

CHAPTER 1: A BASIC BACKGROUND ON HOAS

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Almost certainly, you have heard the term “homeowners association” or the acronym “HOA.” You may have heard other names for an HOA as well, like owners association, association, community association, condo association, condominium association, townhome association, sub-association, master association, sub HOA, master HOA, property owners association, POA, district association, co-op, or cooperative. I could list more, but you get the idea – there are a lot of different names for HOAs. In this book, we will use the term “association” when referring generally to all types of associations. When we are discussing specific types of associations, we will use the more specific name.

Not only are there different names for associations, but there are also many different aspects of associations that impact how we understand them and even how associations operate. In some ways it reminds me of the ancient Indian parable of the blind men and the elephant. For those who are not familiar with the story, it goes like this:

A group of blind men heard that a strange animal, called an elephant, had been brought to their town, but none of them were familiar with it. Out of curiosity, they said: “We must inspect and know it by touch, of which we are capable.” So, they sought it out, and when they found it, they felt about it.

The first person, whose hand landed on the trunk, said, “This animal is like a thick snake.” For another one whose hand reached its ear, it seemed like a kind of fan. The third man, whose hand was upon its leg, said, the elephant is a pillar like a tree-trunk. The blind man who placed his hand upon its side said the elephant, “is a wall.” Still another, who felt its tail, described it as a rope. The last felt its tusk, stating the elephant is that which is hard, smooth and like a spear. Soon the blind men fell to arguing about what the elephant was really like without any of them really understanding it.

An elephant is large and has different parts to it. If you focused on a single part, you would not really understand the whole creature. Learning about associations can be like blind men trying to figure out what an elephant is like because there are so many different facets to associations and especially association law.

Some Major Aspects Associations Include

For example, an association is, in part a creature of contract. The governing documents of an association constitute a contract and so someone new to associations might say association law is contract law, but that is just the leg of this elephant. Similarly, associations are usually created as part of new subdivisions so they have a lot to do with land use and development. Associations are legal entities and so associations involve corporate governance. Associations also involve collections, insurance, rentals, and on and on.

Why Do We Have Associations?

Because there are so many different aspects of association law and it can get confusing, before we try to understand what an association is, understanding **why** people create associations might be the best place to start in understanding associations. People create associations for multiple reasons, but most people are familiar with association rules about keeping property looking nice. Some people create associations to ensure certain standards are met by each owner in the community.

Imagine you worked hard to keep your home looking nice, but your next-door neighbor had a broken-down old truck raised up on cinder blocks in the front yard that was half hidden by two-foot weeds. Not only would this detract from how your yard looks, but if you ever needed to sell your home, it might be difficult because who wants to move in next to a dump? Even if you were able to sell, the price might be reduced.

It is easy to see why such an owner might find great appeal in a neighborhood where rules require all neighbors to keep things looking nice.

Another “why” behind associations is common area. Common area is property or facilities that the association owns so that all members of the association have a right to use it.ⁱ Common Area might be an amenity that owners want, like a pool, or a necessary component of a project, like a roof that serves multiple units in a condominium project.

If everyone owns these common areas, how do you make sure that everyone contributes to the cost of maintenance. Maybe more important, how do you make sure someone takes care of maintenance at all. Associations are a good way to address these issues. The association collects assessments or dues to cover maintenance costs of the common area (and administrative needs for the association) and the association is tasked with overseeing the maintenance in the first place.

Utah Association Statutes: The Condominium Ownership Act (Utah Code Ann. 57-8-1 et seq.) and The Community Association Act (Utah Code Ann. 57-8a-101 et seq).

Now that we understand why someone might want an association, we can return to what an association is. In Utah there are two different types of statutory associations, a condominium association and a community association. They are even governed by different Utah statutes, the Condominium Ownership Actⁱⁱ and the Community Association Act.ⁱⁱⁱ

For this reason, it is critically important to know what type of association you live in because you need to know which law applies to you and your association. Many of the provisions in the Condominium Ownership Act and the Community Association Act are exactly the same or substantially similar, but there are also crucial differences that dramatically affect owner rights and the process an owner must follow to assert their rights.

Distinguishing Condominium Associations and Community Associations

When most people think of an HOA, they probably have in mind an association governed by the Community Association Act. These are typically associations with single family homes that

usually have rules about keeping your yard and home looking nice. Condominium associations, rather than having single family homes, have condominium units. That said, the way to tell for certain what statute applies to a specific association is to look at the association's declaration of covenants, conditions, and restrictions, which people often refer to as the "declaration" "or CC&Rs."^{iv} We will use the term CC&Rs since it is more familiar to most people.

The CC&Rs will usually expressly "subject" or "apply" the association to the Community Association Act or, if it is a condominium, the Condominium Ownership Act. Some CC&Rs fail to subject an association to either act. Such communities are still associations. However, in those cases, the acts would not apply to that association. Such associations will be limited to the provisions of the association's CC&Rs and other governing documents.

That may not seem significant, but it is often quite problematic for an association to try and operate outside the control of either the Condominium Ownership Act or the Community Association Act. Each of these statutes have laws designed to make the operation of an association much easier and clearer. In such cases, it is often advisable to amend the CC&Rs to apply the acts to the associations. Unfortunately, it can be difficult to get enough owners to vote to approve an amendment.

There is at least one way to subject an association to the Community Association Act without doing so in the CC&Rs (unfortunately, there is not a similar option for the Condominium Ownership Act). The Community Association act provides that "[u]nless otherwise expressly exempted, this chapter applies to an association that registers, or renews or updates the association's registration, with the department under this section."^v Thus, you could subject the association to the Community Association Act by registering the association with the Department of Commerce."^{vi} Many associations register with the department anyway because liens provided under Section 57-8a-301 of the Community Association Act can only arise if the registration requirement is met.^{vii}

Definition of Association

Because Utah has two different association acts, there are two different statutory definitions of the term "association." Associations subject to the Community Association Act are defined in Utah Code Ann. 57-8a-102(2) as follows:

- (a) Except as provided in Subsection (2)(b), "association" means a corporation or other legal entity, any member of which:
 - (i) is an owner of a residential lot located within the jurisdiction of the association, as described in the governing documents; and
 - (ii) by virtue of membership or ownership of a residential lot is obligated to pay:
 - (A) real property taxes;
 - (B) insurance premiums;
 - (C) maintenance costs; or
 - (D) for improvement of real property not owned by the member.
- (b) "Association" or "homeowner association" does not include an association created under Chapter 8, Condominium Ownership Act.

Associations subject to the Condominium Ownership Act are defined in Utah Code Ann. 57-8-3(2) as follows:

- “Association of unit owners” or “association” means all of the unit owners:
- (a) acting as a group in accordance with the declaration and bylaws; or
 - (b) organized as a legal entity in accordance with the declaration.

Both definitions include groups of owners of real property subject to governing documents. Those are the common elements. The main distinction is that associations under the Community Association Act explicitly exclude condominium associations, making such associations the catch all for any association that is not a condominium association.

Associations are also Contracts

Associations are not just controlled by state statutes. People are often surprised to learn that an association is a contractual relationship. Both Utah statutes and case law recognize that associations are controlled by their governing documents, which constitute a contract between the association and the property owners.^{viii}

Many homeowners object to the idea that they have entered into a contract with their association. They point out that they never signed the CC&Rs or any contract agreeing to be a part of the association or to follow association rules. This does not matter. When an owner acquires a lot, they bind themselves to the terms of the CC&Rs and other governing documents.^{ix} Also, if an owner knows there is an association when they buy their property, there is an implied-in-fact contract with the association as well.^x

The next objection often raised by homeowners to the idea that they have entered into a contract with their association is that they did not actually know there was an association or that acquiring their home bound them to a contract with the association. How can I unknowingly enter into a contract, especially when I did not even know about the association or its rules?

It usually does not matter whether an owner actually knew about the association or its rules when they bought their property. Utah’s Supreme Court has observed that if the governing documents are recorded, then those recorded documents impart notice.^{xi}

What Is the Significance that Governing Documents are a Contract?

It is important to note that Utah courts state that the associations governing documents *are* a contract. In most states, courts have only held that they are interpreted as a contract. This distinction takes associations interesting places in the law.

For example, any time there is a claim for a breach of contract in any court case, among the first defenses that an attorney thinks to raise is the “prior breach rule.” The prior breach rule essentially means that if the one party breached the contract first, then the other party does not have to perform under the contract.

Think about this in an HOA context. If the Association tells an owner they are being fined because they have violated the governing documents for leaving a garbage can out, the owner could take a picture of the association park that has not been well maintained. Can that owner argue a prior breach? That is one of the issues the *Kelly v. Timber Lakes* case argued about. Kelly ultimately lost the argument that the association breached first, but the court did not rule that the owner could not raise a prior breach argument, just that in that case the issue raised was not a prior breach.

Another example of how contract theory can influence associations is parking. Associations can restrict parking on private roads owned by the association, but typically anyone can park on a public street. However, theoretically an owner could enter a contract not to park on a public street.

Thus, a New Jersey court found that the association's parking regulations promoted a neighborhood scheme which was created by the deed restrictions.^{xii} Owners, by purchasing the deed to property within the association, agreed to be subject to the covenants, conditions and restrictions of the association.

Therefore, the homeowner, as a matter of *contract*, agreed to additional regulations restricting parking. Other states have followed the New Jersey precedent and, while Utah has not considered the question of parking specifically, Utah Courts have ruled that restrictive covenants are contracts^{xiii} and the "[i]nterpretation of ... restrictive covenants follows the same rules of construction used in interpreting contracts."^{xiv} Consequently, Utah associations can likely enforce parking restrictions in their restrictive covenants, but it is not certain since at least one state, Florida, has found that associations cannot enforce parking on public streets.^{xv}

There are many other ramifications of governing documents being contracts and construed as contracts, but this excerpt is not intended to be exhaustive and probably cannot be exhaustive anyway so it makes sense to mention other key aspects of associations and provide a brief introduction to them instead.

Nonprofit Corporations

Many (possibly most) associations are nonprofit corporations. There is a clear preference in the law to have associations organize as nonprofit corporations. Indeed, both the Community Association Act and the Condominium Ownership Act have provisions that expressly permit associations to organize as nonprofit corporations so long as the governing documents permit it.^{xvi}

When an association is organized as a nonprofit corporation, it is subject to the Utah Revised Nonprofit Corporation Act.^{xvii} This makes it easier for associations to operate and for professionals to deal with associations due to the clear and thoughtful provisions of the Utah Revised Nonprofit Corporation Act. The provisions of the Utah Revised Nonprofit Corporation Act are so helpful in governing associations that the Community Association Act and the

Condominium Ownership Act incorporate the Utah Revised Nonprofit Corporation Act in many instances even for associations that are not organized as nonprofit corporations.

Below are two tables that identify the citations where each of the association acts incorporate the Utah Revised Nonprofit Corporation Act and how:

Table 1: The Incorporation of the Utah Revised Nonprofit Corporation Act in the Condominium Ownership Act.

1. UCA 57-8-8.1(5)(d) permits application of the Nonprofit act indemnification provisions. (Automatic application).
2. UCA 57-8-17(1) incorporates UCA 16-6a-1601(1) through (5). (Automatic application).
3. UCA 57-8-17(1) incorporates UCA 16-6a-1601. (Automatic application).
4. UCA 57-8-17(1) incorporates UCA 16-6a-1602. (Automatic application).
5. UCA 57-8-17(1) incorporates UCA 16-6a-1603. (Automatic application).
6. UCA 57-8-17(1) incorporates UCA 16-6a-1605. (Automatic application).
7. UCA 57-8-17(1) incorporates UCA 16-6a-1606. (Automatic application).
8. UCA 57-8-17(1) incorporates UCA 16-6a-1610. (Automatic application).
9. 57-8-40(2) expressly authorizes a condo association to organize as a nonprofit corporation in accordance with the nonprofit act.
10. UCA 57-8-40(5)(b) gives precedence to the nonprofit act over subsections 5(c) through 5(f). (Must incorporate)
11. UCA 57-8-40(5)(d) gives precedence to any organizational documents over subsections 5(e) through 5(f). (Must incorporate or organize).
12. UCA 57-8-42(1) incorporates the Nonprofit act notice methods as fair and reasonable. (Automatic Incorporation).
13. UCA 57-8-55(1) incorporates Part 11 of the Nonprofit act to merge multiple associations. (Must incorporate).
14. UCA 57-8-57(1) incorporates UCA 16-6a-813 to permit action without a meeting. (Must Incorporate).

The condominium ownership act expressly excludes parts of the Nonprofit Act as follows:

1. 57-8-17(7)(a) excludes 16-6a-1604. (Automatic application).
 2. 57-8-17(7)(b) gives 57-8-17 precedence over the Nonprofit Act. (Automatic Application).
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Table 2: The Incorporation of the Utah Revised Nonprofit Corporation Act in the Community Association Act.

1. UCA 57-8a-218(14)(d) permits application of the Nonprofit act indemnification provisions. (Automatic Application).
2. **UCA 57-8a-221 permits reincorporation of dissolved associations as nonprofit corporations. (Automatic Application).**^{xviii}
3. UCA 57-8a-227(1) incorporates UCA 16-6a-1601(1) through (5). (Automatic Application).

4. UCA 57-8a-227(1) incorporates UCA 16-6a-1601. (Automatic Application).
5. UCA 57-8a-227(1) incorporates UCA 16-6a-1602. (Automatic Application).
6. UCA 57-8a-227(1) incorporates UCA 16-6a-1603. (Automatic Application).
7. UCA 57-8a-227(1) incorporates UCA 16-6a-1605. (Automatic Application).
8. UCA 57-8a-227(1) incorporates UCA 16-6a-1606. (Automatic Application).
9. UCA 57-8a-227(1) incorporates UCA 16-6a-1610. (Automatic Application).
10. 57-8a-228(2) expressly authorizes a condo association to organize as a nonprofit corporation in accordance with the nonprofit act. (Must incorporate).
11. UCA 57-8a-228(5)(b) gives precedence to the nonprofit act over subsections 5(c) through 5(f) of the a nonprofit act. (Must incorporate).
12. UCA 57-8a-228(5)(d) gives precedence to any organizational documents over subsections 5(e) through 5(f) of the nonprofit act. (Must incorporate).
13. UCA 57-8a-214 incorporates the Nonprofit act notice methods as fair and reasonable. (Automatic Application).
14. UCA 57-8a-601(1) incorporates Part 11 of the Nonprofit act to merge multiple associations. (Must incorporate).
15. UCA 57-8a-226(1) incorporates UCA 16-6a-813 to permit action without a meeting. (Must incorporate).

The Community Association Act expressly excludes parts of the Revised Nonprofit Act

1. UCA 57-8a-227(7)(a) excludes 16-6a-1604. (Automatic Application).
2. UCA 57-8a-227(7)(b) gives 57-8a-227 precedence over the Nonprofit Act. (Automatic Application).

One of the most important reasons that associations should strongly consider incorporating as nonprofit corporations is to protect board members and management committee members from liability. The Utah Revised Nonprofit Corporation act provides board members and management committee members protection under the business judgment rule.^{xix} Essentially, this rule, which was codified into the Utah Revised Nonprofit Corporation Act, states that as long as a board member or management committee member meets certain duties (the duty of good faith, care of an ordinarily prudent person in a like position under similar circumstances, and to act in the best interests of the corporation/association), then a director or officer will usually not be liable to the association or its members unless they acted with gross negligence or bad faith.

Associations that are not incorporated, have only the liability protection that is included in the associations' governing documents, which can sometimes be no protection at all. It is a heavy risk to possibly be liable for decisions made as an unpaid volunteer.^{xx}

There are many other aspects of associations, which we will review in later chapters and we will also explore these same topics in greater depth, but this brief introduction provides important background that will help you better understand other issues and provide an important context to understanding associations as a whole so that we do not end up misunderstanding associations like the blind men with the elephant.