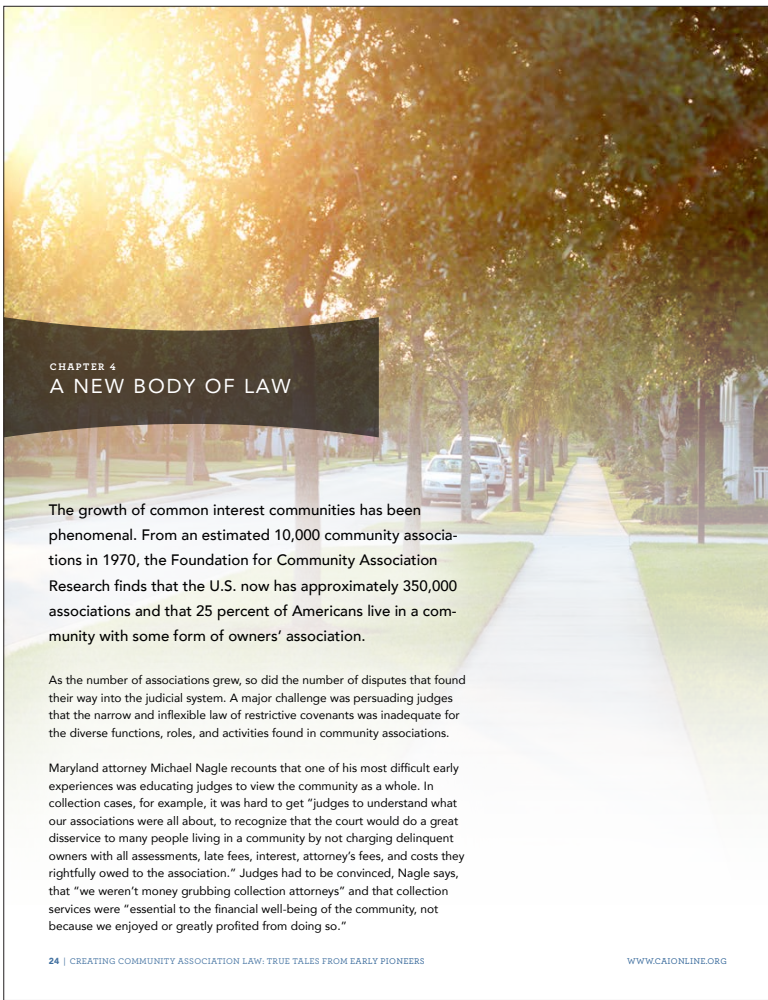


CREATING COMMUNITY ASSOCIATION LAW:

— TRUE TALES FROM EARLY PIONEERS —

BY MARVIN J. NODIFF

CHAPTER 4
A NEW BODY OF LAW

The growth of common interest communities has been phenomenal. From an estimated 10,000 community associations in 1970, the Foundation for Community Association Research finds that the U.S. now has approximately 350,000 associations and that 25 percent of Americans live in a community with some form of owners' association.

As the number of associations grew, so did the number of disputes that found their way into the judicial system. A major challenge was persuading judges that the narrow and inflexible law of restrictive covenants was inadequate for the diverse functions, roles, and activities found in community associations.

Maryland attorney Michael Nagle recounts that one of his most difficult early experiences was educating judges to view the community as a whole. In collection cases, for example, it was hard to get "judges to understand what our associations were all about, to recognize that the court would do a great disservice to many people living in a community by not charging delinquent owners with all assessments, late fees, interest, attorney's fees, and costs they rightfully owed to the association." Judges had to be convinced, Nagle says, that "we weren't money grubbing collection attorneys" and that collection services were "essential to the financial well-being of the community, not because we enjoyed or greatly profited from doing so."

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COMMUNITY ASSOCIATION LAW CHRONOLOGY

1958
The first condo act in the U.S. is adopted by Puerto Rico.

Early 1960s
The Federal Housing Administration prepares a model document for creating planned unit developments known as Form 1400.

1962
The Federal Housing Administration creates the Horizontal Property Act to recognize cubes of space—described by horizontal boundaries—as real property that could qualify for FHA-insured loans.

1964
The Urban Land Institute publishes the first study of planned communities, *The Homes Association Handbook*, by Byron R. Hanke.

1967
Every state in the U.S. has adopted a version of the FHA model act.

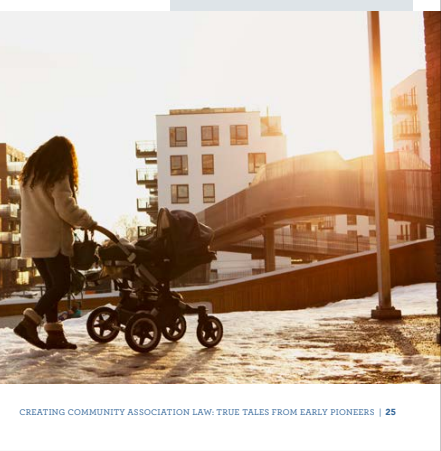
And there were distractions dealing with unique personalities. Marc Markel recalls preparing for court early in his Houston practice when he asked a manager—his star witness—to wear a dress or pants, "whatever you wear to a business meeting." She showed up at the courthouse "wearing a gown, large eyelashes, an up-do hair style, and high heels." Markel scurried to get a continuance.

Legal pioneers encouraged judges to focus on the association's role and function at the heart of the dispute and apply an analogy from a related body of law. Beginning in the mid-1970s new cases emerged that eventually lead to a 1986 state supreme court declaring that a "new body of law" had been created.

Landmark Cases
Associations had authority to govern by adopting rules, providing the rules were reasonable, according to a Florida court in *Hidden Harbour Estates, Inc. v. Norman* in 1975. The court described the association as comprising "a little democratic sub-society" in which each unit owner "must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property."

"When I started representing condominium associations in 1982, there was no such thing as community association law."

—JAMES L. STRICHARTZ



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Predicting the Future

P. MICHAEL NAGLE PREDICTS: Transient use (Airbnb, etc.), ethnic diversity, generational tensions millennials and baby boomers, cybersecurity issues, naturally occurring retirement communities, aging infrastructure, and aging residents will drive governing document changes.

ROBERT M. DIAMOND PREDICTS: As infrastructure deteriorates, low- and moderate-income association members will face insufficient reserves. The need to terminate associations will become more common.

DAVID S. MERCER PREDICTS: An association's authority to enforce regulations will have to come from either a statute or recorded document for any enforcement case that goes to court.

RICHARD P. NEULAND PREDICTS: There will be more legislation at both the federal and state levels inhibiting community associations, and management company profits may become the determining factor affecting legislation.

MARC D. MARKEL PREDICTS: As the number of community associations increases, state and federal regulation will increase, which will affect how associations operate and may affect the quality and quantity of volunteers. Balancing quiet use and enjoyment with state and federal regulations will continue for years to come.

RICHARD S. FIORE PREDICTS: Keeping up with community association law will become more difficult, more intellectually challenging and complicated.

MICHAEL C. KIM PREDICTS: There will be less deference toward "the powers that be," and boards will have to prove they deserve deference.

ELLEN HIRSCH DE HAAN PREDICTS: More associations of all sizes will use professional management.



Katharine Rosenberry is concerned about the trend for more legislation in California. "Many California legislators live in community associations while they are in legislative session, so they think they are legal experts in the field and have no qualms about introducing laws [based on] only limited knowledge." She notes the original Davis-Stirling Act was 25 pages, but has ballooned to 100 pages, with another 100 pages for commercial developments. "One year when I was working in the California legislature," Rosenberry recalls, "I think 5,000 bills were introduced; by comparison, when I worked with the legislature in England, they introduced about 15."

"Practitioners should be cautious," advises Nowack, "when drafting broad provisions obligating the association to act." Pointing to HUD's new rules on harassment in the community, Nowack asserts, "an association should not be required to take every step available" without being able to exercise its discretion. "An association cannot control all behavior and cannot be the super-police to enforce all laws," he says.

Keeping up with the law will become more difficult, notes Richard Fiore. "Community association law," he observes, "is becoming more and more intellectually challenging and complicated every year as the scope of issues expands to include an ever-growing multitude of local, state, and federal issues."

Accepting and adapting to innovations in technology are other concerns. "Technological impact will be tremendous (for good and bad)," foresees Mike Kim. Other forces include "the cultural shift in generational succession [but keep in mind that human nature itself hasn't changed very much], ease and speed of communications, and higher demand for transparency." Kim predicts there will be less deference to "the powers that be," and that boards will have to "prove they deserve deference."

"A positive trend," predicts de Haan, "is more use of professional management for associations of all sizes and locations."

THE BIGGEST CONCERNS

- Lack of civility
- Increased legislation
- Inadequate documents
- Insufficient reserves
- Association authority
- Negative media coverage
- Technology

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