New Towns, Private Governments

By Doris Goldstein

Although New Urbanists talk about creating "new towns," the great majority of Florida's New Urbanist communities do not have a municipal government. Instead, most are managed and operated by homeowners' associations, the same type of corporate entity that manages the most mundane gated community. In some cases, special taxing districts have taken on certain municipal functions. In a state where the barriers to forming a municipal government are set high – statute requires a population of at least 5,000, or 1,500 in counties with a population of fewer than 75,000 – New Urbanist developers have cobbled together an approximation of town government.

A community's homeowners' association (often abbreviated as HOA) and its duties are established by a recorded declaration of covenants, conditions and restrictions (abbreviated as CC&Rs). The two blend corporate law, contract law, and real property law to allow the developer to craft a private government. Unlike a municipality, which gives each adult an equal vote, voting in an HOA is based on property ownership. Typically, each lot is assigned one vote. The more lots you own, the more votes you get.

For most of the history of HOAs in Florida, there have been very few rules about what an HOA could do or how it could operate. Federal law, of course, prohibits discrimination. However, the developer's attorney, in writing the CC&Rs, is free to give extensive rights to the developer and to the HOA. Each buyer, by taking title to a lot, is deemed to have accepted the terms and conditions.

The primary function of an HOA is to own and maintain common area that is not dedicated to the public, such as private roads, landscaping and recreational facilities. However, HOAs may go beyond that role to regulate the behavior of residents. HOAs can, for example, and do regulate the number, type, and size of pets, the right to rent property, late-night basketball, and noisy air-conditioners. Because property owners are deemed to have willingly accepted the recorded covenants and restrictions when they buy property, the covenants and restrictions can contain restrictions that would be unacceptable if imposed by a municipality. For instance, the U.S. Supreme Court in 1977 held that a town's law prohibiting the posting of "for sale" signs violates the First Amendment protections of free speech. However, the Florida Supreme Court later held that a restrictive covenant prohibiting homeowners from posting "for sale" signs in their yards did not violate the First Amendment.

Only in recent years has Florida begun to regulate HOAs, including requirements for financial reporting to the members and properly noticed board meetings. Even under these new laws, however, the developer is permitted to control the association until 90 percent of the lots are sold. Most states that regulate HOAs require a much earlier turnover. And the new legislation does little to restrict some of the more intrusive powers of HOAs.

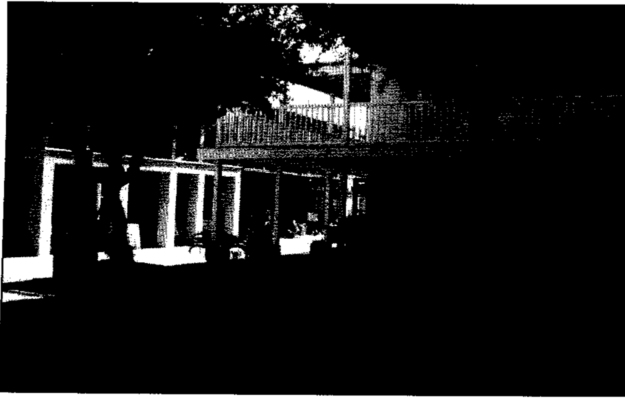
In many respects, Florida's long history of enforcing recorded covenants and restrictions benefits New Urbanist developers. For instance, Florida courts have typically upheld the most stringent of architectural review boards, provided there is a coherent plan for the community and consistent application. These standards, of course, fall right in line with New Urban design codes. Florida courts have had no qualms about applying the most rigorous remedy – an injunction requiring the owner to comply with the architectural review board.

In other ways, however, the conventional HOA is an awkward fit for New Urbanist communities. Historically, HOAs maintain private property and foster exclusivity. New Urbanist communities, on the other hand, invite the public in. Streets – far from being gated – are meant to interconnect. The town center square is intended to be full of activity, not a passive green space with "keep off the grass" signs that we drive past in our cars. Rather than building an expensive private (and seldom used) club house, a New Urbanist developer may invite in a YMCA or build a meeting hall and establish a charitable organization for cultural activities. And, of course, the shops and restaurants serve as amenities as well, reducing the need for private HOA facilities.

In Amelia Park, a YMCA, shown here at the end of a residential street, is used by both Amelia Park residents and the surrounding community.

The fundamental tension in designing governance for New Urbanist communities is this balance between private and public space and between passive and active uses. We have lived too long in gated communities, and old attitudes die hard. Even in those dwindling number of places where the local government is willing to accept streets for dedication, homeowners object when traffic from nearby businesses spills onto *their* streets. If a group of teenaged boys from a neighboring subdivision join an informal game of soccer on the green, do we celebrate the success of New Urbanism – or call them trespassers?

For that reason, the best practice for most new urban communities is to keep commercial common areas out of the HOA. Usually, the commercial common areas, such as greens and plazas, parking, and sidewalks, are owned and maintained either by a commercial property owners' association or by the developer. In either case, the cost of maintenance is divided among the commercial property owners.



In Seaside's Ruskin Place, residents live above shops or studios. Commercial wares spill out onto the sidewalk in a lively, inviting space.

While this approach is simple in concept, it is frustrated by the intricacy of New Urban design. Residential and commercial properties exist next to each other and sometimes on top of each other. Furthermore, uses should be allowed to evolve and follow market demand. All these provide additional challenges to the developer's attorney who must manipulate legal forms that developed in a purely residential setting. This is not a reason to "dumb down" New Urban design but rather a requirement for extra care in drafting legal documents. The beauty of private covenants and restrictions is also their downfall: almost everything is permissible to the drafter at the beginning, but once the documents are in place, they are notoriously difficult to amend.

A new trend in Florida real estate development, both conventional and New Urbanism, may further reduce the role of the HOA. In recent years, Florida has seen an explosion in the number of a type of special taxing district, called a Community Development District, or CDD. A CDD can own and maintain roads; water, sewer and storm-water management facilities; and parks and recreational facilities. The CDD pays for capital expenses by issuing tax-exempt bonds and pays for both the bonds and ongoing maintenance by levying charges that appear on the homeowner's county tax bill.

The area a CDD serves can range from thousands of acres down to fewer than 100 acres. Developers like CDDs because the CDD rather than the developer is indebted for the infrastructure. Counties like CDDs because they can shift the cost of maintenance to the CDD. Consequently, the number of CDDs in Florida is exploding. Although the law permitting CDDs has been on the books since 1980, growth in the last few years has been exponential. When the *Orlando Sentinel* did an investigatory series on CDDs in October 2000, there were 116 in Florida. By the end of 2003, the number had doubled. By early December of 2004, there were 288. (Statistics on CDDs are available at the Florida Department of Community Affairs website at www.floridaspecialdistricts.org.)

One of the controversies concerning the use of CDDs is the tension between private and public. Conventional developers have used CDDs to fund elaborate recreational facilities that they have tried to reserve to residents' use, and gated streets that discourage, if not prohibit, outside traffic. The United States Internal Revenue Service has called this an improper use of the tax-exempt bonds that financed the facilities. This drawback, of course, is of far less concern to New Urbanist developers.

While the developer controls the CDD during development and in the early years of operation, the CDD begins to operate more like a municipal government and less like an HOA over time. Voting converts from a property-based system to one person, one vote if the district has at least 50 registered voters. (In second-home communities, of course, this transition may never occur.)

Because Florida law discourages the formation of new small towns, the CDD may be as close as most New Urban communities come to becoming a real town. But although CDDs have many of the powers of local government, a CDD is not really a town. It does not have the power to adopt a comprehensive plan, building code, or land development code; nor does it have police power, and it requires the consent of local government to plan or construct parks, recreational facilities, fire stations, and schools. Instead, a CDD is a rather unglamorous service provider, mired eternally in the nitty gritty of utilities, stormwater management and road repair. Because of their limitations, CDDs usually exist in tandem with an HOA – the CDD to maintain the infrastructure and the HOA to enforce architectural control and other private covenants.

So where in this scheme does civic life lie? Do we need a mayor and a city council to become a real town? Or can we combine these ingredients – a CDD, an HOA, a cultural organization, and an urban design that invites interaction – to make a reasonable facsimile of public process? Early indications are that people in New Urbanist communities do get involved with their neighbors and their neighborhood. The next step is giving them better tools with which to do that, with thoughtfully designed legal structures that recognize the complexity of New Urban communities, build in workable self-governance measures, and allow for natural evolution of the community.

The Community Development District serving Alys Beach will be responsible for protection, maintenance and restoration of the beach dune system.

Doris Goldstein is an attorney based in Jacksonville, Florida who provides legal services and support for developers of New Urbanist communities and their attorneys. Since 1986 she has been closely involved with the growth of Seaside including the development of its town center, and has aided in the development of more than 20 other New Urbanist communities. 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.