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The Contractual Community Why Community Associations Are Not Governments And Why That Matters

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Articles in this and other publications devoted to the science of community association operations and management often discuss the concept of "community association" as if it were just another subdivision of local government. It is a common perception because so much discussion about this unique housing type is devoted to questions of governance. We have boards of directors, which in some respects appear to be like city councils. There are property managers who carry out many of the same functions as city staff. The property so governed has many of the same physical accoutrements as a town or city-streets, utilities, parking, recreation facilities, etc.

There are controls which are seemingly analogous to municipal government, where ordinances such as zoning place restrictions on individual property rights in order to give effect to the paramount needs of the city or county-as determined by the elected policy-makers. But while these two governance systems may appear similar, their respective legal bases are really quite different. Understanding this difference may help to understand why the occasional characterization of community associations as "mini-governments" or "quasigovernment agencies" is particularly inapt and can lead to false assumptions about community associations.

The sovereignty of our political government is subject to the limitations imposed upon its authority by various constitutional provisions, but its continued existence, short of war or violent revolution, is assured. A community association is not a sovereign entity, even though in many cases and in many of its duties, it appears as one. Its continued existence is wholly dependent upon the collective will of the owners of the property, and it has no assurance whatever of perpetual life.

Most of the law of community associations, both common and statutory, is based upon one fundamental concept that the interests of the individual and those of the community must function in a kind of consensual harmony in order for the community association to work. That is, virtually every operation of a community association, and all of its authority, is derived from a private, contractual relationship among the owners, and these agreements, while stated in the CC&Rs and in the Bylaws, are nevertheless wholly dependent upon the collective will of the parties to that contract-the owners, and others who may share an ownership interest, such as mortgage lenders.

The entity exists only with their continuing acquiescence. At any time, these owners, by whatever voting percentage is required, could terminate the community association by the simple expedient of amending the governing documents to eliminate it. Of course, the voting percentage may in some cases be as high as 100% of the owners. Also, the law of partition and corporate dissolution would have to come in to play in order to parcel out the common property, and the interests of lenders would have to be considered, but at least in theory, it could be done.

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The same is not true for public entities which, as subdivisions of federal and state government derive their right to exist from the authority of the "sovereign" to use an old but still valid concept, limited only by the rights granted to individuals by the Constitution of the United States, the Bill of Rights, and the various state constitutions. Even if 100% of the citizens of the United States voted to do it, they could not terminate this country's existence-only Congress, supported by a significant number of state legislatures, has the power to amend the Constitution. From this sovereign authority comes the police power with which all government entities enforce their authority to govern.

The authority of the community association is not derived from constitutional law, per se, but rather from the common law of contract, as augmented by a few relevant statutes, and as such, are completely at the mercy of the parties to the contract-usually the owners of the separate interests. Government agencies are founded upon the principal of government supremacy-that while they must recognize and obey the constitutional rights and liberties of the individual, the public interest, where it has been clearly defined, is always paramount, and the rights of individuals must give way to it when a conflict in authority arises.

There are no better examples than the right of the government to tax its citizens and the right of Eminent Domain. To the extent of its authority to levy taxes on individuals, the government's authority is clearly superior to that of any individual citizen. Similarly, where the public need for property exists, the government may acquire it (with adequate compensation to the owner) for such public good as rights of way or redevelopment. Now of course, each of these governmental powers is limited by certain constitutional guarantees such as the rights to equal protection and due process, but when those requirements are satisfied, the government is free to act without further restraint. The importance of the public, or "community," interest as it relates to government is clearly carved into stone, and in this democracy little doubt of the supremacy of the public interest, as defined and limited by the Constitution, exists. Such assumptions are based upon hundreds of years of democratic political history.

We may think that similar assumptions apply to the common interest in a community association, but clearly they do not. The legal underpinning of a community association is a mere contract, one that depends upon the continuing mutual obligations of the owners to function. For example, the power of an association to assess its members is not analogous to the power of the government to tax. The power to tax is limited only by the vote of the legislature or Congress, and except for a few constitutional limitations, there is virtually no limit on that power other than those imposed by political considerations. The power of a community association to assess is limited both by the contract itself and by statute, and any such limitation cannot be set aside by the board of directors acting alone but must come from a consensus of the individual owners-a true "grass roots" democracy.

The right of individual property ownership is clearly paramount to the common interest in a community association. There is no mechanism, in the absence of severe damage or destruction,¹ even by a vote of the members, whereby a typical community association could take possession of an individual's separate interest no matter how pressing the need, unless it were the result of non-payment of assessments, for example. There is no community association equivalent to "Eminent Domain".



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So, while we sometimes describe them as "mini-governments" or "quasi governmental agencies" community associations are anything but. They have no power outside of that conferred upon them by the contracts among the owners. They have no "sovereign" or "constitutional" right to exist independent of those contracts, and they exist only until the parties to the "contract" agree otherwise. As such, community associations are not "governments" at all, but merely real property with a management and organizational scheme imposed upon it. They cannot print money. Their continuing existence is completely reliant upon the owners adhering to the contract and continuing to supply the necessary operating capital. They are also quite capable of becoming obsolete. When they do, there will be no constitutional precedent to save them, only the laws of economics will ultimately govern their fate.

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