

## The Odd Couple:

### Interplay Between Homeowners Associations And Municipal Governments



In daily life, individuals are more likely to have contact with a municipal government or a homeowners association (HOA) than with the state or federal government because municipalities and HOAs are well suited to address issues of local concern. But individuals may have difficulty in determining whether an issue of local concern should be referred to the municipal government, the HOA, or both. For example, determining whether operation of an in-home daycare violates the local municipal code, the subdivision restrictions or both, is not always easy. Sometimes, both the municipality and the HOA will have an interest in addressing such an issue, so an individual might contact both entities with the complaint. This article discusses the interplay between municipalities and HOAs and how the two can work together, and separately, to address issues of local concern.

*Miriam-Webster's* dictionary defines a municipality as "a primarily urban political unit having corporate status and usually powers of self-government." An HOA is an organization composed of owners of neighboring properties that is responsible for administering the covenants, conditions and restrictions (CCRs) that are applicable to those properties. There are approximately 800 municipalities in the state of Missouri. While that number seems large, there are far more HOAs operating in the state. An estimated 1,000 HOAs exist in the Kansas City area alone.

HOAs emerged in the late 1800s in the United States as a way to maintain property values and improve life for property owners within a specific geographical area. Today, one in five people in the U.S. is a member of a homeowners association. There are an estimated 342,000 to 344,000 HOAs in the U.S., and that number continues

to grow. According to the Community Associations Institute, approximately 80 percent of newly constructed homes in the U.S. are in subdivisions with an HOA. The primary purposes of modern HOAs include providing public services, such as maintaining infrastructure, managing recreational facilities, promoting public safety, enforcing the CCRs, and providing sanitation services. Since municipalities traditionally provided these services, municipalities save an estimated \$2 - \$4 billion each year due to the existence of HOAs.

Supporters of HOAs argue that they fill funding gaps caused by restrictions on, or underfunding of, local governments. Transferring responsibility for enforcement of property maintenance standards, infrastructure improvements, and public safety to HOAs frees up public resources for use on other public

services. Conversely, critics contend that HOAs erode support for the local government. For example, if homeowners within an HOA are concerned about crime, they can erect a gate to their subdivision instead of voting for additional funding for public safety services. In this scenario, HOAs operate as a substitute provider of public services as opposed to a complementary provider.

Perhaps the most common service provided by an HOA is enforcement of property maintenance standards. An HOA's legal authority to enforce property maintenance standards differs from a municipality's authority. In Missouri, the state Constitution and state statutes set limits on the authority of a municipality. Chapter 89 of the Revised Statutes of Missouri (RSMo.) authorizes municipalities to enact zoning regulations. In particular, under Section 89.020.1, RSMo., the municipal governing body is "empowered to regulate and restrict the height, number of stories, and size of buildings and other structures; the percentage of lot that may be occupied, the size of yards, courts, and other open spaces; the density of population; the preservation of features of historical significance; and the location and use of buildings, structures and land for trade, industry, residence or other purposes." Municipalities are subject to Dillon's rule that provides a municipality may only exercise powers expressly granted, or those necessarily or fairly implied in express grants, or those essential to the declared objects of the municipality. Any reasonable doubt as to whether a power has been delegated to a municipality is resolved in favor of non-delegation.

An HOA derives its authority from its CCRs. Typically, a subdivision developer executes and records the CCRs with the local recorder of deeds. The CCRs usually set out the scope of the HOA's authority; provide architectural and aesthetic standards for buildings in the subdivision; regulate the uses of property in the subdivision; and provide procedures for the operation of the HOA. Under Missouri law, these regulations are referred to as restrictive

“ The only purely popular government is local, and founded on local knowledge. The citizens can rule the city because they know the city... ”  
~ G.K. Chesterton

“ Homeowners Association: the means whereby people who own homes are able to transfer their rights to the neighborhood control freaks. ” ~ Ron Brackin

covenants. Restrictive covenants restrict the free use of real property, so Missouri courts strictly construe them. However, there are few limits on the type or scope of restrictions that can be included in the CCRs. Consequently, while municipal zoning regulations and CCRs often contain similar prohibitions (e.g. a prohibition on operating a business from a residential property), CCRs may include prohibitions that a municipality may not be able to enact for legal or political reasons (e.g. allowing only a few types of signage on residential property based on the content of the signs).

Further, enforcement of zoning regulations and buildings codes by a municipality differs from enforcement of CCRs by an HOA. Municipalities are substantially limited to enforcing regulations through prosecution in municipal court. In recent years, municipal court prosecutions have received negative press due to perceived abuses in the municipal court system. Consequently, the Missouri General Assembly enacted Senate Bill 5 in 2015 and Senate Bill 572 in 2016, both of which impose restrictions on municipal court prosecutions and limit



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of a permit by a municipality trumps a provision of the CCRs that prohibits the building or use authorized by the permit. Homeowners often request that municipalities deny licenses or permits for activities that are allowed by the municipal code but

“ With these new regulations finalized, it is important for Missouri public employers to prepare for the consequences of the increased minimum salary provisions so as to avoid penalties. ”

a municipality’s ability to collect fines for municipal code violations.

Conversely, HOAs typically enforce CCRs in one of two ways: (1) instituting a lawsuit seeking an injunction or declaratory judgment to remedy the violation; or (2) if allowed by the CCRs, imposing a fine or suspending services provided by the HOA to the violating homeowner. Frequently, the CCRs provide that the fines imposed by an HOA become liens on the property. While municipalities are statutorily restricted in the amount of fines that can be recovered from a violation of a zoning regulation or building code, an HOA’s ability to levy fines, and the amount of the fines levied, are not similarly restricted and, so long as the HOA follows the procedures set forth in the CCRs, the HOA can increase the amount of the fines exponentially. In addition, municipal commissions and governing bodies are required to base their decisions to approve licenses or permits on specific standards that are set forth by law. Alternatively, CCRs can authorize HOAs to exercise substantial discretion to approve or deny requests of homeowners.

A frequent source of confusion for homeowners is whether the issuance

prohibited by the CCRs. However, municipalities cannot enforce CCRs. Only the HOA, or the homeowners themselves, can enforce the provisions of the CCRs.

While municipalities and HOAs have distinct enforcement authority, they can work together to promote the general welfare of the community. Generally, municipalities do not have the manpower to conduct frequent inspections of all residential properties within their boundaries to determine if there are any code violations. Conversely, because HOAs typically cover small geographic areas, it is easier for an HOA to identify properties that violate the CCRs. Because such violations also frequently violate the municipal code, an HOA can serve as a municipality’s first line of defense in identifying problem properties before the properties become a public nuisance. If a property owner is facing municipal court prosecution, as well as the imposition of fines from the HOA, the property owner has a greater incentive to alleviate the problematic condition(s) on the property.

While an HOA is usually better able to identify problem properties than

a municipality, HOAs may not have the technical sophistication necessary to appropriately enforce the CCRs. Municipalities frequently have full-time staff and legal counsel to assist in identifying and enforcing municipal codes. Further, municipalities usually have a budget that provides for the cost of such enforcement. Typically, HOAs operate on small budgets and do not have employees or legal counsel to assist with enforcement. Further, HOAs often suffer from apathy or disinterest and, therefore, might not diligently pursue enforcement of the CCRs.

HOAs frequently have more difficulty than municipalities in removing provisions from the CCRs that become burdensome, or adding new restrictions that become necessary, over time. If a municipality determines that the current zoning regulations or building codes do not adequately meet the needs of the municipality, removing regulations or adding new ones can occur over a few months and with the minimal procedural requirements imposed by state statute (i.e., public hearings and approval of an ordinance). Frequently, the CCRs contain language allowing the HOA to amend, change



or modify the CCRs. However, this language, as construed by Missouri courts, is a limited grant of authority.

According to the Missouri Court of Appeals for the Eastern District, in the case of *Hazelbaker v. County of St. Charles*, in general, an amendment to CCRs that imposes additional burdens on the property owners subject to the CCRs is not valid except upon approval of such amendment by unanimous consent. In *Hazelbaker*, the owner of one lot within a subdivision sued for a declaratory judgment and injunction against enforcement of a provision of the CCRs prohibiting the subdividing of lots within the subdivision. The provision at issue was approved by a vote of owners of 60 out of the 66 lots in the subdivision. The subdivision's original CCRs provided that "a majority of the Lots may 'agree[] to change said covenants and restrictions in whole or in part.'" Reviewing prior Missouri decisions, the Court of Appeals held that this amendatory language "does

not give owners the power to add new burdens to the restrictions by majority vote, rather it merely authorizes changes to existing burdens by majority."

This case law imposes a severe restriction on an HOA's ability to adapt the CCRs to changing conditions over time. Unless the CCRs expressly state that the HOA can add new burdens to the CCRs with less than a unanimous vote of the members of the HOA, then the HOA will have tremendous difficulty in adding new restrictions. For example, if small, roof-mounted windmills are developed that can provide enough electricity to power a residence, then homeowners will have an incentive to purchase and install those systems. An HOA may want to adopt a restriction prohibiting roof-mounted windmills, but it will not be able to get unanimous approval of that restriction because, at the very least, the property owner that wants to install the windmills will not approve the change.

Consequently, municipalities and HOAs both have limitations on their ability to respond quickly and adequately to issues of local concerns. While municipalities and HOAs have different motivations and powers, their basic purpose of providing public services is compatible. By working together to identify problem properties and encourage remediation of the properties, municipalities and HOAs can improve the general welfare of the community. Perhaps they are neither an "odd couple" nor "two peas in a pod," but rather like "peanut butter and jelly;" two things that, while substantially different, work well together. 🌿

**K. Andrew Weber** is an attorney at the law firm of Hamilton Weber LLC in St. Charles, Missouri. His primary practice areas include local government, corporate and real estate law. Weber has extensive experience working with local governments. Further, as part of his real estate practice, Weber represents multiple homeowners associations.

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