

## Association, Know Thyself

Every association, every board, and every resident should have the goal of creating and maintaining a development with a high quality of living, a friendly, neighborly atmosphere, and stable or increasing property values. In order to accomplish this goal, it is essential to “know thyself.” To “know thyself” as an association, you must know and understand what type of development you live in and what laws and documents govern and bind your development, your association, and the owners within it.



mined solely by whether the project has been subjected to the Utah Condominium Ownership Act by recording a declaration of condominium which specifically says the project is subjected to the Condo Act. If so, it’s a condominium. If not, it’s a PUD.

In a PUD, each owner owns their lot, while the association entity holds title to the common area. In a condominium, the association does not own the common property, but rather each owner holds title to an undivided interest in the

common property, as well as to his or her unit. So, for example, each unit owner may own 1.37% of all of the buildings, roofs, streets, amenities and so forth. Unfortunately, these concepts get confused by title and real estate professionals, developers, and local governments, so that, in Utah anyway, we see many PUDs where the common area is owned by the individual owners in percentage interests, just like a condominium, rather than by the Association itself. In a PUD, you are said to “own the dirt” your home sits on, as well as the house itself. The “dirt” may simply consist of the footprint of your house or it may be much larger. In a condominium, you typically own airspace only, from the dry-wall inward and the carpet on the floors upward.

It is essential that you understand what type of community you live in because, assuming your community is governed by an association, the law that applies to a particular association is determined by what type of community it is (condo or PUD), and whether the association is incorporated as a nonprofit corporation. So, it’s also essential that you know whether your association is incorporated (and current in its status with the state). If your community is a condominium, then it is governed by the Utah Condominium Ownership Act. If you live in a PUD, then your association is governed by the Utah Community Association Act. Both condos and PUDs are governed by the Utah Nonprofit

The “Common Interest” Community. A “common interest” community is a community with common rights and obligations shared by all of the property owners. It’s typically a community with common property (“common area”) that is privately owned, managed, and maintained. If there is common property, an association of the property owners (an “HOA” or “community association”) manages it with funds obtained by levying assessments against the individually owned properties. The common interest that defines a “common interest community” is typically tangible property (swimming pools, streets, parking areas, roofs, halls, etc.) but may consist simply of the right to enforce use restrictions and other covenants binding property in the community, in which case there may not be an association at all.

Form of Ownership. There are two main types of “common interest” communities - condominiums and PUDs (a third type, “cooperatives,” are rare in Utah and not discussed here). I use the term “PUD” to mean any common interest community that is not a condominium. To understand what type of development you live in, you must understand the nature of the ownership of the units and common elements. The type of common interest community that you live in (PUD or condo) is deter-

### What Subjects Are Addressed by Which Utah Law?

Corporation Act, if they are incorporated. In sum, two of these three Acts will most likely apply to you (but never all three), and will govern crucial aspects of the day-to-day governance and operation of your community. It is every board member's job to be aware of these laws and their burdens and benefits.

Every common interest community is also regulated by several layers of written documents. The documents are enforceable in a specific hierarchy. Documents that are lower in the hierarchy (e.g., rules) are not enforceable if they conflict with higher level documents (e.g., CC&Rs). Documents are enforceable if they are consistent with the higher documents, and if they were adopted in compliance with the higher documents.

This hierarchy is illustrated by the subject of satellite dishes. They are governed by federal law, the FCC, and cannot be regulated by an association in a way that conflicts with FCC rulings. Another example is that your CC&Rs or bylaws cannot set out provisions for member voting that are prohibited by the Nonprofit Corporation Act. A final example is that a board cannot adopt a rule that takes away traditional property rights from owners when the CC&Rs do not provide warning or notice that such rights may be restricted, such as a rule prohibiting renting units when the CC&Rs are silent regarding renting of units. A rule that affects a substantive prop-

<b>Condominium Act</b> (applies only to condos)	<b>Community Association Act</b> (applies only to non-condos)	<b>Nonprofit Corporation Act</b> (applies to <u>all</u> incorporated associations)
Articles of Incorporation	Articles of Incorporation	Articles of Incorporation
Assessments (authority)	Assessments (authority)	Assessments (authority)
Assessments (collecting, - including liens/foreclosure)	Assessments (collecting, - including liens/foreclosure)	
Budget	Budget	
Bylaws	Bylaws	Bylaws
CC&Rs (Declaration of)	CC&Rs (Declaration of)	
		Committees
Common Area (defined, rights to)	Common Area (defined)	
Common Facilities & Utilities (rights to, termination of)	Common Facilities & Utilities (rights to, termination of)	
Declarant (defined, certain rights and obligations)	Declarant (defined, certain rights and obligations)	
		Directors (number, qualifications, duties, authority, etc.)
Enforcement (of lien, board discretion, rights)	Enforcement (of lien, board discretion, rights)	
Fines	Fines	
Insurance	Insurance	Insurance
	Lease (defined generally)	
Lien Rights	Lien Rights	
Management Committee (specifying some duties, authority)	Board of Directors (specifying some duties, authority)	Board of Directors (number, qualifications, duties, authority, etc.)
		Meetings
		Members List
Notice	Notice	Notice
		Officers
Records		Records
Rental Restrictions	Rental Restrictions	
Reserves	Reserves	
Rules	Rules	
Voting (rights)		Voting (rights, proxies, ballots, etc.)

**This chart is meant to simply illustrate that certain subjects are addressed by statute and to point you in the right direction for each subject listed. The list is not comprehensive. These statutes are the first source of authority for your association, unless they specifically defer to your governing documents or are silent on an issue.**

erty right likely needs to be adopted through a CC&R amendment.

However, having said that, the law also favors the ability of an association to achieve the intended benefits of a common interest community and the ability of a resident to live in peace and quiet, so if the CC&Rs at least grant a general power to adopt rules, then the association also has the power to adopt reasonable rules designed to protect residents from unreasonable interference in the enjoyment of their units and the common area caused by use of other units. The importance of this principle depends on the physical characteristics of a given community, such as the close proximity of units and the extent of shared property and responsibilities. The closer the proximity of units and the greater the shared property and responsibilities, the more inherent authority an association has to regulate the use of individual units to protect the interests of all owners in the use and enjoyment of their property and the common areas.

The multi-layered principles, law and documents governing HOAs are complicated, but they allow a well-run homeowners association to provide owners with increased property values, structured governance, and harmonious living. So, it's important that the board knows and understands the principles, statutes and legal documents that bind the association and its owners, and to freely consult with professionals when it doesn't fully know or understand these things.

By Curtis G. Kimble  
Attorney at Law



**Your Complete Choice  
for  
HOA Representation**

### GOVERNING DOCUMENTS

<b>Articles of Incorporation</b> (filed with Utah Div. of Corporations)	→	establish the association as a nonprofit corporation.
<b>Declaration of CC&amp;Rs</b> (recorded with county recorder)	→	creates rights and obligations which are binding upon the association and future owners of property; contains the fundamental provisions dealing with ownership and property rights.
<b>Plat Map</b> (recorded with county recorder, equal in hierarchy to CC&Rs)	→	is a visual representation of the property descriptions contained in the CC&Rs. It defines physical boundaries and distinguishes between units or lots and common elements and limited common elements.
<b>Bylaws</b> (must be recorded in all associations)	→	set forth procedures for internal government and operation of the association.
<b>Rules and Regulations</b> (not recorded, board adopts, are equal in hierarchy to resolutions)	→	govern use of property, activities, and conduct; intended to fill holes purposely left in the CC&Rs and bylaws and often change over time as the community changes.
<b>Board Resolutions</b> (not recorded, board adopts, are equal in hierarchy to rules)	→	establish rules, policies, and procedures for internal governance and association activities; regulate operation and use of common area.

**The governing documents of an association should not conflict with each other or with the law, but through oversight and faulty drafting, they often do. In the event of conflicting provisions, a statute will prevail over the governing documents and the order set forth in the chart above will then generally prevail. This hierarchy is not definite and may vary based upon the contents of each document, e.g., a more specific provision in the plat will govern over a general provision in the CC&Rs.**

All content is intended as general information only and is not to be construed as legal advice on a specific set of facts. Always consult an attorney for specific legal questions. Richards, Kimble & Winn makes no assurances and expressly disclaims liability for errors and omissions in the contents of this publication. This publication may not be reproduced in whole or in part without the permission of its author and of its copyright holder © 2011 Richards, Kimble & Winn, PC.

**Questions, comments?** E-mail the author at:  
curtis@rkw-law.com

Check out our blog at: [rkwlaw.wordpress.com](http://rkwlaw.wordpress.com)  
Richards, Kimble & Winn, PC  
2040 E. Murray-Holladay Rd., Suite 106  
Salt Lake City, UT 84117  
Phone: (801) 274-6800 Fax: (801) 274-6805  
[www.rkw-law.com](http://www.rkw-law.com)