Homeowner association

For a discussion of nonprofit, voluntary neighborhood advocacy groups, see neighborhood association.

In the United States, a **homeowner association** (**HOA**) is a corporation formed by a real estate developer for the purpose of marketing, managing, and selling of homes and lots in a residential subdivision. It grants the developer privileged voting rights in governing the association, while allowing the developer to exit financial and legal responsibility of the organization, typically by transferring ownership of the association to the homeowners after selling off a predetermined number of lots. Membership in the homeowners association by a residential buyer is typically a condition of purchase; a buyer isn't given an option to reject it. Most homeowner associations are incorporated, and are subject to state statutes that govern non-profit corporations and homeowner associations. State oversight of homeowner associations is minimal, and varies from state to state. Some states, such as Florida[1] and California, have a large body of homeowner association law, and some states, such as Massachusetts, have virtually no homeowner association law.

The fastest growing form of housing in the United States today is common-interest development (CID), a category that includes planned unit developments of single-family homes, condominiums, and cooperative apartments.[2] Since 1964, HOAs have become increasingly common in the United States. The Community Associations Institute trade association estimated that HOAs governed 24.8 million American homes and 62 million residents in 2010.[3]

1 History

Homeowners associations first emerged in the United States in the mid-19th century. Their growth was limited, however, until the 1960s, when several factors led to a period of rapid national growth, including, a push towards large scale residential development by the Federal Housing Authority and the Urban Land Institute; an increasing cultural preference for architectural uniformity; a decline of readily available land; rising construction costs; and a modification of federal mortgage insurance rules to include cooperatives and condominiums.

Early covenants and deed restrictions were exclusionary in origin, and in the first half of the 20th century many were racially motivated.[4] For example, a racial covenant in a Seattle, Washington neighborhood stated, "No part of said property hereby conveyed shall ever be used or occupied by any Hebrew or by any person of the Ethiopian, Malay or any Asiatic race."[5] In 1948, the United States Supreme Court ruled such covenants unenforceable, in Shelley v. Kraemer. However, private contracts effectively kept them alive until the Fair Housing Act of 1968 prohibited such discrimination. Some argue that they still have the effect of discriminating by requiring approval of tenants and new owners.

The explosion in the number of CIDs can be traced back to a publication by the Urban Land Institute in 1964, also known as TB 50.[6] This technical bulletin was funded by the National Association of Home Builders and by certain federal agencies: the FHA, United States Public Health Service, Office of Civil Defense, the Veterans Administration and the Urban Renewal Administration.[7]

The Federal Housing Administration in 1963 authorized federal home mortgage insurance exclusively for condominiums or for homes in subdivisions where there was a qualifying homeowner association. The rationale was that developers wanted to get around density laws. The effect, however, was to divert investment from multifamily housing and home construction or renovation in the inner cities, speeding a middle-class exodus to the suburbs and into common-interest housing. The federal highways program further facilitated the process. In the 1970s, a growing scarcity of land for suburban development resulted in escalating land costs, prompting developers to increase the density of homes on the land. In order to do this while still retaining a suburban look, they clustered homes around green open areas maintained by associations. These associations provided services that formerly had been provided by municipal agencies funded by property taxes; yet, the residents were still required to pay those taxes. Accordingly, local governments began promoting subdivision development as a means of improving their cash flow.[8]

Another primary driver in the proliferation of single family homeowner associations was the U.S. Clean Water Act of 1977, which required all new real estate developments to detain storm water so that flow to adjoining properties was no greater than the pre-development runoff. This law required nearly all residential developments to construct detention or retention areas to hold excess storm water until it could be released at the pre-development flow level. Since these detention areas serve multiple residences, they are almost always designated as "common" areas, which becomes a reason to create a home-

owner association. Although these areas can be placed on an individual homeowner's lot, eliminating the need for an association, nearly all U.S. municipalities now require these areas to be part of a common area to ensure an entity, rather than an individual or the municipality itself, has maintenance responsibility. Real estate developers, therefore, have established homeowner associations to maintain these common areas. With the homeowner association already in place, the developers have expanded their scope to provide other requirements and amenities that they believe will help them sell homes.

2 Industry

Community Associations Institute (CAI) is a trade organization of individuals and businesses that sell supplies or services to homeowners associations, such as lawyers and community association managers. The CAI does not represent homeowners associations. It lobbies the legislatures of states that have significant proportions of homeowners living in HOAs to promote legislation beneficial to its members, while opposing laws that would harm its members.[9]

2.1 Authority

For purposes of this article the term "homeowners association" or "association" refers to a mandatory homeowners association, where the homeowner's property interest is the real property (dirt) and improvements thereon. Condominiums and cooperatives are considered by most states to be a different form of community association because the property interest is different. The authority of a homeowners association is determined by relevant state statutes and the "governing documents." The governing documents usually include the Covenants, Conditions, and Restrictions (CC&Rs) and the corporate documents (articles and bylaws) referenced by the CC&Rs and usually attached as exhibits. They may also include board-enacted rules as authorized (expressly or implicitly) by the CC&Rs.

The association is structured as a private corporation and subject to the state's corporation statutes and/or specific association statutes. It is incorporated by the developer prior to the initial sale of homes, and the CC&Rs are recorded when the property is subdivided. The "governing documents" usually include the CC&Rs, the corporate documents (articles and bylaws) as referenced in the CC&Rs, and board-enacted rules and regulations as authorized (expressly or implicitly) by the CC&Rs. In these situations, the governing documents "run with the land". This means that the governing documents "touch and concern" the land, and there is no mutual agreement between the seller and subsequent buyers regarding their terms. In essence, these are "adhesion contracts"; they are a condition of ownership and a prospective buyer must take it or leave it.

If an owner sells the encumbered real property (and improvements thereon), the seller ceases to be a member of the association and the new owner automatically becomes a member. All members of a mandatory homeowners association must pay assessments to and abide by the association's governing documents.[10]

2.2 Limitations to enforcement of CC&Rs

The governing documents may be limited by public policy, and state or federal statutes. However, in some cases because of the constitutional prohibition against "impairment of contract", a covenant provision may "trump" a statute. This occurs where a later-enacted statute adversely affects a substantive contractual provision that existed before the statute was enacted. Predictably, there is also an exception to the exception – a contractual provision that is rendered illegal by later enacted state or federal law cannot be constitutionally protected. For example, a developer-drafted covenant giving himself the sole right to amend the CC&Rs was declared unenforceable as a matter of public policy in at least one state, where the developer attempted to amend years after he had sold all the property. (That state's legislature later codified that public policy). These examples provide good reason for an association to obtain the advice of competent legal counsel.

2.3 Board of directors

The association's board of directors is composed initially of developer-appointed members, then of a mix of appointees and of homeowners elected at the annual meeting to maintain the common areas and enforce the governing documents. The mix changes to solely homeowners as the percentage of land/home ownership shifts away from the developer. The board of directors makes decisions regarding the association, including management of the association's finances, protecting the associations real and intangible assets, and enforcing the governing documents.[11] Boards of directors have a legal responsibility, known as Fiduciary Duty to the members. Violation of that duty may result in liability for individual directors. The association will often adopt an ethics code for the board members to ensure they act ethically and in accordance with their responsibilities.[11]

2.4 Association management

Many homeowners associations hire management companies to handle the governing duties of the association. Management services are typically broken up into three categories: financial only, full management, and on-site

management. Financial services will typically cover administration of bank accounts, bookkeeping, assessment collection, and the HOA's budget. Full management typically includes the financial services plus help with board meetings (keeping minutes, agendas, etc.), board elections, and maintenance duties (obtaining contractor bids, etc.). On-site management typically includes all of the full management services plus direct assistance to homeowners with an assigned manager to the HOA. Education requirements for managers varies from state to state, with some requiring certification under all circumstances and others having a more lenient approach. For instance, while California does not require HOA managers to be certified, it does require that managers meet certain educational requirements to claim certification.[12]

2.5 Powers

Associations provide services, regulate activities, levy assessments, and may, if authorized by CC&Rs or a state legislature, impose fines. Unlike a municipal (public) government, they are not deemed "state actors" subject to constitutional constraints.[13] A homeowners association can enforce its actions through the threat and levying of fines and private legal or equitable actions seeking damages, foreclosure or injunction, under civil law. Homeowners have the ability to defend against such actions, and are usually entitled to sue associations for contractual or statutory violations, or for a legal determination as to the enforceability of a provision in the CC&Rs corporate documents or board-enacted rule. However, they cannot sue for civil rights violations under 42 U.S.C. 1983 because associations are private corporations and not public governments.

Association boards may appoint corporate officers or officers may be elected directly by the membership (depending on the jurisdiction). The officers and the board may create committees, such as an "architectural control committee", a pool committee, a neighborhood watch committee, and others, as authorized by the CC&Rs or state statutes.

2.6 Assessments

Mandatory homeowner associations can compel homeowners to pay a share of common expenses, usually proportionate to the ownership interests (either by unit or based on square footage). These expenses generally arise from the operation and maintenance of common property, which vary dramatically depending on the type of association. Some associations little or no common property and the expenses solely involve enforcement of use restrictions or assumed services. Others are effectively private towns with elaborate amenities including private roads, street lights, services, utilities, amenities, commonly owned buildings, pools, and even schools. Assessments paid to homeowner associations in the United States amount to billions of dollars a year, but are not classed as property taxes.[14]

When determining what the monthly/annual assessment should be, it is important to consider what funds are required. There should always be a minimum of two funds: an operating fund and a reserve fund. The operating fund is used to pay for the operating expenses of the association. A reserve fund is used to pay for the infrequent and expensive common area assets maintenance, repair and replacement costs. The reserve fund is significant when reducing the chances of a special assessment (mentioned in the risks below). Obtaining a reserve study is recommended to help determine and set the reserve contribution rate which is included in the regular monthly assessment.

3 Benefits

A HOA (Homeowners Association) provides a number of benefits which vary depending on the community and structure of the HOA. These benefits may include an opportunity for residents to enforce and amend the CC&RS (covenants, conditions and restrictions) to maintain the common scheme of development, shared neighborhood values and minimize ownership maintenance responsibility. Use restrictions may be stricter than municipal codes provide but are usually subject to statutory constraints. For example, HOAs may regulate the exterior appearance of single family homes and even the conduct of owners, tenants and guests (such as prohibiting nuisances like excessive noise). Many homeowner associations operate and manage common property owned by the HOA for the exclusive use of its members and their tenants or guests. Common property (or area) is an important benefit of HOAs, providing homeowners with amenities such as a pool, clubhouse, gym, tennis court or walking trail that they may otherwise be unable to afford. The extent of these amenities varies widely depending on the community. [15]

Board members or officers are elected by the homeowners, with the ability in some states for the membership to remove board members. CC&Rs (Covenants, conditions and restrictions) and sometimes state statutes require both board and membership meetings to conduct HOA business.

Each member of a homeowner association pays assessments that are used to cover the expenses of the development. Some examples are landscaping for the common areas, maintenance and upkeep of the subdivision's amenities, insurance for commonly owned structures and areas, mailing costs for newsletters and other correspondence, employment of a community association manager, association legal counsel, security personnel and gate maintenance, and any other items authorized by the

governing documents.

Some residents rate their overall experience living in a common interest development as good. A survey of 709 people by Zogby International, sponsored by the Foundation for Community Association Research, an organization created by the Community Associations Institute trade association, showed that for every homeowner who rated the overall experience of living in a homeowner association as negative, seven saw it as positive.[16][17]

The imposition of an HOA accomplishes several benefits for the municipality. First, these amenities may be burdened with property taxes which would not be the case if the amenities were owned by the municipality, thus the mandated private amenities are cash generators for the municipalities. Second, the municipalities bear no obligation to maintain the amenities given that they are owned by the HOA. On the other hand, HOA communities are sometimes exempt from taxes on certain services provided by the municipality, if the HOA is providing them instead as the amenities funded by the HOA are for the exclusive use of its members and are not be shared with citizens of the larger municipality.

4 Onerous regulations

Homeowner associations have been criticized for having excessively restrictive rules and regulations on how homeowners are allowed to conduct themselves and use their property.[18] Some maintain that homeowner association leaders have limited financial incentive to avoid indulging in rigid or arbitrary behavior; unless people begin to leave in droves, it will have little effect on the value of a board member's home.

In *The Voluntary City*, published by the libertarian Independent Institute, Donald J. Boudreaux and Randall G. Holcombe argue not in universal favor of homeowners associations, opining that they do not necessarily have advantages over traditional governments. These include the fact that the association's creator, e.g. a developer, has an incentive to set up a government structured in such a way as to maximize profits and thus increasing the selling price of the property. If a certain decision would increase the selling price of certain parcels and decrease the selling price of others, the developer will choose the option with the highest net income to itself. This will sometimes result in suboptimal outcomes for the homeowners. Jim Fedako has argued that homeowners associations are better than other forms of government, because their powers are limited by contract.[19]

5 Undemocratic

Some scholars and the AARP charge that in a variety of ways HOAs suppress the rights of their residents.[20] Due to their nature as a non-governmental entity, HOA boards of directors are not bound by constitutional restrictions on governments, although they are essentially a de facto level of government.[21] If a homeowner believes a breach of duty has occurred by the board of directors, they have the ability to be elected to the board during the next election or in extreme cases, sue the association at their own expense.

Corporation and homeowner association laws provide a limited role for HOA homeowners.[22] Unless either statutory law or the corporation's governing documents reserve a particular issue or action for approval by the members, corporation laws provide that the activities and affairs of a corporation shall be conducted and *all corporate powers shall be exercised* by or under the direction of the board of directors. Many boards are operated outside of their state's non-profit corporation laws. Knowledge of corporate laws and state statutes is essential to a properly run HOA.

Once notified by a homeowner, attorney or other government official that an HOA organization is not meeting the state's statutes, the boards have the responsibility to correct their governance. Failure to do so in certain states, such as Texas, can result in the levy of misdemeanor charges against the board and open the board (and HOA) to potential lawsuits to enforce state laws of governance. In some instances, a known failure to rectify the board's governance to meet the state's statutes can open the board's members to personal liability as most insurance policies indemnifying the board members against legal action do not cover willful misconduct.

Homeowner associations establish a new community as a municipal corporation.[23] Voting in a homeowner association is based on property ownership,[24] Only property owners are eligible to vote. Renters are prohibited from directly voting the unit, although they can deal directly with their landlords under their lease contract, since that is the party who has responsibility to them.

Additionally, voting representation is equal to the proportion of ownership, not to the number of people.[25] The majority of property owners may be absentee landlords, whose values or incentives may not be aligned with the tenants'. Homeowners have challenged political speech restrictions in associations that federal or state constitutional guarantees as rights, claiming that certain private associations are *de facto* municipal governments and should therefore be subject to the same legal restrictions.

Of great concern is the fact that several court decisions have held that private actors may restrict individuals' exercise of their rights on private property. A recent decision in New Jersey held that private residential communities had the right to place reasonable limitations on political speech, and that in doing so, they were not acting as municipal governments.[26] With few exceptions, courts have held private 'actors' are not subject to constitutional limitations — that is, enforcers of private contracts are

not subject to the same constitutional limitations as police officers or courts.

In 2002, the 11th Circuit Court of Appeals, in *Loren v. Sasser*, declined to extend *Shelley* beyond racial discrimination and disallowed a challenge to an association's prohibition of "for sale" signs. In *Loren,* the court ruled that outside the racial covenant context, it would not view judicial enforcement of a private contract as state action, but as private action, and accordingly would disallow any First Amendment relief.[27]

In the *Twin Rivers* case, a group of homeowners collectively called The Committee for a Better Twin Rivers sued the Association, for a mandatory injunction permitting homeowners to post political signs and strike down the political signage restrictions by the association as unconstitutional. The appeals court held the restrictions on political signs unconstitutional and void, but the appeals court was reversed when the New Jersey Supreme Court overturned the Appellate courts decision in 2007 and reinstated the decision of the trial court.[28]

In some HOAs, the developer may have multiple votes for each lot it retains, but the homeowners are limited to only one vote per lot owned. That has been justified on the grounds that it allows residents to avoid decision costs until major questions about the development process already have been answered and that as the residual claimant, the developer has the incentive to maximize the value of the property.[29]

6 Board misconduct

The New Jersey Department of Community Affairs reported[30] these observations of Association Board conduct:

> "It is obvious from the complaints [to DCA] that that [home]owners did not realize the extent association rules could govern their lives."

> "Curiously, with rare exceptions, when the State has notified boards of minimal association legal obligation to owners, they dispute compliance. In a disturbing number of instances, those owners with board positions use their influence to punish other owners with whom they disagree. The complete absence of even minimally required standards, training or even orientations for those sitting on boards and the lack of independent oversight is readily apparent in the way boards exercise control"

> Overwhelmingly ... the frustrations posed by the duplicative complainants or by the complainants' misunderstandings are dwarfed by the pictures they reveal of the undemocratic life faced by owners in many associations. Letters routinely express a frustration and outrage easily explainable by the inability to secure the attention of boards or property managers, to acknowledge no less address their complaints. Perhaps most alarming is the revelation that boards, or board presidents desirous of acting contrary to law, their governing documents or to fundamental democratic principles, are unstoppable without extreme owner effort and often costly litigation.

Certain states are pushing for more checks and balances in homeowner associations. The North Carolina Planned Community Act,[31] for example, requires a due process hearing to be held before any homeowner may be fined for a covenant violation. It also limits the amount of the fine and sets other restrictions.

California law has strictly limited the prerogatives of boards by requiring hearings before fines can be levied and then reducing the size of such fines even if the owner-members do not appear. In California, any rule change made by the board is subject to a majority affirmation by the membership if only 5% of the membership demand a vote. This part of the civil code[32] also ensures that any dissenting individual who seeks a director position must be fully represented to the membership and that all meetings be opened and agenda items publicized in advance. In states like Massachusetts, there are no laws to prohibit unilateral changes to the documents by the association board.

7 Double taxation

Most homeowners are subject to property taxation, whether or not said property is located in a planned unit development governed by a homeowners association. Such taxes are used by local municipalities to maintain roads, street lighting, parks, etc. In addition to municipal property taxes, individuals who own private property located within planned unit developments are subject to association assessments that are used by the development to maintain the private roads, street lighting, landscaping, security, and amenitites located within the planned unit development. A non-HOA property owner pays taxes to fund street repairs performed by the city; the HOA property owners pay these same taxes, but without the same benefit, since the local government will not maintain the streets to their homes. Thus the HOA property needs to pay a second time, to privately maintain the street.

The proliferation of planned unit developments has resulted in a cost savings to local governments in two ways. One, by requiring developers to build 'public improvements' such as parks, passing the cost of maintenance of the improvements to the common-interest owners; and

two, by planned-unit developments being responsible for the cost of maintaining infrastructures that would normally be maintained by the municipality.[33]

8 Financial risk for homeowners

In some U.S. states (such as Texas) a homeowners association can foreclose a member's house without any judicial procedure in order to collect special assessments, fees and fines, or otherwise place an enforceable lien on the property which, upon the property's sale, allows the HOA to collect otherwise unpaid assessments. A proposed constitutional amendment in Texas would limit the power of HOA's in such matters. A case in point involves a soldier who, in 2008, was informed his fully paid-for $300,000 home in Frisco, Texas had been foreclosed on and sold for $3,500 by his HOA over unpaid dues of $800 while he was serving in Iraq.[34] In 2010, the case was settled and the soldier regained ownership of the home. Federal laws protecting military personnel may have been his defense; however, a gag order prevents details from being known.

Other states, like Florida, require a judicial hearing. Foreclosure without a judicial hearing can occur when a *power of sale clause* exists in a mortgage or deed of trust.[35]

A report self-published by a professor at Washington University disputes the claim that HOAs protect property values, stating, based on a survey of Harris County, Texas (which had an unusual legal regime regarding foreclosures): "Although HOA foreclosures are ostensibly motivated by efforts to improve property values, neither foreclosure activity nor HOAs appear linked with the above average home price growth."[36]

Homeowners association boards can also collect special assessments from its members in addition to set fees, sometimes without the homeowners' direct vote on the matter, though most states place restrictions on an association's ability to do so. Special assessments often require a homeowner vote if the amount exceeds a prescribed limit established in the Association's by-laws. In California, for example, a special assessment can be imposed by a Board, without a membership vote, only when the total assessment is 5 percent or less of the association's annual budget. Therefore, in the case of a 25-unit association with a $100,000 annual operating budget, the Board could only impose a $5,000 assessment on the entire population ($5,000 divided by 25 units equals $200 per unit). A larger assessment would require a majority vote of the members.

In some exceptional cases, particularly in matters of public health or safety, the amount of special assessments may be at the board's discretion. If, for example there is a ruptured sewer line, the Board could vote a substantial assessment immediately, arguing that the matter impacts public health and safety. In practice, however, most boards prefer that owners have a chance to voice opinions and vote on assessments.

Increasingly, homeowner associations handle large amounts of money. Embezzlement from associations has occurred occasionally, as a result of dishonest board members or community managers, with losses up to millions of dollars.[37][38] Again, California's Davis-Stirling Act, which was designed to protect owners, requires that Boards carry appropriate liability insurance to indemnify the association from any wrongdoing. The large budgets and expertise required to run such groups are a part of the arguments behind mandating manager certification (through Community Association Institute, state real estate boards, or other agencies).

The AARP has recently voiced concern that homeowners associations pose a risk to the financial welfare of their members. They have proposed that a homeowners "Bill Of Rights" be adopted by all 50 states to protect seniors from rogue Homeowner Associations.[39]

9 Limits to powers

The Supreme Court of Virginia has ruled that an HOAs power to fine residents is an unconstitutional delegation of police and judicial power. Prior to the Telecommunications Act of 1996, HOAs could limit or prohibit installation of satellite dishes. Many communities still have these rules in their CC&Rs, but after October 1996, they are no longer enforceable. With a few exceptions, any homeowner may install a satellite dish of a size of one meter or smaller in diameter (larger dishes are protected in Alaska). While HOAs may encourage that dishes be placed as inconspicuously as possible, the dish must be allowed to be placed where it may receive a usable signal. Additionally, many HOAs have restrictive covenants preventing a homeowner from installing an OTA (Over-The-Air) rooftop antenna. These restrictions are also no longer enforceable, except in some instances. For example: the antenna may be installed at any location unless it imposes upon common property. Also, the antenna must be of a design to receive local, not long-distance signals and must not extend any higher than twelve feet above the top roof-line of the home, unless an exception is granted by the HOA due to extenuating terrestrial interference.[40]

In Florida, state law prohibits covenants and deed restrictions from prohibiting "Florida-Friendly Landscaping,"[41] a type of xeriscaping. In spite of the law, at least one homeowner has faced harassment and threat of fines from a homeowners association for having insufficient grass after landscaping his yard to reduce water usage.[42] Similar legislation was introduced and passed by the legislature in Colorado but was vetoed by governor Bill Owens.[43][44] Residents in

Colorado have continued to call for regulation to protect xeriscaping, citing homeowner associations that require the use of grasses that consume large quantities of water and threaten fines for those who do not comply with the covenants.[45]

10 Alternative to CIDs

An alternative to CIDs is the multiple-tenant income property (MTIP), known in the United Kingdom as housing estates. CIDs and MTIPs have fundamentally different forms of governance. In a CID, dues are paid to a nonprofit association. In an MTIP, ground rents are paid to a landowner, who decides how to spend it. In both cases, certain guidelines are set out by the covenant or the lease contract; but in the latter scenario, the landowner has a stronger incentive to maximize the value of all the governed property in the long term (because he is the residual claimant of it all) and to keep the residents happy, since his income is dependent on their continued patronage. These factors are cited as arguments in favor of MTIPs.[8]

11 See also

- Gated community
- Davis–Stirling Common Interest Development Act
- Housing society
- Business improvement district
- Comparison of homeowner associations and civic associations

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13 Further reading

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14.1 Text

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