REGULATING TEXAS HOMEOWNERS' ASSOCIATIONS

THESIS

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By

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Dedicated to the Memory of My Father

Richard Robert Sword

He taught his children and grandchildren how to think,
not what to think.

Nancy Sword Warren

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The educative process is a continuous process of growth, having at its aim at every stage an added capacity of growth.

John Dewy,
Democracy and Education

When we are young the growth process is natural and often occurs rapidly. As we age, the process slows and can be more difficult. This is especially true when a person returns to school later in life. I wish to express my gratitude to those who have helped me through this growth process: my mother, Sara Sword, who had more faith in me than I had in myself; my husband Richard Warren, who understood how important it was to me to earn my MA degree; my mentors Dr. Johnnie Rosenauer and Dr. Patricia Shields who encouraged me to continue my education; my thesis committee: Dr. William DeSoto, Dr. Hassan Tajalli, and Dr. Howard Balanoff who provided guidance for this project; my professors who shared their knowledge; my friend, Bennent Allen who provide significant information for this thesis; and my friends and neighbors in the Scenic Hills community who continuously supported this project.

I hope this paper will be a reminder to my grandchildren Seth, Caleb, Brittany and Devon that you continue to grow throughout life and if you are persistent, your goals are attainable.

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TABLE OF CONTENTS

LIST OF TABLES

Page

Tables

The quest for community will not be denied, for it springs from some of the powerful needs of human nature_needs for a clear sense of cultural purpose, membership, status and continuity.

Robert Nesbit, *The Quest for Community*

CHAPTER I

INTRODUCTION

"Humans are by nature social beings" (Grasso 1998, 19). Our family, home, religion and community "represent everything that roots us, anchors us, identifies us and locates us in this world—" (Friedman 1999, 27). The word community is derived from the Latin words "*communis*—which means 'common' —and *communitas*—which means 'fellowship,' a term itself close to the Greek *philia*, or friendship" (Carey 1998, 1). It is natural for us to seek relationships with those who share similar interests, beliefs and values.

"Rapid and massive urbanization is one of the most striking features of American history" (Christensen 1986, 7). "Early America was a land of many small, local communities, often differing greatly from one another. But within each community there was a shared vision of man's nature and proper ends" (Carey 1998, 14). During the nineteenth century, industry began to drive the American economy and people left rural communities to find work in the cities. "As our country began to become more urbanized in character, issues among homeowners began to develop." Zoning laws, building and development codes were enacted but "conflicts continued to arise." Homebuyers wanted assurances that their community would be protected from "objectionable (but legal activities)" and other property in the neighborhood would have

to be maintained. Restrictive covenants were "created by developers to insure that the quality of the 'community' would be maintained" (Mitchell 1998, 3).

After World War II, high birthrates created a demand for housing. (McKenzie 1994, 57). The American small town of the 1950's exemplified community. "Neighbors ... shared a way of life characterized by common values, common habits, and a common culture" (Carey 1998). Suburbs were created when builders developed the property around small towns that were located on the outskirts of large cities. Families who could afford to leave the city flocked to suburbs. (McKenzie 1994, 57)

Often, once the developer left "residents discovered no provisions had been made to maintain entry areas and right-of-way." Homeowners' associations were created as "an attempt to afford the homeowners within the community the best possible chance of maintaining and enhancing the value of their homes"(Mitchell 1998, 4). The Interim Committee on State Affairs Report to the 76th Legislature (Texas) states that property owners' associations provide services cities can no longer afford to provide. "In certain jurisdictions local governments give approval to developers to build with the assumptions that an association will be in place to take the load off municipal services" (Interim Committee on State Affairs Report to the 76th Legislature 1998, 2-5).

Over the last three decades, there has been an increasing trend in the United States for people to buy homes in communities with an association (Sterk 1997, 274). In 1970, there were 10,000 property owners' associations. Today it is estimated that there are 205,000 property owners' associations in the U.S. with a total reserve of $18 billion and 15% of all U.S. homeowners belong to some type of property association (Treese 1999, 20). It is not surprising that in today's world where globalization drives the economy

and diversity is mandated in the workplace, people are drawn to communities where their neighbors have similar interests and values and they have a feeling of belonging. (Friedman 1999, 27).

Advocates of homeowners' associations contend that they protect property values and the quality of the neighborhood. (Barsalou 1995, 1) Others claim that, "homogeneity, exclusiveness, and exclusion are the foundation of their 'social organization …'" (McKenzie 1994, 177) and "… association boards often seem to operate as though they were wearing blinders, rigidly enforcing technical rules against peoples use of their own homes and ignoring the consequences of such intrusive behavior" (McKenzie 1994, 19).

While homeowners' associations have become more prevalent throughout the country, they are concentrated in the sunbelt states because there has been more new housing developments in that region during the last few decades. (McKenzie1994, 11) Problems between homeowners and homeowners' associations prompted many states to adopt comprehensive legislation regulating homeowners associations. (Statues for Community Associations 2000) However, most homeowners' associations in residential communities in Texas were not regulated until Senate Bill 507 was passed during the 77th Legislative session. (Texas Legislature Online, 2001)

This paper is not intended to judge the merits of homeowners' associations, but rather to evaluate legislation that regulates Texas homeowners' associations. The following chapters will: explain the structure and function of homeowners associations; trace the emergence and growth of common interest communities; outline the problems with homeowners' associations; review legislation regulating homeowners associations;

discuss research on the attitudes and perceptions of homeowners living in communities with homeowners' associations; and comment on the new Texas Residential Property Owners Protection Act.

CHAPTER II

DEFINITIONS, STRUCTURE AND FUNCTIONS OF COMMON INTEREST COMMUNITIES AND HOMEOWNERS' ASSOCIATIONS

Terminology

On reviewing the literature on homeowners' associations, one quickly discovers that there are a number of terms used to refer to planned communities and the associations that govern them. This chapter presents and explains the terminology unique to common interest communities and homeowners' associations. Planned communities are often called a Common Interest Community (CIC), Common Interest Development (CID), or Planned Unit Developments (PUD). Homeowners' Association (HOA), Community Association (CA), Common Interest Realty Association (CIRA), Property Owners Association (POA), and Residential Community Association (RCA) are terms that are used to refer to the governing body of planned communities (Treese 1999, 3). Many communities have neighborhood associations. Normally neighborhood associations are unincorporated and "generally do not have the power to levy mandatory assessments. Dues are commonly nominal" (Mitchell 1998, 5). It is useful to recognized these terms and acronyms because different sources use different terms.[1]

Table 2.1

Key Terms and Acronyms

Term	Acronym
Alternative Dispute Resolution	**ADR**
Community Association	**CA**
Community Association Institute	**CAI**
Common Interest Community	**CIC**
Common Interest Development	**CID**
Common Interest Realty Association	**CIRA**
Covenants, Conditions and Restrictions	**CC&Rs**
Department of Housing and Urban Development	**HUD**
Federal Housing Administration	**FHA**
Homeowners' Association	**HOA**
Property Owners Association	**POA**
Planned Unit Development	**PUD**
Residential Community Association	**RAC**
Uniform Common Interest Ownership Act	**UCIOA**

(Treese 1999 & McKenzie 1994)

[1] Unless directly quoted this paper will refer to planned communities as Common Interest Communities (CIC) and associations as Homeowners Associations (HOAs).

Definitions

Common Interest Communities are communities in which residents own or have exclusive use of a dwelling unit or own "a dwelling unit on a lot. A separate, usually nonprofit corporation holds title to the common areas" (Treese 1999, 3).

There are three usual structures for common interest communities: cooperative ownership, condominium ownership, and planned communities.

1) Cooperative Ownership: A residential building is "held in cooperative ownership" and "individual residents ...own shares in the cooperative corporation, which owns the building and issues a 'proprietary lease' to each resident-shareholder's apartment" (Sterk 1997, 276).
1) Condominiums: Residents hold "title to a specific unit and an undivided interest as a 'tenant-in-common in the common elements" (Treese 1999, 3).
1) Planned Communities: "... each member owns a dwelling unit on a lot. A separate, usually nonprofit corporation holds title to the common areas" (Treese 1999, 3).

Although these communities differ in structure, most are created by a developer (Sterk 1997, 277) and a common interest reality association or homeowners' association "jointly administer a piece of land or building that is owned 'in common'" (Kirkpatrick).

Homeowners' Associations are "legal entities that govern the business affairs of planned communities" (Kirkpatrick 1995). The Department of Housing and Urban Development (HUD) defines a homeowners' association as:

> ... an incorporated, nonprofit organization operating under recorded land agreements through which (1) each lot owner in a described land area is automatically a member, and (2) each lot is automatically subject to a charge for a proportionate share to the expenses for the [HOA's] activities, such as common property maintenance (Mitchell 1998, 5).

According to Treese (1999, 3), there are three characteristics common to all homeowners' associations:

1) All owners automatically become members of the association.
1) Governing documents bind all owners to the community association and require mutual obligation.
1) All owners pay mandatory lien-based assessments to fund the operation of the association and maintain the common elements.

Structure

A "Declaration of Covenants, Conditions and Restrictions" (CC&Rs) or a "Master Deed" is drafted by the developer before any individual units in the community are sold. The "Master Deed" is "designed to bind each unit purchaser in the community. (Sterk 1997, 277) "The restrictions 'run with the land', meaning that all successive buyers are subject to the covenants" (Interim Report 1998, 5). The Declaration generally imposes restrictions on unit owners and creates an association with power to levy assessments against the unit owners and to make rules." By-laws for the association, provisions for a board of directors and election of board members, procedures for amending by-laws, and an initial set of rules for the development are also drafted by the developer (Strek 1997, 277-278). "These documents are every bit as enforceable as the laws, charters, and constitutions of public governments" (McKenzie 1994, 127-128). Courts have enforced use restrictions and assessment obligations that are provided for in the Declaration, or the association rules (Strek 1997, 277-278).

"Once the development becomes operational, the association's board may amend the rules, enact new ones, and levy assessments on the unit owners. ...the board may act, in accordance with the bylaws, to enforce the rules or assessments" (Strek 1997, 277-278). Initially, the developer elects "directors and officers that are employees or business

associates of the developer. As the majority of the votes within the HOA shifts to the residents, the residents begin to elect homeowner representatives" (Mitchell 1998, 15).

A homeowners' association usually "has three distinct legal parts: 1) a corporation with a board of directors and officers; 2) by-laws that set up the governance of the corporation and its members; and 3) the Declaration of Covenants and Restrictions or the Declaration of Condominium" (Kirkpatrick 1995). These associations have "a measure of financial control over residents" and "some power to enforce lifestyle restrictions and to allocate benefits and burdens among members of the common interest community" (Sterk, 1997 277).

Function of Homeowners' Associations

The *Community Association Factbook* states,

> In order to function successfully and foster a vibrant community, each association:
> 1) Establishes and collects assessments from its members
> 1) May place a lien to enforce the assessment obligation
> 1) Equitably controls use and enjoyment of property
> 1) Fairly makes and enforces rules establishing a scheme of use of the common property and, to a limited extent, the use of individually owned property (Treese 1999, 3)

In *Privatopia*, McKenzie notes,

> The overriding purpose of the association, as defined by its documents, is the protection of property values through maintenance of property itself and through preservation of the project's character and appearance. In carrying out this purpose the board of directors has all the powers of any nonprofit corporation, including the power to buy and sell property. Beyond these basic requirements there is enormous range of restrictions that the developer may have created as part of a target-marketing strategy. (1994, 129)

Directors of HOAs have a number of responsibilities which may include: maintenance of common areas; management of association assets (dues and assessments); enforcement of the governing documents which can include imposing fines or attaching

liens to a owner's property and impose certain standards of behavior. "An overlooked, but important function of the HOA is to disseminate information about the community" (Mitchell 1998, 18). New residents should receive basic information about the community. All residents should be kept informed on new and on-going issues that affect the community (Mitchell 1998, 18).

Homeowners may see HOA membership as equivalent to membership in a country club or a fraternal organization. However, a HOA is a corporation with legal power to enforce the community's CC&Rs. Members cannot sell their stock in the corporation or resign their HOA membership if they do not want to pay increased dues or disagree with the decisions of the directors of the board. (Sterk 1997, 311)

CHAPTER III

THE DEVELOPMENT OF COMMON INTEREST COMMUNITIES AND THE CREATION OF HOMEOWNERS'ASSOCIATIONS

This chapter traces the growth of common interest communities from conception through their influence on the present housing industry.

Early Common Interest Communities

The concept of people owning property in common and sharing the cost maintaining it is not new. Some contend that there were condominiums around the forums in ancient Rome. (Kirkpatrick 1995). However, "scholarship has demonstrated that Roman law was antithetical to condominium development and that the first proto-condominiums probably appeared in the Germanic states during the late Middle Ages (Treese 1999, 5)." Urban growth and suburbanization in the late nineteenth century prompted the development of planned communities. (Treese 1999, 5))

The process of the suburbanization of London began in the late eighteenth century. Family estates began being subdivided and sold "to middle-class businessmen seeking relief from congested city living" (McKenzie 1994, 33). Before selling their estates, families wanted "to retain control of how the land would be used in the future" (McKenzie 1994, 33). Often covenants were used to create "private parks and other

amenities for exclusive use." This was a simple form of private land planning, a conceptual forerunner of today's CIDS. (McKenzie 1994, 33)

The descendants of the Earl of Leicester "required those who leased lots surrounding ... Leicester Square ... to promise to pay tax for" the upkeep of the private park. (McKenzie 1994, 34) When the property was sold in 1808, there were restrictive covenants attached. The provisions of covenants restricted subsequent owners from building on the square; required that the property owner maintain the park and the fence surrounding it and allow "tenants on the square pay ... for the exclusive right to use the park. It would remain fenced and gated and the tenants would have keys" (McKenzie 1994, 34).

In 1831, Samuel Ruggles transplanted the "idea of using covenants in this manner ..." to the United States. Ruggles "drained a swamp in Manhattan" and called it Gramercy Park. The community was built around a park and enclosed with a gated eight-foot fence and only residents of the community had keys. "He placed the property in the hands of trustees for the benefit and use of those who owned the sixty-six surrounding residential lots" (McKenzie 1994, 34).

As the twentieth approached, "a new group of reformers collectively oriented to reforming society through reforming the city was the combined result of Enlightenment ideas about the perfectibility of society, ..." (Christensen 1986, 1). They believed society would benefit by creating better living conditions and more pleasant environment for everyone. This theory corresponds to the utopian philosophy "that human nature can and should be easily molded" (Magstadt and Schotten 1996, 44). The Greek translation of utopia is "'no place'—but it also meant 'good place.' ... In its long history as a literary

form, the utopian tradition has been secular, concerned with creating the good life *on earth* and in the here-and-now" (Christensen 1986, 3).

Howard's Garden City

Ebenezer Howard, an English Court stenographer, was influenced by utopian philosophy and believed that social change could occur through "'rational planning'" (McKenzie 1994, 2). He envisioned a community that combined the best features of the city and country and was "based on service to the community and not on self interest ..." (McKenzie 1994, 2-3). Howard's book, *Garden Cities of Tomorrow: A peaceful Path to Real Reform*, was published in 1898. (Christensen 1986, 1) The book was a "manual for financing, building, and operating of a new kind of community, ..." (McKenzie 1994, 2-3). Both "admirers and critics alike conceded the tremendous influence of his book" (McKenzie 1994, 3).

Howard's garden city had two elements meant to work in tandem: the comprehensive physical planning and political and economic organization of the model city" (McKenzie 1994, 3). His model had a circular design with a center park surrounded by public buildings and shops, houses were on circular tree lined streets with gardens in the center, industries connected by rail would be on the outer edge of the city – an agricultural area surrounded the city that would provide food for residents and "prevent expansion beyond the planned optimum size" (McKenzie 1994, 4-5). The city's "political and economic structure ... included radical proposals for public land ownership, a novel form of government , and an economic system of publicly regulated monopolies" (McKenzie 1994, 4-5). The city's constitution was similar to "the charter of a business. ... In place of politics and ideology would be rational management of

practical matters by experts, each elected to a particular department because of his or her expertise in the area … the best electrician, the smartest engineer, the best trained librarian and so forth …. Howard simply assumed that voters would choose on the bases of expertise, ... thus preserving his democratic technocracy" (McKenzie 1994, 5-6). He advocated regulating trade by limiting the number of retailers in any one business. (McKenzie 1994, 5-6) "Howard felt that the utopian transformation of human society could come painlessly, through urban planning alone" (McKenzie 1994, 5-6). Early follower Lewis Mumford wrote that, " …Howard's prime contribution was to outline the nature of a balanced community and show what steps were necessary, in an ill-organized and disoriented society, to bring it into existence" (McKenzie 1994, 3).

Americanization of the Garden City

Community ownership of all real property with residents renting their houses was a key element of Howard's planned community. (McKenzie 1994, 7-8) However, "Private developers and businessmen, rather than government, have long been the dominant forces in American urban planning" (McKenzie 1994, 7). U.S. entrepreneurs realized that Howard's concept of building entire communities could generate large profits. They transformed Howard's ideas into "a form of private housing known as common-interest developments (CIDS), …" (McKenzie 1994, 7).

The first fifteen years of the twentieth century was known as the Progressive Era. "It was a time of organization and reform in all areas of American life …" (McCree Bryan and Davis 1990, 65). "America's garden cities are descended from the Progressive reform movement and reflect the values of that period, …" (Christensen 1986, 3). Cities historically have been "synonymous with 'civilization.' They have "been the home of

science and art, culture, learning and writing. ..." and "...the birthplace of democracy ..." but cities have also been associated with evil. (Christensen 1986, 5).

The Industrial Revolution created crowded cities and numerous social problems. In the United States, utopianism found expression in the communitarian movement. (Christensen 1986, 6)

> A new connection of land reform with social reform, coupled with the clear presence of urban problems, reinforced a more material definition of the environment.
> ... American garden cities reflect an overriding emphasis on landscape and the physical environment and scant attention to institutions. They are descended less from the communitarian movement than Frank Lloyd Wright's Broadacre City, a scheme premised on social change through *technical* means. (Christensen 1986, 6-7)

Early planned communities in the United States were exclusive subdivisions designed to separate and shield the rich from the crime and poverty of the cities. (McKenzie 1994, 9).

> From the 1890's through the onset of the depression, covenants became more widespread in subdivisions for the wealthy, more stringent and numerous, and more long-lived (averaging thirty-three years), with provisions for automatic renewal. More comprehensively planned luxury developments were beginning to take on the uniform appearance associated with today's CIDS
> This expansion of deed restrictions was related to changes in the structure of the real estate business. This emergent industry had begun to change near the turn of the century with the "rise of the community builders" ...These large developers became preeminent through the comprehensive use of deed restrictions, the influence of powerful national organizations, and partnership with government: ... community builders supported public planning—a process that they themselves shaped and largely controlled (McKenzie 1994, 36-38).

The Conception of Homeowners' Associations

Jesse Clyde Nichols was one of the early community builders. He had a "sophisticated understanding of the relation between private power and government ... Nichols popularized two ideas among developers: the importance of developing a

symbiotic relationship with government and the value of setting up a permanent mandatory-membership homeowner association to enforce deed restrictions" (McKenzie 1994, 38).

Nichols created the Country Club District in Kansas City. The Country Club District Improvement Association was set up in 1910. Membership in the association was voluntary. "Nichols became dissatisfied with the association, however, because it became too independent" (McKenzie 1994, 39). In 1914,

> ... he built a development called Mission Hills in Missouri. Kansas City was nearby, ... but there was no city adjacent to the new subdivision. The development needed some sort of authority to provide essential public services. ... Nichols incorporated the Mission Hills Homes Company ... . He gave it the power to enforce the deed restrictions he imposed, maintain vacant property, hire contractors ... and pay taxes on behalf of residents. As in today's CIDS, owners became members automatically on receipt of their deeds (McKenzie 1994, 40).

Nichols was convinced "that what worked ... for the affluent would work equally well for all homeowners" (McKenzie 1994, 41). He had the opportunity to argue his point when "the American Academy of Political and Social Science gave Nichols a forum in an *Annals* issue on housing and town planning. ... His forceful presentation of the benefits of deed restrictions inaugurated what are now perennial themes for advocates of CIDs" (McKenzie 1994, 41). Nichols "built 10 percent of housing in Kansas City between 1906 and 1953 and founded the Urban Land Institute in 1936" (McKenzie 1994, 39).

Radburn

After World War I, there was a shortage of housing. New York Governor, Alfred E. Smith, appointed the New York Housing Committee to study the problem. They found "that housing shortages for working-class people were systemic, not episodic: as

long as builders expected large profits, housing prices would always be too high for working people" (McKenzie 1994, 46).

Alexander Bing set up the City Housing Corporation "as a solution to this problem. ..." Bing "sought to harness private economic power in the service of improving society" (McKenzie 1994, 46). The City Housing Corporation "was a unique combination of visionary intellectual ferment and progressive capitalism. ... Radburn was a result of ... a dynamic group of architects, planers and thinkers heavily influenced by the garden city ideas of Ebenezer Howard"(McKenzie 1994, 46). The City Housing Corporation "was intended to be a large, well-capitalized, limited-dividend corporation—one that did not offer the possibility of large returns but promised a reliable 6 percent annual return on investment" (McKenzie 1994, 46).

> Radburn was to be innovated in both physical layout and organizational structure. As originally planned, the development was to occupy two square miles of spinach fields in the New Jersey countryside. It would house twenty-five thousand people in three neighborhoods, each built around an elementary school and all clustered around a single high school. ... The most famous design innovation of the development was the "superblock," a large cluster of houses that were "reversed," with the living areas facing inward on a green open space and the rear of the house facing peripheral streets (McKenzie 1994, 47).

Charles Stern Ascher "coordinated the work of a group of political scientists and public administrators from the National Municipal League who designed a private government for Radburn, New Jersey. ... The government was designed in accordance with principles of municipal government straight out of Progressive Era political science, using the council-manager system" (McKenzie 1994, 45).

Because "construction cost ran higher than anticipated ... Radburn became 'a thoroughly upper middle class town' with a 'homogeneous population characteristic of affluent, upper middle class suburbs' ..." (McKenzie 1994, 48). The City Housing

Corporation "filed for bankruptcy in 1934. Radburn ended up even smaller than intended, housing only five hundred families ..." (McKenzie 1994, 48).

Radburn was

> clearly the most influential model for subsequent American new communities; Greendale, Wisconsin and the new Deal's greenbelt town program, undertaken during the Great Depression and atypical in its close kinship with Howard's ideas; Columbia Maryland, the most famous of American new cities and illustrative of the 1960's new town renaissance; and Levittown, New Jersey, an example of postwar, large-scale suburban developments. ... Philosophically most are closer to one another than they are to Howard's conception of the garden city. (Christensen 1986, 2)

"Today, Radburn is home to 700 families—3,000 people. ... Radburn comes closer than any other American city to Ebenezer Howard's pastoral ideal" (Durso 2000, 39).

Deed Restrictions and Segregation

There were luxury subdivisions from coast to coast by 1928 when Helen Monchow did a study on deed restrictions. She found that "restrictions fell into categories: those pertaining to the type and use of structures; those dealing with the use of lot area; those dealing with racial restrictions; and those concerning the powers of the developer, the duration and enforcement of restrictions, and the maintenance of property" (McKenzie 1994, 43). She found that there were "'racial restrictive covenants'" in half of the luxury subdivisions she studied. The restrictions explicitly stated "'Africans, Mongolians prohibited'", ... "'White race only ,'" or "Asiatics and Negroes barred ...'" Her "findings suggest that racially restrictive covenants were the real estate industry's response to the demographic shifts that brought large numbers of black Americans from the South to the Northeast and Asian immigrants to the West Coast" (McKenzie 1994, 41). Even the government endorsed segregated communities. Early Federal Housing

Administration (FHA) policy was that "'If a neighborhood is to retain stability, it is necessary that properties shall be occupied by the same social and racial classes'" (McKenzie 1994, 56).

Race restrictive covenants were prevalent "from 1917 to 1948, when the Supreme Court held them unenforceable" (McKenzie 1994, 68). Today, developers use elaborate deed restrictions that mandate lifestyle to create homogenous neighborhoods. These "'single –interest neighborhoods'" are "designed just for seniors, singles, golfing, boat fanciers, or other specific population segments. Community designer Wayne Williams terms this single interest approach "'positive ghettoism'" (McKenzie 1994, 57).

Housing During the Depression and War Years

The Great Depression and World War II dramatically affected the housing industry. In 1925, there were 937,000 housing starts in the U.S., but by 1933 there were fewer than 100,000 housing starts. To help stimulate the economy the Federal Housing Administration was created, "making greater amounts of financing available through mortgage insurance programs. Together with New Deal reforms, FHA helped revolutionize housing finance and production. FHA encouraged large-scale housing subdivisions through its land planning, property and subdivision standards and use of conditional commitments" (Treese 1999, 5).

By the start of World War II, the U.S. economy was beginning to recover and the war created jobs and economic growth. However, the nation's resources were delegated to the war effort. Between 1940 and 1945, there were only 2.3 million new housing starts. (McKenzie 1994, 57)

Increased Demand for Housing Created a Building Boom

When World War II ended, "the pent-up demand for housing, the high birthrates, and the application of massed-production techniques to construction combined to create a building boom ... " (McKenzie 1994, 57). In 1940 only 41% of American families owned homes; by 1960, homeownership had jumped to 61%. (McKenzie 1994, 57)

Cities like Chicago were plagued by "a high rate of crime and juvenile delinquency, poor housing, inadequate schools and recreational facilities, and racial and ethnic tensions that occasional flared into violence and gang war" (McCree Bryan and Davis 1990, xi). While many Americans lived in poverty, middle-class families often could afford to escape from the cities. "Homeownership became the middle-class norm as 'dormitory' suburbs sprouted in the outskirts of American's cities" (McKenzie 1994, 57). "The Federal Highway Act rapidly increased the pace of suburban residential development from 1956 on" (Treese 1999, 5).

"By 1960, ... land suitable for suburban housing was becoming scarcer and more expensive ..." and "builders could foresee a time when they might no longer be able to build 'big lot' suburban homes to sell at prices the middle class could afford" (McKenzie 1994, 80-81). The cost for clearing land, building roads and running pipes for water and sewage in 1948 was "'11 percent of the price of the housing unit; by 1959, it was 15.5 percent; in 1966, 19.6 percent; in the late 1970's at least 25 percent, frequently 30 percent of the total bill'" (McKenzie 1994, 83).

Builders needed to "find a way to build suburban housing on smaller lots" that would still appeal to homebuyers (McKenzie 1994, 80-81).

> The attraction of suburbia, from its origins in the late-eighteenth-century England, had been the chance for the middle class to flee high-density urban

> living, the "corruption" of the city, and the constant press of contact with the city's heterogeneous population. Suburbs catered to an arcadian fantasy in which the nuclear family would be plucked from the social fabric of the city and placed in purifying contact with nature (McKenzie 1994, 81).

Builders found common interest development housing to be the solution to their problem. CIDs were "a way of squeezing more people onto less land" (McKenzie 1994, 80). A 1978 joint Urban Land Institue / Communiy Association Institute volume summarizes the economic logic behind CIDs.

> The common-interest community is fundamentally a creature of land economics, and of man's preference for owning his own territory. In any locale only so much land is available for settlement; and as this land inventory decreases, costs go up, lots for shelter become smaller, and houses are eventually built on top of one another. When this condensing or stacking takes place, the means of owning one's own territory must also be modified.
>
> A result of diminishing lot sizes has often been the requirement by public agencies of open, undeveloped space to compensate for the greater residential density ... Ownership of this open space generally resides in the community through nonprofit, usually nonstock corporation to which all owners belong. ... These reciprocal rights and obligations are the basis for the tie between individual titles-the common-interest aspect of the title (as cited in McKenzie 1994, 84).

The Federal Housing Authority enthusiastically endorsed CID construction. (McKenzie 1994, 88-89) "In 1963, FHA published *Planned United Development With A Home Association*" and commenced providing mortgage insurance for homes in community associations (Treese 1999, 6). The publication was a manual that "provided planners and developers with guidelines and standards for obtaining FHA insurance for CIDS, which FHA wished to encourage" (McKenzie 1994, 89). In order to obtain mortgage insurance, the developer is required to create "a homeowner association with the power to enforce 'protective covenants' that will 'run with the land ... and set firm legal foundation for conserving the plan of the unit continuously into the future'"

(McKenzie 1994, 89). The publication "illuminated the private-public partnership that characterized the growth of CIDs" (McKenzie 1994, 91).

The Community Association Institute

In 1962, there were fewer than five hundred homeowners association and by 1975 there were twenty thousand. (McKenzie 1994, 107) In early 1970's, common interest communities began to experience a number of problems:

> The national economy was in and out of recession, with housing starts dropping rapidly from 1972 ...to 1975. ... CID residents were reporting difficulties with the management and governance of their developments. The consequences of inadequate and even corrupt management by developers, managers, and owners included underfunding of reserves for contingencies and property maintenance, inadequate or improper enforcement of deed restrictions, and, in some cases, outright theft of association funds. ... There were two dimensions to this challenge. ... First was the problem of marketing. ... Second was the problem of educating consumers about how to operate the new product (McKenzie 1994, 107-108).

Byron Hanke was "chief of the FHA's land planning division ... the prime mover in obtaining FHA insurance for CIDs and was principal author of *Planned Unit Development with a Home Association* and *The Home Association Handbook* ..." (McKenzie 1994, 109). Hanke recognized "the need for an institutional support network for these new organizations" (McKenzie 1994, 109). In 1973, at the National Association of Homebuilders (NAHB) annual meeting, Hanke, Richard Canavan, NHAB staff vice president in the Building and Service Division, and developer David Rhame presented the idea for the Community Associations Institute. (McKenzie 1994, 110)

> In September 1973 CAI was incorporated, and its first board meeting was in November. ... The organization's purpose and membership were stated as follows: "The Community Association Institute is an independent, non-profit research and educational organization formed in 1973 to develop and distribute guidance on homeownership associations and their shared facilities in condominiums, cluster housing, planned unit developments, and open space communities. Membership in the Institute is opened to associations and their

> members, builder-developers, managers, public agencies and officials, other professionals, and other interested individuals and organizations." ... By 1992, CAI had become the leading supplier of information, education, literature, and legislative advocacy regarding CID housing (McKenzie 1994, 112-114).

The Community Association Institute "grew rapidly and accomplished a great deal, particularly in developing CID specializations within such professions as law and property management, ..." (McKenzie 1994, 114). However, by 1991 the organization was experiencing "shortfalls in revenue and the loss of momentum" (McKenzie 1994, 114). Many believed that the problem stemmed from an imbalance in the membership. The majority of the CIA members

> were property managers or other professional who made their living serving CIDs. ... This situation came to a head in 1991 and 1992, leading to a major restructuring that moved CIA much closer to becoming the trade association its founders were determined it should not be. With a new governing structure, CIA shifed its emphasis toward legislative advocacy and other forms of political action, including grassroots mobilization of its thousands of members at the national, state, and local levels (McKenzie 1994, 114-116).

"Today, 205,000 community associations house 42 million Americans" (Teerse 1999,6) and there are "6,000 to 8,000 new community associations formed each year" (Fuller and Durso 2000, 2).

CHAPTER IV

CONTRIBUTING FACTORS TO PROBLEMS IN HOMEOWNERS' ASSOCIATIONS

As in many other organizations, lack of member participation is ranked as the first contributing factor of problems in HOAs. Lack of resident understanding of rules of HOA governance and the fiduciary obligations of the board were ranked as the second and third. (Treese 1999, 10) Belonging to a HOA, is "a new and unique experience for most homeowners" (Treese 1999, 7). Often, they do not realize that when they bought a home in a HOA community they entered into a contract that gave the association the right to increase dues; make and enforce rules on what they can do with their property; levy assessments; place a lien against property for nonpayment of dues or assessments and even foreclose on property. (McKenzie 1994, 128-129) HOAs are complex organizations and often operate under little or no government regulation so often buyers are not aware of the implications of owning a home governed by an association. This chapter will discuss factors that contribute to conflicts between homeowners and HOAs.

Contract Between the Homeowner and the Association

Advocates of CICs contend that when buyers purchase homes in a HOA community, they voluntarily enters into a contract with the association (Sterk 1997, 303) and agree to abide by community rules. (McKenzie 1994, 147) McKenzie (1994) finds this faulty reasoning because "it is increasing difficult to find non-CID housing in many

parts of the country ..." and " the opportunity for real estate choices among CIDS—that is, meaningful choices among different lifestyles and regimes of rule—may be diminishing" (147).

According to Sterk,

> Although, the contract argument against judicial intervention in community association decisions has considerable force , it is not a show stopper. First, our legal regime does not sanction absolute freedom of contract. Contract enforcement is the norm in our system, at least in part because enforcement simultaneously promotes personal autonomy, facilitates shifting of resources to higher-valuing users, and provides a basis, rooted in reciprocity, for reaching just results. But when particular contracts and, or particular categories of contracts, do not advance the goals that underline contract enforcement, doctrines often emerge to counteract the norm (1997, 274).

Sterk lists following objections to the contract argument for HOAs:

1) Bundling: When a buyer purchases a home, HOA membership is "bundled with other items more significant" such as: the school district, proximity to work, recreation, shopping or medical facilities. The decision to buy a home governed by a HOA "should not necessarily be treated as a decision bound by the association's rules" (302).

2) A contract usually implies specific terms and limits. However, the agreement between the homeowner and the association

> ...binds the unit owner to determinations the association might make in the future. As a result of the agreement, the association has the power to impose new duties not specified in the agreement itself. ... Because contract law generally constrains the exercise of discretion by contracting parties, one would also expect to see limits on the exercise of community association discretion (304-306).

3) Homeowners associations are "initially formed with the unanimous consent of all the residents"(303) or are created in CC&Rs drafted by the developer (277) and gives the

"developer the power to create a distinct lifestyle in a development, which the developer can use as a powerful marketing tool" (McKenzie 1994, 127-128). When a buyer purchases a home in a community with a HOA, he/she expects that the association will ensure that the community continues to reflect his/her lifestyle. However, once the developer turns control of the association over to the homeowners and "the make up of the community changes ... the HOA will not be representative of all the residents" (Sterk 1997, 303).

In *Group Autonomy: Residential Associations and Community*, Alexander "'suggests that homeowner associations have community elements and should not be treated simply as a group created by contract.'" Association membership forces the homeowner to "'become bound up with the group.'" and "'Exit becomes difficult'" (as quoted in Sterk 1997, 289). HOAs are not like voluntary organizations where a member can resign his/her membership if they do not agree with the leadership's decisions. Homeowners have to sell their homes if they wish to resign from the association. (Sterk 1997, 289)

In an 1998 address before the Interim Committee on State Affairs Report to the 76th Legislature, Steve Solcich said regarding homeowners' associations in Houston, "Actual notice, and a lack of choice to join a HOA are still non-existent at house closings making these closings an unconscionable contract" (Interim Report, 1998).

Homeowners' Associations as Corporations

Homeowners' associations are usually incorporated and are regulated under corporate laws (Treese 1999, 8). "Residency in CIC requires home buyers to become part of a corporation and live according to its rules, which reach into areas of people's

lives that business corporations would leave alone"(McKinzie 1994, 126). HOAs and corporations both "are voluntary arrangements that bind some people to the actions of others" (Sterk 1997 , 306). However, corporations deal with issues that are very different from the issues in HOAs. (Sterk 1997, 307)

There are basic differences between corporations and HOAs. First, a corporation has one main goal, to increase profits for the shareholders while HOAs have a variety of goals and often deal with conflicts that have nothing to do with money. (Sterk 1997, 306-319) McKenzie (1994) points out that, many HOAs are primarily concerned with rule enforcement (13-18). Second, corporate officers and directors have a great incentive to act in the shareholders' best interest if they don't, they will be replaced. Directors of HOAs are not paid and may not always be motivated to act in the best interest of all the residents of the community (Sterk 1997, 312). Finally, "Shareholders can diversify their portfolios to avoid extensive risk" (Sterk 1997, 310). Shareholders in publicly held corporations can sell their stock if they disagree with the directors' decisions or a vote of the stockholders. (Sterk 1997, 314) If HOA a member disagrees with a board decision it is not as easy for him to sell his home. For most homeowners "the down payment required to qualify for a mortgage is likely to represent the largest single investment" he/she will make and the "price does not represent its full value to its owner, ..." (Sterk 1997, 319). Sterk (1997)states that, "These differences counsel against transplanting rules from the corporate context to the community association context" (275).

Homeowners' Associations as Governments

When a common interest community is created, the corporate developers and their lawyers use

> relatively standardized CC&Rs, articles of incorporation, and by laws ... set up a system of government complete with a set of rules. The priorities embodied in this process are clear and explicit: first, there is a plan; second there is property; third, there are rules to protect the property: fourth, there is a physical "city"; and last, there are people to live in the city and follow the rules that protect the property (McKenzie 1994, 144-145).

In his book, *Privatopia* (1994), Evan McKenzie refers to Latham's comparison of corporations to private governments. Earl Latham contends that both

> "state and corporation are mature political systems to the degree in which they exhibit ... describable characteristics common to all body politic. In a functional view of all such political systems it can be said that there are five essential elements:
> 1) an authoritative allocation of political function;
> 2) a symbolic system for that ratification of collective decisions;
> 3) an operating system of command;
> 4) a system of rewards and punishments;
> 5) institutions for the enforcement of the common rules (133).

According to McKenzie, CIDs also exhibit these five elements:

1) Latham's authoritative allocation of function is found in the corporate articles of incorporation and other governing documents ...
2) The symbolic system for the ratification of collective decisions is the annual election by which board members are selected, which established whatever claim to legitimacy the board may have.
3) Latham's operating system of command is the board and committee structure, including the often powerful architectural committee.
4) The system of rewards and punishments is the board's ability to fine members for rule violation and to withhold or grant permission to do certain things.
5) Latham's institutions for the enforcement of common rules ... The board cites violators and holds the hearings ... (133-134).

Sanford Lakoff defines private governments as "limited-purpose associations: they are ostensibly voluntary in membership; they exist 'alongside and subordinate to' public government ; and, most important, they exhibit "fundamental political characteristics" (as quoted in McKenzie 1994, 135). As a result of an analysis by the Urban Land Institute in 1973, the Department of Housing and Urban Development

required that CICs "have a means of government that included voting rights ... as a condition of giving federal assistance to these projects" (McKenzie 1994, 136).

Managing a Successful Community Association[2] describes HOAs as follows :

> By their very nature, associations become mini-governments. They provide services that in many areas of the country have been provided by municipalities, including maintenance of common areas, roads, utility systems (water and sewer), lighting, refuse removal, and communication systems. Implementation and enforcement by CAs of these easements of access, architectural covenants, and use restrictions contain in land documents are analogous to police and public safety services provided by governmental bodies (as quoted in McKenzie 1994, 137).

In his book, *Edge City* (1991), Joel Garreau refers to property owners' associations as "shadow governments."

> Shadow governments that are privately owned and operated, such as homeowners' associations ... can rigidly control immense residential areas. ... What makes these outfits like governments, scholars say, is the extent to which they have the following three attributes:
>
> - They can assess mandatory fees to support themselves: the power to tax.
> - They can create rules and regulations: the power to legislate.
> - They have the power to coerce, to force people to change their behavior: police power.
>
> All governments have these powers. What sets shadow governments apart is that they have three additional attributes:
>
> - The leaders of shadow governments are rarely if ever directly accountable to all the people in a general election.
> - When and if these leaders are picked in a private election, the vote is rarely counted in the manner of Jeffersonian democracy, with each citizen having a voice. Instead, it is usually one dollar, one vote.
> - These leaders are frequently not subject to constraints on power that the Constitution imposes on conventional governments (187).

Although "Wayne Hyatt, the most prominent legal advocate in CAI and former president of the organization wrote: 'Upon analysis of the association's functions,

[2] Produced by CAI and ULI in 1974.

one clearly sees the association as a quasi-governmental entity parallel in almost every case the powers, duties and responsibilities of a municipal government'..." (McKenzie 1994,138) both "... CIDs and the courts now resist assigning the private government label to homeowner association boards. This resistance ... reflects a concern that constitutional limitations on municipal government activity might become applicable to homeowner associations" (McKenzie 1994, 136).

Majority Rule

Majority rule is seen as part of a democratic form of government. (Dye 2001 , 12) In HOAs it is common that there needs to be approval of a super majority of residents before rules can be changed. (McKenzie 1994, 147) The ULI and FHA proposed "in the 1964 *Home Association Handbook*, ... that changes in the CC&R require a two-thirds vote and a three-year waiting period before they would become effective" (McKenzie 1994, 127). Because of the super majority vote, HOAs are difficult to terminate. (Mitchell 1998, 8)

In an "Investigative Report" appearing in the March/April 2001 edition of *Common Ground* gave an account of residents attempting to dissolve the Beckett community association in New Jersey. The association requires an eighty percent vote of the homeowners to dissolve the association. "A few years ago, ... fed-up neighbors formed Residents for a Better Becket ... to disband the association" (13). Two reform candidates have been elected to the board with the intention of dissolving it. According to "a spokesman for the New Jersey Department of Community Affairs, "'Disbanding is so unusual, there aren't even statutes to govern such an action ...'" (13).

Sterk (1994) questions "why we should look to majority rule as a basis for making social decisions" (287). Majority vote is not how scientific problems are solved and few believe religious truth can be found by taking a vote. (287) "By outvoting the minority, the majority avoids confronting and evaluating minority concerns" (319). "John Hart Ely has argued that courts should as a matter of constitutional law, protect those most likely to be excluded from political power in a majoritarian regime. ... If we treat voting rights as a political issue to be decided by majority rule, a majority would be empowered to disenfranchise members of the collective body" (as cited in Sterk 1994, 288). Sterk contends that "majority rule is not an end in itself, but means of assuring that government respects personal liberties and promotes social welfare. ... The argument that majorities ought not to be permitted to abridge fundamental rights has become a staple in American constitutional theory" (Sterk 1994, 291).

Minority rights are usually associated with protecting minority racial, ethnic or religious groups. Minorities in common interest communities consist of residents with different concerns and interests. Common interest communities may offer a variety of amenities such as security, golfing, a pool and community center and homebuyers are drawn to a community for different reasons. Residents have different priorities. To some the pool is most important, others think security should be the top priority and the golfers may not be concerned about anything but the condition of the course or if they can get a tee time. "Community association decisions, like other government decisions, often provoke sharp disagreements". ... and "our constitutional scheme protects members of minority groups against untrammeled majority rule" (Sterk 1997, 274).

Leadership

A homeowners' association's board of directors can have enormous control over the member's lives. "In most states, failure to pay the fine authorizes the association to attach a lien interest to the individual unit, and ultimately, to sell the unit at auction if the fine is not paid." Enforcement of restrictions may authorize the board to monitor the age of residents, number of occupants in a home, or whether business is being conducted in a home (McKenzie 1994, 128-129).

"People who are willing to volunteer" to serve on the HOA board "often are motivated by a strong sense of community responsibility. ... Board members receive no pay for their services yet they must take on what are often heavy responsibilities. ..." Board meetings and committee meetings place demands on their time and "... rule enforcement can generate an unpleasant and often personal reaction from their neighbors" (McKenzie 1994, 131). However, not all board members may be concerned with their neighbor's best interest. Some "association officials may use their positions to satisfy their own instinctive or subconscious drive for power and authority ..." (Sterk 1997, 312). *New Gangster in Town* characterizes board members as "'powertrippers'" with 'do as we please attitudes'. Setting double standards of enforcing deed restrictions helps them weed out people who oppose their breach of authority. They feel untouchable, invincible ... knowing well the protection afforded them under the Property Code" (reprinted in the Interim Report 1998).

There are problems common to many HOA boards.

1) Boards often employ an autocratic system of authority which is outdated and "at odds with the stated goals of the larger society" (McKenzie1994, 135).

New public management emphasizes "the positive role of public service in our society ..." (Riccucci 2001, 173).

2) Because association board members are usually not compensated, they "do not put their livelihoods on the line whenever they make a decision of significance to the community. ... The personal incentives that induce corporate officers and directors to act carefully do not apply with equal force to members of a community association board" (Sterk 1997, 311).

3) Board members are not legally accountable for their actions. "In most states, board members are protected against lawsuits ... as long as they act prudently and in good faith" (McKenzie 1994, 130).

2) Boards commonly hold special meetings that are not opened to all the residents. An Arizona Homeowner Association Study Committee was formed to investigate complaints against associations. One of the committee's suggestion was "that steps be taken to ensure that every association complies with the Arizona Open Meeting Law; and that any changes to an association's CC&Rs be discussed and approved by residents" (Common Ground March/April 2001, 13).

5) Boards members may not have management experience and committee members "may have no professional expertise; such as architects or engineers on the architectural committee. (McKenzie 1994, 133)

6) People who like to be in control and enjoy having power over others are often eager to serve on the board or architectural committee. (McKenzie 1994, 131)

7) It is the board's responsibility to enforce the community's CC&Rs. "Charges of violation are made and heard by the board. There are no policies that separate the roles of accuser and trier of fact or that call for the empanelling of an independent, impartial jury" (McKenzie 1994, 129).

8) Boards often are more concerned with property values and expedient management than the homeowners concerns.

> According to the Barton and Silverman study, the corporate management model seems to permeate the thinking of board members as well as the residents, so that the CID is thought of as 'a type of business, where efficient property management saves money and increases the value of owners investments,' an attitude that conflicts with neighborliness." ... Barton and Silverman concluded, 'We see a general tendency for both associations and professional managers to emphasize ease of management over involvement and to regard "people problems" as simply a complication of property management This emphasis is misplaced'"(McKenzie 1994, 143).

Homeowners' associations are a representative democracy and "different viewpoints will be presented on many issues" (Mitchell 1998, 17). Disagreements are inevitable when neighbors have control of each other's lives. According to Mitchell, the "board should strive to keep the discussion focused on taking the best action for all residents. As a general rule, if the board is acting reasonably in pursuit of the common good of the residents, the discord among residents will be kept to a minimum" (17).

Rigid Rule Enforcement

Rigid enforcement of the rules can lead to antagonism against the board. (McKenzie 1994, 131) Advocates of planned communities and HOAs encourage board members to strictly enforce the CC&Rs. The industry's view is that "'Rules must be enforced uniformly, promptly, and firmly by the board. Delays can result in waivers and allow the violator a defense that he or she may otherwise not have had. Other

homeowners may violate the rule and eventually you have a general disregard of the rules'" (McKenzie 1994, 131). Critics contend that HOAs often place "rules over community" and can "reflect the worst kind of nasty neighborhood favoritism imaginable" (McKenzie 1994, 146 and 134).

In his article, *Howdy, Neighbor,* Brian Erickson describes what happened as one family arrive at their new home before sunrise. A neighbor comes over and "snaps, 'Who are you people, and what the blazes are you doing on my street at this time of night?" Another neighbor comes over and says, "'You better not have a dog, I hate dogs'". Around noon, a man in an uniform pulls up in a truck with emergency lights. He asks to see ID and says he is with Neighborhood Patrol and that the realtor requested that the house be watched. He says, "'We have rules and regulations around here, and you're going to have to follow them whether you like it or not. I could write you up right now for having that truck on the street. You'd better get with the program.'" Erickson (2000) notes that times have changed since the "Welcome Wagon ... greeted new residents to an area with flowers, local information, coupons and parties" (17-18).

Homebuyers are attracted to planned communities because they are well maintained and offer amenities they desire, however, often they fail to realize they will have to conform to strict CC&Rs of the community. The CC&Rs may have rules that cover "exterior color schemes, ... landscaping and even for when garbage cans can appear on the curb ..." (Benjamin 2000, 56). In many communities there have been conflicts over rules pertaining to displaying the flag. (Durso *Common Ground* 2001, 17) Benjamin contends "disagreements over ... neighborhood covenants are becoming more serious than simple spats." He cites an account of a feud over property maintenance

between "a 61-year-old disgruntled homeowner" and his association in an Arizona retirement community. The homeowner "allegedly burst into an association meeting ... and began shooting. ... The rampage killed two and wounded three ..." (56).

Jay DiBenardo's "association filed a lien on his house for putting an illegal gazebo in his yard. He said he never had such a thing. But now he does have a purple steel flamingo in his yard, just to bug the association." He makes the sculptures and "has sold about 100 of the flamboyant birds to other homeowners wishing to protest their associations." DiBenardo has gone to the internet to protest HOAs his "group is called Homeowners Supporting Homeowners in Association (www.hshia.org)" (Razzi 2000, 88). According to Razzi, in many communities residents "complain that their neighbors take their role as enforcers way too far. Petty back-fence arguments can escalate into fines liens and lawsuits. And frustrated homeowners—who didn't realize that by buying a house they were agreeing to lives of such conformity—are screaming for attention" (88).

Liens, Foreclosures, and Lawsuits

Often, homeowners' association members "agree to nonjudicial foreclosure. That means the association doesn't need a hearing or a judge to sell a resident's house to collect fines and legal fees. Associations can also tax residents to finance lawsuits. Members must pay or face fines, lawsuits or ultimately foreclosure" (Benjamin 2000, 56-57). According to Sterk, "courts have become increasingly inclined to enforce association-imposed assessments" (331).

The Exemption Act protected Texas homesteads against foreclosure for 148 years. Since 1987, homeowners' associations in Texas have been able to foreclose on

property. (SB 699, 76th Legislative Session 1999) This has upset many Texas residents. In a letter to State Representative, Edmund Kuempel, Bennett Allen (1999) questions why covenants, conditions and restrictions (also known as declarations) are allowed to be written to negate the Texas Homestead Act. He writes, "It is apparent that the subdivision's developers can incorporate anything they desire into the 'declarations' and negate existing laws if they do so by 'run with the land'! I wonder from whence did the developers gain such power?" In a "1988 court ruling, Supreme Court justices noted that associations and fee requirements are in place first and supersede later homestead exemptions filed by purchasers of houses"(Flynn 1998).

A Houston man, "ill with a brain tumor, ... fell behind on $600 in dues. His association sued to retrieve them, leading to $4,600 more in legal fees. When he couldn't pay in time, the association sold his house valued at $55,000 for $17,000. The foreclosure has since been void." His lawyer said associations are "...'fee machines'..." (Benjamin 2000, 57). Houston is located in Harris County. In 1997, associations filed 1,050 foreclosure suits in Harris county. (Flynn 1998)

Attorneys in states where there are many planned communities have found "covenant enforcement litigation ... a profitable legal specialization ..."(McKenzie 1994, 132). Joni Greenwalt, author of *Homeowners Associations: A Nightmare of a Dream Come True*, says, "'Suing the association is not a good plan ... Sometimes what will start as a problem costing $200 or less will escalate to $50,000 with legal fees" (as quoted in Razzi 2000, 88).

According to Mitchell,

> The benefits of the HOA are significant in these types of actions. First, the costs to an individual – both the financial and psychological costs – to pursue

> such an action are often devastating. Most residents cannot afford the financial costs or the stress associated with the individual pursuit of such an action. Alternatively, the HOA can pursue the action often times without disclosing the name of the notifying resident to avoid the personal stress associated with the suit. Additionally, in a community of almost any size, the HOA can better afford the cost of the suit. (in a community with 500 residents, the HOA will have a cost of $60 per resident to pursue a lawsuit costing $30,000 to prosecute (1998, 19).

Steve Solcich claims, "The typical homeowner cannot use an attorney in Harris County because of the outrageous cost"[3] (Interim Report 1998).

Inadequate Reserve Funds

Often the homeowners' association's reserve fund is lower than the 75% of the annual budget recommended by industry experts. (McKenzie 1994, 130)

> One study in California showed that reserves averaged 40 percent of the annual budget ... Reserves become especially critical when the unexpected happens—when roofs fail prematurely, pools develop cracks and leaks, pavements deteriorate, structural beams begin to shift, or water begins to fill basements or ruin interior walls (McKenzie 130, 130).

In a common interest community, the cost of common ground and facilities and management is shared by the homeowners. The dues each homeowner pays is determined by the number of homes in the development. "Many times regulations or the political process will reduce the number of housing units in a residential development" (Mitchell 1998, 9). If there are fewer homes in the development, each homeowner will be responsible for a larger share of the HOA's expenses.

"Often, ... homeowners' inherit an association treasury that has been underfunded from the start" (Razzi 2000, 87). The developer has control of the association until most of the homes have been sold and paying for future maintenance is not a priority. By the time the homeowners gain control of the association, they are faced with not having enough money to pay maintaining an aging community (Razzi 2000, 87). When a board

is faced with a costly repair or having to replace expensive equipment, they either have to raise dues or require the members to pay a special assessment. If HOA's dues have to be increased substantially more than members anticipated, eventually some homeowners may not be able to afford to stay in their homes. (McKenzie 1994, 130)

Lack of Participation

Members of the Community Association Institute rank lack of homeowner participation as the number one contributing factor of problems in community associations. (Treese, 10) Solcich, critic of HOAs, claims, "Texans as homeowners do not want their associations. 99% of homeowners hate their associations, and will never attend monthly meetings or become actively involved to promote its survival, nor will they participate in the organized effort to dissolve the association" (Interim Report). It is common for attendance is to be low at HOAs' annual meetings, members often don't support board function and activities and there is "frequent conflict between boards and members"(McKenzie, 135). A California study by Barton and Silverman suggests that attitude reflects a "common perception that boards are just a small group of powerful neighbors" (McKenzie , 135). This attitude is consistent with a University of Michigan report that showed that citizen trust in government fell from 61% in the early sixties to a low of 27% in 1994. (Hodges 2000, 2)

Social Concerns

Homeowners associations have been criticized for placing concern for property values over the welfare of the total community. In HOA communities, paying dues satisfies the residents' community responsibility. (McKenzie 1994, 148) In contrast,

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[3] Address before Interim Committee

> cities, states and nations have a vast networks of private and public threads that tie citizens together and make them interdependent. We are linked via law, religion, the mass media, and bureaucracies in ways that encourage or compel us to be responsible to, and for, each other. These responsibilities extend far beyond maintaining property values and conformity (McKenzie 1994, 149).

Common interest communities are restrictive by nature. Restrictive covenants are written to ensure homogenous neighborhoods. Until it was illegal, covenants were used to exclude minorities so property values would be protected. (McKenzie 1994, 64) At one time, FHA policy stated "'Satisfaction, contentment, and comfort result from association with persons of similar social attributes. Families enjoy social relationships with other families whose education, abilities, mode of living, and racial characteristics are similar to their own'" (McKenzie 1994, 65). Covenants no longer can restrict owners because of race or religion but they are written to promote a homogenous neighborhood. There are covenants that specify the make-up of a family. One Florida HOA defines a family as "'one adult, a spouse, and any unmarried children.' No mention of grandparents, grandchildren dependent nephews, nieces, cousins, or other kin normally associated with the word 'family'" (Spears, 54). Retirement communities that have 80% of their residents over the age of 55 are exempt from the Fair Housing Act of 1988 and are allowed to restrict children from living in the community. (The Housing for Older Person's Act of 1995)

Another criticism of common interest developments is that they

> have a communalistic, even cultlike, isolationist nature. They are deliberately cut off from the surrounding society and dedicated to living according to a specific set of rules. ... Residential isolation and acceptance of seemingly oppressive security measures (coupled with the withdrawal from the workforce, in the case of seniors) lends an eerie detachment to the atmosphere, not unlike what one might expect to encounter in a commune" (McKenzie 1994, 141-142).

Richard Louv contends that children in planned communities are living in an "'artificial environment … Will children who grow up in these places have any sense of commitment to them? Or will these developments someday become vast soulless slums. … We have a generation in this country that doesn't know you should be able to paint your house any color you want'" (as quoted in McKenzie 1994, 144). McKenzie expresses concern that children brought up in CIDS will not have the same concern for their neighbors and mankind as previous generations who lived in traditional communities. (149)

CHAPTER V

LAWS GOVERNING HOMEOWNERS' ASSOCIATIONS

The covenants, conditions and restrictions or deed restrictions that dictate the operation and rules of common interest communities "are legally know as 'equitable servitudes,' a legal concept that predates the constitution" (McKenzie 1994, 147). Deed restrictions originated in 14th century England and permit "a seller of land—such as the original developer and his successors, the board—to retain control over how the land is used after he sells it" (McKenzie 1994, 20). Deed restrictions were used

> in medieval England when agricultural land in common use was broken up into parcels, and the law devised ways to regulate the new, interdependent relationships of adjoining landowners. During this time restrictive covenants were simply owners' promises not to harm the land.
>
> In the eighteenth and nineteenth centuries, ..." subdividers first began to use deed restrictions as private land-planning tools, setting aside parcels of fenced and gated park land for the exclusive use of the buyers and tenants. In some places homeowners voluntarily organized associations to maintain these parks.
>
> In the late nineteenth century ... developers greatly expanded the use of restrictive covenants, creating uniformity of appearance and setting up permanent homeowner associations to enforce restrictions. ...
>
> By ... 1928 American community builders had become heavily reliant on restrictive covenants for the implementation of their physical and administrative community plans (McKenzie 1994, 30-31).

At one time English judges viewed "...many restrictive covenants ... as undue restraints on the free sale of property." However in America, "...restrictive covenants are an approved legal device" (McKenzie 1994, 21). This chapter will look at federal and

state laws that pertains to common interest communities and homeowners' associations and review current laws and proposed legislation in Texas.

Federal Legislation

The Declaration of Independence states, "We hold these Truths to be self-evident, that all men are created equal, that they are endowed with by their creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness ..." (Jefferson 1776). People do not always have the same interpretation of liberty or pursuit of happiness. One person may believe that he should have the liberty to build an eight-foot fence and paint it purple and his neighbor could argue that the fence prevents her the happiness of enjoying the sunset. Real estate is generally regulated by the states. However, there are federal regulations that affect common interest communities and there have been court rulings that have declared some deed restrictions unconstitutional or discriminatory.

The 1st Amendment to the Constitution protects the "...freedom of speech, the press and the right of the people to peaceably to assemble ..." (U. S. Constitution 1791) but "some community associations have banned political signs, prohibited distribution of newspapers, and forbidden political gatherings in common areas" (McKenzie 1994, 15). The "courts typically have enforced use restrictions included in the Declaration, even against challenges that the restrictions inhibited free speech or undermined personal autonomy. ... They have upheld Declaration restrictions against signs, despite free speech and antitrust challenges" (Sterk 1997, 280).

The Fourteenth Amendment, which was ratified in 1868, guaranteed citizens of the United States "due process, and equal protection of the laws" (U. S. Constitution

1868). However, "covenants to exclude African-Americans, Asians, Jews and other minorities from buying or renting homes in specific neighborhoods or developments" ... were common ... "until 1948, when the U.S. Supreme Court outlawed the practice ..." (McKenzie 1994, 58). In an 1973 analysis produced by the Urban Land Institute, Hugh Mields questions the constitutionality of homeowners associations. He states,

> since most HOA exclude lessees from membership ... these 'private governments' may violate the equal protection clause of the Fourteenth Amendment. ... In addition, HOAS are not voluntary associations, though they have been treated as such. The fees or assessments that they collect have been held to be a form of taxation which again is legally suspect. The crucial legal question regarding the extent and substance of legitimate citizen participation all relate to this problem (McKenzie 1994, 136-137).

In 1988, the Fair Housing Act Amendments (FFAA) were enacted which prohibited discrimination in housing because of race or color; national origin; religion; sex; family status (including children under the age of 18 living with parents or legal custodians; pregnant women and people securing custody of children under 18; and the handicapped. (Federal Fair Housing Act) The Housing for Older Persons Act of 1995 does allow an age exemption for communities if at least eighty percent of the units are occupied by a person who is 55 years of age or older. (CAI Summary and Analysis of HUD Final Rule 1999) In his article *All's Fair*, David Ramsey (2000) claims that twelve years after FFHA discrimination against the disabled is still common. (23)

A more recent issue involving federal regulations concerned "restrictive covenants attempt to place restriction or prohibitions on antennas and satellite dishes. Pursuant to the Telecommunication Act of 1996, the Federal Commission prohibited HOAs from unreasonably restricting satellite dishes less than one meter in size and certain antennas installed by residents" (Mitchell 1998, 21).

Lawsuits involving homeowners and HOAs commonly involve certain individual freedoms that the Constitution guarantees citizens. The majority opinion of the California Supreme Court in Frances T. v. Village Green Owners Association held that "Constitutional and common law protections do not lose their potency merely because familiar functions are organized into more complex or privatized arrangements" (as cited in McKenzie 1994, 150).

Legislation in Other States

As common interest communities grew in popularity during the sixties, it became apparent that "there was insufficient legislation to provide specific statutory direction" (McKenzie 1994, 152). The primary source "of law for dealing with CID existed … in the form of appellate court opinions resulting from lawsuits" (McKenzie 1994, 151). Judges did not always agree and rulings varied from state to state. "Legislatures nationwide failed to come to grips with the full range of issues presented by the rise of common-interest housing" (McKenzie 1994 152-153). The industry feared they could become over regulated and lobbied against what they thought was excessive legislation. (McKenzie 1994, 152)

In the late sixties and early seventies, the condominium market exploded. Builders and developers "viewed condominiums as a financial investments" (Treese 1999, 6). "Problems such as recreation leases, construction defects, and underfunding of reserves prompted investigation and legislation aimed at eliminating these particular problems" (McKenzie 1994, 152). "By 1967, every state had adopted a condominium property act …" (Treese 1999, 6). However, other forms of common interest communities were basically unregulated. (McKenzie 1994, 152) "In 1977 the National

Conference of Commissioners on Uniform State Laws, borrowing from the Virginia Condominium Study and with the assistance of CAI, ..." (Teese 1999, 6)

> ... adopted a Uniform Condominium Act. In 1980, the conference adopted a Uniform Planned Community Act, and the next year adopted a model act for cooperatives. In 1982 the conference consolidated all three acts into the Uniform Common Interest Ownership Act, which it recommended for adoption by the states. ... By 1992 CAI concluded, some version of the four model acts had been adopted in nearly one-third of the states (McKenzie 1994, 153).

After an intensive study by the Joint Editorial Board for Real Property Acts, the Uniform Common Interest Ownership Act (UCIOA) was drafted by the National Conference of Commissioners on Uniform State Laws and was approved and recommended for enactment in all the states at its 103rd Annual Conference in Chicago, Illinois in 1994. The Act is a single comprehensive law and applies to condominiums, cooperatives and planned communities. The provisions of this act are too extensive to be adequately covered in this paper, however, provisions that are relevant to issues that are addressed in this work will be highlighted. (UCIOA 1994)

An important "precept of UCIOA is that full and adequate disclosure ..." is made to purchasers of units in CIC.[4] (UCIOA 1994)

> The best 'consumer protection' that the law can provide to any purchaser is to insure that he has an opportunity to acquire an understanding of the nature of the products which he is purchasing. Such a result is difficult to achieve, however, in the case of the common interest community purchaser because of the complex nature of the bundle of rights and obligations which each unit owner obtains[5] (UCIOA 1994).

The Act requires purchasers to be provided with a public offering statement. "The ... public offering statement ... provides purchasers with cancellation rights and

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[4] Summary of proposed changes 2
[5] Comment 1, Section 4

imposes civil penalties upon declarants[6] not complying with the public offering statement requirements of the Act"[7] (UCIOA 1994, Section 4-103). Some items required to be include in the public offering statement are:

> ... copies of the declaration, bylaws, and rules and regulations of the common interest community, as well as copies of any contracts or leases to be executed by the purchaser. ... any current balance sheet and a projected budget for the association, ... a statement of the amount, or that there is no amount, in the budget as a reserve for repairs and replacement; ... the projected monthly common expense assessment for each type of unit; ... any special fee due from the purchaser at closing; ... a description of any liens, defects, or encumbrances on or effecting the title or effecting title to the common interest community; ... (UCIOA 1994, Section 4-103).

Disclosure of fees for common elements, such as, use of the golf course or swimming pool that are not covered by the monthly assessment is also required. "Such fees can represent a substantial addition to the monthly assessment"[8] (UCIOA 1994).

> "In addition, ...a brief narrative description of the significant features of those documents, as well as of any management contract, leases of recreational facilities, and any other sorts of contracts which may be subject to cancellation by the association after the period of declarant control expirers ...[9] (UCIOA 1994) ... The disclosure requirement of paragraph (6) is intended to eliminate the common deceptive sales practice known as "lowballing," a practice by which a declarant intentionally underestimates the budget for the association by providing many of the services himself during the initial sales period [10] (UCIOA 1994).

An important provision in Section 4-103 is that

> within 15 days after receipt of the public offering statement a purchaser, before conveyance, may cancel any contract for purchase of a unit from a declarant, if the declarant fails to provide a public offering statement to a purchaser before conveying a unit, that purchaser may recover from the declarant [10] percent of the sales price of the unit plus [10] percent of the share, proportionate to his common expense liability, of any indebtedness of the association secured by security interests encumbering the common interest community ... (UCIOA 1994).

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[6] Declarants refers to the developer or builder who has control of the CIC before control is transferred to the homeowners.
[7] ibid.
[8] Comment 8, Section 4
[9] Comment 3, Section 4
[10] Comment 4, Section 4

Section 3-102 of the UCIOA enumerates the powers of the owners' associations. Under this act the association board of directors has a great deal of power to operate the association and enforce the association's rules. The most important provision in this Section 3-102 is that it requires "that disputes between the executive board and unit owners or between two or more unit owners regarding the common interest community must be submitted to nonbonding alternative dispute resolution ... " (UCIOA 1994). "Some state court systems may strongly support ADR as a way to divert a flood of cases that often seem trivial but hotly contested by litigants" (McKenzie 1994, 132).

To date, the Uniform Common Interest Ownership Act (1994) has been enacted by Connecticut, Minnesota, Vermont and West Virginia. (Statutes for Community Associations 2000) Laws that are uniform from state to state are very beneficial because the U.S. population is so mobile. This is especially true of real estate law. Often when a person moves from one state to another, he assumes that property laws are relatively consistent which can be a costly mistake.

Alternative Dispute Resolution (ADR) or "mediation is a process in which parties submit their dispute to a neutral third party (a mediator) who works with them to reach a nonbonding settlement of their dispute" (Treese, 11). ADR is being used in several states to "alleviate the oppressive burden of lawsuits from CIDS, ..." (McKenzie 1994, 132). According to a CAI survey, "One-fourth of the association surveyed reported using ADR at least once. Ninety percent of CA's that use arbitration or mediation find it effective. ... In Hawii, the, nonprofit Neighborhood Justice Center has attained an 85 percent success rate in resolving CA disputes through ADR" (Treese 1999, 11).

In Florida, before an association's board of directors can impose

> ... either a fine or suspension, a hearing must be held to afford the alleged violator an opportunity to be heard on the issue. At least (14) days notice of the hearing must be given, and the hearing must be held before a committee of at least three members of the homeowners' association appointed by the board of directors who are not officers, directors or employees of the association or the spouse, parent, child, brother or sister of an officer, director or employee of the association (Dunbar and Dudley 1997, 92).

Republican theorists recognize "that deliberation helps individuals transform their perceptions of their own self-interest, ... mutual deliberation will cause individuals to recognize their common ground with others. This recognition, in turn, will lead to empathy for those in different circumstances" (Sterk 1997, 297).

California, Florida and Texas are the states with the most common interest developments (McKenzie 1994, 11). Laws governing homeowners association are more comprehensive in most states than in Texas. (McKenzie 1994, 154) Florida has "a significant body of law" covering homeowners' associations. California in general and Los Angeles in particular have been at the cutting edge of American trends in use of zoning, restrictive covenants, suburbanization, and common interest housing." The Community Association Institute "has established a permanent legislative action committee" in both states (McKenzie 1994, 154).

In California, the issue of "whether homeowner associations should be viewed by the law as governments, and also whether they should be seen as some sort of private business or nonprofit enterprise" has been addressed in appellate court cases and legislation. (McKenzie 1994, 154) In cases that involved "different circumstances courts have called CID boards both 'mini-governments' and 'business establishments' and have sought to establish boundaries for their behavior along both lines" (McKenzie 1994, 154).

Common interest communities have benefited from this double standard because they "have neither the limitations of a government nor the full potential for civil liability of a business" (McKenzie 1994, 155).

In Florida, since 1992, there have been "special laws governing homeowners' associations ... In 1995 and 1997 the special statutory provisions were expanded and refined" (Dunbar and Dudley, Introduction) In their manual, *The Laws of Florida Homeowners' Associations: Single Family Subdivisions Townhouses and Cluster Developments Master Community Associations*, attorneys Peter Dunbar and Charles Dudley provide assistance to Florida homeowners living in a community governed by an association. Florida's law "set out specific operational procedures for homeowners' associations while providing for protection of individual rights of association members" (Dudley and Dunbar 1997, 4).

Texas Legislation

Texas, property owners' associations are incorporated under Article 1396 of the Texas Civil Statutes. (Interim Committee Report 1998, 8). Texas condominiums are regulated by the Texas Property Code Chapter 81, the Condominium Act, and Chapter 82, the Uniform Condominium Act. (Texas Property Code 1984/1994, Chapters 81-82) Chapter 81became effective January 1, 1984 and applies only to "a condominium regime created before January 1, 1994" (Texas Property Code 1984/1994). The 73rd Texas Legislature adopted the Uniform Condominium Act and it became effective January 1, 1994 and applies only to condominiums "for which the declaration was recorded created on or after January 1, 1994" (Texas Property Code 1994).

There were no specific state regulations for Texas suburban residential property owners' associations until 1995. Because of lack of zoning in Houston, "homeowners' associations fill the void by stringent enforcement of deed restrictions under their neighborhood bylaws" (Interim Report 1998). Prompted by problems in Houston homeowners associations, the 74th Legislature added Chapter 204 to the Texas Property Code and it became affective August 28, 1995. (Texas Property Code 1995) Chapter 204 "applies only to a residential real estate subdivision, excluding a condominium development governed by Title 7, Property Code, that is located in whole or in part in a county with a population of 2.8 million or more. This chapter applies to a restriction regardless of its effective date" (Texas Property Code 1995). Houston is located in Harris County which, according to the 1990 census, had a population as 2,818,101. As of 1996, Chapter 204 only applied to Harris County because it was the only county that had a population of at least 2.8 million. (U.S. Census Bureau, 1998)

Senator Jerry Patterson of Houston introduced SB 107 during the 75th Legislative session in 1997. The bill related "to a notice of homestead foreclosure information required for the sale of certain residential property" (SB 107 1997). The bill never made it out of committee. (Texas Legislature Online, 6/02/01) In "(Un)Welcome Mat," Patterson was reported as saying that 'to require notification in simple language that buyers of houses can loose [*sic*] their homesteads through foreclosures by associations. ... would be a first step to clear away a maze of misunderstanding about the law.' He said he is endlessly surprised to hear 'even college-educated people stand up in forums, and misstate homestead protections'" (Flynn 1998).

The Interim Committee on State Affairs was charged "to study the legal powers, duties, and structure of homeowners' associations' in Texas" and report their findings to the 76th Legislature. (Interim Report 1998) Included in the report were articles that accounted homeowners' associations taking extreme legal action against homeowners, a transcript of Steve Solcich's address before the committee, letters from homeowners, a copy of an abbreviated version of the law regulating homeowners' associations in the state of Washington State and a copy of a proposed Texas Planned Community Act.

A copy of one article in the report told of a foreclosure on Harvella and Johnnie Jones' property in North Woodland Hills. The foreclosure resulted "after a three year legal dispute over a $55 increase in the Jones assessment fee, which they say is illegal. … The home … was purchased for $448 by the North Woodland Hills Community Association at a constable's sale … " (Wooding 1995). The Jones filed a lawsuit against the association that was settled out of court. (Wooding 1996) Another article reported that a divorced grandmother who had lived in her home nineteen years was horrified when she learned of the "final court judgment—authorizing Northernglen to have the sheriff seize and sell her home for being delinquent in her community maintenance fees" (Flynn 1998). The dispute began over a basketball hoop without a net, a garage door that needed repaired and lawn maintenance. (Flynn 1998)

Steve Solcich had complained more than once to the Consumer Protection Division about the illegal abuse of authority by HOA board officers of the Huntington Village Community Association and Rick Butler, an attorney. He wrote the Attorney General requesting

> an investigation for the revocation of Hunting Village Community Association's Non-profit franchise by the State of Texas, and Quo Warranto for

> the Removal of its Board Officers. … We are in absence of any other remedy as we remain strong-armed by the HVCA's board officers' illegal abuse of authority. This conspiracy joins with a few high-powered attorneys who perpetrate their ongoing $800,000 Fraud, deception and discrimination in violation of the TX Property Code, violation of TX Anti-Trust and Non-Profit laws (1998).

Before the Interim Committee, Solcich said he had been investigating homeowners associations in the Houston area for six years. The following are the main points in Solcich's (1998) address:

1) The great majority of homeowners, usually more than 99%, will not participate in their association in any direction; that is keeping or dissolving it.
2) The board officers need some regulation and criminal penalties to curtail their frequent gangster violations of Restrictive Covenants, By-laws and Charters.
3) The association board officers are by far the biggest violators of corporate formalities. The homeowner is helpless. The State must step-in, investigate and revoke these franchises. Instead, all I have found is every violation is for the preservation of property values deeming it in the best interests of public policy.
4) Actual notice, and lack of choice to join a HAO are still non-existent at house closings making these closings an unconscionable contract.
5) The typical homeowner cannot use an attorney in Harris County because of the outrageous cost.

Other letters received by the committee were less passionate but expressed the need for state regulation. James Evans (1998) wrote,

> … homeowners associations perform a useful function and, when they remain true to their purpose, are justified in filing lawsuits. However, the current law allowing them to recover legal expenses is too one-sided a threat. It invites abuse and should be repealed. …
>
> I urge you to change the law such that it's practical for a resident who is being treated unfairly by a homeowners association to defend him/herself.
>
> My choices would be to:
>
> 1) Repeal the provision permitting them to collect their legal expenses from the homeowner and,
> 2) Add a provision making 3rd party arbitration, binding on the association but not on the homeowner who protests their demands, and make it available to him at some fraction of its cost.

Eleanor McFarland and Nikki Thompson's letter to Senator Ken Armbrister (1998) listed specific areas that needed addressed. The letter stated that although laws exist regarding Non Profit Corporations, no one seems able to enforce them. They asked that the Committee address the following:

1) "decrease the Board's authority …
2) increase the Board's accountability to a government body in both Civil and Criminal Statues
3) increase association members "ability by an adjudicator in matters of conflict with" the Board of Directors."

The letter went on to suggest how this could be accomplished.

> [1] We need an agency or an entity with the authority to arbitrate without the full legal cost involved in a long court battle.
> Similar, for example, to the Texas Natural Resource Commission. This entity would be able to:
>
> [a] have the authority to enforce adherence:
> The 1994 Real Estate Act
> The Real Estate Licensure Act
> The civil Non-Profit Act article 1396 for Texas
> The Open Records Act
> The 1995 Open Meetings Act
>
> [3] explain any state law applicable to the complaint to both the Association Boards and Association Membership,
>
> [4] arbitrate, and decide the complaint. Once they give judgment, the authority to make it binding on both parties. …

The agency would also arbitrate conflicts over elections and by-laws and provide information on operating a homeowners' association and laws applying to associations. This agency would be funded by a small assessment on membership dues, such as

TNRCC receives from water charges. This letter was particularly constructive because it addressed the problem of enforcing regulations. (McFarland and Thompson 1998)

The law regulating homeowners associations in Washington State was included in the report because of the "provisions for open and notorious operation of homeowners associations" (Interim Report 1998). The law requires homeowners' associations to have open meetings, open records and an annual financial statement.

The Interim Report contained a Proposed Texas Planned Community Act. There are provisions in the Act for: creation of a homeowners association; modifying restrictions; powers of property owners associations; creation and operation of architectural control committees; sellers of property governed by homeowners associations; obligation of owners; property owners association meetings and property owners association's lien for assessment. The Section 210.011 of the act requires open meetings except for matters concerning pending litigation, contract negotiations, or enforcement action, personnel, invasion of privacy of individual owners or matters concerning owners that are of a confidential nature. If the board meets in a closed session "any business to be considered … must first be announced at the open meeting". Section 210:15, Property Owners Association's Lien for Assessment, specifies the circumstances and procedures for placing a lien on an owner's property. (Interim Report 1998)

In 1998, the "Interim Committee on State Affairs Report to the 76th Legislature Charge Two, Legal Powers, Duties, and Structure of Homeowners' Associations in Texas" was submitted. The report concluded that:

1) Homeowners association performs a valuable and necessary function in the maintenance and protection of the homes in Texas.

2) The enforcement of restrictive covenants through administration of the bylaws of a homeowners association charter is necessary to insure contractual responsibility and does not restrict private property rights.

3) The rights of property and homeownership should not be abridged by unfair enforcement measures.

4) Adequate legal representation is not available to all citizens involved in disputes regarding homeowners associations.

5) Each Texas homeowner is entitled to adequate notice and opportunity to be heard on matters regarding their homes.

6) Due process concerns are not adequately addressed by the current foreclosure process.

7) Homeowners associations are de facto political subdivisions.

The committee made the following seven recommendations:

1) Provide adequate disclosure of membership in a homeowners association during closing procedures on property.

2) Provide that each homeowner involved in a dispute with their homeowners association be afforded proper notice of and an informal hearing before the homeowners association board of directors prior to any legal action.

3) Proscribe any legal action arising out of a dispute between a homeowner and the homeowners association be adjudicated in the proper small claims or justice of the peace court.

4) Provide alternative dispute resolution by a disinterested party.

5) For future subdivisions, adopt the Uniform Planned Community Act, with modifications.

6) Entitle homeowners to a right of redemption against foreclosed property.

7) Homeowners associations should develop some type of board member certification that would be required prior to indemnification. (Interim Report)

As a result of the Interim Committee on State Affairs Report , during the 76th Legislature in 1999, Senator Carona introduced, Senate Bill 699 (1999). The bill

provided remedies to property owners with grievances against property owners associations. The bill opens by stating:

> Since, 1987 property owners' associations have been able to foreclose and operate with considerable latitude regarding their powers to modify, extend, or continue restrictions and procedures. While Article 1396-1.01 et seq., V.T.C.S. (Texas Non Profit Corporation Act) governs property owners' associations, there is no state agency that monitors or regulates violations of the Texas Non-Profit Corporation Act (Act). The only homeowners' remedies provided under the Act require the homeowner to employ a private attorney to pursue a grievance against a property owners association (SB 699 1998).

The bill proposed to amend Title 11 of the Texas Property Code by adding Chapter 207, Texas Planned Community Act. In Subchapter C, Section 207.069 the bill provides for education of board members and Subchapter D provides protection for purchasers of homes in communities with associations. (SB 699 1999) Senate Bill 699 passed the Senate's State Affairs Committee and the House's Business and Industry committee, but the 76th Legislature adjourned before the bill could be passed. (Texas Legislature Online, October 11, 2000)

During the 77th Legislature in 2001, Senator Corona introduced Senate Bill 507. The bill amended Title 11 of the Property Code by adding Chapter 209, the Texas Residential Property Owners Protection Act. (SB 507 2001)

The bill analysis opens by stating that,

> In Texas, homeowners' associations operate with little statewide regulation or guidance. As a result, ...conflicts arise. ... S.B. 507 adds the Texas Residential Property Owners Protection Act to the Texas Property Code, to provide guidelines for the operation of associations as well as specific protections for Texas homeowners living in association-managed communities.

Texas Residential Property Owners Protection Act "only applies to a residential subdivision in which a property owners' association ... collects regular or special

assessments and to a property owners' association that requires mandatory membership. The Act does not apply to a condominium development" (Bill Analysis 2001, 4).

Association records are covered in Section 209.005 states that, "A property owners' association shall make the books and records of the association, including financial records, reasonably available to an owner …" (a). There can by a wide interpretation of "reasonably available".

Section 209.006 requires a property owners' association to notify the owner before suspending "an owner's right to use a common area , file suit against an owner other than to collect a regular or special assessment or foreclose under an association's lien, charge an owner for property damage, or levy a fine for violation of the restrictions or bylaws or rules of the association, …" The notice must be written and given by "the association or its agent …" and sent "by certified mail return receipt request" (a).

The notice must:

1) describe the violation or property damage that is the basis for the suspension, action, charge, or fine and state any amount due the association from the owner; and
2) inform the owner there was given notice and reasonable opportunity to cure a similar violation within the previous six months; and
3) may request a hearing … on or before the 30th day after the date the homeowner receives the notice (b).

The following section (209.007) gives the owner the right to cure the violation and request a hearing before the association's board. The process for requesting a hearing is also described. This section gives the owner or the association permission to use alternative dispute resolution but it does not require ADR be used or mandate that the ADR decision is binding.

Attorney's fees are address in Section 209.008 attorneys' fees.

a) A property owners' association may collect reimbursement of reasonable attorney's fees and other reasonable costs incurred by the association relating to collecting amounts, including damages, due the association for enforcing restrictions or the bylaws or rules of the association only if the owner is provided a written notice that the attorney's fees and cost will be charged to the owner if the delinquency or violations continues after a date certain.
(b) An owner is not liable for attorney's fees incurred by the association ... if the attorney's fees are incurred before the conclusion of the hearing under Section 209.006 or, if the owner does not request a hearing under that section, before the date by which the owner must request a hearing (SB 507 2001).

Sections 209.009 prohibits property owners' associations from forcing a foreclosure sales if the debt securing the assessment lien if "(1) fines assessed by the association; or (2) attorney's fees incurred by the association solely associated with fines assessed by the association." Section 209.010 describes the process of notification after the sale. Section 209.011 covers the Right of Redemption after foreclosure. This section is lengthy and details the redemption process and the responsibilities of the parties involved.

Senate Bill 507 was signed by the Texas House of Representatives and the Texas Senate May 28, 2001 and signed by the Governor June 14, 2001. The Act becomes effective January 1, 2002. (Texas Legislature Online, July 1, 2001) Senate Bill 507 address the issues of open records, written notice of association action against owners; the process for foreclosing on member's homes and the right of redemption of property by owners. The Act does not address:

1) Providing buyers information so they are aware that there are restrictions on his/her property and that the association has some control over the use of the property and the homeowner has certain obligations to the association.
2) Specifying the power granted to the association board of directors.
3) Open meetings.

4) Providing for modification of existing rules.

5) Regulating the power of the architectural control committee.

6) Requiring training for association board members.

The significance of SB 507 is that there is now a law that applies to all Texas homeowners' associations with mandatory membership and the power to collect assessments. Perhaps future legislators will recognize the need to enact stronger regulations.

CHAPTER VI

THE ATTITUDES AND PERCEPTIONS OF HOMEOWNERS' ASSOCIATION MEMBERS: METHODOLOGY AND RESULTS

Texas homeowners' association members were surveyed to assess: their understanding of community covenants and association's rules; their perceptions of their association's rules and architectural controls; and their attitudes toward education for board members, mediation of grievances against the association and state regulation of homeowners' associations. This chapter will discuss the results of that survey and the results of a 1999 National Survey of Homeowner Satisfaction (1999) commissioned by the Community Association Institute.

Methodology of the Survey of Attitudes and Perceptions of Texas Homeowners' Association Members

Two groups of Texas residents living in communities where membership is mandatory in a homeowners' association with the power to assess the members were asked to complete a survey. (See Appendix A)

The first group were members of a Texas senior community that requires at least one member in each home to be 55 years of age or older. The surveys for this group were placed on the mailboxes of the 191 homes in the community. The residents were asked to complete the survey and place it in a box at the community lodge.

The second group was faculty members of the Political Science Department at Southwest Texas State University and students and alumni of the Master of Public

Administration Program at Southwest Texas State University. A listserv was used to distribute the surveys to the second group. Only residents living in communities where membership is mandatory in a homeowners' association with the power to assess were asked to reply.

The literature indicates that many problems in homeowners' association occurred because homeowners do not understand the community's covenants and the association's by-laws, rules and restrictions before they buy their homes; and that homeowners and members of the association's board of directors often have different opinions. The survey questions were designed to determine if members of Texas homeowners' associations:

1) Understood the community's covenants, and the association's by-laws, rules and restrictions before they bought their home;
2) Thought the rules and architectural controls were appropriate;
3) Thought board members should be required to view a video tape or attend a class that explained the obligations and rights of association board members and laws pertaining to homeowners' associations;
4) Would be willing to resolve a grievance against a homeowners' association through mediation;
5) Thought there should be state regulations governing homeowners' associations.

In order to determine if homeowners and association board members had different perceptions about their community, the respondents were asked if they had ever served on an association's board of directors.

Survey Results

Of the 191 surveys distributed in the senior community, 93 responded (80.2% of the total population). Because the second group received the survey electronically, there was no way to know the number of surveys distributed, however, 23 responded (19.8% of the total population). There were 26 respondents who had served on an association's board of directors (22.6% of the population.) Overall, 116 surveys were returned. A summary of the results is presented in Table 6.1.

To the question, "How well did you understand the community covenants and the association's by-laws, rules and restrictions before buying?" there were 112 responses. Of the 112 responses, 38 (33.9%) responded that they had a good understand; 39 (34.8%) responded they had a fair understanding; 16 (14.3%) responded they had a poor understanding and 19 (17%) responded they had no understanding of the association's by-laws, rules and restrictions before buying. The results indicate that over half of the respondents (65.1%) didn't have a good understanding of the community covenants and the association's by-laws, rules and restrictions before buying.

To the question, "How appropriate are the rules and regulations for your community"? there were 115 respondents. Of the 115 responses, 68 (59.1%) responded the rules were very appropriate; 40 (34.8%) responded they were somewhat appropriate; 3 (2.6%) said they were somewhat inappropriate and 4 (3.5%) said the rules were not appropriate at all.

To the question, "How appropriate are the architectural controls for your community?" there were 115 responses. Of the 115 responses, 61 (53.0%) responded they were very appropriate; 45 (39.1 %) responded that they were somewhat appropriate;

4 (3.5%) responded that they were somewhat inappropriate and 5 (4.4 %) responded that the architectural controls were not appropriate at all.

To the question, "Do you think board members should be required to view a video tape or attend a class that explained the obligations and rights of association board members and laws pertaining to homeowners' associations?" there were 109 respondents. Of the 109 respondents, 81 (74.3%) responded yes and 28 (25.7%) responded no.

To the question, "If you had a grievance against a homeowners' association, would you be willing to resolve it through mediation?" there were 114 responses. Of the 114 respondents, 111 (97.4%) responded yes and 3 (2.6%) responded no.

To the question, "From your experience, do you think there should be state regulations governing homeowners associations?" there were 112 responses. Of the 112 respondents, 65 (58%) responded yes and 47 (42%) responded no.

Table 6.1
Descriptive Statistics Among Respondents

Variable	N	Percentage
Community Category		
Senior	93	82.2
Non-senior	23	19.8
Total	116	100.0
Board Member		
Yes	89	77.4
No	26	22.6
Total	115	100.0
Understanding Before Buying		
Good	38	33.9
Fair	39	34.8
Poor	16	14.3
No	19	17.0
Total	112	100.0
Appropriateness of Rules		
Very Appropriate	68	59.1
Somewhat Appropriate	40	34.8
Somewhat Inappropriate	3	2.6
Not Appropriate	4	3.5
Total	115	100.0
Appropriateness of Controls		
Very Appropriate	61	53.0
Somewhat Appropriate	45	39.1
Somewhat Inappropriate	4	3.5
Not Appropriate	5	4.4
Total	115	100.0
Favor Education for Board Members		
Yes	81	74.3
No	28	25.7
Total	109	100.0
Favor Mediation		
Yes	111	97.4
No	3	2.6
Total	114	100.0
Favor Regulations		
Yes	65	58.0
No	47	42.0
Total	112	100.0

The responses were analyzed to determine if there was a significant difference between the responses from the senior community and the responses from the non-senior communities. After applying the chi-square test for significance, there was no significant difference found between the responses from the senior community and the responses from the non-senior community. Results are presented in Table 6.2.

The responses were analyzed to determine if there was a significant difference between the responses of members who had served on a homeowners' association board of directors and members who had not served on a homeowners' association board of director. After applying the chi-square test for significance, there was no significant difference found between the responses of members who had served on a homeowners' association board of directors and members who had not served on a homeowners' association board of director. Results are presented in Table 6.2.

Table 6.2

Relationship Between Variables

Variable Pairs	N	Chi-Square
Community Category by Understanding	**112**	**.925**
Community Category by Appropriateness of Rules	**115**	**.559**
Community Category by Appropriateness of Controls	**115**	**.298**
Community Category by Favor of Education for Board Members	**109**	**.118**
Community Category by Favor of Mediation	**114**	**.378**
Community Category by Favor of Regulations	**112**	**.434**
Board Member by Understanding	**111**	**.190**
Board Member by Appropriateness of Rules	**114**	**.138**
Board Member by Appropriateness of Controls	**114**	**.965**
Board Member by Favor Education for Board Members	**108**	**.147**
Board Member by Favor of Mediation	**113**	**.667**
Board Member by Favor of Regulations	**111**	**.997**

National Survey of Homeowner Satisfaction

In 1999, The Gallup Organization was commissioned by the Community Association Institute to conduct a survey on homeowner satisfaction in communities with homeowners' associations. The following is a description of the methodology used and a profile of the respondents.

Methodology:

> The Community Associations Institute commissioned The Gallup Organization to conduct interviews with 401 homeowners who currently live in a Community Association to assess members' satisfaction with their community in

general and specifically with their Community Association. In addition, 3,289 homeowners who do not live in a Community Association were interviewed for comparison purposes.

The surveys were administered by a team of Gallup consumer telephone interviewers between 4:00 p.m. and 10:00 p.m. local time from February 1, 1999 to February 15, 1999

On average, the typical community association homeowner, as represented by our respondents, was:

- 48 years old
- Earned $45,000 or more on an annual basis
- Was slightly less likely than non-association homeowners to have a child 18-years-old or younger living at home
- Had a professional or managerial occupation

Had at least a college education (National Survey of Homeowner Satisfaction)

The typical homeowner lived in a single-family home that was about 13 years old. Sixty-eight percent of community association homeowner respondents lived in an association with fewer than 500 units. Only 25 percent of association homeowners stated that this was their first home, and the majority had lived at their current residence for over five years. For most residents, this was their first experience living in an association. (National Survey of Homeowner Satisfaction 1999)

Results

Some results of the National Survey of Homeowner Satisfaction were reported on the Internet. The results were reported in terms of percentages and the actual number of respondents was not given. The results available did not directly corresponded to questions on the previous survey of Texas homeowners' associations' members, however, some of the results are worth examining. Results are presented in Table 6.3.

To the question "How well do you understand the community's covenants, rules, and restrictions now?" 39% responded they had an extremely good understanding, 50% responded they had very good understanding, 9% responded they had a fair

understanding, 1% said they had a poor understanding and 1% said they had no understanding at all. The Community Association Institute Research Foundation reported that, "Most Community Association members have a very good understanding of the community's rules and restrictions now, which is an increase in their understanding of the rules before buying."

To the question, "How fairly are the rules enforced in your community by your community board/management?" 18% responded extremely appropriate, 52% responded very appropriate, 22% responded somewhat appropriate and 2% responded not appropriate at all.

To the question, "How responsive is your community association to the needs of its residents?" 17% responded extremely responsive, 58% responded very responsive, 24% responded somewhat responsive, 6% responded not very responsive and 3% responded not responsive at all. These results are not accurate because the total responses add up to 108%. The results were included because they do indicate that most association members are satisfied with the management of their association. These findings contradict some of the literature on the subject.

To the question, "Do you plan to live in a community association when buying your next home?" 37% responded yes, 26% responded no, 24% responded don't know, 11% responded they didn't plan on moving and 2% didn't respond to the question. The three reasons most frequently given for buying another home in a community with a homeowners' association again were: upkeep of property, safety/security and keeps property values up. The three reasons most frequently given for not buying another home

in a community with a homeowners' association again were: too restrictive/don't like rules, fees/cost and not interested.

The Community Association Institute Research Foundation concluded that,

> Overall, Community Association members are very satisfied with the association in which they live This high level of satisfaction is evidenced by the fact that many members (40%) would not consider selling their house even if given 15% above the market value Because of this high level of satisfaction, 48% of Community Association members plan to live in a Community Association again, or plan to not move from their current community
>
> An interesting finding was that non-members' most common reason for not living in a Community Association was that there was not a Community Association that was near enough for them to live in This indicates a demand for more Community Associations (1999).

Table 6.3

National Survey of Homeowner Satisfaction

Variable	Percentage
Understanding of Rules Now	
Extremely Good Understanding	39
Very Good Understand	50
Fair Understanding	9
Poor Understanding	1
No Understanding	1
Total	100
Fairness of Rule Enforcement	
Extremely Appropriate	18
Very Appropriate	52
Somewhat Appropriate	22
Somewhat Inappropriate	6
Not Appropriate At All	2
Total	100
Responsiveness of Community Association	
Extremely Responsive	17
Very Responsive	58
Somewhat Responsive	24
Not Very Responsive	6
Not Responsive at All	3
Total	(108)
Buy Home with a Community Association Again	
Yes	37
No	26
Don't Know	24
Don't Plan on Moving	11
Refused	2
Total	100

CHAPTER VII

CONCLUSION

Summary

As the United States became more urbanized, conflicts between neighbors became more prevalent. Residents in more affluent communities wanted assurances that their neighborhoods would be protected from objectionable activities and the other property in the area would be maintained. Developers created restrictive covenants "to insure the quality of the 'community would be maintained" (Mitchell 1998, 3). After World War II, the demand for housing increased especially in the suburbs around large cities. Developers created new communities, but once the subdivision was complete and the developers moved on to their next project, residents were responsible for maintenance of entry areas and right-of-way. Homeowners' associations were created to maintain common areas of a community and protect property values. (Mitchell 1998, 4) Some local governments encourage homeowners' associations because they provide municipal services that are usually the city's responsibility. (Interim Report 1998, 2-5)

Homeowners' associations are the "legal entities that govern the business affairs of planned communities" (Kirkpatrick 1995). Common interest communities are planned communities where the residents own their dwelling unit (Treese 1999, 3) and a common interest association or homeowners' association "jointly administer a piece of land or building that is owned 'in common'" (Kirkpatrick 1995). Before building begins in a

planned community, the developer drafts a Declaration of Covenants, Conditions and Restrictions, CC&Rs) that provide for the homeowners association and establish rules and regulations for the community. These documents are "designed to bind each unit purchaser to the community" (Strek 1997, 277). "The restrictions 'run with the land', meaning that all successive buyers are subject to the covenants" (Interim Report 1998, 5). Homeowners in common interest communities "automatically become members of the association" and "pay mandatory lien-based assessments to fund the operation of the association and maintain the common elements" (Treese 1999,3). The homeowners association has "a measure of financial control over residents" and "some power to enforce lifestyle restrictions and to allocate benefits and burdens among members of the common interest community" (Sterk 1997, 277).

Problems arise in all communities because they are made up of individuals with different needs and interests. In common interest communities problems often stem from the resident's lack of understanding of the rules and how homeowners' associations function. HOAs are complex organizations and are usually incorporated and regulated under corporate law. (Treese 1999, 8). Corporations and homeowners' associations operate similar to a government, however, rigid regulations that apply to government operations do not apply to corporations or homeowners' associations. Also, changing rules or by-laws of a HOA is difficult because it usually requires at least a two-third vote of the membership. (McKenzie 1994, 127)

Conflict between homeowners and the association board of directors is not unusual in common interest communities. Board members often have a great deal of control over the residents' lives. (McKenzie 1994, 128-129) At times, residents see

board members as individuals who enjoy having power over others. (McKenzie 1994, 131) This perception is enforced if the board has an autocratic management style, holds closed meetings, rigidly enforces rules and is more concerned with property values and expedient management than the homeowners' concerns. (McKenzie 1994, 130-143) Frequently members of HOAs agree to nonjudicial foreclosure, which gives the association the authority to sell a residents home to collect fines and legal fees. (Benjamin 2000, 56-57) Because lawsuits are very expensive, most homeowners can't afford to pursue legal action if they have a grievance against an association. (Mitchell 1998, 19) Inadequate reserve funds can also be a problem for many associations. Many homebuyers are not aware that when they buy a home governed by an association that they have agreed to abide by the association's rules and pay the assessments for the association's operating expenses and maintaining common area and once they find out they have made a commitment that can affect their lives for years.

Although there are some federal laws that regulate homeowner associations, the states' statutes primarily regulate HOAs and regulations vary from state to state. Many states have comprehensive laws regulating HOAs and in other states HOAs are basically unregulated. In 1994 Uniform Common Interest Ownership Act was drafted by the National Conference of Commissioners on Uniform State Laws and was approved and recommended for enactment in all the states. (UCIOA 1994) The act requires all purchasers be given a public offering statement that contains copies of the declaration, bylaws, and rules and regulations of the community. (UCIOA 1994) In some states, alternative dispute resolution is being used to resolve disputes between homeowners and HOAs. Until the Governor signed the Texas Residential Property Owners Protection Act

on June 14, 2001, most residential HOAs were not regulated in Texas. Although the Act provides some protection for residents in communities governed by HOAs it ignores many other important issue such as providing purchasers with a public offering statement before closing, requiring open meetings and requiring board members to have basic training on their responsibilities and obligations to the members of the association.

Research suggests that most residents are satisfied living in common interest communities that are governed by homeowners' associations. (National Survey of Homeowner Satisfaction 1999) The results of a survey of Texas residents living in CIC governed by a HOA revealed that: they perceived the rules and architectural controls in their communities are appropriate; they would be willing to resolve a grievance through mediation; and they favored training for board members and state regulation of homeowners associations. According to a national survey "48% of Community Association members plan to live in a Community Association again, or plan to not move from their current community" (National Survey of Homeowner Satisfaction 1999).

Recommendations

1) Anyone considering buying a house needs to investigate the community where the house is located. If there is a homeowners' association, it is important that the rules and by-laws of the association are carefully reviewed as well the association's financial records. The buyer also needs to know about assessments and how much control the board of directors has. Having a lawyer look at the documents and point out any problems before closing could be worth the lawyers fee.

2) Associations board of directors should adopt a more interactive management style. If they seek the members opinions before making decisions, it could avoid conflict. An advisory council made up of a cross section of the members could provide valuable information to the board.
    a) If a homeowner is accused of violating the rules, a hearing should be held before a committee of members who are not on the board or related to a board member.
3) Texas needs to adopt more comprehensive regulations for homeowners' associations. Regulations should include:
    a) Provisions for adequate disclosure of all association documents at least 14 days before closing on a house in a HOA community.
    b) Require mediation of disputes between homeowners and the association before legal action is taken.
    c) Require that board members attend a class that provides information on the responsibilities of board members.
    d) A commission with the authority to enforce the regulations, explain the regulations to association members and to arbitrate disputes between homeowners and associations.

The Future of Homeowners' Associations

The population of the United States is becoming older and more ethnically diverse.

> By 2030, 18 percent of our population will be aged 66-84 (as compared to 11 percent today), and 32 million Americans will be 75 or older—100 percent increase from current numbers in that age group. A fifth of the populations of 27 states will be elderly. ...

> The Hispanic and Asian populations together will gain 44 million people and constitute 24 percent of the total population by 2025, up from 14 percent today. ... Meanwhile, Texas, Florida, Georgia, and California will gain more than one million African Americans by 2025. ...
>
> Currently, one in five Americans has some kind of disability, and one in 10 has a severe disability. With the population aging (and the likelihood of having a disability increasing with age), the growth of the number of people with disabilities can be expected to accelerate (Fuller 2000, 3-4).

The housing industry recognizes "that communities will need to adjust to and reflect their changing populations" (Fuller 2000, 4). Homeowners' associations are also responding to the changing demands of home buyers (1999, 4). The C*ommunity Association Factbook* reports the following trends:

- Community associations will play a more important part in American politics and civil society.
- State legislation regulating the activities of CAs and CA managers will increase.
- Associations will continue to adapt to social issues such as residential day care facilities, aging in place, and compliance with the requirements of the Americans with Disabilities and Fair Housing Acts.
- CAs will continue to explore security precautions while preserving ties to the surrounding community.
- CAs will continue to reflect the racial and cultural diversity of the U.S.
- An aging population will create naturally-occurring retirement communities (NORCs) in community associations.
- Community associations will provide inclusionary housing to low-and moderate-income home buyers.
- "Smart communities" will incorporate new technologies to improve connectivity with schools, hospitals, municipal government and businesses (Treese 1999, 8).

At Communities for Tomorrow Summit in 1999, Wayne Hyatt, chair of the Future Trends for Community Design and Lifestyles panel, said,

> I think community is a place of sharing—not only of things but intangibles—of values and of goals, where activities are not boundary-specific and people are not constrained by walls and gates—a place where there is diversity...in culture, the race, the income. [Communities] are not bland places. These are places where there is an acknowledgment of social tension inherent in balancing people and property (Fuller 2000, 17).

It would be wonderful if we all could live in communities where everyone felt they were welcome and associations cared about the what is best for all of the residents rather than what was cost effective and expedient. However, this is not a perfect world and homeowners' associations need to be regulated to guarantee that homeowners have the freedoms guaranteed in the U. S. Constitution.

APPENDIX

LEGISLATING TEXAS HOMEOWNERS' ASSOCIATION SURVEY

Understanding of covenants, association by-laws:

How well did you understand the covenants, association by-laws, association's rules and restriction before buying?

Good understanding ( ) Fair understanding ( )
Poor understanding ( ) No understanding ( )

Appropriates of rules architectural controls:

How appropriate are your rules and regulations for your community?

Very appropriate ( ) Somewhat appropriate ( )
Somewhat inappropriate ( ) Not appropriate at all ( )

How appropriate are the community architectural controls or the limits your association places on external improvements?

Very appropriate ( ) Somewhat appropriate ( )
Somewhat inappropriate ( ) Not appropriate at all ( )

Need for Regulations:

Do you think that training should be required for association board members?
Yes ( ) No ( )

If you had a grievance against your homeowners' association, would you be willing to resolve it through alternative dispute resolution? Yes ( ) No ( )

From your experience, do you think there needs to be state regulations governing homeowners associations? Yes ( ) No ( )

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In 1987, she moved to Texas and worked for Foley's Department Store. She returned to school in 1989, completed an Associate Degree in Public Administration and an Associate Degree in Real Estate Management in 1991 from San Antonio College. In 1992, she completed her Bachelor of Applied Arts and Science degree from Southwest Texas State University. Since 1991, she has worked for Southwest Texas State University and in January of 1998, she entered the Graduate College of Southwest Texas State University.

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