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Housing's 800-Pound Gorilla

Homeowners associations are growing in numbers and power.

By James B. Goodno

Nevada state senator Michael Schneider was on his way to an important floor session a couple of years ago when his secretary insisted he take a phone call. An angry constituent was on the line. She wasn't mad at Schneider, but she was mad at the president of her homeowners association, whom she was holding at gunpoint on her front stoop.



Schneider managed to diffuse the situation, but it was emblematic. While many residents are happy in their common-interest communities or developments — the condominiums, cooperatives, town houses, and planned communities governed by homeowners associations and their covenants, codes, and restrictions — angry disputes and perceived violations of residents' rights often spur legislative and legal action.

Beyond the highly charged and personal nature of these disputes is a set of philosophical and practical questions about the nature and future of local governance, particularly in the fast-growing Sun Belt.

"Homeowners associations enable places to govern lighter," argues Robert Lang, director of Virginia Tech's Metropolitan Institute. "When developers put in the infrastructure and homeowners or community associations maintain it and when associations are responsible for trash pickup, code enforcement, and security, local government can provide minimal services — or turn its attention elsewhere. They can have cities of 200,000 with tiny governments," Lang says.

Others have different takes on the power of homeowners associations. Evan McKenzie, a lawyer and political scientist who teaches at the University of Illinois at Chicago, describes homeowners associations as private governments. He argues that they should be held to traditional government standards.

Clifford Treese, a past president of the Community Associations Institute, whose members include homeowners association leaders and related professionals (property managers, attorneys, developers), takes the opposite tack. He says that community associations (as homeowners associations are also called) carry out privatized government functions and need not conform to government standards.

For planners and local decision makers, a common-interest approach to development has its merits, primarily because it reduces the costs of new development to the municipality. But there can be problems. Short-term issues revolve around the rights of individual homeowners, "double taxation" (association fees and local taxes), and contradictions between municipal or county codes and the homeowners associations' covenants, codes, and restrictions. And over the long haul, local governments may have to face the fact that poorly capitalized or managed associations cannot maintain aging developments.

These issues are sure to grow in importance, if only because some parts of the U.S. have come to rely on (or require) common-interest developments. According to a recent paper by Treese, the number of homeowners associations leapt from 10,000 in 1970 to 260,000 in 2004. By his estimate, common-interest communities contained 20.8 million units last year.

Some jurisdictions, particularly in the Sun Belt, push developers to provide common elements. In southern Nevada, Clark County and the cities of Las Vegas, Henderson, and North Las Vegas require developers to landscape around the communal walls that characterize the region.

Some planners and developers believe private communities can offer a higher quality of life. "I think [these communities] give some people a stronger sense of home and security," says Jon Wardlaw, AICP, assistant planning manager in Clark County's comprehensive planning unit.

Some residents disagree. Monica Caruso, a longtime homeowner activist and the communications director of the

Southern Nevada Home Builders Association, says that it's unfair for local governments to push homeowners into private communities — if only because they make so few housing options available. "Government and planners say they want to create quality homes in livable communities, but not everyone wants to live like this," she says.

Rooted in utopia



Arguably, the roots of planned communities can be traced back to the utopian communities established by the Shakers and other religious groups in the 18th century. One could argue that some of the earliest European settlements in North America — Plymouth, Massachusetts, and Jamestown, Virginia — were prototypes of the common-interest communities.

Other common-interest communities focused on practical concerns. In Manhattan, housing cooperatives were established by socialist trade unionists to house their members, particularly immigrant workers in the textile and garment factories. (The flip side is that in other locales, covenants in privately controlled communities were long used to prevent African Americans, Latinos, Jews, and others from moving into particular neighborhoods — a practice the U.S. Supreme Court deemed unconstitutional in 1948.)

Modern common-interest communities draw their inspiration mainly from Radburn, New Jersey, Sunnyside Gardens in Queens, and the Country Club District in Kansas City. "Homeowners associations as we know them fully evolved at Radburn in the 1920s. City managers, the covenant form of private government, and master planning were all in place," says Evan McKenzie of the University of Illinois.

Cooperatives, which today are the least common form of common-interest housing, were the first to gain popularity. They were first established as working-class housing in the 1880s, according to Treese. The first luxury coops were built in the 1920s in New York and were soon copied in Chicago and Washington, D.C. Condominiums were first created in the 1950s and gained favor in the 1960s. They became the most popular form of common-interest housing in the early 1980s and remain so today.

By 1990, planned communities had taken the lead. In 1998, there were 16.4 million units in common-interest developments: 748,840 were cooperative units, 5.1 million were condominium units, and 10.5 million were in planned communities. From 1970 to 1998, common-interest units as a percentage of total U.S. housing units leapt from less than one percent to 14.6 percent.

Planned communities bear the closest resemblance to local governments, and raise the most ticklish questions about the future of metropolitan America. These communities include standard subdivisions, townhouse developments, gated communities, and larger master planned communities. New urbanist communities are typically common-interest developments (and they have some of the strictest covenants, codes, and restrictions). "New urbanist developments are so hyper regulated, it's unbelievable," says Chris Armstrong, AICP, senior planner with Carter & Burgess in Las Vegas.

Government or governance?



Planned community development blossomed during the 1970s, just when taxpayer revolts, including California's Proposition 13, signaled the beginning of privatized public services. In the most extreme cases, developers took responsibility for putting in and maintaining infrastructure and common facilities and delivering trash collection, security, and other traditionally public services. Rather than providing the services themselves, developers created homeowners associations to do so. Today, homeowners associations are typically governed by a volunteer board of directors. Property management is carried out by a mixture of management companies, HOA-employed managers, and volunteers.

"The arrangement made sense to municipalities," says McKenzie. "They didn't want to ask the existing taxpayer for more money to finance development, so they adopted a system allowing them to tax new residents while delivering minimal services."

"We don't let anyone build without a homeowners association," a North Carolina city manager told members of a recent American Bar Association tour. "They're cash cows."

In some cases, HOAs have taken on a decision-making role that makes them resemble local governments. "Effective local authority in the city and county of Honolulu has devolved to homeowners associations," says David Callies, FAICP, a University of Hawaii law professor and specialist in land-use law. "Homeowners associations have become the vehicle for local governance in Hawaii almost by default. That's where you go for variances, that's where you go for provision of services, that's where you go for security."

This situation is ripe for controversy. The battles fit into four broad categories:

Financial: Homeowners complain about double taxation. They pay fees to their association and taxes to their municipal government. Although their tax rates are similar to or even higher than those of homeowners living in other types of developments, they do not receive the same public services.

Rights: The covenants, codes, and restrictions are frequently more restrictive than city ordinances, and, because they are private contracts that are considered voluntary, they can prohibit acts that would otherwise be constitutionally protected; for example, flying a flag or posting a political sign in the front yard.

Governance: The quality and nature of governance varies from association to association. Some homeowners associations are well run, others verge on bankruptcy; many HOA officers take their fiduciary responsibilities very seriously and respect their members; others don't. Although Nevada has a commission overseeing homeowners associations and Florida recently appointed an ombudsman, most states have limited oversight.

Procedures: Approving changes to covenants, codes, and restrictions (CC&Rs) often requires a super-majority, and sometimes can be stymied by mortgage agreements. On the other hand, increasing fees, levying special assessments, fining residents for violations of the rules, entering litigation, and starting foreclosure proceedings for failure to pay fines can be instigated by a simple board majority.

Treese believes these problems are frequently overstated, and he argues that the structure of community associations allows for the democratic resolution of conflicts. "Everything that was lauded about New England town meetings is present in community associations," he says. "Boards like praise, presidents like praise, so they tend to reflect the wishes of their members. People who show up tend to have complaints, but when it comes to elections, there is a high level of participation."

Without checks and balances and professional guidance (few HOAs retain planning consultants or public works advisers), problems can arise. Homeowners complain when boards raise fees or levy special assessments, but an association can get in deeper trouble if its reserves fall short of meeting the cost of maintaining roads or roofs.

"A new homeowner may look at a common area — a clubhouse, or a pool, or a tennis court — and say, 'I get to use that; isn't it cool,'" McKenzie notes. "But you have to pay for it, and what happens when the HOA board concludes it doesn't have enough money for repairs and decides it needs a special assessment and starts sending out bills for \$10,000 or \$20,000?"

Homeowners may grumble when an HOA blocks an addition or a new paint scheme, but they also protest when an HOA signs off on projects that may violate the rules, especially when there are no requirements for a public hearing. This situation generates calls for reform.

"Since common-interest communities are acting more like local governments, we should hold them to different standards [than we have in the past]," argues Callies. "To receive a variance from a local government, a homeowner must typically demonstrate hardship and that there is no obvious adverse impact on neighbors. Homeowners associations do not operate by the same standards. They should, particularly in settings where associations act as local planning commissions."

He also says that in some places home buyers have no choice but to join a homeowners association — and that undermines the notion of voluntary participation. "Can neighbors set limits on what a person can do with his property beyond what ordinances restrict?" asks David Callies. "In a noncovenant community, the answer is generally no. In a gated or covenant community, the answer is yes. In Hawaii it has become very difficult over the last five years to move into a new home in a noncovenant community. Your only option might be an older home in Honolulu, but those have become very expensive. This might require a rethinking of our philosophy over what limits homeowners associations can set."

"I think associations face the same dilemmas township governments do," concedes Treese. "Some people want their community to remain the same, some want it to change." He says that homeowners associations can adapt.

Nevada sets the pace

These challenges are a fact of life for planners, developers, officials, and residents of Southern Nevada, particularly those in Clark County or the cities of Henderson, Las Vegas, and North Las Vegas.

"We see a lot of different product types here," says Chris Armstrong, whose company, Carter & Burgess, provides planning and engineering services to several major developers in Las Vegas, including KB Homes, America West, and Ryland. "Most that we see now, a very high percentage, have either a homeowner association or a landscape maintenance association. Generally, they're driven by city or county requirements."

Most new development in Las Vegas is of the common-interest variety, and public policy is an important engine of this type of development. Local landscaping requirements do lead to the creation of landscaping or homeowners associations. But there are other factors at work as well.

The Bureau of Land Management controls most of the desert surrounding the built-up areas of Las Vegas. When the federal government releases land for development, local jurisdictions and private developers tend to favor master planned communities.

"To try to make development cohesive, it makes sense to have master planned communities that have HOAs," says Denna Woodbury, AICP, principal planner in the city of Henderson's current planning division. "A lot of development is occurring within master planned communities," adds Chris Armstrong. "Otherwise, there are not a lot of contiguous parcels. A lot of land released by the BLM is purchased by a consortium or a single buyer for master planned development."

Much of the high-end real estate development in Southern Nevada is taking place in master planned communities, Summerlin being the best known. Developers say they can offer an attractive product, and jurisdictions can look at land use in a rational fashion. Less charitable observers suggest that local governments also encourage the development of pricey — and thus revenue-generating — enclaves.

In North Las Vegas, the city's south side is largely Latino and low- to moderate-income. However, most of the city's growth is taking place in master planned communities on formerly federal land to the north. "They think that they can build swanky stuff," says Robert Lang, "and that they can keep it swanky for a long time to come."

State senator Michael Schneider seems to agree. "After the mayor [of Las Vegas] was elected, I told him, 'Your staff only approves homeowners associations.' He asked, 'Why do we do that?' I told him: 'Because you get to raise taxes without letting the public know you're increasing taxes. You bring in X thousand dollars without increasing services.' It's a taxing scheme," Schneider adds.

Schneider has led efforts to reform Nevada's homeowners association laws, creating what some observers view as a model package for statewide policy. Passed in three acts in 1997, 1999, and 2003, Nevada's legislation did the following:

- Capped fines HOAs could levy at \$50 (now up to \$100).
- Required HOA boards to receive approval from their residents before starting litigation.
- Required board elections every two years and prohibited proxy votes during board elections.
- Banned foreclosure based on nonpayment of fines.
- Required education for property managers.
- Mandated annual meetings with announced agendas.
- Created a mechanism for recalling HOA board members.
- Created first an ombudsman's office and later a state commission to hear complaints and enforce regulations.
- Required that new home buyers be informed of CC&Rs and sign off on surrender of rights before closing.

"It was like writing a section of law creating a new type of government," says Schneider.

For the common good

All homeowners associations serve property owners within a specific common-interest development rather than an entire municipality. But homeowners associations and common-interest communities have a broader impact on local finances and land use.

"If there is new commercial development after a walled community is built, we will ask for a pedestrian link, but in many cases the residents don't want it; they don't want to invite outsiders into their community," says Greg Toth, AICP, a member of Henderson's current planning team.

As common-interest communities and their cities and counties move into the future, fiscal demands and

conditions will change, and land-use demands and fashions will evolve. Will HOAs limit the ability of cities and towns to meet the changing desires and needs of residents?

"It will be interesting to see what happens in the next 15 years," says Armstrong. "There will be social consequences when communities start to decay and need rehabilitation or redevelopment."

"Highest and best use might become retail," adds Schneider, the Nevada state legislator, referring to land currently occupied by a residential community. "How are you going to do that when an HOA and CC&Rs stand in the way?"

The same question can be asked if a broader community wants to build a school, park, transportation hub, or affordable housing on land governed in part by a homeowners association. "When an association is bankrupt, can't repair the infrastructure or common facilities, and the value in land is more than the value of buildings, then the city would be better off if a developer would buy the whole thing and bulldoze it to smithereens," says Schneider. "The thing is, how are you going to get 200 homeowners to sell?"

David Callies believes this is a moot point. "The courts will always come down on the side of the local or state government when a public good is involved," he says, pointing to Hawaiian housing law as an example: "If infrastructure can support it and the lot is large enough, a property owner is allowed to build a second free-standing unit, something that might be called a granny flat on the mainland. Even if covenants prevented it, you'd be able to build it on public policy grounds."

Treese argues that community associations and public entities can work together to address issues of social concern without going to court. "I believe there are things you can do with community associations to make them more affordable," he says. "You can give qualified residents a tax credit that can be sold to the community."

In extremis

There are times when legislative or legal action seems inevitable. In Southern Nevada, water is often at issue. "Some people in Summerlin wanted to put in artificial turf to save water, and the HOA said no. It's going through a bitter battle," says Susan Johnston, principal planner with Stanley Consultants in Las Vegas.

Then there are fiscal and social issues. "Those who pay private fees won't be interested in increasing taxes to pay for county or municipal services," says Callies. "The argument seems equitable, but, on the other hand, it can be very anti-community. Instead of focusing on communal or public responsibility, homeowners end up looking for quid pro quo; their perspective becomes one of impact fees and special assessments, not public financial health." Callies adds: "Common-interest development promotes neighborhoods; it doesn't promote larger communities."

Mike Schneider draws a similar conclusion: "HOAs were a great social experiment that failed in many ways," he says. "I'm not so sure if we as policymakers had to do it all over again, we would allow them."

But HOAs are here for the foreseeable future. More oversight from the states is likely, as is more professional management. Weaker associations face the danger of bankruptcy, particularly as their communities age. Schneider suggests that these associations ultimately may have to be absorbed by their surrounding jurisdictions.

Treese is optimistic that community associations can correct their shortcomings and contribute to stronger communities in the future. Somewhat surprisingly, some of their sharpest critics agree.

"I'm still optimistic this form of living can work," says Monica Caruso. "Let's be reasonable. Let's really think about the common good."

Jim Goodno is Planning's contributing editor.

Resources

Images: Top — The pool area at Tripoli, Henderson, Nevada. Photo by Greg Toth. Middle — Picnic tables at Vista Ridge, Henderson, Nevada. Photo by Greg Toth. Bottom — The gates at Shadowbrook Falls, Clark County, Nevada. Photo by James B. Goodno.

Organizations. American Homeowners Resource Center: www.ahrc.com

Community Associations Institute: www.caionline.org

Foundation for Community Association Research: www.cairf.org

Metropolitan Institute, Virginia Tech: www.mi.vt.edu

Nevada Real Estate Division: <http://red.state.nevada.us>

The Privatopia Papers (a blog focusing on homeowners associations) are at www.privatopia.blogspot.com

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