



# Home Is Where

WHEN 67-YEAR-OLD WALLY KUCHLEWSKI ARRIVED AT HIS Chicago condominium recently, an eviction notice was on his door and everything he owned was out on the sidewalk. A neighbor saw him crying. A few hours later, his condominium board's 75-year-old secretary, who was returning from her older sister's funeral, drove up to the condo's parking lot. Kuchlewski approached the secretary's white sedan, took out a gun, and fired several shots into her head and body, killing her. Her roommate, who was also in the car, was hit by stray bullets and suffered injuries to her mouth and abdomen.

The shooting resulted from a long standoff. Kuchlewski, who worked in a nearby metal shop, had been upset because the

board had refused to replace a key he'd lost, had kicked out his fiancée because she wasn't a co-owner of the unit, and had prevented him from washing his thrift-shop work clothes. In protest, he'd been deducting \$15 from his monthly condo fee of about \$170. He had withheld only \$640, but to cover court costs and attorney's fees, the board wanted him to pay over \$4,000. Now he awaits trial for first-degree murder, attempted murder, and aggravated battery.

Although few homeowners resort to such violence to express their frustration with their homeowner associations, Kuchlewski is one of a growing disgruntled minority. The boards of these associations wield tremendous power over the lives of their residents,



# the Heart Is\*

BY ROSS GUBERMAN ILLUSTRATION BY TOMER HANUKA

and most do their best to strike a balance between what individual homeowners demand and what the boards think the neighborhood needs. The few that don't, however, have provoked a backlash fueled by several "concerned citizen" groups, a backlash that is prompting state legislatures to respond.

ABOUT 50 MILLION AMERICANS BELONG TO HOMEOWNER associations, also known as HOAs or common-interest developments, which are composed of single-family homes, condo-

miniums, or co-ops. Four out of five new homes, ranging from starter homes to high-rise apartments to gated mansions, are in one of the nation's 250,000 HOAs. However they look or whomever they cater to, HOAs impose the same obligations: If you want to buy a property in an HOA development, you must join the HOA, allow a board you help elect to manage shared grounds and other public spaces, pay regular dues and any "special assessments" for upkeep or other costs, and obey a host of quality-of-life rules, even if they're added after you move in.

**\*Provided your dog's weight does not exceed 30 pounds, your shutters are painted a tasteful hue, and your lawn is in accordance with the standards mandated by the architectural-control committee.**

In return, the HOA keeps the welcome sign painted, the sidewalk cracks filled, and the flower beds fresh. It may also provide streets, parks, playgrounds, security, snow removal, and utilities that were once the province of local government. But the HOA does more than beautify the neighborhood and preserve property values. It is often the sole driving force behind the Halloween parades and holiday parties that are increasingly rare in an age of bowling alone.

Although structured as non-profit corporations, HOAs operate as private governments. An HOA can impose fines on those who flout its quality-of-life policies, just as a municipality can penalize those who violate its zoning, antismoking, or noise-control laws. An HOA also levies dues and assessments that are as obligatory as taxes and sometimes less predictable. In exerting these quasi-political powers, HOAs represent one of the most significant privatizations of local government functions in history.

That shift has come at a price. Most HOA board members, who are volunteers, fashion themselves as community representatives or homeowner advocates. But a few board members are hungry for power, their rule subject only to term limits, recall, or rejection at the next ballot box. Corruption can be as unbridled in HOAs as in big-city politics. HOA board members have been caught fixing their own elections, finagling kickbacks for themselves from contractors, and using their newfound authority to settle scores against neighbors. Some residents claim, for example, that after they've protested HOA policies at board meetings, they've been slapped with citations for obscure rule violations, such as putting their trash out on the wrong day or failing to remove weeds around a tree. "The problem with HOAs is that it's a kangaroo court that resolves these conflicts," said Evan McKenzie, a University of Illinois at Chicago political science professor and the author of *Privatopia: Homeowner Associations and the Rise of Residential Private Government*. "An unaccountable board plays judge and jury."

THE INSPIRATION FOR HOAS IS ROOTED IN THE GARDEN-city movement in England, which tried to help curb sprawl in the early twentieth century by creating self-contained communities surrounded by greenbelts. Some early HOA developments in the United States included language in their deeds to keep non-whites out unless they were live-in servants. After World War II, HOAs became a source of housing for the middle class, including employees of large corporations in planned communities.

Developers have long liked HOAs because they knew that they could squeeze in more homes more cheaply if they built narrower streets and had the homes share utilities. By including some open space for parks, and by enforcing strict aesthetic standards, builders could also sell those homes at a premium. Cities have favored HOAs because they allowed municipalities to collect property taxes from HOA residents without having to provide the services the HOAs now offer.

The federal government also has lent its support to these associations. In the late 1960s, the Federal Housing Administration teamed up with homebuilders and the Urban Land Institute to

promote HOAs as a way of offering affordable homes to the greatest number of homebuyers. The government endorsed the view that planned communities could decrease building costs, provide more value for the dollar, and exploit the available land where people wanted to live.

A generation ago, public officials, builders, contractors, and professionals who depended on HOAs for their livelihoods banded together to form a trade association, the Community Associations Institute. It began as a neutral think tank but evolved into a powerful and well-funded lobbying organization on behalf of HOAs. Although CAI styles itself as a voice for homeowners and HOAs alike, its political arm seeks to avoid local regulation, federal regulation, and any other limits on how HOA board members can keep their residents in line.

Although HOAs were initially envisioned as utopian enclaves, complete with grassy expanses and New England-style town halls, as they've grown bigger and more pervasive, and as homeowners have become increasingly wedded to their property rights, stories of abuse have come to the fore. One involves Evelyn Lyles, a single mother in her forties who has battled metastatic breast cancer for two decades. Overwhelmed by her medical bills, Lyles was late paying some dues to her Gilbert, Arizona HOA. She told her HOA's lawyer that she was willing to pay the \$393 she owed, but the association had piled on so many late fees and legal fees that the lawyer told her the amount was no longer enough. So the association placed a lien on her home. When Lyles missed a \$55 payment last year, her HOA began to foreclose against her property. An anonymous donor eventually paid off the dues and fees she owed.

Then there's Wenonah Blevins, an 83-year-old widow in Houston, Texas who fell behind in her HOA dues by \$876. The HOA had apparently sent notices to her late husband that she never opened. Blevins's HOA sought to recover the debt plus \$2,941.50 in attorney's fees. A police officer evicted Blevins and took everything she owned except the clothes she was wearing and an outfit for the next day. The HOA sold off her \$150,000 home for \$5,000. The floor for a home auction price can be as low as the few hundreds or thousands the homeowner owes the HOA, which in Blevins's case was about \$4,000. When Blevins's neighbors accused the board at a meeting of tarnishing the neighborhood's reputation, it responded by saying that it was just following the advice of its lawyer. Blevins sued and won compensation for losing her home for a year, a rare victory for a homeowner.

About half the states allow "non-judicial foreclosures" if owners lapse on their dues. Typically, the HOA's collection attorney places a lien on the property and announces its new legal status in a local newspaper. The home is then auctioned. Homeowners get none of the due-process protections they could use to ward off other creditors—no right to a hearing and no right to confront their HOA board.

Even in states that require court approval for an HOA foreclosure, the HOA nearly always wins. Under current law, any unpaid dues, no matter how small, can be grounds for foreclosure, particularly once the amount of the delinquency is swelled with interest and fines.

The CAI insists that fewer than 1 percent of non-judicial foreclosures result in homeowners losing their homes. But by threatening such a devastating loss, foreclosure actions can coerce homeowners to pay inflated delinquencies even if such delinquencies are unjustified or onerous. According to a 2001 study of foreclosures in California by Sentinel Fair Housing, a homeowner advocacy group, when HOAs foreclose, the typical homeowner is \$2,557 in arrears. When banks or municipal governments foreclose, by contrast, the typical homeowner owes \$190,000 in delinquent payments or back taxes.

For homeowners facing foreclosure, the nightmare is made worse by the collection lawyers who usually handle the procedure. Because HOAs are considered creditors and not debt collectors, the lawyers who work for them are not subject to the notice and attorney-fee provisions of the federal debt-collection laws. These lawyers typically approach inexperienced HOA board members with an attractive offer: They'll take care of all delinquencies and go after the homeowner, not the board, for whatever fees the attorneys decide to charge. According to McKenzie, who used to represent HOAs himself, the windfall can be too tempting for the collection lawyers to resist. "The process is being abused so badly that there's no way to fix it," he said. "The collection lawyers don't care about the bad press, or about throwing elderly people out the window, or about scaring off potential buyers because the association is known to be so tyrannical."

Most HOAs also retain a general counsel who advises them to enforce their quality-of-life policies as rigorously as the collection attorneys advise HOAs to pursue late payments. For that reason, homeowners in many states can risk fines, liens, or even foreclosure if they paint their shutters pink or violate lawn-care standards mandated by their HOA's architectural-control committee. Such edicts, which can be more intrusive than anything a local government would impose, generally stay on the books unless a supermajority of residents can agree to update them.

The policies are designed to preserve and promote a community ethos that can generate not just happier residents but also higher property values. Some HOAs work with residents so the community can enjoy rock gardens, bike paths, babysitting co-ops, or high-speed Internet access. Other HOAs organize their members to keep cities from building nearby highways or from tearing down trees.

But HOAs can prove destructive when boards insist that residents follow the letter of the law. Molly Foley-Healy, a CAI official, conceded that a minority of boards may enforce the rules too inflexibly at the prompting of their lawyers. A better approach, Foley-Healy said, would be to ensure that the rules match the community's needs and interests, something HOAs can forget when they get lost in the minutiae of individual disputes. "The best community association practitioners," she said, "understand that the old school of thought on advising boards to rigidly enforce unreasonable rules will result in a dysfunctional community rife with controversy and discontent."

Old-school inflexibility has provoked high-profile controversies over the right to fly flags and other individual rights. George Andres, a former Marine, was so outraged when his Florida HOA banned the residents from flying the American flag if it wasn't attached to their houses that he planted a 12-foot flagpole in the front yard of his townhouse. The association tried to foreclose on him. Governor Jeb Bush heard about the dispute and signed legislation in April 2002 allowing HOA residents to fly their flags no matter what their boards say. Bush visited Andres on Flag Day and gave him a flag that had previously been flown over the state capitol.

Other rules can govern every part of residents' homes and lot. A family in Newport Beach, Ca., for example, was banned from having a basketball hoop over the garage door in the frontyard of their single-family home. The HOA and the family fought in court for eight years before settling, and the kids were allowed to

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keep their hoop. A couple near Philadelphia ran into trouble when it tried to install metal swings in their backyard instead of the wooden swings the HOA had mandated to preserve a uniform look. Although the couple cited EPA reports that warned of poisons lurking in pressure-treated wood, the HOA imposed a fine of \$10 a day and refused to budge even after the couple offered to paint their swing set in earth tones. The couple removed the set. Another HOA in Atlanta fined a family \$25 a day for having green grass on its lawn in winter rather than the mandated Bermuda sod, which turns brown in cold weather.

Even HOAs' biggest critics recognize that a clean, homogeneous look helps maintain property values. Once an HOA starts making exceptions to the rules, other homeowners can demand their own exceptions—like, "Hey, you let him build his gazebo, so why can't I have purple siding?" If HOA boards ignore infractions, their members can be accused of breaching their fiduciary duty to their fellow homeowners, just as executives can be charged with breaching their duty to shareholders.

Some HOAs go beyond aesthetic considerations, however, and try to dictate who belongs in the neighborhood and how the homeowners should behave. Pets are a common target; the CAI even distributes a pamphlet entitled *Pet Policies: How to Draft and Enforce Rules that Sit, Stay, and Heel*. A Boca Raton, La. HOA prohibited all large dogs as well as any medium-sized ones over 30 pounds, presumably because large dogs bark more loudly and are more dangerous. After the weight of a 5-year-old mutt named Lucky came into question, she was weighed several times at an animal hospital with a court reporter on hand. Each time, she hovered about a pound below or above the 30-pound limit. The case was settled, and Lucky was allowed to remain with her owner.

Residents themselves can invite scrutiny. In 1991, for example, a Santa Ana, Ca. condo board accused a 51-year-old grandmother of “parking in [a] circular driveway, kissing and doing bad things for over one hour.” The woman denied the charge, though that didn’t keep neighbors from calling her “Hot Lips.” The HOA, which had cited no restriction that the woman might have violated, backed down after it turned out that she was a victim of mistaken identity: the culprits turned out to be a teenage girl and her boyfriend.

Some HOAs have age requirements so they can appeal more to a particular demographic. One New Jersey HOA took its age policy so seriously that it sued a married couple because the wife was three years younger than the minimum age of 48. The HOA went to court and won; age-discrimination laws don’t apply to private actors like HOAs. The man was ordered to make his wife live elsewhere or rent or sell his unit.

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IN 1985, THEN-STATE-ASSEMBLYMAN GRAY DAVIS TEAMED up with a fellow state assemblyman to pass the Davis-Stirling Act, which expanded HOAs’ powers to go after what Davis called “deadbeat” homeowners. Nearly two decades later, as governor, Davis signed one of the nation’s first laws prohibiting HOAs from banning pets.

As Davis’s change of heart suggests, sentiment is turning against HOA boards, in part because of anecdotes publicized by a loose network of anti-HOA activist groups. Groups like the American Homeowners Resource Center, which insists that CAI is just a corporate shill, prod wronged homeowners to write their public representatives and appear at public hearings to relay their tales of oppressive treatment at their HOA board’s hands.

In response, some states with large HOA populations are trying to make it harder for HOAs to foreclose. Proposed legislation in California would require HOAs to seek a court order before foreclosing over late-dues payments totaling less than \$2,500. Texas and Florida forbid HOAs from foreclosing over fines related to quality-of-life violations. Both states give owners a “right of redemption” so that they can repurchase their foreclosed homes within a certain number of days. The Texas statute is referred to as “The Wenonah Blevins Act.” Other states, like Virginia, are now entering the fray.

Some states have introduced piecemeal legislation to grant homeowners some of the freedoms they’d have if they lived in a municipality. Vermont, for example, has passed a “right to dry” bill that would prevent HOAs from banning clotheslines. Virginia, like Florida, has prevented HOAs from restricting displays of the American flag unless those limits are specified in advance.

At the local level, some municipalities have promoted arbitration to resolve conflicts. In Montgomery County, Md., for example, local HOAs pay a nominal yearly fee that helps establish low-cost dispute resolution. Florida has just passed legislation mandating specialized alternative dispute resolution for HOA disputes statewide. “These disputes just don’t belong in court,” said William Sklar, who teaches law at the University of Miami and who co-chaired the Florida HOA-reform task force that recommended the change. “People can’t afford to spend tens of thousands of dollars to fight their association over a parking space.”

BOARD MEMBERS FACE NEVER-ENDING CHALLENGES IN managing these day-to-day disputes. But all the brouhaha over flags and dogs may be distracting them from a more pressing concern: the long-term health of their developments.

Although the bulk of HOA-controlled housing was built in the last 25 to 30 years, the infrastructures of many of the older developments are beginning to crack. Most HOAs can fund major repairs only if they impose costly special assessments. Few of them had enough foresight to ask the past generation of owners to invest in repairs that are now essential. Insurance companies are not responsible for wear-and-tear, and it’s too late to sue the original builders for construction defects. That leaves homeowners to cover what could amount to billions in repair costs over the next years.

Homeowners face other risks. In a recent California case, after the Simi Valley Le Parc Homeowners Association hired a contractor to clean up earthquake damage, a board member expressed dissatisfaction with the contractor’s work. The contractor sued the board for breach of contract and trade disparagement and won a \$6.7 million arbitration award. It fell to the homeowners to cover that amount, first by having their monthly dues seized, then through a special assessment. When the homeowners argued that no money was left to pay for utilities or perform other needed maintenance, one judge said of the homeowners, “They’re going to suffer the consequences of the acts of the board of directors.” After protests and a lawsuit, the HOA’s insurance carrier wound up footing the bill. Another case in California held individual homeowners responsible for hundreds of thousands of dollars in punitive damages after a court found that its board had acted with malice against a contractor. The homeowners settled the case in August by self-imposing a special assessment averaging \$23,000 per household.

Such risks and controversies were far from the minds of the urban planners and government officials who signed on to this utilitarian experiment decades ago. Since then, the growth of HOAs has exploded too far and too fast for policy experts to keep up or for any nationwide reform to emerge. Until that happens, the worst HOAs will keep making it harder for homeowners to enjoy the homes that HOAs are supposed to protect.

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