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LAND, COVENANTS, AND LAW: INTEGRATING LOCAL GOVERNMENT REGULATION AND PRIVATE LAND USE COVENANTS

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The Community Associations Institute (CAI)[1] estimates that more than 60 million Americans make their homes in an approximately 309,000 homeowner and condominium associations, cooperatives and other association-governed communities. That is approximately 20% of Americans. And those numbers don't take into account the number of common interest communities – condominiums and planned developments – comprised entirely of commercial properties or mixed uses. No one forces people to buy property in these communities – there are plenty of other options out there (just ask the 80% of Americans that *don't* live in common interest communities) – but there is a reason that they choose to do so. Likewise, developers don't have to create common interest communities – they do so because increasingly the market is demanding something common interest communities can provide that traditional subdivisions can't:

- Greater control over neighboring land uses than zoning ordinances typically provide
- Higher standards of design and aesthetics than would occur under local subdivision ordinances alone
- Higher level of infrastructure maintenance than typically provided by local government
- Convenient and affordable access to amenities that may not otherwise be available in the area and a viable mechanism for long-term maintenance and operation
- Truly "local" government that shares their interest in maintaining their property values and protecting the environment in which they have chosen to live, work or invest

The Fundamentals of Common Interest Communities

The foundation for most common-interest communities (CIC) is a set of covenants which is recorded in the public records prior to the sale of the first lot or unit. Recording is intended to

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[1] CAI, a national organization formed in 1973 which now has 60 local chapters and more than 30,000 members, is dedicated to fostering vibrant, competent, harmonious community associations. It has been a leader in providing education and resources to the volunteer homeowners who govern community associations and the professionals who support them.

provide notice to anyone considering purchasing property in the community of the "rules" that govern the community. The covenants appear as a title exception when a title search is conducted prior to closing and would be listed in the title report or on the title insurer's commitment which the buyer obtains prior to closing. These covenants typically address:

- mandatory association membership
- assessment power and financial obligations of owners
- maintenance standards and allocation of maintenance responsibilities
- architectural controls and review procedures
- use restrictions
- rulemaking authority and procedures
- enforcement mechanisms
- reservation of development rights
- amendment procedures

In addition to the covenants, the governing documents for a CIC will typically include

- articles of incorporation and bylaws for the association, which address the owners' membership and voting rights as well as procedures for election of the association's board of directors and officers and establish standards for management of the association

- rules regulating conduct and activities in the development; and

- design standards to facilitate the architectural review process.

Contrary to what some commentators suggest, associations are *not* unregulated. Most associations are organized as nonprofit corporations under state law, thereby making them subject to the entire body of statutory and case law that regulates nonprofit corporations. Every state has statutes addressing the creation and operation of condominiums and many states also regulate homeowners associations[2]; in other states, regulation of CICs other than condominiums is left to common law principles and a large body of law established by the courts. An increasing number of states are passing laws which establish minimum requirements and basic protections for property owners.

[2] The Uniform Common Interest Ownership Act (UCIOA), which regulates multiple forms of common interest communities, is currently the law in Alaska, Colorado, Connecticut, Delaware, Minnesota, Nevada, Vermont and West Virginia and was introduced in the 2011 sessions of the legislatures in New Jersey and Mississippi. It contains provisions for the formation, management, and termination of a common interest community, including a condominium, a planned community, or a real estate cooperative. It also includes significant consumer protection provisions effective at the time of sale of any unit in a common interest community. Other states with statutes regulating the creation, operation, and disclosure requirements for planned communities include California, Florida, North Carolina, Pennsylvania, Texas, and Georgia (although Georgia's statute is optional).

Creating the CIC

Whether or not governed by statute, the developer and its lawyer have some discretion in deciding how restrictive or flexible the covenants for a particular community will be. Despite popular belief that all lawyers do is change the names on a form, not all covenants are the same. Just as a good planner uses recognized principles of good planning to create a unique land plan for each community, a good lawyer will tailor the covenants to the unique needs of the community, which will vary widely depending on the nature and location of the development and the types and relationships of uses contemplated for that development.

While there are many similarities between condominiums and planned developments, there are important legal differences. In a condominium, the association controls and maintains, but does not own, the "common elements" of the project. Each owner holds title to individual "unit" and an undivided interest, as tenants-in-common with all other owners, in the common elements. In a planned unit development, each owner holds title to its lot or unit and all the improvements on that lot or unit. The association owns, controls, and maintains the "common areas" for the benefit of all owners. Ownership and maintenance need not go hand-in-hand; the association may maintain parts of the project that it does not own, including building roofs and exteriors and landscaping, among other things.

There are a number of considerations in deciding which type of CIC is most appropriate for a particular project, including:

- land use
- architecture
- zoning and subdivision ordinances
- state law
- available financing; and
- market acceptance

The CIC structure is not necessarily dictated by architecture or physical attributes; a subdivision of single family, detached residences may be structured as a condominium and a high rise building may be structured as a vertical subdivision. The developer's choice of ownership structure may depend upon the flexibility provided under state law (particularly as it relates to such things as the association's obligation to maintain insurance on the project), or the process and timing involved in obtaining subdivision approval, the ability to satisfy requirements of the secondary mortgage market, and general consumer and lender acceptance, which may rise and fall with the economy, among other things[3].

A Substitute for Local Regulation?

While some scholars like to refer to associations as "private mini-governments," they do not, cannot, and should not replace local government regulation. Local governments that feel threatened by the existence of an association or, alternatively, view associations as a way to off-

[3] Typically, condominium statutes prohibit local governments from imposing different requirements on condominiums than would apply to the same development under a different form of ownership (for example, multifamily rental property).

load some of their responsibilities, are being short-sighted. Private land use controls merely supplement and enhance local regulation. They are not a substitute for it.

Local governments sometimes feel threatened by the existence of large planned communities because they represent a huge potential voting block and lobbying group in local politics. In reality, residents are going to vote the way they think is best, not the way their association tells them to vote. There may also be a fear that a large association will choose to incorporate as a separate municipality and take total control of its destiny[4]. The reality is that if municipal incorporation was the "be all and end all," the association might not have been needed in the first place.

Working Together to Achieve Goals

Ideally, the association and the local government should have a complementary relationship, each benefiting from the other's existence. However, local governments and their planners need to understand how community associations are organized and operate, as well as the benefits and the limitations of community associations, to ensure that they are properly established and utilized to achieve the mutual goals of the local government and the developer. A few examples to illustrate this point:

Continuing Obligations. Many development orders, agreements and similar documents setting forth the conditions of development approval impose ongoing obligations on the developer that are intended to extend beyond the development period. How does the local government ensure that those obligations will be fulfilled once the developer has completed the development and moved on?

In *County of Los Angeles v. La Vina Homeowners Association*[5], the County's specific plan required the developer to provide easements for public hiking and equestrian trails through its proposed development to connect with a larger trail system outside the development. The conditional use permit and tentative map for the development all required the trails, but the final plat failed to show them and no easement was ever recorded. After the developer's control of the association terminated, the association decided it didn't want public access on its trails anymore and attempted to deny access to the public. The County sued and ultimately won, but clearly this was a situation that would never have occurred if the easements had been properly established to begin with.

This case illustrates the problem that local governments often impose requirements and conditions, but then fail to put steps in place to ensure that those obligations are memorialized in a way that is binding on the association and the property owners once the developer is gone. The local government needs more than assurances from the developer that an association will be created. It doesn't need to micromanage the creation of the association or its governing documents, but it should have procedures in place to ensure that the association has been created and that the documents contain the essential powers the association needs to perform its responsibilities. Many jurisdictions require the covenants to be submitted for review and

[4] For an interesting paper on this subject, see Rogers, *Measuring the Price Impact of Municipal Incorporation on Homeowner Associations*, 86 Land Economics 91 (2010).
[5] Civ. Action No. B210444 (Cal Ct, of App, April 2010).

approval before the plats are recorded and even specify basic provisions that need to be included in the covenants. Many more jurisdictions have no procedures in place to ensure that the association is ever created or, if created, is capable of doing the things it is supposed to do.

Unintended Consequences. In *Carolyn v. Orange Park Community Association*[6], the court addressed the issue of whether trails owned by an association became "public accommodations" for purposes of complying with the Americans with Disabilities Act simply because the association did not take action to exclude the public from using them. The court concluded that they did not, but the outcome might have been quite different if easements to use the trails had been granted to the public.

As local governments increasingly require developers to provide parks, open space and similar amenities for public use, there needs to be some sensitivity to the fact that requiring public access carries ongoing costs and consequences for the association and property owners in that development. Is it fair to put that burden on only the homeowners in one community, as opposed to making these public facilities maintained by public tax dollars?

Changing Market and Economic Conditions. The Great Recession has had a devastating impact on the real estate industry, causing many developments to be put on hold, others to be abandoned prior to completion, and still others to stretch out far longer than anyone originally anticipated. Many are now in the hands of lenders or successor developers who hope to turn things around, but are dealing with a very different market than the project was originally targeting and very different financial possibilities. In some cases, the obligations imposed upon the original developer now make the project financially unfeasible. The local government must face the reality that if the development is to be completed at all, some changes may need to be made to make it attractive for a successor developer to step up and take over. Perhaps what everyone originally wanted and expected will have to be set aside in favor of completing the development and removing the eyesore that the site has become. In this respect, the local government and the new owner of the property should not be adversaries but should work together toward the common goal of turning the distressed project into a successful one for both the developer and the community.

Multiple Standards and Reviews. Local governments often regulate more than just land use and subdivision of property, establishing design standards and requiring submittal of plans for approval prior to issuance of a building permit. The developer then imposes an additional set of design standards and review procedures that are intended to further restrict the property and what may be built upon it. Where approvals are required by both the local government and private covenants, the association's review should occur first and the local government should require that the property owner submit evidence of that approval before it expends time and resources on its review, since it may have to repeat its review if the plans must be modified in order to satisfy the association's standards. This is a not a case of one set of standards preempting the other -- both must be satisfied. It benefits both the association and the local government to cooperate in ensuring that the requirements of both are met before construction is allowed to commence.

[6] 177 Cal.App.4th 1090 (2009)

Conflicting Goals. Conflicts increasingly arise between the desire of planners and local governments to promote flexible and sustainable design principals and developer's desire to establish stricter standards for its development. These conflicts can be seen in a variety of areas, from parking on public streets to clotheslines.

In the case of *Verna v. The Links at Valleybrook Neighborhood Association, Inc.*[7], private covenants prohibited parking of trailers and commercial vehicles on public streets in the community, even though they were allowed by local ordinance. When the association's right to enforce its restrictions was challenged, the court stated that, while restrictive covenants cannot lessen or avoid the obligations imposed by ordinance, an association's governing documents are essentially a contract among the owners of the property subject to them and thus, the association could regulate parking on public streets more strictly than the township, at least as between those persons bound by the covenants.

One might think that the local government would support such restrictions on residential streets, since on-street parking can restrict traffic flow, increase the risk of traffic accidents, and impede emergency vehicles and delivery of public services such as snow plowing, street sweeping, garbage collection, resurfacing, mail delivery, etc. In fact, those are all arguments that have been used by some jurisdictions to deny parking on public streets when developers are trying to introduce traditional neighborhood design concepts commonly known as "New Urbanism." However, there are situations in which the local government, presumably desiring to encourage trendy New Urbanism concepts and minimize the amount of impervious surface area devoted to off-street parking, has insisted that an association ***allow*** on-street parking, even in areas where it is clearly creating a bottleneck for traffic and a safety issue.

The principal that an association's governing documents are a contract among the property owners and can be more restrictive than state or local laws and ordinances has historically applied to private covenants addressing other issues as well, including such things as clotheslines, signs, flagpoles, pets, and smoking. However, since the federal government enacted the Telecommunications Act of 1996 limiting enforcement of covenants banning satellite dishes and antennas, there have been increasing efforts by state legislatures to invalidate restrictive covenants on a variety of subjects, particularly flags, political signs, and more recently, clotheslines[8]. The debate over the "right to dry" versus the freedom of members of a private community to contract away privileges that they might enjoy elsewhere rages on. To date, at least seven states have adopted laws invalidating covenants that would prohibit clotheslines and other states are considering similar laws.

Local governments have conflicting interests here. While the desire to promote environmental consciousness and use of "renewable energy sources" such as solar collectors and clotheslines is laudable, local governments also benefit tremendously from the higher property values traditionally associated with communities that have private land use covenants and

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[7] 852 A. 2d 202 (2004).

[8] For further reading on this subject, see L. Chadderdon, *No Political Speech Allowed: Common Interest Developments, Homeowners Associations, and Restrictions on Free Speech*, 21.2 Journal of Land Use 233 (Spring 2006).

aesthetic standards. The continued erosion of association rights to enforce private land use controls may adversely impact the property values in those communities. This favors a balanced approach to state and local regulation in these areas that would permit reasonable association regulation and enforcement of aesthetic restrictions, particularly as to number, height, size, location, and screening requirements.

Conflicts with State and Federal Law. In an era of declining revenues and increasing belt tightening by local governments and school districts, the desire to promote land uses that do not increase the burden on public school systems is understandable. In an effort to avoid such burdens, some local governments have required, as a condition of development approval, that a developer restrict occupancy of its homes to persons who are unlikely to have school-age children living in the home. Unfortunately, the conditions are sometimes impossible to meet and often fall short of accomplishing the goal.

At least two district courts have held that the Fair Housing Amendments Act of 1988[9] prohibits a municipality from compelling property owners within a zoned area to manage their property as "housing for older persons."[10] As a practical matter, it is very difficult to do, as requirements imposed by local government as a condition of development approval often don't align with federal and state fair housing laws. Attempts to establish entitlement to exemption from those laws often fail, either initially because the developer fails properly to address this in the covenants, or because the association has no authority or fails to enforce the restriction. As a result, the developer or association cannot comply with the local government's requirement without violating state or federal law, and the city or county rarely has the resources to manage, monitor and enforce such requirements, particularly after the initial sales period. Once a community is out of compliance, it is almost impossible to get back into compliance since the community can no longer legally discriminate, even if zoning requires that it do so.

Conclusions

As with many things, associations are sometimes not as effective as their creators would hope; they are typically run by volunteer boards of directors with varying levels of experience and enthusiasm and have to deal with issues of owner apathy as well as the same financial stresses that many nonprofit organizations encounter. Local government regulation is needed to protect everyone by ensuring a minimum level of regulation when the association is unable or unwilling to fulfill its role of administering and enforcing the private covenants as the developer had intended.

Private covenants and governmental land use controls can and should be integrated to protect and enhance our communities. If done well and properly implemented, everyone benefits. When developers are able to respond to market demands, buyers get what they are looking for, developments are more likely to achieve their projected absorption rates and returns, and property values are enhanced, increasing the tax base for local governments. However, it is incumbent upon all of us, whether developers, lawyers, planners, or local government officials,

[9] Public Law 100-430, 102 Stat. 1619 (1988), 42 U.S.C. §3601, et seq.

[10] See *Gibson v. County of Riverside* (181 F. Supp. 2d 1057, CD CA (2002) and *Massaro v. Mainlands* 3 F.3d 1472 (11th Cir. 1993).

to understand the benefits and limits of private land use covenants and association governance and work together to achieve the common goal of creating great communities.

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