



# FACTS & ISSUES

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League of Women Voters of the Houston Area

## HOMEOWNER ASSOCIATIONS - AMERICAN DREAM OR NIGHTMARE?

### INTRODUCTION

Homeowner Associations have rights and powers established in Texas law. Their purpose is to oversee common property and see that deed restrictions are followed, and they are allowed to impose fees to carry out these functions. When homeowner associations work well they are viewed as a positive force in the community. There are problems that have developed over time, however. We will review several of these issues: (1) HOAs have a priority lien exempt from the homestead exclusion, thus foreclosures of properties have been and are occurring. (2) Property codes and legislation have been interpreted by property management companies and HOA boards to grant the HOAs rights and powers in excess of those identified in the HOA governing documents, thus they are undisclosed to a buyer of HOA property. (3) HOAs have evolved a priority of payments policy without due process from extra powers granted by legislation in excess of the original covenants. (4) When HOA governing documents state an owner has the right of access to association records and a right to open meetings, there is a lack of authority to enforce these rights other than by costly litigation at expense of the homeowner.

### HOMEOWNER ASSOCIATION DEFINED

Under Texas Law "property owners association" is defined as:

#### § 204.004. PROPERTY OWNERS' ASSOCIATION.

(a) A property owners' association is a designated representative of the owners of property in a subdivision and may be referred to as a "homeowners association," "community association," "civic association," "civic club," "association," "committee," or similar term contained in the restrictions. The membership of the association consists of the owners of property within the subdivision.

(b) The association must be nonprofit and may be incorporated as a Texas nonprofit corporation. An unincorporated association may incorporate under the Texas Non-Profit Corporation Act (Article 1396-1.01 et seq., Vernon's Texas Civil Statutes).

(c) The association's board of directors or trustees must be elected or appointed in accordance with the applicable provisions of the restrictions and the association's articles of incorporation or bylaws.<sup>12</sup>

As the various terms mentioned above came into use in the construction and real estate industry, the differences were usually architectural, such as detached residential residence, attached residential residence, townhouse, or condominium. (Different authors or researchers use some of the terms interchangeably.) If a subdivision was planned with elements of common property that was shared in ownership by all the homeowners, no matter what the architectural type, an association was created to oversee maintenance of the common property and, theoretically, to enforce the deed restrictions. When a buyer purchases a home in this type of subdivision, it is mandatory for them to become members of the association. A mandatory homeowner association charges assessments against all homeowners holding title to property in that subdivision.

To secure such fees for the developer or the association, all deeds covering a home make reference to the declaration of covenants that contains a lien that is declared to run with the land.

When there is no common property in a subdivision, the need for a membership organization or for assessments to be charged against the owners is up to the homeowners. These owners are free to organize themselves into a voluntary association if they choose and to fund selected projects voluntarily. If fees are agreed to by some owners for a specific purpose, paying the fee is voluntary on the part of all homeowners. No lien can be placed on property for nonpayment of such fees. This study is concerned with mandatory homeowner associations.

### ESTABLISHMENT OF HOMEOWNER ASSOCIATIONS

In the formation of a homeowners association, the developer must file Articles of Incorporation for a non-profit entity with the Texas Secretary of State prior to the initial sale of homes. Another document that describes the property and sets out the responsibilities of the association and the obligations of homeowners is called the Declaration of Covenants, Conditions and Deed Restrictions (CC&Rs). The CC&Rs may be included with the deed at closing for a home purchaser. By-Laws describe the day-to-day operating constraints while the Rules and Regulations control residents' behavior. These documents are filed for record in the County Clerk's Property Records. The records are then public information and are considered notice to interested parties and buyers. Additionally, property codes have been passed by the legislature granting more powers to HOAs that go beyond what is spelled out in the HOA covenants. Examples are powers to amend rules regulating the collection of delinquent assessments and the application of payments, impose fines, charge for resale certificates, or statements of unpaid assessments and other nonspecific powers. Two such property codes are (1) Chapter 204, Texas Property Code, 1995, which was originally bracketed for Harris County. It has been amended to include counties that are adjacent to the Gulf of Mexico and a county with population of 2.8 million. Three counties that meet those criteria are Chambers, Galveston, and Brazoria. Chapter 204 was again amended in 2005 to include any county with a population of 275,000 or more, adjacent to any county with a population of 3.3 million and containing a national forest. Only Montgomery County meets that criterion. (2) Chapter 209, Texas Residential Property Owners Protection Act, 2001, which gives homeowners rights to a notice and a hearing before costly enforcement action for violation of charges against them, bars foreclosure for fines, and adds a detailed right of redemption after foreclosure sale.<sup>1</sup> (See Texas Property Code online.)

### MANAGEMENT, POWERS AND POPULATION DATA OF ASSOCIATIONS

Discussions about homeowner associations in Texas often focus on Harris County because of the large number of associations in Houston, which lacks a zoning ordinance.<sup>2</sup> The homeowner association (HOA) is created to manage the affairs of the common interest development. A developer usually retains complete control in the early stages of the community development, personally selecting the members of the board, who are frequently not required to be residents or homeowners in the HOA. The developer specifies a time in terms of years or when a certain percentage of residences are sold when control may be relinquished to the homeowners to elect the board. The board selects its officers and may create subcommittees, such as architectural control committees, pool committees and neighborhood watch committees. The board of directors assumes responsibilities for governing the association, often with a third party general manager or management company for day-to-day operations. Like a city, associations charge their members annual assessments to pay for maintenance of common property (parks, pools, tennis courts, club houses, etc.), other services (street maintenance, garbage collection, cable connections, water, etc.), and administration. "Special assessments" may also be charged members to repair common property or other capital projects.<sup>3</sup> A homeowner association can enforce its actions through private legal action under civil law using the assessments it has collected from homeowners.

Assessments differ in amounts according to the organization of an association. Charges may be uniform, based on square footage of the home, or based on tax appraisal district valuation. The issue of how assessments are based is important relative to the Texas Open Meetings and Texas Open Records Acts. [See Open Meetings and Open Records section.] There are three criteria used to determine whether an HOA is subject to the Texas Open Meetings and Texas Open Records Acts: (1) membership in the property owners' association is mandatory for owners or for a defined class of owners of private real property in a defined geographic area in a county with a population of 2.8 million or more in a county adjacent to a county with a population of 2.8 million or more; (2) the property owners association has the power to make mandatory special assessments for capital improvements or mandatory regular assessments; and (3) the amount of the mandatory

special or regular assessments is or has ever been based in whole or in part on the value at which the state or a local governmental body assesses the property for purposes of ad valorem taxation under Section 20, Article VIII, Texas Constitution.

There has been an explosive growth in the number of HOAs in the past decade. The Community Associations Institute (CAI) industry data reflects that in 2008, there are 300,800 HOAs, an increase from 10,000 in 1970. This represents 24.1 million homes with 59.5 million residents. The estimated value of homes in HOAs approaches \$4 trillion, approximately 20% of the value of all US residential real estate.<sup>4</sup> In 1962 there were fewer than 500 homeowner associations in the United States. Today, most new developments of residential properties are created with a homeowner association.

### HISTORY – ORIGINS OF HOMEOWNER ASSOCIATIONS

Understanding the historical evolution of the collaboration between business and government in the growth of the HOA housing industry may help a reader to understand the issues that have evolved. In 1898, Ebenezer Howard, an Englishman, read Edward Bellamy's utopian novel *Looking Backward*. Howard became converted to Bellamy's belief that a perfect community was possible through rational planning. Howard published a book in the United States in 1902 under the title *Garden Cities of Tomorrow* that became a guide to modern town planning.<sup>5</sup> The first planned developments in America were not cities as in England, but luxury subdivisions designed to afford affluent families privacy and ability to control those who could buy such property. Two of the early developments pre-dating Howard's plan for communities were Gramercy Park in New York that formed an association in 1831, and Louisburg Square in Boston, which did the same in 1844. By 1928 scores of luxury subdivisions across the country were using deed restrictions as their legal architecture. The homeowner associations were organized in planned communities so that residents could sue those who violated the rules.<sup>6</sup>

Private developers and businessmen, rather than government, have long been the dominant forces in American urban planning.<sup>7</sup> American private real estate developers aided by a silent government partner (See next section); have consistently promoted private home ownership as the American dream. The industry made the single-family home a mass-produced consumer item premised on private home ownership and claimed to be designed to safeguard property values.<sup>8</sup> For example, HOAs claim that they need foreclosure power to increase property values. However, statistical analysis has shown the claim to have little if any validity, at least in the Houston area. Using Houston Area Realtor (HAR) data, the 1994 – 2000 price growth change analysis reflects that subdivisions with HOA foreclosure-related filings showed a 32% cumulative growth change in price; subdivisions with no foreclosure-related HOA filings showed a 59% cumulative growth change in price; and data covering all subdivisions showed a 42% cumulative growth change in price. Other price trend analyses can be viewed on the web page *Houston Area HOA Foreclosure-related Filings* (HOAdata.org). This statistician's research report is an event count analysis of HOA foreclosures by neighborhood from 1985—2001 and shows the bulk of these filings occur in neighborhoods with low median home values. Overall, homeowners in the bottom quartile of home value face more than ten times the risk of HOA foreclosure proceedings as those in the top quartile. Legal changes in 1987 (Texas Supreme Court opinion) and 1995 (Property Code 204) also seem to have encouraged HOAs to bring more foreclosure filings to court across the spectrum of home values. The annual pace of filing after 1995 is almost double the previous decade's rate. Although HOA foreclosures are ostensibly motivated by efforts to improve property values, neither foreclosure activity nor [the existence of] HOAs appear linked with above-average home price growth.<sup>9</sup>

### FEDERAL GOVERNMENT – A SILENT PARTNER

The most significant development for community builders during the great depression was entry of the federal government into partnership with the real estate business. The National Housing Act was adopted in June of 1934, and the Federal Housing Administration (FHA) was created. According to real estate historian Marc Weiss, from its inception the FHA was operated primarily by representatives of the real estate and banking industries. Key positions were held by members of National Association of Real Estate Boards with staff recruited from the private industry sector.<sup>10</sup>

The FHA established required guidelines and standards in 1963 for developers' use in acquiring insurance and approval of planned-unit developments. These guidelines and standards required that such developments "must" have a mandatory membership nonprofit homes association in control. The real estate trade industry and FHA promoted the use of covenants that attach to and run with the land, creating a lien for assessments on property, thereby leading to the possibility of foreclosure on property if assessed fees are claimed delinquent. Byron R. Hanke, chief of the land planning division of

FHA, pointed out that there was a need to create open spaces in developments, but local governments were not interested in maintaining them. Hanke argued for the homeowner associations to be responsible for them. The industry embraced the ideas in the new standards, the local governments accepted it, and FHA insured it.<sup>11</sup> Another very significant publication of guidelines used by the industry is the 1964 *The Homes Association Handbook* published by the Urban Land Institute and commonly referred to as Technical Bulletin 50 (TB#50, revised printing 1966). The TB#50 contains model covenants. The authors of this work included the FHA Study Director and Land Planner Byron R. Hanke.

#### COMMUNITY ASSOCIATIONS INSTITUTE (CAI).

The connection of the Community Association Institute (CAI) to the HOA housing industry was assured at its founding in 1973. Byron R. Hanke was the prime mover under the auspices of the National Association of Home Builders and the Urban Land Institute of its creation. Initially, it was planned that there would be cooperation among five industry interest groups: HOAs and homeowners, builder-developers, property managers, public agencies and officials, and other professionals and interested businesses that vend to HOAs. CAI was to be the vehicle to keep them together so that they could promote mutually beneficial public and legislative advocacy. The CAI was intended to be an independent, non-profit research and educational organization, formed to develop and distribute guidance on homeowner associations. Hanke had intended that homeowners be assured of influence within the organization so that CAI could perform the function of educating association directors and homeowners. Because of conflicts of interest among the five interest groups, homeowners' input was not encouraged, which contributed to a lack of homeowner support for the organization. Although it was originally planned that CAI have an impact on operational procedures of HOAs by means of education, its influence and impact on HOAs has evolved primarily through managers, management companies, and attorneys who are CAI members.<sup>12</sup>

Although the organization grew rapidly while developing HOA specializations in professions such as law and property management, by 1991 CAI was troubled by revenue shortfalls and had lost momentum. The original concept of equally-important interest groups evolved into unequal representation within the CAI organization. Of the 12,000 CAI members in 1992, approximately 6,450 of the 150,000 HOAs in the nation were members. Participation of other critical interest groups was worse. Ninety-four public officials were members. Only 177 developers were members. The bulk of CAI membership outside of homeowner associations were property managers or other professionals who made their living vending to HOAs. The growth of homeowners' complaints against HOAs and criticism by political scientists such as Robert Jay Dilger, Evan McKenzie, Stephen E. Barton, Carol J. Silverman, and Gregory S. Alexander contributed to the CAI decision to reorganize as a 501(c)(6) tax-exempt nonprofit business trade organization in order to concentrate on lobbying state legislatures. The new organizational structure had very little homeowner representation.<sup>13</sup> Its major members are attorneys and management firms.<sup>14</sup> In 2005 CAI dropped its HOA membership category. The CAI Legislative Action Committee attorney members are very influential and attend hearings held by the Legislature concerning property code bills or matters pertaining to property owners or HOAs. There is little organization among homeowners to lobby legislators to support homeowner property rights. During the 80<sup>th</sup> Texas legislative session, bills were introduced calling for "disclosure to homeowners," but the proposals only referred to disclosing to purchasers that covenants and by-laws were a part of the purchase deal. If purchasers knew that membership in a mandatory HOA would exempt them from having constitutional protection for their homestead from foreclosure by the HOA because of the covenant lien that runs with the land, they possibly would decide not to make the purchase. Some persons hold that anyone considering purchase in an HOA has the right and obligation to read associated governing documents carefully. Often, however, the documents are not being provided until the closing appointment and many HOAs, especially of newer subdivisions, have covenants as lengthy as 350 pages. The purchaser is at a disadvantage under those circumstances. Older HOA covenants may be only 12-14 pages. The length of covenants may be related to an increase in the number of violations and reasons to charge additional fees or fines against homeowners. What purchasers also need to know and are not told is that property codes have been passed by the legislature that override or supplement the covenants and by-laws of HOAs, i.e. Chapters 204 and 209. These codes grant far more powers to management and boards than the original HOA covenants. These powers include amending rules regulating the collection of delinquent assessments and the application of payments, imposing fines, charges for resale certificates, or statements of unpaid assessments and other nonspecific powers. [See section Fines, Fees below.] The lack of proper disclosure is what has kept such a large percentage of people ignorant about something that could potentially bankrupt them and result in the loss of their home through a forced sale, typically at a depressed price.<sup>15</sup>

## ISSUES OF CONCERN: HOA Foreclosure, Priority of Payments, Elections, and Texas Open Meetings and Texas Open Records Acts

**FORECLOSURE.** Most, if not all states have constitutional provisions established to protect homesteads. Article 16 Sec. 50 of the Texas Constitution provides for homestead protection from forced sale, mortgages, trust deeds, and liens. *"The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for: the purchase money thereof, or a part of such purchase money; the taxes due thereon; an owelty of partition imposed against the property by court order or by a written agreement of the parties to the partition... work and material used to repair or renovate existing improvements thereon if contracted for in writing... in the case of a family homestead..."*

The authority of associations to foreclose on homes -- the most hotly-debated issue concerning the associations -- stems from the 1987 ruling by the Texas Supreme Court in *Inwood North Homeowners' Association v. Harris* (736 S.W.2d 632). The Supreme Court invalidated two lower courts' decisions in this case by saying Art. 16, Sec. 50 of the Texas Constitution did not protect homeowners against foreclosure for delinquent assessments.<sup>16</sup> This was a 3-2 decision by justices, with an absent homeowner-defendant and no legal representative for homeowner interests present. Justices O. Mauzy and J. Gonzalez wrote in the dissenting opinion that "the court herein has created a remedy in the name of 'public policy' in direct contravention of the Constitution of this State."

A more recent Texas Attorney General opinion of December 9, 2004, written for Representative Fred Hill, Chair of the Local Government Ways and Means Committee, stated "the court in *Inwood* acknowledged that security for homeowners' association fees was not a true vendor's lien, but was instead more in the nature of a contractual lien not among the express constitutional exceptions to homestead protection." The opinion further stated that their office had received extensive briefings that take issue with the Supreme Court analysis and reasoning in *Inwood* and recommends repeal of the *Inwood* law." [sic] "That may be good policy and, as such, would be appropriate for the legislature to address or for the Texas Supreme Court to consider." (Opinion No. GA-0279).

Homes have been taken in foreclosures for minor overdue amounts or minor deed infractions and sold for a pittance. For example, near Houston, an 82 year old widow, Wenonah Blevins, owed \$814.50 in back dues. She never knew she faced foreclosure until after the HOA had sold her \$150,000 home for \$5,000. CAI's former treasurer said the association "did everything right in the foreclosure."<sup>17</sup> Another case in Houston involving a dispute over an oil stain on a driveway, led to a lawsuit that was settled but only after charging the owner \$2000 in legal fees. It is argued that a cap or otherwise regulated legal fees relating to foreclosures should be enacted because amounts that lawyers take give them an incentive to file lawsuits and to pass on their fees to homeowners. In many cases, legal fees greatly exceed the amount of an original payment dispute.<sup>18</sup>

A restriction on property that is a lien enforceable by HOA foreclosure on homes is different from some other vendor's liens. It has long been held that fees charged by doctors, lawyers, credit card lenders, other suppliers of products or services, etc. cannot foreclose on the home of a debtor for collection of fees. To secure fees (assessments) for the developer or the homeowners association, however, all deeds covering a home make reference to the declaration of covenants that contains a lien that is declared to run with the land. Rarely, if ever, is an explanation made to a new purchaser that the lien that runs with the land established in the CC&Rs, in effect, exempts the home from the Texas constitutional protections against foreclosure on a homestead. Nor is it usually disclosed to a purchaser that property codes have been passed by the legislature that supplement or override the association's covenants by granting more powers to HOAs that go beyond what is spelled out in the HOA's covenants. The question can be asked, why should associations have special legal powers to collect debts? Why should they not have to use the same debt-collection methods as other creditors, such as collection agencies and small claims courts? Alternatively, the associations could be allowed to place passive liens, without foreclosure power, on the homes if an actual delinquency exists. The debt would be collected if the home is sold but not foreclosed.<sup>19</sup>

**CURRENT FORECLOSURE DATA:** The CAI claims that disputes, foreclosures and problems are rare. This is not the case in Harris County Courts. Research in the County Clerk Property Records, County Civil Court, and District Court records reveals many thousands of legal actions against homeowners. One Houston family made a study and analysis of

HOA foreclosures covering 1985 - 2001. The study revealed over 15,000 foreclosures or suits that could lead to foreclosures. This data is in process of being updated. ([www.HOAdata.org](http://www.HOAdata.org)) Even litigation that does not end in foreclosure by an HOA can cause significant financial stress on a family, forcing a bankruptcy to save their home. An article by Shannon Buggs in the Houston Chronicle, May 30, 2008, reported that research by the Georgia Institute of Technology and the Chicago-based Woodstock Institute, found that owners of single-family homes lose 0.9 percent of the value of their houses for every foreclosed property within a city block of their residences. Further, it was found that when there are 2.8 foreclosures for every 100 owner-occupied properties in a year, violent crime in the area goes up 6.7 percent.

Analysis of Houston's daily legal and business newspaper, the *Daily Court Review*, *Constable Foreclosure Auction*, reveals that the percentage of HOA foreclosure filings has increased each year since 2006. In 2006, the HOA foreclosure filing was 56.22% of the total filings; Lenders' foreclosure filing was 13.52%, while the Tax lien foreclosure filing was 12.5%. In 2007, HOA foreclosure filing increased to 67.5%; Lenders' foreclosure filing was 10.5%; the Tax lien foreclosure filing was 8.44%. By 2008, HOA foreclosure filing increased to 70% of total filings while Lenders' filings dropped to 5.4% and Tax lien filings dropped to 6.3%. [See also previous section HISTORY – ORIGINS ... for statistics on results of foreclosure filings.]

The House Research Organization's *Interim News* has made some suggestions as proposals to limit foreclosures. (1) Allow foreclosures only upon a vote of the HOA homeowners or board; (2) Allow foreclosures only when delinquent assessment exceeds a certain threshold, perhaps \$5,000; (3) Confine any liens to the payment of dues and exclude penalties or legal fees; (4) Require cases with a disputed amount below a certain threshold to go directly to justice of the peace courts; (5) Require HOAs to allow a reasonable extension of time to pay assessments for people with financial hardships, i.e. loss of a job or serious illness or disability; and (6) Require that homes sold in foreclosure meet a minimum sale price, such as the appraised value less liens and back taxes.

**FINES, FEES:** Charging fines and fees against homeowners leads to a significant number of foreclosure suits. Many HOA covenants (especially older ones) do not have provisions that allow fines to be charged against homeowners and are limited in what fees can be assessed. Other than assessments, fees allowed may be interest on late assessments or returned check charges. Property Code 204 enacted in 1995 was bracketed to apply to Harris County. The HOA powers enumerated therein have been interpreted by management firms and attorneys to grant much greater powers to associations in excess of their covenants, especially allowing unlimited power to bring claims of violations and charge fines. Often management and boards proceed on the theory that even if a power is not specifically granted or addressed in their covenants, they have the power and can take any action desired, creating new opportunities for revenues or claims for violations. The transfer/resale certificate is one such "opportunity" whereby when a home is resold, the owner must pay the association a percentage of the home sale price, a fee for inspection of the property for visible deed restriction violations, and other fees to disclose any delinquent charges on the property and name any litigation against the association. Such fees can run from a few hundred to thousands of dollars. Many older covenants do not have a provision that an association can "adopt and amend rules regulating the collection of delinquent assessments and the application of payments." Property Code Chap. 204 contains such a statement. It is interpreted by management and boards to be superior to any covenants not containing this provision.

In 2001, Property Code Chapter 209 resulted from SB 507 and was entitled "Texas Residential Property Owners Protection Act." The act's provisions included: requiring associations to give homeowners specific notice before a board takes certain actions, but not if the association files a foreclosure suit; and requiring boards to hold hearings over some types of disputes. Property Code Chapter 209 prohibits foreclosures based solely on fines imposed by the association or to collect attorney's fees solely associated with fines. It makes owners not liable for attorney's fees incurred before a hearing that is required by the bill, among other items.<sup>20</sup> Previously, managements had been charging owners with claimed violation fines and related attorney fees. Boards and Managements of HOAs began a practice of prioritizing the application of monies from assessment payments without due process, reclassifying the funds and applying it as: "Any accrued fines take precedence over HOA dues and will be deducted from payments prior to the reduction of a resident's dues balance. All of these fines will be collected thru the collections department the same as the association dues."<sup>21</sup> This is a typical example of the prioritizing and taking of funds from assessment payments, and leaves an owner's account appearing to be delinquent with assessment and eligible for foreclosure. Bills were introduced in the 2007 legislature in an effort to overcome this practice of re-prioritizing monies and re-applying without due process. Several Texas legislators in the 80<sup>th</sup> session introduced Priority of Payments bills with guidelines that assessments would be applied first to past-due assessments and secondly to current assessments before applying to any fines or attorney fees. None of the bills passed the House. Minor infractions can

run charges against homeowners into the hundreds and thousand of dollars, charging fines of \$200 per day (Property Code Chapter 202.004) and attorney fees, neither of which is subject to a cap.

**ELECTIONS:** American citizens are particular about their voting records and how elections are handled in a presidential election or elections for other public offices. Less consideration is given for the procedures of HOA elections, whether for amending governing documents or election of board members. It is because there are HOA elections that the CAI has claimed are democratic. Yet it is in the election procedures that potential for fraud exists and questionable actions occur. Covenants often state there is one vote per home allowed, but there is variety in how home ownership is counted for voting purposes among HOAs. Secret ballots are not used in many HOAs. Board members and other persons collect proxies from owners who do not attend the election meeting. Other owners may send their blank, signed/unsigned ballot to the administration or management and let them vote it however they wish. In some opinions, this violates the one home-one vote provision where such a provision is in the Covenants. The management, board president or other board members, and/or other employees, are in complete control of the elections, a clear conflict of interest. Some persons vote dozens to hundreds of proxies. Suggestions that could improve election procedures include: Legislatively requiring election procedures so that a secret ballot is guaranteed each owner to prevent harassment or intimidation because of how they vote. There should be absolutely no conflict of interest in handling of ballots. No employee, manager, board member or spouse, no officer, committee member of the HOA or spouse, should handle, open or count ballots. Owners should be allowed to vote without elimination by claimed delinquency, violations, etc. No other taxing agency can disenfranchise a homeowner for delinquency of payment. At a meeting on the date of the election, the secret ballot process should be continued by opening and counting the ballots in the presence of homeowners. Announcement of election results should be made before the membership. To assure that the election is democratic, it is preferred that disinterested persons monitor the election meeting as well as handle the entire election procedure.

There are those who will argue that proxy ballots are used in the business world of non-profit corporations. That is true. However, a difference exists between that type of corporation and the corporation of private homeowners. The corporation that is in business cannot bring fees and charges against the voter if they do not vote as the company wants them to, fees and charges that can lead to foreclosure of the homestead of the voting person.

**OPEN MEETINGS, OPEN RECORDS:** Very often HOA management companies and boards will not permit homeowners access to association records, although many covenants state they have such a right of access. With little or no oversight of handling of financial resources allowed, suspicions easily arise as to why there is such hostility toward owners who seek knowledge about their association and whether fiduciary responsibilities are being met. When there is no accountability over finances where large sums or millions of dollars are involved, the situations are ripe for fraud and financial abuse. The Texas Open Meetings and Texas Open Records Acts could serve as protection for Harris County homeowners if the acts were applicable to all HOAs. The criteria established in those statutes made them applicable only to The Woodlands HOAs. During the 80<sup>th</sup> legislative session, Rep. John Davis introduced a bill which brought Clear Lake under those provisions. A simple amendment to those acts could make them applicable to all Texas HOAs. Removing applicability criteria three -- (3) the amount of the mandatory special or regular assessments is or has ever been based in whole or in part on the value at which the state or a local governmental body assesses the property for purposes of ad valorem taxation under Section 20, Article VIII, Texas Constitution -- would remove the barrier that keeps all HOAs except The Woodlands and Clear Lake from these protections. The Open Meetings and Open Records Acts would serve to eliminate potential malfeasance and misbehavior of boards and managements. These acts contain enforcement provisions that allow misdemeanor criminal charges for violations. Robert Metcalf of a Chadds Ford, Pa. Association has said the positive effect of sunshine cannot be overestimated when it comes to individuals exercising control over others.

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This paper was researched and written by members of the League of Women Voters, Houston Area, Committee for Homeowners Association Study. Irene Beanie Adolph, Maryann Bartholemey, Laura Blackburn, Joan Denkler, Gwen Essinger, Betty Oertel, Jan Wilbur, and Lynn Walshak, Chair.

<sup>1</sup> David A. Kahne. *A Bill of Rights for Homeowners in Associations*. (AARP Public Policy Institute, 2006) p. 9.

<sup>2</sup> Texas House of Representatives, House Research Organization. *Foreclosure by Homeowner Associations: Striking a Balance*. *Interim News*, 77-10 (July 23, 2002) p.

<sup>3</sup> *A Bill of Rights for Homeowners in Associations*. p. 2. <http://www.aarp.org/ppi>.

<sup>4</sup> Community Associations Institute. *Industry Data, National Statistics*. <http://www.caionline.org>

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<sup>1</sup> McKenzie. *Privatopia*. pp. 2-3.

<sup>2</sup> *Ibid.* p. 9.

<sup>3</sup> George K. Staropoli. *The Truth About The Emergence and Quiet Acceptance of Planned Communities and Homeowners Associations*. (Citizens for Constitutional Local Government, Inc. 2006). p. 1-3.

<sup>4</sup> McKenzie. *Privatopia*. p. 8.

<sup>5</sup> Chris Adolph. Harvard. *Homeowner Association Foreclosures and Property Values in Harris County, 1983-2001*. abstract Oct. 21, 2002. Also, Testimony of Tom Adolph in support of HB 2646, a Texas property owners' association bill. April 28, 2003.

<sup>6</sup> McKenzie. *Privatopia*. pp 56-61.

<sup>7</sup> *Ibid.* pp. 91-93.

<sup>8</sup> *Ibid.* p. 111-113.

<sup>9</sup> George K. Staropoli. *The Truth...*. Note p. 4.

<sup>10</sup> NOTE: CAI member management firms and CAI Legislative Action Committee attorneys were present at 80th session hearings, stating opposition to all bills introduced that would require Open Meetings and Open Records for HOA meetings and access to records; that required that all assessment payments be applied first to assessments before any other claims. Such bills did not get out of committee. The bill that provided Open Meetings and Open Records for Clear Lake was applicable only for Clear Lake, not the entire state, thus the Representative author was able to get it passed.

<sup>11</sup> Robert Metcalf. *Position Statement On Common Interest Developments*. May 19, 2007, p. 4.

<sup>12</sup> House Research Organization. *Interim News*, 77-10 (July 23, 2002) p. 2. Also Supreme Court of Texas, *Inwood North Homeowners Association, Inc. v. Charlie Harris, Jr. et al*, Respondents. Nos. C-5283, C-5285, July 15, 1987.

<sup>13</sup> David A. Kahne. *A Bill of Rights for Homeowners in Associations*. p. 5.

<sup>14</sup> House Research. *Interim News*. pp. 4-5.

<sup>15</sup> *Ibid.* p. 4.

<sup>16</sup> House Research Organization. *Interim News*. July 23, 2002. p. 2.

<sup>17</sup> Rockwall Timber Creek Homeowners Assoc. Inc., *Restrictions*. Recorded Bk. OR, VL 5107, pg 210, Rockwall County, Texas. Also Affid't by Amy McCorkle, homeowner in Rockwall Timber Creek Estates. Recorded Bk. OR VL 5176, p287, Rockwall County, Tx.

<sup>18</sup> Texas State Statutes: <http://hls2.tlc.state.tx.us/statutes/index.htm>.