..ctures for Communities
..ie "Communities Directory" book
..rticle by Dave Henson • dhenson@igc.org
Occidental Arts and Ecology Center • (707) 874-1557
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One of difficulties of writing about the legal structures for intentional communities is that they most often very different from each other. In the space provided, we'll try to cover as many options as possible. While this is necessarily a very legalistic topic, we'll try to summarize the ups and downs of each option in common terms.

Most of us involved in intentional communities have an aversion to legal procedures, government regulation, and taxes. It is often the ugly sides of the American fetish for private property, lawsuits and the corporate form that inspires us to create grassroots democracy and trust based intentional communities in the first place. However, forming an intentional community where the members seek to collectively own land and buildings, and possibly run a business together, requires that at least some of those involved become fluent in the relevant aspects of property and tax laws and regulations. .

We in the United States have inherited a relatively recent tradition of placing the highest value – and legal rights – on private property. The vast majority of cultures around the world for the past many millennia have organized the relationship between themselves and the land they inhabit as community property, or with a sense of stewardship rather than any sense of private property ownership. As we know, the private property model has lead to a rule of law which protects private "rights" to exploit nature for private benefit. Growth is valued above the sustainable management of the "common wealth" of the natural world. Intentional communities are a return to a more traditional – and more ecologically sustainable – model of social organization. Because we are going against the grain, we will run into all sorts of legal barriers. Persevere! We are reclaiming the traditions of our ancestors, and modeling solutions for our children.

What follows are summaries of the options a group of individuals have to hold land and/or conduct business together. Note that the legal form (partnership, corporation, LLC) is decided at the state level, and the tax status is decided at the federal level. While we will primarily be looking at legal forms for owning land, in many cases that same legal form can be used for operating businesses. At times in this article, we will be discussing simultaneously the land owning and business opportunities of a particular legal form.

Options for Community Legal Structures
There are many legal forms that allow an individual or a group of individuals to own real property (land and buildings). Before we examine each organizational form, let's look at some of the more important questions a community should consider while comparing each legal form:

- Does the form fit the values of our community?
- What are the group and individual tax consequences?
- What are the group and individual liability consequences?
- How would the form influence a lender in deciding whether or not to refinance a mortgage or give a loan?
- Does the form set requirements or restrictions for how the organization must divide the organization's profits or losses among the individuals members, partners or shareholders?
- Do the individual members, partners or shareholders have to pay taxes on the organization's profits (as well as receiving the tax benefits from losses)? Does the organizational form itself have to pay the taxes, and benefit from losses? Or do both have to pay taxes?
- Does the form allow the group to assign its own criteria for management and economic decision making authority (ie: only active members get to vote), or does it mandate specific rules for decision making within a group?
- How easy is the form to set-up; to manage over time? How vulnerable is it to changes in the law; to IRS or other governmental scrutiny? How much are annual filing fees?
- Does the form limit the group's electoral political activity (as 501c(3) non-profits do)? Is that important to our group?
- How easy is it to make changes in the controlling documents of the organizational form, or to manage people's joining with or departing from the community?

Their are three basic categories of legal organizational forms that allow an individual or group of individuals to hold real property:
(I) "Sole Proprietorship" (ownership by an individual),
(II) "Co-Ownership" (ownership by a group of individuals), and
(III) "Corporate Ownership" (ownership by an artificial legal entity).

In this article, there is also listed an option (IV), "Creating a Mix of Two or More Legal Forms."

(I) Sole Proprietorship – Individual Ownership
Here, an individual alone owns real property and/or a business. That individual enjoys and suffers all the rights, benefits, profits, responsibilities, taxes and liabilities of such ownership. In a community context, this is one way for an individual community member to operate her/his own business at a community while limiting the impact on the larger community to the terms of any lease agreement they might create – say for use of one of the community buildings as a business shop or office.

One form that communities can take is to subdivide a property into individually owned lots and homes, then create an intentional community of neighbors. When the owner dies, the sole proprietorship terminates, and her/his property is passed on by will to her/his heirs.

Advantages: The relative advantages of typical individual home owning apply, including that this model fits better into the way lenders think about mortgages and refinancing. There will likely be a higher resale value for each home (unencumbered by complex contractual obligations to a larger community). To add more intentionality and legally binding restrictions to the community, the group of individual owners could create a homeowners association (see the "non-profit" section of this article). There are only nominal filing and licensing fees for a sole proprietorship.

Disadvantages: This is certainly the least communal of all options, as the individual or single family owners are not contractually bound to sharing property, expenses, liabilities, or maintenance and decision making responsibilities. Further, each individual home owner could sell or lease his/her property without the consent of the community.

(II) Co-Ownership

This covers a variety of ways a group of people can legally organize to buy and own land and buildings, and to legally conduct for-profit economic activities. Many of these organizational forms differ significantly from state to state, so it is important that you do your own research in addition to the general descriptions you read in this or other books.

1) Joint Tenancy

Joint Tenancy is the joint ownership of a single property by two or more people, where all of the joint tenants have an equal interest and rights in the property.

Joint tenancy can be created several ways: a) when someone wills or deeds property to more than one person; b) when more than one person takes title to a property (as when a married couple buys property in California, the deed usually names them as joint tenants), or c) when joint tenants transfer property to themselves and others (as a way to add more people to your joint tenancy community). All the joint tenants have equal rights to use of the joint property, and all share equally in liabilities and profits. This most often includes sharing all necessary maintenance costs, taxes, and work responsibilities. However, a tenant is responsible for the costs of improvements made without the consent of the other tenants.

Advantages: The right of "survivorship," which means that a joint tenant cannot will her/his interest in the property, but rather upon that joint tenant's death, the title is automatically passes to the surviving joint tenants. The surviving joint

tenants take the estate free from all creditor's claims or debts against the deceased tenant.

Disadvantages: These are significant for most communities, including that a joint tenant may sell or give his/her interest to another person without the approval of the other tenants. Such action causes a severance of the joint tenancy, and the arrangement reverts to Tenancy in Common (see below). Also, if one tenant goes into debt, the creditor seeking collection could force the sale of the property to access the cash value of the debtor tenant's share in the property.

2) Tenancy in Common

Tenancy in common is when two or more people have undivided interest in a property. If not otherwise specified, the presumption is that all the tenants in common share interests in the property equally. The tenants may, however, distribute interest in the ownership of the property at whatever fractions they wish. Taxes and maintenance expenses, profits and the value of improvements on the property must be distributed in the same proportion as the fractional distribution of their shares of ownership.

A tenant in common may sell, mortgage or give his/her interest in the property as s/he wishes, and the new owner becomes a tenant in common with the other co-tenants. Unlike with joint tenancy, there is no right of survivorship – the property interest of a deceased tenant in common would pass to her/his heirs.

Advantages: There are not many for most communities. This is a lowest common denominator legal form, meaning that in lieu of the group creating a more sophisticated and intentional legal form or written agreement, people holding property together are considered tenants in common.

Disadvantages: These would be substantial for most communities, and are basically the same as described in "joint tenancy" (above), with the addition that any one tenant in common can force a sale of the property to recover the value of their interest in the property.

3) Partnership

A partnership is an association of two or more people who carry on a for-profit business. It is the most common way several people can form a small business together. In the simplest form of a partnership, each partner makes equal contributions, shares equally profits and losses, and has equal share to rights, responsibilities and liabilities. If that partnership owns property together, a "tenancy in partnership" exists.

To make the legal side of interstate business easier to negotiate, the Uniform Partnership Act has been adopted in 43 states. It defines a partnership as a for-profit business association where two or more persons are co-owners. The controlling document for a partnership is the "partnership agreement" which at a bare

minimum needs to state the names and addresses of the partners, the fictitious name of the partnership, and be signed by all the partners. It needs to be filed with the county clerk.

Unless otherwise stated in the partnership agreement, every partner can act on behalf of the partnership – including signing contracts and borrowing money – and have that act be binding on the partnership as a whole. This has the potential to be a big problem in that one community member could suffer a lapse of group process and borrow money in the name of the partnership, or buy a boat with the community's partnership checkbook (with the money the community was saving to overhaul the septic system...). All the partners are *jointly and severally liable*, meaning that the whole partnership *and each individual partner* are responsible for the full value of contracts signed by any one partner. This is typically avoided by putting specific language in the partnership agreement that says something like 'purchases over $100 made on behalf of the partnership must require consensus by the partners at a regular partnership meeting,' or 'no individual partner can borrow money on behalf of the partnership.'

A "general partnership" is when each partner has all rights of ownership, and each is liable for all the debts and liabilities of the partnership. A "limited partnership" allows for limited partners to invest, but only be liable for partnership debts and liabilities up to the amount of their share in the partnership. Limited partners have reduced decision making authority and other rights regarding the partnership. In a limited partnership, at least one partner must be a general partner, and that person or persons are jointly and severally liable for all the partnership debts and liabilities.

Advantages: In a partnership, a partner cannot sell or otherwise assign her/his rights in partnership property to another. Similarly, a creditor, wanting to collect a personal debt that an individual partner owes, cannot force a sale or lien on the partnership's property. If a partner dies, his/her rights in the partnership return to the partnership, but the heirs of the deceased partner are entitled to the value of that partner's interest in the partnership. Also, for a community, the partnership form offers maximum decision making control of the organization – the partners can put into their agreement any decision making or profit sharing structure they choose, and, if desired, they can change it over time with minimum legal hassles.

The other major advantage of a partnership is that it has "pass-through tax status," meaning that, while the partners are taxed on the profits of the partnership, the partnership itself is not taxed. Similarly, the tax advantages of losses to the partnership are distributed directly to the partners.

Disadvantages: As noted above, all general partners have unlimited liability. A strong partnership agreement can help remedy this problem. It is cumbersome to add new partners or to have a partner leave. In both cases, the partnership agreement needs to be re-signed by the remaining partners, and filed again with the county clerk. Dissolving a partnership can also be difficult, again depending on the

clarity of the partnership agreement. A partnership cannot hold accumulated earnings in the partnership, but must pass on the profits and losses each year to the partners.

(III) Corporate Ownership
There are several corporate forms that should be considered by a group of individuals who want to hold real property together and/or conduct for-profit or non-profit business as a community.

1) Corporation
A corporation is a legal entity consisting of one or more shareholders, but having existence separate from the shareholders. Over the course of American history, the corporation has been ruled by courts to have the legal status of a "natural person," meaning that it has many of the constitutionally protected rights of we flesh-and-bones people, including free speech, rights to standing in federal courts, rights to due process, and extensive private property rights. This has led in recent decades to court decisions that deny voters the right to limit political campaign contributions by corporations, because it would limit their free speech rights! Courts also have, for example, allowed corporations virtually unlimited rights to barrage our minds with ads ("free speech"), and have severely limited the access that environmental and labor rights regulators have to inspect corporate property and records ("unreasonable search and seizure"). At the same time, unlike we *real persons*, corporations enjoy limited liability and enormous tax breaks (e.g.: fines for environmental crimes can be written off as a business expense).

The unreasonable authorities that corporations have acquired from courts have put the very foundation of our democracy at risk. Corporate lobbying and campaign contributions have so warped our political process, that corporations have swindled enormous tax breaks on their profits. This has led to the pauperization of our schools, health care and welfare systems, family farms, and inner cities. Further, large multinational corporations have recently succeeded in effectively detaching themselves from the control of any particular nation state, and have their own 'lowest common denominator' self-regulation through the World Trade Organization and the new Multilateral Agreement on Investments. There is a growing grassroots movement dedicated to getting at the root of so many of our social, economic and environmental problems: illegitimate corporate authority to rule our economy, political process, culture and minds.

With that off my chest, let's get back to business of creating alternatives to corporate control of the world: building intentional communities! The basic corporate form is not the best legal form for a community. Compared to an LLC or a partnership, the disadvantages outweigh the advantages.

Advantages: A corporation is a common way to raise capital. It is familiar to investors, and legal precedence has been established for every possible sticky situation. Ownership is transferred easily, and the corporation lives forever: it

continues until terminated, surviving the departures and deaths of the shareholders. The main advantage is limited liability. A corporation can often also accumulate earnings over the years and distribute them when the tax advantages are best for the shareholders.

Disadvantages: Profits are taxed twice – once as corporate taxes, then again as shareholder personal income. There is somewhat stringent government oversight, and there are many legal requirements (keeping records, holding meetings, keeping minutes, and filing reports). Incorporation costs, legal fees and annual registration fees ($800/year in California, for example) should be considered too.

2) Chapter S Corporation

This form is essentially like a corporation, but with the tax advantages of a partnership or an LLC. In fact, tax filing is based on partnership return. The tax implications of an S Corporation are the most complex of any of the similar legal forms – one should consult a tax attorney or accountant about the specifics. I'm not aware of any reason to form and S Corporation over an LLC.

Advantages: Eliminates the double taxing of the corporation. Keeps limited liability advantages of the corporation. Allows pass-through of losses to offset income from other sources. It is a common way to raise capital. Ownership is transferred easily. Like a regular corporation, this entity continues until terminated, outliving its shareholders of any one time.

Disadvantages: All profits must be distributed and taxed annually. You can't have over 35 stockholders. Lots of rules - more than a regular corporation. There are specific limits on who can join as shareholder.

3) Limited Liability Company (LLC)

All 50 states have enacted LLC laws since 1988. There is a move in Congress to make a uniform LLC law so states can have common LLC rules. For many communities who are holding real property and are conducting any kind of for-profit business, this is likely the best legal form to use.

The initial filing fees vary in states from $50 to $500 – most states are around $100. The annual tax is $0 in most states, but $800 in CA, $500 in MA and less than $500 in a half dozen other states. An LLC is controlled by an "operating agreement," and the participants are called "members." The LLC is similar to S Corporation, with its limited liability and pass-through taxation status, but the LLC has substantially fewer restrictions than an S Corporation.

An LLC is treated as a partnership for tax purposes instead of as a corporation – if it lacks a majority of the following corporate characteristics:
1) limited liability
2) continuity of life
3) centralized management

4) free transfer of ownership

The LLC law in most states makes it pretty easy to comply with the above restrictions.

Advantages:
Like a partnership or S Corporation the LLC avoids double taxation of a corporation. Unlike an S Corporation, their is no limit on the number of shareholders. Unlike a partnership, LLC members are not liable for LLC debts. Unlike a corporation, there is no statutory necessity to keep minutes, hold meetings, or make resolutions. The operating agreement can allocate different decision making rights to different kinds of members (for example, the community could decide that LLC investors are limited to voting only on expenditures which exceed a certain dollar amount, keeping day-to-day decision making in the resident group). Admitting new members is easy, and any type of legal entity can join an LLC including a person, a partnership, a corporation, another LLC, trusts, and foreigners.

Disadvantages:
An LLC cannot accumulate earnings like a partnership can. It must distribute them the year the earnings are made. Annual fees are typically greater than for corporation (as noted above).

4) Non-Profit Corporation - THIS ITALICIZED PART STILL BEING WORKED ON
* *Homeowners associations*
* *condominium associations*
* *shields members from liability*
* *delegates management to the officers of the corp - widely accepted*
* *perpetual existence (not effected by comings and goings)*
* *file with state and IRS*
* *deal with AG*
* *Documents:*
    * *articles of incorporation*
    * *by-laws*
* *can't advocate*
* *religious non-profits under IRS Section 501(d). Donations to a 501(d) organization are not tax deductible for the donor.*

2) Condominium
* *a non-profit condo association owns al of the land on which the separately owned condos are built.*
* *association maintains the common areas and governs outside of units*
* *Usually mortgaged and financed individually, with monthly assessment for common areas*
* *controlling document is a CC&R (Covenants, Conditions and Restrictions), & controlled by board of directors (like homeowners association)*
* *typical for co-housing. Banks understand. They can be undervalued, though.*

* *This fits well with resale; and are easier to refinance*

3) Cooperative Associations
* *Coop owns the land, common bldgs, all units, and the improvements*
* *Each member does not own title, but a share in the Coop, and has a lease with Coop*

Advantages:
* *Coop can specify membership requirements better than subdivision (where individuals can sell to whomever they wish),*
* *equity level can be set at beginning, to limit speculation and high prices*
* *board meeting minutes*
* *usually financed by a single loan, the group has to qualify together - can be advantage*

Disadvantages:
* *joint and several liability (to the extent of the equity in their shares) for the obligations of the association*
* *hard to get a bank to finance one individual's but-in, especially if the coop agreement limits resale*
*

This fits well with resale; and are easier to refinance

1) Land Trusts

A trust is an arrangement where legal title to property is transferred by the grantor to a trustee or trustees, to be held and managed by that person or persons for the benefit of the people specified in the trust agreement (called beneficiaries).

Conservation Easements

(IV) A Mix of the Previous Three Categories of Legal Forms
* *private homes and yards are subdivided or condominium*
* *common bldgs & common lands could be cooperative or land trust*
  * *where all the individual unit holders are members*
* *or, a non-profit homeowners association could own common lands*
  * *where all the individual lot owners are members*
* *etc*

Personal vs. Community Property

So far we've reviewed ways for a community to hold title to real property. There still remains the question of *personal property*. Some communities require that, as part of joining the community, some or all of the individual's personal property be transferred to the organization, whether it be a partnership, LLC, corporation or other form. This might include money and bank accounts, cars, and any other private personal property. Some communities require a 'vow of poverty,' and the giving up of personal property to the organization. Others have certain personal property contribution requirements listed in their partnership agreement, bylaws, or

operating agreement. Such agreements can also govern what personal property a departing member or partner may take with them from the organization.

Most typically, the community holds title to the land, and individual community members retain ownership of their personal property. As for the buildings, there are two typical ways communities work this out.

One way is that a community will hold title to all the homes and shared buildings as community property through their partnership or LLC, for example. The homes and other buildings are then used by community members for as long as they are members of the community, probably for some monthly payment to that partnership or LLC. When someone leaves, there is no need to sell the individual home. This eliminates the problem of having a departing member decide who will take their place in the community, and largely does away with housing cost speculation on the houses in the community. There is most often, however, a need to reconcile that departing member's financial, material and/or sweat equity in that home. Some communities don't place a value on this at all – when you leave, you leave without equity. Others put simple or complex formulas into their written agreements so that when a person leaves (and it should be expected that it won't be on the best of terms), there is no question of how to figure what monetary compensation that departing member receives. It is absolutely critical to address this question in your agreements *before* someone leaves. Otherwise, the irreconcilable differences may force you all into court, to nobody's benefit.

The other way that communities manage the question of who holds title to the buildings, is to have each individual or family own their own home, the improvements on that home, and sometimes the land under and just around the home. The community owns the overall property around which the homes are situated, and manages all of the common lands and common buildings. Often county zoning regulations will not allow for this level of subdivision of ownership, but if it is legal, it lets individuals and families have maximum control over their own homes.

The problem here is when someone wants to leave the community, they have to sell their house. Who decides on the value of the home? This begs the question of who decides whether a community member can build onto their home, thus raising the price of their home if they eventually leave. Does the community set style guidelines? Who decides whether or not to accept a particular willing buyer? These are very difficult questions that need to be addressed in your written agreements.

Research and Resources

As your community meets to craft your legal and organizational structures, focus your discussions on making decisions! It is common to have a two hour discussion on these topics where real progress and agreements are made, but leave the room without writing the exact decision down. It is impossible to structure the legal organization of your community in one or two meetings, so save the last 15

minutes of each meeting to get down in that special binder exactly what was agreed upon, what the nature of the questions are on the issues where no decision was reached, what was left to discuss, and what the next steps you all will take to continue to move the process along.

My best research advice is for you to form a committee of a few people in your community to take on a research project. After doing some work, have the committee present the best options for community legal structures to the whole community for extensive discussion. This may be the one area to break down and pay for some legal advice – but do it after you're committee has become literate about the questions and options. Ask around for an attorney with experience in tax and real estate law. You want someone who will really understand the "alternative" nature of your endeavor. A certified public accountant (CPA) can often be very helpful on the tax questions. Remember, an attorney or CPA works for you – their advice on organizational questions is only as good as the community's clarity about what your economic and organizational goals are.

Try the legal clinic at a law school near you. They often offer legal advice inexpensively or for free, and may be able to hook you up with a law student looking for a research project.

The world wide web is an excellent place to get free legal advice. In doing research for this article, I found many sites with very clear and lengthy legal notes about the options discussed here. Particularly helpful for this article were "Legal Issues for Communities," by Rob Sandelin (1997) at www.infoteam.com/nonprofit/nica; "Methods of Taking Title to Real Property," by David V. Lis at www.masteryinc.com; and "LLC FAQ" at www.bizfilings.com/frgllc. Search for "Limited Liability Company," "Partnership," etc, and you will find more than you can read!

Nolo Press, in Berkeley, CA, puts out some great self-help legal books, including step-by-step books on how to set-up a corporation, partnership, LLC or non-profit. Some come with the papers you need to file on a computer disk: Nolo Press, (510) 549-1976, 950 Parker Street, Berkeley, CA, 94710.

The Institute for Community Economics puts out the "Community Land Trust Handbook" and other resources on land trusts: (413) 746-8660; 57 School Street, Springfield, MA 01105.

Biography
Dave Henson is the Director of the Occidental Arts and Ecology Center (OAEC), a 501(c)3 non-profit educational and rural retreat center near the coast in Sonoma County, California. Dave is also a founding member (July, 1994) of the Sowing Circle Partnership and intentional community that holds the title to an 80 acre property, including four acres of organic gardens and orchards and over 25 buildings. OAEC leases from Sowing Circle the use of most of the buildings, gardens and wildlands to operate the learning center.