

THE EVOLUTION OF COMMUNITY GOVERNANCE: ADAPTING TO NEW CHALLENGES

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I. Challenges, Changes and Trends Affecting Community Governance Today

- A. Developer and builder bankruptcies and foreclosures leading to project suspensions, delays, and shutdowns and have resulted in:
- developers' inability to fulfill commitments given to local government as a condition of development approvals in a timely manner (if at all)
 - greater local government scrutiny of and involvement in governance structure and documents
 - heightened lender concerns regarding the ability to obtain and transfer declarant rights in the event of the developer's default and foreclosure or deed in lieu of foreclosure
 - increased focus on the need to obtain lender consent and subordination to the covenants, obtain releases of common areas from mortgages, and promptly convey common areas to the association upon completion
 - greater scrutiny from state and federal agencies regulating subdivided land sales leading to more stringent disclosure requirements
 - a lack of confidence and a greater level of mistrust among buyers that the developer will do things "right," resulting in a greater need for owner protection and a balance of power in the governing documents
- B. Loss of developer subsidies combined with high rate of delinquencies and foreclosure have impaired the ability of owners associations to fulfill their obligations, leading to:
- Lack of maintenance of private infrastructure
 - Depletion of reserve funds for future repairs and replacements
 - Failure to fulfill continuing obligations imposed by local government
 - Failure to monitor and enforce compliance with covenants and governmental requirements
 - Deterioration in community standards
- C. Greater use of internet and social networking has led to increased communication, knowledge sharing, and activism by homeowners, resulting in:
- Greater sophistication among buyers, more likely to find and react to negative information
 - Increased state regulation of association operations

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- D. Increasingly complex state laws regulating association operations increase demands on association managers and volunteer directors, increasing need for education and training
- E. Increasing number of dual income households means fewer capable volunteers willing to take on leadership positions on boards and committees; this is compounded in resort and second home communities where few owners live in the community full-time and fewer want to spend their limited time in the community dealing with association management
- F. Aging of many communities and concurrent changes in demographic composition have led to physical obsolescence of some facilities
- G. Federal and state action to prohibit or restrict collection of transfer fees, requiring alternative mechanisms or sources of funding for reserves and community programs and activities

II. Adapting Community Governance to Meet Today's Challenges

- A. Anticipate and prepare for greater local government scrutiny of governance structure and documents prior to plat approval
- B. Anticipate changes by local government to current procedures and requirements:
 - Requirements for developer subsidies, perhaps backed up by bonds or escrows
 - Requirements for "back up" special service districts
 - Perhaps fewer continuing obligations imposed on associations
 - Greater level of regulation of design and use at local government level
- C. Use fewer associations with fewer boards
 - Consolidates management and reduces administrative costs
 - Minimizes need for leaders
 - Increases the ability to spread costs and risk
 - Reduces complexity
 - Simplifies and reduces cost of state and federal land sale compliance
- D. Recognize the limitations of association governance
 - Consider less (or more reasonable level of) regulation, monitoring and enforcement
 - Consider more limited scope of responsibilities for the association
- E. Provide greater flexibility to associations to adapt to changes in economy and changing community interests and demographics through
 - Soft programming
 - Amenities such as passive parks, trails, and open space
 - Governing documents that authorize, encourage, and provide a structure to facilitate owner input into soft programming and establish procedures for changing use of existing amenities
- F. Ensure that the governing documents balance the need for developmental control and flexibility with adequate protections for homeowners

- Focused reservation of developer rights
 - Realistic "worst case" time frames for exercise of development rights
 - Active association with mandatory meetings during developer control
 - Class voting, without overreaching
 - Explicit procedures for adoption of budget, allocation of expenses
 - Rulemaking procedures
 - Owners' "bill of rights"
 - Alternative dispute resolution procedures
 - Process for owner participation on board of directors during development period
- G. Ensure that the governing documents include provisions to address absentee ownership, apathy, and potential lack of capable leadership
- Establish voting mechanisms that encourage and facilitate participation
 - Avoid handicapping association operations with unreasonably high approval requirements
 - Maximize ability to satisfy approval requirements through combining votes, written consents, electronic or mail ballots, use of proxies
 - Expand classes of persons who qualify to serve as directors and authorize retention and compensation of outside / professional directors
 - Authorize retention and compensation of professionals to assist in architectural review and provide fee structure sufficient to fund
- H. Ensure that the governing documents are "user friendly" to facilitate reading, understanding, use, and compliance by owners, officers and directors, and management personnel
- I. Incorporate alternatives to transfer fees for funding community programs
- J. Prepare for the possibility of involuntary change in control during the development and sale period
- Obtain lender consent and subordination to covenants and releases from mortgages prior to conveyance of common areas
 - Provide clear path for transfer of declarant rights
 - Anticipate possible lapse in developer control

For additional commentary on this subject, see W. Hyatt, "*Bent, Broken or Unbowed? Community Associations in 2010 and Beyond*" at <http://www.hspclegal.com/resources.html>