MANAGEMENT AND GOVERNANCE IN COMMON INTEREST COMMUNITY ASSOCIATIONS

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> My original intention in purchasing a condominium was not to be concerned with maintenance.... I now have that concern for 125 units. (Board President)

Every year about 40,000 people join the board of one of California's 15,000 condominium or planned-development homeowners' associations for the first time. They take on the responsibility for management of common property and services, for collection of assessments to maintain that common property and services, and for enforcement of conditions, covenants, and restrictions which control both the use of common property and those uses of private homes which might impinge on others in the development. A recent article calls these associations "invisible kingdoms"; others refer to them as "mini-governments," businesses, and community associations.[2] Legally they are nonprofit mutual-benefit corporations, a category

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[2]Mike Bowler and Evan McKenzie, "Invisible Kingdoms," _California Lawyer_, December 1985, pp.55-58.
Katherine Rosenberry, "Condominium and Homeowner Associations: Should They Be Treated Like 'Mini-Governments'?," _Zoning and Planning Law Report_ 8 & 9 (October 1985), pp. 153-158.

which covers everything from food co-ops to garden clubs. It is scarcely surprising that new board members are often unsure of the nature of their responsibilities. No one is able to categorize easily this hybrid form of private organization with public responsibilities: part business, part government, and part neighborhood organization.

The board members find themselves dealing with the endless minutae of financial statements, painting contracts, and lengthy documents written in impenetrable legal prose. They also find that behind mundane property management is often conflict and real human drama, as stories like the following reveal:

> Our present board is composed of members of a group who rebelled against the activist, fascist policies of the original group.... We live in a beautiful neighborhood with nice folks. Keeping it that way requires vigilance and takes more time than any of us would like, but the alternative is to let the Nazis come back.

> Our little group of homes is in the throes of living with and without some trees.... We have spent thousands of dollars for artistic pruning and countless hours discussing who should and should not have a view of [the city], the water, the mountains, or whatever is just outside of the window on the other side of the trees.... We've had tears and tantrums, actual nocturnal pruning by unauthorized persons. Somewhere there is a happy solution to all of this.

We cannot offer happy solutions, but by drawing on the first statewide random survey of common-interest homeowners' associations, we can at least clarify some of the dilemmas board members face.[3]

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[3]Stephen E. Barton and Carol J. Silverman, Common Interest Development Homeowners' Associations: Report to the State of California Department of Real Estate, State of California Department of Real Estate, Sacramento, 1987.

We will argue that boards are responsible for both managing and governing their associations, and that efficient management and effective governance can interfere with each other. Nonetheless, both are necessary to a well-functioning association, and boards must learn to balance both responsibilities.

What we present here is based on a mail survey completed by 579 randomly selected board presidents and 12 case studies of associations chosen to represent the diversity found in our survey. The survey responses are all from associations defined by California law as common-interest developments: 67 percent of the respondents identified their association as a condominium, 25 percent as a planned development, 1 percent as a cooperative, and 7 percent did not know which they were. Eighteen percent of the developments were made up of detached homes, 48 percent of attached townhouse units, 26 percent of apartments, and the rest had more than one type of structure. Our survey went to board presidents of incorporated associations, so the unincorporated associations (which are generally smaller) are not included. We did have many small associations in our sample, however. Size ranged from two units to 2,700 units. Fully 25 percent, one quarter of our sample, were 16 units or less. Half were 43 units or less. Only one-quarter were 100 units or more. It may be worth noting at this point that only 15 percent of our sample are members of voluntary organizations, such as the Community Associations Institute, that help community associations, and that most of the membership are larger associations. There is a real need for voluntary educational associations to reach out to smaller associations which are all the more in need of help since many cannot afford professional management.

We had a very good response to our survey -- a return rate of 77 percent -- and such was their enthusiasm over the state government being interested in their problems that over 200 board presidents took the time to write additional comments, such as, "Never let a retired out-of-state lawyer on your board," and "I have already resigned, effective next month."

The Developer

Let us start the discussion of our findings at the beginning, with the developers who establish community associations. We are sorry to say that all too often there are serious problems reported. One-third of our sample reported major construction defects: 10 percent reported roof problems; another 10 percent reported problems with plumbing, drainage, or other water leaks; 8 percent reported problems with building structure; and smaller numbers had other problems of all sorts. It is not surprising, then, that 24 percent had threatened or filed suit against the developer or told us they would have, had he not gone bankrupt.[4]

The majority of associations report that the developer set initial assessments too low. Associations where this is reported are more likely to sue their developer, even holding construction

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[4]All reported percents are ± 4 percent at the 95 percent confidence level.

defects constant. The percentage reporting initial assessments set too low is not quite as high among the newer associations, so stronger regulation and industry education may be having an effect; but even so, the problem remains widespread. Legal conflict between developers and associations has serious consequences not only for the developer but also for the association. Construction defects and lawsuits against the developer are both strong predictors of member harassment of the board. If roofs are leaking, the association is tied up in court for years and not getting things fixed, and the board is asking for special assessments to pay the lawyers, this does not exactly build member support for the association. Threatening to sue but settling out of court does not have as strong a negative effect -- so ways of resolving disputes quickly and with less expense are also important for giving the new association a good start.

The Management Company

Once the developer has turned over control to the new owners, the board faces what is perhaps its most important decision, how to manage the association. Sixteen percent had an on-site manager, 40 percent had an off-site management company, and the other 44 percent were self-managed by the board of directors. The choice is an important one because professional management is a major expense, a major source of guidance for the board, and -- as we will see later -- is an important determinant of the relationship between the board and the membership of the association. Despite these trade-offs, only one-tenth of our sample were dissatisfied with their management, regardless of what type they had chosen.

Comments about management companies were very mixed. Some board presidents said their management company was a real lifesaver, while others complained that management companies were expensive and always wanted more money. We did have a couple of victims of outright embezzlement, but for the most part hostility to management companies seemed to reflect the boards' difficulty in understanding the cost of professional management services. This is not so different from the difficulty homeowners have in understanding how the board spends their assessments. Everyone thinks the other fellow is wasting money. Of course, sometimes they are. But as one board president commented, "You get what you pay for! [We] thought we'd save [money on management] -- went from $850 monthly to $630 -- and we're sorry we did."

Our survey shows that management companies have an important educational role in explaining the necessity of spending money now to avoid problems in the future. Having professional management is positively correlated with having a preventive maintenance program and having done the study of reserve funding needs now required in California. Two thirds of our sample had complied with this law, which had been in effect for three years when we began our survey. Management companies also helped associations identify construction defects and take legal action against the developer. In sum, professional management does matter, and it has an important role in educating boards on their responsibilities.

The Board of Directors

Now we come to the role of the association board of directors. In general, being a board member (and a board president in particular) is not easy. The most frequent single comment we got in our survey was, "It's a thankless task." Only 16 percent reported that members give the board a lot of support, 39 percent said the members do not care, and the rest reported active opposition by at least a few members. Board presidents wrote such comments as, "Apathy reigns supreme. Most owners want some unpaid volunteer to make decisions for them rather than attend board meetings. We are running out of fools who will volunteer their time...." or, "Owners and renters make demands as if we are paid managers. Few care that we are volunteering time." Twenty-one percent of associations had fewer candidates for their governing board than there were seats to fill in the last election.

Not only did board members feel they received little support from the membership, they felt many members did not understand the role of a community association. Thus, we received comments like the following: "People do not understand community living. Each person thinks he is the one who should be the exception."

The board's responsibility to enforce the conditions, covenants, and restrictions (CC&Rs) is a major source of unpleasantness, to put it mildly. We found ample evidence that boards have a difficult time enforcing the CC&Rs. Thirty-one percent reported at least one type of CC&R violation was a serious problem for them in the past year, and 25 percent reported that they had done everything they knew how to do and still were unable to gain compliance from at least one violator over the past year.

Lack of participation and violations of CC&Rs reflect the expectations people bring to the purchase of a home in a common-interest community. On the one hand, they are homeowners who are used to the idea that homeowners have a right to do what they want with their property. On the other hand, they have also purchased membership in a larger association that provides services and the "carefree living" such membership supposedly brings. When residents feel either of these rights have been violated, they often respond with hostility towards the governing board of the association. Just under half of our associations (44 percent to be exact) reported that in the last year board members had been harassed, subjected to personal accusations at a public meeting, or threatened with a lawsuit. Five percent of associations were actually sued in the last year. Not only is it difficult to enforce association rules, but also boards that do so are frequently harassed in return.

Prevention of Rule Violations

Clearly, prevention of problems before they arise is essential to a smoothly running association. The basis of prevention is a membership that is educated about their responsibilities and committed to the association. We have identified several factors that are strongly related to violations of CC&Rs: ownership, participation in boards and committees, and type of management. Most of the factors are related to the membership's understanding of, and commitment to, the association.

So far in this paper, we have talked as if common-interest communities were all occupied by resident owners -- which is really only true for one-fifth of our sample -- and ignored the existence of renters and absentee owners. Four-fifths of the associations have at least some of their units rented. More than one-third report that they have over 30 percent rentals. One-fifth of the associations report a majority of rental units.

For many boards, absentee owners and renters are a source of serious frustration. A large percentage of absentee owners and renters undermines the relationship between the association, the residents, and the owners. In this situation, people live in the community but are not members of the association, and others are members but do not live there. Three different classes of people thus are involved, resulting in conflicts of interest that are even harder to deal with than those that arise among resident owners. Typical comments about absentee owners are that they are more often late paying assessments, they do not want to spend money on improvements which make the community a better place to live, they do not screen tenants, and they do not educate tenants about the nature of the community. Our statistics confirm that associations with a higher percentage of absentee owners also have a higher percentage of overdue assessments. Typical comments about renters are that they lack "pride of ownership" and pay no attention to the association rules. Our statistics also show that developments with more renters report more rule violations.

Does this mean renters violated the rules more often? Sometimes. One association we studied denies access to the laundry room to renters, while the CC&Rs forbid exterior clotheslines. But, while we cannot say with certainty, our survey and case studies suggest that violations by renters are accompanied by violations by owners. We find that an increase in renters is a stronger predictor of violations than the actual number of renters. When owners see the number of renters go up, they feel less commitment to the association, and are more likely to violate the rules.

The second factor which strongly affects violations of CC&Rs is the percentage of the membership who serve on the board or committees, or otherwise volunteer to help the association. Holding such background factors as size and price constant, the greater the percentage of the membership who serve on the board, on committees, and as volunteers, the fewer the violations of CC&Rs. We think the explanation for this is that the more likely people are to personally know a neighbor who serves on a board or committee (even if they do not serve themselves), the more likely they are to be informed of and support the CC&Rs. We often hear that large boards and extensive committees are unwieldy, time-consuming, and inefficient. They are also a valuable way of creating personal contact between board and membership.

The third factor that greatly reduces CC&R violations is self-management. Again, we think the explanation has to do with maintaining personal contact and commitment. Boards often try to use management companies to reduce their own responsibilities. Management companies are vulnerable to this because they want to get the job done and they want to follow the wishes of their clients as much as possible. The result, we suggest, is diminishing commitment, more problems, and more work for the manager. This is not to say that board members should do the rule enforcement themselves. Using a manager may avoid some of the hostility rule enforcement creates among neighbors. Rather, we mean that boards need to keep in regular contact with and educate the membership before rules are broken.

The Value of Participation

At this point we could go into an inspirational appeal for the value of involvement and participation, but instead let us take a sober look at how hard it really is to act on those values. We have been to an association where a very tired board president wanted to step down but was told by the remainder of the board that they would also resign if he even gave up the presidency to become a less-involved board member. We have been to an association where two factions in essential agreement broke out into loud screaming matches that destroyed an annual meeting. Getting people involved and making their involvement productive are not easy.

The immediate incentives all run against involvement. It brings conflict, since more people involved often means more ways of looking at things; it is inefficient, since involvement means constantly bringing in new and inexperienced people who do not fully understand the situation; it brings time-consuming, boring meetings; and it gets in the way of doing the "real work" of taking care of the property. Not only that, but residents usually do not want to get involved anyway unless they are upset about something. As one board president wrote us, "I've discovered that mostly no one pays much attention to what the Board does until it does not suit them: then they become an annoying, misinformed pain." It is not easy converting an angry owner into one who contributes time to committee work or joins the board, yet anger is often the first step out of apathy.

Participation, involvement, commitment, and good citizenship are all fine phrases, and they do make a big difference to the community association, but, as the saying goes, it's easier said than done!

With a clear understanding, then, that there are no easy solutions -- let us offer some suggestions. We have been asked if there is a personality test which will separate out the dedicated from the self-interested on the board. There is not. We asked people on the board why they served, and were given answers that ranged from pure self-interest (such as looking out for their investment, wanting control, wanting to know what is going on), to a desire to contribute to the association, to help their community, or to do their fair share, with most answers reflecting a combination of the two. But those who participate because of self-interest can learn from others that their self-interest and the interests of the community are intertwined, even if they are not always identical. This starts at the beginning. When the developer first establishes the association and new residents first move in, this is the time when people are most open to learning about their new neighborhood and participating in the community association. It is also important for brokers who bring in new residents to fully inform them and for boards to reach out to them as soon as they arrive. We found that associations that make personal contact with new residents, either in a welcome visit or in an informational meeting, have greater participation and fewer problems with violations of their CC&Rs.

Management companies can also help in the educational process, as we discussed earlier. Perhaps boards need to think of management companies more as consultants who help the board do its job rather than as people who will relieve the board of its burden. Consulting and education is certainly the only way knowledge of good management practices can reach the vast number of smaller associations, since most of them cannot afford professional management. Community associations cannot pay managers enough to have them do all the personal contact, and this is the kind of learning that comes much better from a neighbor who sets a personal example anyway.

The association has the responsibility to reach out to its all residents and owners, including renters. We have found that most associations do not make much attempt to involve renters. Two-thirds of the associations with committees do not allow renters to serve on them, and only one-half the associations that made a welcome visit when a new owner moved in do the same for new renters. The association needs to convince renters that the community is not just another rental complex and that they, too, can benefit from the association. We found in our survey that associations making personal contact with new renters, through a welcome visit or an informational meeting, reported fewer CC&R violations than those associations not making personal contact.

Recruiting people to actively involve themselves in the association can be an endless and frustrating process. Even in the most active associations we studied, board and committee members were usually recruited through personal contacts. People do not often just walk in and ask how they can help. But it is a necessary process. Governing the association is not just managing the property, enforcing the rules, and collecting the assessments. Governing the association is not just setting policy for management to carry out. Governing the association also means getting the consent of the governed. There are few tasks that are harder, more thankless, and more essential to the well-being of the community association. The community association board should be aware that efficient management and effective government are both necessary, and, while it is not easy, it is possible to sustain both.