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Homeowner boards can't exclude democracy

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BY PAULA FRANZESE AND MARGARET BAR-AKIVA

Throughout the nation, private residential subdivisions controlled by homeowner association boards have become Goliath-like manifestations of a phenomenon known as privatization. Increasingly, we are witnessing the rise of "fortress America" as, behind gates and walls, residents agree to relegate to private contract and governing boards a host of matters traditionally considered to be within the public and governmental domain.

The resultant loss of individual autonomy comes at a dear price, while the divide between the "us," however conceived, and the "them" widens.

More than 250,000 homeowner associations now exist, and more than 50 million Americans live in a condominium, cooperative, planned, walled or gated community. These "privatopias can be anything but. Often preying on residents' desires for security, stability and preservation of property values, homeowner associations have created privatized regimes of governing rules to regulate everything from architectural style, the color of one's shutters, the permissibility of pets, screen doors and basketball hoops to the posting of signs and the flying of flags.

Less than democratic participatory structures have produced, in many instances, the autocratic enforcement of these rules. Those who depart from governing strictures can be punished severely, subjected to onerous fines, costly litigation and even foreclosure. Homeowner associations finance litigious strategies with residents' money, paid into annual dues and fees.

Sadly, heavy-handed rules, closed-door decision making, aggressive enforcement patterns and the politics of exclusion stymie the formation of authentic community and real connection, transforming the relevant inquiry about resident relations from "How is my neighbor doing?" to "What is my neighbor doing?" Cultures of distrust will pit neighbor against neighbor, association against resident and resident against association.

Earlier this month, in a suit brought by Rutgers law professor Frank Askin and his Constitutional Litigation Clinic, the homeowners of Twin Rivers were handed a major victory by a New Jersey appeals court. For the first time in the nation, a court found that private communities such as Twin Rivers are "constitutional actors" and that residents within their bounds do not surrender their constitutional liberties, no matter what their deeds say.

No sooner was the decision handed down than the Twin Rivers homeowner association board announced that it would appeal. The board has already spent more than \$500,000 of homeowners' funds to fight this case. Soon thereafter, the board's counsel was quoted as saying that if residents are "not happy with (Twin Rivers) policies, they should look elsewhere to live."

This response offers a telling glimpse not only into the troubling world of Twin Rivers but into the often harsh realities of homeowner association living in general. This is a world where power tends to be stacked from the very outset of development in favor of the governing boards, where attorneys can brazenly call for dissenting homeowners to leave (no matter the absence, in some markets, of meaningful choice) and where a cadre of "professionals" providing obscure services get paid to oppose the rights of the very same homeowners who pay their bills.

One thing is clear: Something is wrong with a system of common-interest community governance that could produce this spectacle of a homeowner association board vigorously fighting against the interests of the residents that it is supposed to represent. The time is ripe for meaningful legislative reform. Unfortunately, the Uniform Common Interest Ownership Act, which passed the Assembly last year and was stopped, thankfully, in the Senate, is not the right bill for New Jersey's residents.

That legislation was crafted by attorneys of the Community Association Institute, the same monolithic national lobbying organization that provided attorneys to argue the case against residents in the Twin Rivers case, that filed an amicus brief on behalf of the Twin Rivers board, that represents the special-interest groups that profit from these associations and that is providing attorneys to appeal the case to the New Jersey Supreme Court. One would be hard-pressed to find a less qualified organization to be crafting homeowner protection bills.

The legislation, while purporting to back the laudable recommendations of the Assembly Task Force to Study Homeowners Associations, actually undercuts many of them. Among its deficiencies, the bill would give too much power to association boards while failing to ensure that residents are adequately protected.

By contrast, the Assembly task force recommendations laid the groundwork for real reform by proposing enhanced alternative dispute resolution procedures between associations and homeowners, fair and open election procedures, a speedier transition from developer control to resident control of governing boards, mandatory competitive bidding for all substantial association expenditures, open access by homeowners to relevant financial information, establishment of an Office of Ombudsman for Homeowner Associations and recognition of the increasingly governmental nature of the duties and powers ascribed to associations.

A bill introduced last year by Sen. Shirley Turner (D-Mercer) followed through on these worthy initiatives, rooted in promoting transparency, fiscal responsibility and board accountability while stemming the tide of runaway litigation. Unfortunately, the lobbying efforts of the Community Association Institute managed to stall that bill. It is time to reclaim the promise of the Assembly task force recommendations as our Legislature takes up the task of reform.

Paula Franzese is the Peter W. Ro dino professor at Seton Hall Law School. Margaret Bar-Akiva is a Twin Rivers resident who was involved in the legal case. She also is founding president of the Common Interest Homeowners Coalition, a statewide, nonprofit organization. Franzese may be reached at franzepa@shu.edu.

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