations is not exhaustive and may not satisfy the reader's appetite. The topic is, however, actively being considered, debated, and utilized. Practical and policy issues remain unresolved; however, projects utilizing these concepts are the laboratory for addressing and resolving the issues. The 501(c) tax-exempt organization, properly employed, is very much a part of the evolution of community associations.

Finally, there should be a working group with the local public and private schools in the greater community.

Finance mechanisms and systems

As communities age and, thus, need rebuilding and restoring and as associations undertake new responsibilities, new funding systems will be needed. Community associations will need a power to borrow without artificial constraints and the capacity to pledge property or income streams as collateral. There must, of course, be appropriate controls and protections, but the execution of these protections should rest with the stakeholders rather than being developer- and attorney-imposed.

Different levels and types of assessment and fees meet newly created needs. Caps on appreciation, recaptures of a portion of appreciation, percentage charges on resales, and transfer fees based on the resale price will, in appropriate cases, keep units affordable, fund Section 501(c)(3) activities, lower ongoing operating costs, and meet other needs.

Transfer fees may range, for example, from funding the capital reserve to funding social programs. They capture a modest portion of an owner's appreciation upon resale. The justification for these fees is that the programs they fund add to the house's value, thus heightening the appreciation. The transfer fee is less economically painful than monthly assessments and normally results in a lower charge against the owner than would monthly assessments.

Education and training.

A recent CAI study and survey found that the three greatest causes of problems in community associations were apathy, lack of knowledge of the restrictions at the time of purchase, and a lack of understanding of the board's fiduciary duties.²⁰ All of these can be fixed as one develops community. There should be meaningful education and orientation at the point of sale as to the community, its structure and governance, and the rights and responsibilities of residents within it. If this costs a sale, all concerned should be glad. That lost sale is a lost future problem.

The problem of the uneducated buyer is compounded by inadequate training of the board members themselves. Too often, neither association members nor board candidates understand what qualities make good directors, what the director may and may not do, and what the guidelines are that distinguish between the two. Often, this results not only in a loss of positive opportunity, but, more seriously, creates a combative environment and governance problems.

It is easy to remedy some of these problems and doing so can bear rewards for all concerned. The developer-seller should begin this in two ways. First, it can be short and graphically well-presented

²⁰ *Supra*, note 7.

so buyers know what they are getting. Second, there should be a point of sale training for prospective buyers and then for contract buyers. This can and has been done as a positive adjunct to marketing, serving the dual purposes of market development and association training. The marketing focus group becomes a vehicle to test and to develop governance and regulatory concepts. Instead of consultants making all the decisions about what people want, the people themselves become part of the decision making process.

The topics to cover in training include community and association governance generally; the nature, extent, and purpose of the regulations; community building topics including the mission statement, opportunities to participate in and affect the community's evolution, and orientation as to the community.

There should be "continuing" education. This would include pre-transition programs dealing with board election and director responsibilities and duties; officers' duties and responsibilities; committee service guidelines and training; and, perhaps most importantly, general "painless" refresher training for all in the community association about what it means to be in a common interest community (*i.e.*, a community civics class). Moreover, the courses can include nonadversarial dispute or conflict resolution, negotiation, listening, team building, and other community skills that serve individuals well in many different contexts.

Much of this can be accomplished without making it obvious that it is a "learning experience." A well-done community welcome package for new home buyers can do much of the education. Coordinated activities with the Community Extension Agent, one or more committees, or even board members can make the training process special and social, not pedantic. Much of the training and information flow can be done on the community intranet, thus it can be available for the homeowner to access at her leisure.

Education can be a major amenity as well as a community building connection. Learning centers, computer centers, and business centers as part of the common interest community's common property and facilities not only aid in involvement and association interaction, they also provide opportunities for communication and interaction with people beyond the community's boundaries, particularly when these facilities are developed in connection with other public and or private educational institutions such as high schools, community colleges, and technical colleges. The synergy possible in such relationships can pay significant dividends.

The authors of *Fortress America* shared a most insightful observation from one of their informants. Commenting on his gated community, he said: "This is a good place to live—it just isn't an

interesting place to live.²¹ A key to creating a community is to make it interesting and interactive. Education at many levels and in many guises helps to make the place interesting and vibrant.

Individuals and groups

The same orientation that leads to neighborhood structures and lowered restrictiveness enables associations to achieve a greater capacity to address individual needs. Associations must have greater ability to deal with parts of the community separately: services, rules, costs, and facilities can all be tailored without losing the overall community theme. Proper tailoring reduces the potential that rules will have no genuine, relevant policy purpose. It increases the probability that governance will be aligned with expectations *and* understanding.

Communities can and should be both creators and preservers of value systems. To accomplish these tasks, however, requires a new approach to participation and inclusiveness. It requires that there be links beyond the real estate development as a "community." For example, community building activities will be reflected in a new approach to providing amenities: what will they be, where will they be located, for whom will they be established, and what funding will be used to provide them. Much can be accomplished in this area with little or no marginal cost, but traditional governing documents will need to be changed to permit and to encourage third party use of facilities. Not all facilities necessarily will be open to the public, but those that are will assist in establishing linkages beyond the development's boundaries.

The word "values" has appeared several times in this paper, and it is an important consideration in community. It is also a charged word in today's political environment. Community values need to be developed, agreed upon, and preserved if the development is to be a community and not just a subdivision. However, these values need to be the result of "citizen" participation and decision with an appropriate regard for the views and interests of all in the community. This cannot be top down nor can it be majority rule and all others are losers. It is not easy but vital.

Trust is another essential ingredient in community. It must be developed over time as the value systems develop. It is part of the function of "deciding together." One cannot instill it by document provision or contract. It will never exist if all decisions are board or developer made. Residents in the community must see that they have the power and the opportunity to affect things that affect them.

An increase in telecommuting, resulting in less interpersonal connection on the job, will increase the need for community associations to provide facilities and systems that promote interpersonal activity and genuine communication. This will include both organized activities at designated facilities and, perhaps more importantly, spontaneous gatherings at passive areas that are conducive to a coming together.

²¹ *Supra* note 3.

Volunteerism

Americans will volunteer, but they want to spend their time wisely; they want to see that they are making a difference and accomplishing something in volunteering. At the same time, Americans remain fundamentally individuals; thus it is important to have and to encourage individual activities as well as group activities. Building community and encouraging positive participation and interaction require opportunities for both within an organized, but not overly regimented, framework.

Volunteerism

Community Extension Agent:

- 👍 **Facilitates volunteer organizations**
- 👍 **Supports recreational leagues and cultural organizations**
- 👍 **May maintain volunteer data bank**
- 👍 **May grant charters to charter clubs**
- 👍 **Publicizes meetings, events, etc.**

One important function is to encourage and to facilitate the organization of volunteer organizations within the community. The governing documents will play a role by authorizing and partially funding such activities. They can permit monetary and nonmonetary incentives for volunteering - ranging from discounts on assessments and exemption from specific program fees to recognition within the community. The documents also may authorize cooperation with and support for nonassociation organizations, such as recreational leagues or

cultural organizations, again, by making facilities available or sponsoring activities. Early on, the new owner should have access to materials explaining the nature of the community, its values, and how she can be involved...and make a difference.

Associations should emphasize and allocate resources to volunteerism and to multiple use of facilities for clubs, interest groups, and those outside of the community. Systems, programs, and funds that balance inclusiveness and exclusiveness will address community-building tasks.

An essential ingredient in successfully institutionalizing a volunteer ethic is for the developer and the board to exercise restraint in selecting activities and programs for volunteering. Developer and board should aid the process, not direct it.

Technology

Restrictions on the use of technology, business use of homes, and other such old fashioned provisions in governing documents will need to be eliminated as more and more people work at home, technology improves, and other advances continue. More significant changes include notification and meeting by phone, fax, or computer; neighborhood home pages; annual meetings with computer voting by members watching on community cable; online assessment collection and service requests; online newsletters, and service bulletin boards.

Just as the technological potential is seemingly endless, the potential for legal issues is also significant. These legal issues will require creative document provisions and more informed decision making. Examples of the potential legal issues include such concerns as how the association controls and monitors its own intranet or what rights exist for member access to post anything desired.

The fallout from technology is not all positive, however. There is the risk of loss of interaction fueling apathy and estrangement. Regular face-to-face meetings create friendship and lay the foundation for future communications - things that are crucial to the creation of community. As such, the rush to embrace the "wonders of the web" and all that technology can represent needs to be qualified and cautious. The ability to take advantage of the positive aspects, however, needs to exist.

NOT A CONCLUSION

In the past 25 years, community associations have moved from a little-known concept to one of the most significant concepts in real estate development. This legal evolution has been most extensive and rapid in the last decade. This trend will continue.

As governing documents move from "the language of rights" to a reinstatement of empowerment and judgment, their capacity for future application and evolution is limited only by the dreams of developers and the skill, creative capacity, and commitment of drafters. There are no limits to the potential to make the legal structures fit, work within, and bring to fruition developmental forms and objectives of the future.

If it is true that "the perpetual obstacle to human advancement is custom," then the challenge and the opportunity is to redefine custom, to build on it, and to create new approaches and new applications.