

How To Create A Green Community

Amy Bray

Take eco-friendly building a step further.



Amy Bray

is part of the Commercial Real Estate and Banking Group of Andersen, Tate & Carr, in Atlanta. Ms. Bray focuses her practice on community association law, specifically drafting the governing documents for homeowners associations, condominium associations, and commercial associations, including mixed use, "green," and age-restricted community documents. Ms. Bray has extensive experience in negotiating and resolving complex covenant and easement issues in developments all over Georgia and throughout the nation. In addition, she has experience with green building issues in both development and community association contexts, including the drafting of documents for LEED Guideline certified buildings and developments.

THESE DAYS, everything's going green—and as the saying goes, it's not easy being green. However, with a little planning, both new developments and ones with existing sets of covenants, conditions, and restrictions ("CCRs") can be governed in a manner that allows eco-friendly products and practices.

Although builders see value in constructing homes using sustainable building practices and LEED Guidelines (and alternative green standards), and as such trends are gaining in vogue, there seems to be a lag in making sure that the documents that set the ground rules in those developments match, enhance, and preserve green ideals. As well, in established developments, some owners struggle with antiquated use restrictions that prohibit environmentally friendly practices. Even in the commercial context, developers and building owners desire the efficiency and marketing benefits that green building practices provide. As these trends continue to develop, many attorneys are caught at a loss, failing to consider the need to revisit their usual CCR forms.

HOW TO GO GREEN • Of course, when starting with a brand new development the ability to change existing forms is much easier. The greatest challenge is making sure there is continuity among the actual improvements and programs put in place, the marketing plans, and the

final CCRs. When drafting a new development's CCRs, spend some time considering current trends and draft in the flexibility to change restrictions (or require re-evaluation with sunset provisions) to ensure that the final product tracks current market trends and can change as necessary.

In existing CCRs, the issue is complicated by determining how an amendment can be adopted and if the adoption of such an amendment is possible as a practical matter. In representing an association (or groups of owners) seeking to change a set of existing CCRs, take into consideration that the task is as much a public relations matter as a legal one. A "green audit" may be necessary to determine the changes that can be made to accommodate current trends in eco-friendly and energy efficient living, as well as ways to build in flexibility to allow the development to more easily adjust to the evolution of such trends. This concept of a "green audit" can be used to give an owners' committee or advisory group information that would allow them to share potential changes with other owners and give owners a say in the extent of any proposed changes. Having an open process of researching and crafting a final amendment will give owners a feeling of "buying in" to the final product and improve the chances of the successful adoption of a proposed amendment.

Evaluate And Revise

"Stock" Use Restrictions

Most CCRs prohibit clotheslines, solar panels, compost piles, and vegetable gardens; however, in some cases these items may be permitted in limited circumstances. All of these items are essential (and in some cases easy to accomplish) components of a green lifestyle and need to be accommodated in the CCRs. When a particular use or practice would potentially be objectionable, put controls into place to neutralize the potential objection. Restrictions can be revised to permit clotheslines with reasonable limits on when lines may be used. For example,

require that clotheslines must be taken down when not in use or may not be in continual use for more than 10 to 12 hours at a time.

Permit owners to install solar panels, but retain the right to review and designate locations through the established architectural control process (if any) and permit other "off-grid" power sources. Keep in mind that in some areas local utilities offer rebates to customers that generate their own electricity or sell electricity generated at their homes back to the utility. As energy costs skyrocket, these options will look more appealing to owners, in both commercial and residential contexts. Keeping around blanket prohibitions on such options for generating power will become more likely to cause owner dissatisfaction and friction with association boards.

Allow, and even encourage, compost piles and vegetable gardens in designated locations. Restrictions or guidelines allowing compost piles may include controls on locations, screening requirements, or minimum standards for appearance or type of compost system. For example, there are "mini-composters" on the market that are entirely self-contained and take up little space. These composters would work well, if allowed, in developments with homes where residents are in close proximity to their neighbors. Another consideration is whether a self-contained composter is preferable to an exposed compost pile in a development. A truly forward-thinking association might provide a community composting program as an additional amenity, if space allows and if composters on individual units are not a good idea. This type of program will be discussed further below.

As water becomes more of a commodity in some areas, restrictions that require owners with sprinklers on their property to use a sprinkler timer should be considered. Owners can also be required to set an early morning time period for watering, in order to minimize loss of water to evaporation.

Other potential restrictions, which may be too extreme for some developments, include adding a

prohibition on gas-powered leaf-blowers and lawn mowers. Gas-powered leaf-blowers and mowers produce air polluting emissions just like cars do and they generate extensive noise pollution. If such a restriction is adopted, a program such as having community-shared electric mowers, as described below, can make compliance easier.

Another potential use restriction change is the modification of window covering restrictions that permit only white or off-white window coverings. Natural, neutral colors at windows would allow for a wider array of eco-friendly window coverings, while preserving a development-wide standard. Traditional blinds are poor insulators and many are made of polyvinyl chloride ("PVC") or petroleum-based synthetics. Shades and blinds made of fast-growing bamboos and responsibly-harvested basswood are becoming popular but are generally not white or off-white. These types of window coverings come in natural, brown, and honey shades. Other types of window coverings can be used that are eco-friendly and comply with the standard white or off-white requirement, such as roman shades, honeycomb shades, and lined drapes. These products also provide extra insulation that traditional blinds do not.

Check The Various LEED Guidelines

The United States Green Building Council first adopted the Leadership in Energy and Environmental Design ("LEED") Standard Version 1.0 in 1999 and has followed it with several new versions. The LEED program provides standards for developing high-performance green building designs. There are LEED Standards for a variety of projects, including" new construction, major renovations, homes, and retail. Some states and local builder associations have also adopted their own alternative standards, some modifying the LEED standards for local conditions.

The Congress for New Urbanism, Natural Resources Defense Council, and the U.S. Green Build-

ing Council have now developed a pilot version of a "LEED for Neighborhood Development Rating System" (June 2007). This program, much like the LEED rating system for buildings, sets an industry standard with an objective set of criteria for determining just how extensively Smart Growth, new urbanism, and green building standards are applied in a development. A development earns credits in various categories of the LEED rating system and requires incorporating environment-friendly restrictions in the set of covenants, conditions, and restrictions that govern the development. These restrictions serve a variety of purposes, such as the protection of steep slopes, limiting site disturbance in perpetuity, preserving trees in perpetuity, incorporating on-site energy generation requirements, and requiring adherence to light pollution standards. While an existing community may not be able to achieve the standards this program sets out, reviewing the LEED guidelines can provide invaluable assistance as a starting place for "green ideas."

If a client has a development and intends to obtain a LEED certification it is important to ensure that the CCRs track, and carry forward, the program requirements. For example, in the case of a recent mixed-use condominium, we had to deal with requiring recycling programs, assuring adequate changing facilities were available for persons desiring to bike to work at the condominium, and other issues, in order to assure that the initial programs and uses were addressed in the condominium's governing documents.

Make Design Guidelines And Community-Specific Use Restrictions Track Changing Technology

Architectural requirements need to be flexible to accommodate changing technology, as well. Remember that what is considered great today may change or be replaced tomorrow. When dealing with specific items be sure to create a procedure that allows changes to policies and guidelines with-

out the need to obtain owner consents to amend a recorded document. Creating a built-in sunset provision for guidelines or a mandatory review of the guidelines after a specific period of time will also enhance the CCRs and assist in tracking the evolution of products available to owners.

Such guidelines should specifically state that new technologies and products that were not available when the guidelines were initially adopted must be given special consideration in connection with review of requests for approval. Variances should be granted when new products are in harmony with the intent of the guidelines and the then-current appearance of the development. Considerations for architectural guideline changes may include such simple ideas as allowing awnings on homes, as awnings can reduce demand for air conditioning. Keep in mind that the market's evolution may include a return to items that merely fell out of fashion and not just the creation of new products.

For example, in some developments, decks must be painted to match a home's trim colors. However, long-lasting engineered wood has come onto the market after those guidelines initially came into vogue. Painting this type of material may not be recommended and may even void the manufacturer's warranty. If decks must be painted to match trim, and there is no variance permitted or consideration given to the benefits of the new product, there is a direct disincentive for owners to use the preferable "green" material.

In developments where an association is responsible for maintenance of units or utilities are master-metered, consider requiring programmable thermostats in all units and advise associations to teach unit owners how to use them. Require owners to plug air leaks around windows, doors, and wall penetrations or make sure the association has the authority to do so on behalf of owners.

With respect to landscaping, require use of native plants in landscaping, including wildflowers. Use guidelines to minimize lawn areas and encour-

age tree planting. Of course, professional landscapers and arborists can provide valuable input when drawing up reasonable landscape guidelines for a development. The guidelines should encourage or can even require xeriscaping (water conserving landscape design). Some areas of the country, including my home state, are experiencing a significant, long-term drought and the popularity of xeriscaping in such areas is increasing. Owners in a development that embraces xeriscaping will benefit from reduced watering and other landscape maintenance costs from the adoption of xeriscaping principles. A less stringent change to guidelines would be a restriction on planting non-native plants.

Along similar lines, prohibit or limit the use of industrial fertilizers and other synthetic lawn care products, as these products can adversely affect the ecosystem around the property where it is used. Fertilizer contained in runoff has long caused problems in ponds, lakes, and other waterways. Prohibiting its use may actually save costs related to association expenses in the management of a pond or lake that would otherwise be spent countering the fertilizer's effect on the water (and its inhabitants).

Another idea is to make sure the guidelines allow driveways and other concrete slabs to be replaced by geoblock or other aesthetically pleasing permeable surface. In many standard CCRs, such materials are either not addressed or are implicitly prohibited through the description of the materials driveways, sidewalks, and patios can be made of.

Create Community-Wide Programs And Services That Carry Through Environmental Ideals

This is an area where leadership in an association makes "going green" a positive experience. However, the framework for programs the association may want to establish, the creation of committees, and authority for their operation should be set up in advance in the CCRs and related governing documents. The association can adopt programs

to accomplish green goals without needing to create restrictions and require punitive actions for the failure to comply with those restrictions. Programs should be simple and easy to accomplish, as the people involved will be volunteers.

For example, a community composting program or Christmas tree recycling program will require some community involvement but has limited expense and effort. The composting program would only require some space, a few stand alone trash composters, and a few overseers who make sure things go smoothly. Set up electronics recycling programs or computer donation programs to prevent those toxic items from being improperly discarded. A committee can be tasked with soliciting used computer equipment and other electronics from owners and donate them to charitable groups. The net benefit is two-fold: helping the community and preventing electronics from ending up in a landfill.

Set up a committee to place and maintain recycling containers in common areas to serve the entire development. This is especially effective if local garbage collection companies do not provide recycling with their garbage collection services. In the alternative, have a committee partner with local schools to have containers placed in the community in support of school recycling drives.

The association can adopt an internal policy to use environmentally responsible cleaning materials in clubhouse and pool areas and use compact fluorescent light bulbs. Power development lights through solar panels where possible.

The association can buy an electric mower (or two) for use in the development. Giving owners a cleaner, quieter, easy alternative to gas mowers will help minimize the use of gas mowers and will likely be better received than an outright prohibition on gas mowers.

A committee can also be formed to get in touch with local farmers and farmers' markets to set up a market day in the development. This promotes the concept of buying local and can have a posi-

tive effect on the sense of "community" within the development. If open to the public, such a market can also enhance the public image of the development and assist in marketing property or bring in additional traffic.

COUNSELING CLIENTS REGARDING GREEN CHOICES

• The key to representing community associations has always been advocating for reasonableness. The problem is that one person's idea of reasonable is not always the same as everyone else's. This is especially true when it comes to viewing a neighbor's yard, whether it contains a lush green lawn, a meadow of native wildflowers, or laundry drying on a clothesline.

Currently, a backlash against traditional association controls is growing against restrictions that interfere with green living. Stories circulate about fines for hanging out clothes on temporary clotheslines, growing lawns taller in drought conditions, or replacing lawns with wildflowers. Compost piles and vegetables gardens, too, are often the target of enforcement actions.

One can go to the opposite extreme by prohibiting the use of chemical fertilizers, limiting lawn size, or requiring the use of sustainable materials on buildings. While, of course, it is a laudable goal to want to require owners and occupants to adhere to a high standard of environmental responsibility, it will be difficult to police and enforce. When counseling clients as to what restrictions to loosen, re-write, or adopt, keep in mind there are limits to how much restrictiveness will be tolerated on either side of the issue.

In many cases the choice may be easy, especially when developing a community from the start. Practitioners and associations alike should keep the restrictions easy and reasonable, with a focus on easy-to-staff programs and easy-to-enforce restrictions (for example, instituting community recycling, allowing clotheslines), while permitting (but not requiring) the more expensive or intensive aspects

of green living. If one of the greatest complaints about traditional covenants is the rigidity that requires owners to stick to conventional restrictions that prohibit eco-friendly practices, the response should be to create flexibility that gives owners a choice to adopt green practices and to guide them toward reasonable and responsible practices for the benefit of the community. Counsel your clients to put effort into making sure any current owners or potential owners know about unusual provisions through marketing materials, sale contract provisions, and legally required disclosure documents. This can help to ensure that people buying into the development know the ground rules and are not caught by surprise.

Another consideration is the benefit that owners receive from adopting eco-friendly practices. These days the benefits can exceed mere personal satisfaction: there are real dollars to be saved. Utility bills can be cut and tax incentives gained, at both federal and state levels. In addition, energy-saving homes can gain added value. (See *Solarizing Can Pay Off in More Ways Than One*, by Ginny Figlar and Mary Jo Cameron, <http://life.gaiam.com/gaiam/p/SolarizingCanPayOffinMoreWaysthanOne.html>)

It is true that many people see clotheslines in use outside a home as a detractor from the home's appearance. Others feel that a yard is only pretty and well kept if the grass is green and kept short. And few have considered solar cells aesthetically pleasing. Unfortunately, the reality is that prohibiting clotheslines or solar panels and requiring vast expansive lawns are practices that are not appropriate in a community that seeks to be environmentally responsible and ignores the growing trend favoring environmental responsibility in everyday choices. Sustainable, eco-friendly practices and technology

are ever-evolving. Even if the entire community does not seek to adopt these ideals, the flexibility to consider and permit uses and conditions that are becoming more prevalent is key to satisfaction of the community's residents.

If changes to existing CCRs are adopted, be sure the intent behind the change is clear in your amendment or other documents. It will give guidance to people who have to enforce the changes. After the people who adopted the changes are no longer managing the association, such a statement of intent will let future purchasers in the development know about the ideals behind the requirements.

CONCLUSION • Sometimes, these choices will be made for your developments. Some states are considering passing laws that give homeowners the right to install solar panels (such as Hawaii) and take other actions that are environmentally friendly (for example, Arizona and Florida). Counsel architectural modifications reviewers to consider the benefits the owners seek when making a change. Will denying the change prevent those owners from reducing their monthly utility bills? Will it prevent them from getting tax incentives? There may be the savings of real dollars motivating the proposed change. In addition, homes with solar power sources are better equipped to deal with natural disasters, such as Hurricane Katrina. Developments in areas that face power outages due to storms should see the value in encouraging, or at least allowing, on-site power sources. People are making green choices for any number of good reasons, and the CCRs should have the flexibility to put those choices into practice, as long as the changes are right for the owner, the development, and the association.

This article is reprinted with permission from the July 2008 issue of *The Practical Real Estate Lawyer* magazine published by ALI-ABA. To learn more about *The Practical Real Estate Lawyer* and the American Law Institute and American Bar Association please visit their website located at <http://www.ali-aba.org/index.cfm>.