

LEGAL PLANNING FOR NEW URBANIST COMMUNITIES

Doris S. Goldstein, Attorney

Presented at CNU 2000: The Politics of Place

CONGRESS
FOR THE
NEW
URBANISM

Bio: Ms. Goldstein is an attorney primarily representing developers of new urbanist communities, beginning in 1986 in Seaside. She has been closely involved with the growth of Seaside, including the development of its town center.

Her practice includes homeowner association documentation, architectural standards, commercial property sales and leasing and the formation of condominiums and air-space townhouses in mixed-use buildings.

In addition to her ongoing representation of Seaside, Ms. Goldstein currently represents more than a dozen developers of new urbanist communities in Florida, Alabama, Texas, Colorado and New Mexico in cooperation with local counsel.

JUNE 17, 2000, 3:30 PM

While new urbanist communities look quite different from conventional subdivisions, they usually share a common legal structure: the property owners' association. Although they have many of the functions of town governments, owners' associations are in some ways more powerful, and in some ways less powerful, than municipalities. Because property owners are deemed to have willingly accepted the recorded covenants and restrictions when they buy property, recorded covenants and restrictions can be a powerful tool for shaping the community.

Unlike conventional subdivisions, however, new urbanist communities evolve in complex ways over time. Documents for a new urbanist community need flexibility to cope with unanticipated needs. In addition, documents must pay attention to the close proximity—and intermingling—of commercial, residential and civic uses that occur in a well-designed new urbanist community. To do this, documents need to enable and protect the varied uses.

TOWN CENTER

Most new urbanist communities have town centers with significant common areas which need to be maintained to the level of care of a commercial shopping district. While the town center is an integral part of the community, mixing commercial and residential properties in a single association can make it very difficult to balance the needs of the two types of property. With few exceptions, best practice requires a governance structure for the town center which is separate from the governance of the primarily residential portions.

The town center may be maintained by a commercial property owners' association. Alternatively, the Founder or other management entity may own the town center common areas, and charge common area maintenance charges similar to mall CAM charges. The management entity may go beyond maintenance duties and may oversee tenant mix, hours of operation, and other business concerns.

Squares or greens in or near the town center may be intended as open-air marketplaces, with farmers' markets, pushcarts, or festival events. While standard covenants and restrictions prohibit commercial use of common areas, documents for a new urbanist community should anticipate commercial use of certain open space. The boundaries and uses of these areas may change over time.

Mixed-use buildings in town center offer commercial space below and residential use above. Dividing ownership in such buildings through the use of condominiums, or, in some states, sale of airspace without formation of a condominium, allows the Founder to recoup some capital costs.

However, retaining ownership and renting out units may be less cumbersome and allows greater flexibility for growth and modification of uses. Live-work units have a single residential unit and are rarely divided.

CIVIC BUILDINGS

In the new urbanist language, civic buildings are prominently-positioned, community-oriented buildings. However, building type does not dictate ownership: civic buildings may be owned by government, the association, tax-exempt organizations such as community support organizations or even, in some cases, for-profit entities. Each civic parcel needs to be examined individually, and an ownership form should be selected that will best utilize the property. The declaration, plat and other documents should not inadvertently label all civic use lots as not-for-profit enterprises, require their maintenance by the association or automatically release such lots from association assessments.

RESIDENTIAL ASSOCIATIONS

New urbanist documents must endow the association with all the powers it needs to run effectively. Documents for conventional subdivisions usually limit the association's duties to maintenance of the common areas. This does not allow the association to adequately respond to community needs for delivery of services such as utilities, transportation, communication and emergency response. As the needs of the community are likely to change over time, the association must have the ability to take on new roles in response.

Since new urbanist communities don't wall people out, plazas or greens in primarily residential areas may look and feel like a public park, even when maintained by the association. This may take some adjustment for owners who have a gated-community mentality. Some new urbanist communities dedicate their parks as well as their streets to the general public, when the unit of local government is willing to accept them for maintenance. Local government may be reluctant to maintain alleys or street trees. When common areas are dedicated to the public, the documents should allow the association to step in if the municipality fails to maintain them adequately.

Readable legal document" is not an oxymoron. To effectively participate in the association, property owners should be able to read and use their association documents without having to consult an attorney on every issue. The association also needs effective tools for decision making and dispute resolution.

Residential units within town center may be made part of the residential association, particularly when the residential association owns recreational facilities.

DEVELOPMENT ISSUES

The best way to create an effective residential owners' association is to protect legitimate Founder interests first. Doing so allows the Founder to give the association the powers it needs to operate effectively, and to turn over control relatively early.

The first and most important development issue is architectural control. The Founder must be able to keep architectural control almost to the end in order to accomplish the vision, so architectural control and the association should be clearly separated. The architectural review board is appointed by the Founder and exists separate, apart and independent from the association, although it may be assigned to the association once development is complete.

Trademark protection has proven valuable, and defensible, even when the new urbanist community name became so well known that it was printed on maps. However, one could also argue that new urbanist communities are town-like, and should have a name which belongs to the community, rather than the Founder.

New urbanist communities tend to be rather photogenic. Who should get the location fee—the association or the Founder? If the Founder so chooses, the documents may reserve to the Founder the right to allow commercial photo shoots on the common areas, and to collect a fee.

New urbanist community communities often have a mandatory building requirement which requires the purchaser to build an approved building on the lot within a limited period of time, usually two years. Such a provision encourages the development of streets and neighborhoods, and discourages speculation. The requirement to build is usually enforced with some kind of a Founder buy-back at a price close to the original purchase price to be fair to all the parties. A straight forfeiture is punitive and probably not enforceable. The construction lender also needs reasonable protections.

An extended version of this outline is available online at www.newtownlaw.com.