Report of the Tennessee Advisory Commission on Intergovernmental Relations

Protecting the Interests of Homeowners: An Overview of Concerns Related to Homeowners Associations

Contents

Protecting the Interests of Homeowners:

Responding to Concerns about Residential Developments and Homeowners Associations

Finding a Balance between HOAs' and Homeowners' Rights

Most residential developments today are planned to meet community standards, including providing amenities such as clubhouses and other gathering places that belong to everyone who resides in them. These common areas require everyone's help to maintain. This is typically done through homeowners associations (HOAs), which usually have authority to enforce covenants agreed to by homebuyers.

A number of issues and concerns related to properties governed by HOAs have surfaced in recent years, from incomplete infrastructure to overzealous regulation. Responding to some of these concerns, the House of Representatives of the 107th General Assembly passed a resolution asking the Commission to study HOA rules and regulations and their responsibility to insure their obligations. The House Local Government Subcommittee of the 108th General Assembly asked the Commission to study a bill that would have required owners to disclose to buyers whether developments are complete or when they will be completed. Because the issues overlap, the Commission also chose to study a third bill related to regulations and fines. See appendix A.

Homeowners associations are in many ways small, private governments. As Kaid Benfield, writing for *The Atlantic's Citylab*, describes them,

> they have taxing power, setting mandatory dues that if not paid can result in the placement of a lien on your property or even foreclosure; they have regulatory authority, setting rules for everything from when you can take out the trash to what color and materials you use in your window treatments to what you can and cannot grow in your yard. They have enforcement power, too, including the right to issue cease and desist orders and to impose financial penalties in the form of fines. One legal observer [Ross Guberman][1] has called the exercise of quasi-political powers by HOAs "one of the most significant privatizations of local government functions in history." . . .
>
> In a lot of places—probably in most—it's a sort of government-among-friends, where rules are applied and interpreted with good faith and generosity, where

[1] Guberman 2004.

> neighbors cooperate on upkeep, and where buildings and communities look better and function better because of it.[2]

Requiring Adequate Insurance

The record flood that struck the Nashville area in May 2010 caused $1.5 billion in property damage, including damage to several condominiums near the Harpeth River. When owners of those condominiums discovered that their HOA did not have adequate insurance to repair the buildings' exteriors, they complained that their HOA was not responsive. To call attention to this issue, Representative Gary Moore introduced House Resolution 170, which the House passed in 2012, calling for the Commission to study HOA rules and regulations and their responsibility to insure their obligations.

While HOAs for condominiums built under Tennessee's Condominium Act, adopted in 2008, are required to carry insurance for common areas, those for condominiums built before January 2, 2009, and for single-family developments are not and, consequently, may not have adequate coverage to pay for repairs of common property or to pay liability claims. All condominium owners can require their HOAs to provide notice of coverage, which would allow them at least to discover whether the property was insured; however, homeowners in single-family developments with HOAs cannot. Although property insurance would not have covered damage caused by the May 2010 flood itself, it would have covered damage caused by the rains.

Like the Condominium Act of 2008, all of the model laws developed by the Uniform Law Commission for HOAs except the Uniform Common Interest Owners Bill of Rights require insurance. Adopting such a provision for condominiums built before January 2, 2009, and for single-family developments would help ensure that adequate funds are available to make necessary repairs and pay liability claims for these developments as well as for condominiums built after that date, should the need arise.

The Condominium Act of 2008 also requires HOAs to provide notice of coverage to all residential condominium owners upon request regardless of when they were built, but there is no similar requirement for single-family developments. Almost all of the model laws, including those for single-family developments, require insurers to issue a memorandum of insurance to any owner upon request. Adopting such a provision for single-family developments in Tennessee would ensure that all homeowners have access to information about the insurance carried by their HOAs.

Challenges that arise when developers have financial problems

With the decline in demand for housing and in housing prices that followed the burst of the housing bubble and the Great Recession of 2007-2009, many residential developers began to

[2] Benfield 2013.

struggle to meet their obligations to complete infrastructure and maintain common areas. Without the cash flow from the sale of lots or homes, developers simply did not have enough money. Even now, some homeowners continue to live in neighborhoods where the infrastructure was never completed and where the common areas are not being maintained. House Bill 2070 by Farmer (Senate Bill 2110 by Bowling) would have dealt with this issue by requiring owners to disclose to the buyer whether the development is complete or when it will be completed. The House Local Government Subcommittee sent this bill to the Commission for study in 2014. The Senate State and Local Government Committee amended its bill to require TACIR to study homeowners associations, but it did not receive a vote on the floor.

In order to protect their investment, developers maintain control over HOAs during construction until a date or event specified in the declaration, the governing document of the community. If a developer refuses to complete infrastructure or to maintain common areas while in control of the HOA, the owners' only recourse is to take the developer to court. If the developer has become insolvent, even taking it to court might not work because an insolvent developer won't have the resources. Homeowners need another way to ensure that common areas are maintained.

Empowering Homeowners to Maintain Common Areas

Florida, a state with a long history of HOA developments, deals with this problem by requiring transfer of control of HOAs from developers to homeowners when developers abandon their responsibility to maintain the common property or become insolvent. While this gives homeowners control over the common areas, it does not ensure that they have the financial means to maintain them. Nevertheless, providing homeowners this option could increase the likelihood that the common areas will not deteriorate.

Ensuring Infrastructure is Completed

In order to ensure that funds are available to complete infrastructure when homes in new developments don't sell rapidly enough to pay for it, counties and municipalities routinely require developers to guarantee that funds will be available, usually through letters of credit or surety bonds, to avoid having to use taxpayers' dollars to complete the development. Unfortunately, there have been several instances where developers were unable to finish the infrastructure and local governments had allowed the bond or letter of credit to lapse. One way to avoid a lapse is to use automatically renewing letters of credit rather than surety bonds.

Regulating Homeowners' and Others' Conduct

The main purpose of HOAs is to protect the investments of the homeowners. One of the ways they do this is by restricting conduct or actions that could adversely affect people living in the neighborhood. Homeowners agree to live by these rules when they purchase their homes and grant HOAs power to impose fines to help ensure compliance with these restrictions. From time to time, tensions arise between HOAs and homeowners who think their HOAs have overstepped their bounds.

Senate Bill 2198 by Johnson and its companion, House Bill 2060 by Durham, would have forbidden HOAs, unless expressly authorized by their local government, to limit or prohibit the display of political signs and parking on public streets. It would have protected homeowners in violation of these rules by limiting fines charged by all HOAs to the amount of one month's assessment and requiring a judicial hearing before an HOA could attach a lien.

Regulation of Political Signs by Homeowners Associations

The federal and state constitutions forbid governments to ban the display of political signs—or any signs, for that matter, based on content—but allow reasonable regulations. Because they are not subject to the constraints placed on governmental entities by the Constitution, HOAs can regulate or even ban political signs, but a number of states restrict their right to do this. Tennessee does not. Consequently, people can and do contract away their right to display political signs when they buy homes in areas governed by HOAs.

No state involves local governments in deciding whether to allow HOAs to prohibit political signs. Ten states directly forbid outright bans of political signs by HOAs but allow them to regulate the time, place, and manner of display of those signs, which is similar to the constitutional constraint on government regulation of signs. These laws appear to be constitutional despite the fact that they single out political signs because the states are protecting the right to display political signs rather than restricting it.

Any prohibition against HOAs banning political signs should include authorization to determine the time, place, size, number, and manner of display of those signs. In order to avoid entangling Tennessee's cities and counties unnecessarily in the business of HOAs, any such prohibition should not be subject to local government control.

Regulation by Homeowners Associations of Parking on Public Streets

Some HOAs forbid parking on the streets within their boundaries, even where those streets are public, for safety and aesthetic reasons. Vehicles parked along the street obscure the view of drivers, potentially endangering pedestrians, and narrow streets are difficult for emergency vehicles to navigate. Forbidding HOAs to prohibit all parking on public streets would shift the burden of keeping them clear for safety reasons to local governments. Only two states limit HOAs' power to regulate parking on public streets. HOAs in Nevada can ban parking only of certain large vehicles, while HOAs in Arizona cannot ban any parking on public streets. Restrictions like these would seem to increase the potential for safety problems. Allowing local governments to decide whether HOAs can restrict parking on public streets would seem more prudent.

Imposing and Collecting Fines and Other Assessments

HOA members may be subject to fines if they fail to pay assessments or otherwise don't comply with rules and regulations. Fines can be several hundred dollars or more, which some residents feel is excessive. Tennessee law does not limit the fines that can be imposed by single-family HOAs and older condominiums, but for condominiums developed after January 1, 2009, the law requires the fines to be reasonable. Six states set a maximum fine that HOAs may impose, ranging between $50 and $500 per violation.

Failure to pay these fines or assessments can lead to liens or even foreclosure. For condominiums governed by the Condominium Act of 2008, liens for nonpayment of fines or assessments attach automatically and without notice. In other developments governed by HOAs, the same thing may be allowed by the declaration. The ease with which liens attach has the potential to lead to abuse. To avoid this, eighteen states require recording and sometimes notice to attach a lien. Two other states completely prohibit the attachment of liens for fines. Maryland is the only state that, like Senate Bill 2198 by Johnson, House Bill 2060 by Durham, requires a judicial hearing before a lien may attach.

Once a lien has attached, an HOA can foreclose on the property, and the ease with which an HOA can foreclose could also lead to abuse. Tennessee HOAs can foreclose on a property for failure to pay even a small fine. Nine states limit HOAs' ability to foreclose on homeowners, commonly by requiring a minimum dollar amount or period of delinquency. The Uniform Common Interest Ownership Act and the Uniform Common Interest Owners Bill of Rights Act, model legislation developed by the Uniform Law Commission but not adopted in Tennessee, set a minimum lien amount before foreclosing and require a judgment before foreclosing certain liens.

Limiting HOAs' ability to impose fines, put liens on homes, and foreclose on them would protect homeowners and help keep the matters out of the court system. But a specific cap on fines might reduce HOAs' ability to ensure compliance with rules. They need flexibility to decide the appropriate fines, but they should be reasonable. Extending the reasonableness limitation on fines for newer condominiums to older condominiums and single-family HOAs would protect owners while leaving some discretion to HOAs setting fines. In any case, HOAs should also be required to notify homeowners when liens attach for unpaid fines and assessments; moreover, foreclosure on liens for unpaid fines and assessments should be limited to some minimum amount and some minimum length of time unpaid.

Local Governments Owning Property Subject to HOA Dues

When property owners fail to pay taxes, local governments must hold a tax sale, and if no one bids on the properties, the local governments are required to purchase them for the taxes owed and related costs. Although liens attached for HOA assessments, like all non-tax liens, are extinguished when a property is purchased at a tax sale, the requirements of the declaration, including the requirement to pay assessments apply to the new owner, even if the new owner is a government, according to a recent decision by the Tennessee Court of Appeals. In some communities, paying these assessments has become burdensome for local governments. To ensure that other counties are able to reach similar agreements, the legislature passed Public Chapter 814, Acts of 2014, which authorizes local governments to transfer undeveloped properties to HOAs in return for forgiveness of the assessments owed.

Bills that attempted to empower local governments to deal with this issue in different ways failed to pass in 2012 and 2013. One would have exempted state and local governments from HOA assessments. The other was much broader. It would have allowed local governments to force the sale of tax delinquent properties for less than the amount of taxes owed and related costs. Four other states have adopted similar laws. Allowing local governments to do this would increase the likelihood that they could avoid buying them and assuming responsibility for future HOA assessments. Tennessee already allows the sale of properties for less than the taxes and associated costs owed, but only after the one-year redemption period, not at the tax sale.

Planned Residential Developments and the HOAs Created to Govern Them

One of the most significant trends in suburban American history is the use of common ownership and deed restrictions as land planning devices. Described by Evan McKenzie in *Privatopia*, the roots of this trend date back to the exclusive neighborhoods with private parks, lakes, and other amenities built in the early 1800s. Examples include Gramercy Park in New York (1831) and Louisburg Square in Boston (1844),[3] where homeowners created America's first HOA to care for a park after the developer failed to arrange for maintenance. Louisburg Square is unusual in that the owners, not the developer, formed the association. Beginning in the mid-19th century St. Louis developers created hundreds of private neighborhoods with such services as street maintenance, snow removal, mowing, tree trimming, and street lighting provided by "private street associations."[4]

> By 1928 scores of luxury subdivisions across the country were using deed restrictions . . . as their legal architecture. To guarantee enforcement of the covenants, developers were organizing "homeowner associations" so that residents could sue those who violated the rules.[5]

The 1989 US Advisory Commission on Intergovernmental Relations publication *Residential Community Associations: Private Governments in the Intergovernmental System?* described five historical periods in the history of "residential community associations" or HOAs:

> Origins (1830-1910). During this period the modern community association did not really exist. Some subdivisions did have deed restrictions and attempted to enforce them, and some private property owners' neighborhood organizations did provide basic services and own and maintain common facilities, but no compulsory membership homeowner association was constituted through deed restrictions to perform all three of the basic functions of a community association.
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> Emergence (1910-1935). In the 1910s and especially the 1920s, the larger scale of high-income suburban subdivision development, and the increased demand for design amenities and sophisticated restrictions, created a greater need for developers to provide for the establishment of homeowner associations. At this time, these associations were generally not standardized and were relatively few in number.
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> Popularization (1935-1963). Community builders began standardizing homeowner associations, working primarily through the Community Builders'

[3] Weiss and Watts 1989.
[4] Oakerson 1989.
[5] McKenzie 1994.

> Council of the Urban Land Institute (ULI), and later through the National Association of Home Builders (NAHB). In the 1940s, the ULI strongly endorsed the use of homeowner associations by developers, and published a plan for standardized implementation. At the same time, the Federal Housing Administration (FHA) was strongly promoting the use of deed restrictions in community development, paving the way for homeowner associations as the long-term enforcement mechanism.
>
> Expansion (1963-1973). The FHA and ULI worked together to promote the widespread use of community associations in planned unit developments (PUDs) and in residential condominiums. The latter were first introduced into the US with FHA approval in 1961. During this period of rapid expansion, many of the community associations were poorly organized, often by much smaller scale developers. This led to a good deal of resident dissatisfaction.
>
> Restructuring (1973-1989). . . . The FHA and the Veterans Administration (VA) played an important role in standardizing the implementation of community associations from the 1930s to the 1960s through their mortgage insurance and guarantee functions. Beginning in the late 1970s, two key secondary mortgage market institutions, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) have been very influential in the process of restructuring community association organization, financing, and management to conform to new implementation guidelines. Finally, in the past decade developers have been relinquishing more control of community associations to the property owners at earlier stages, as part of a phased process.

HOAs are organizations created to make and enforce rules and manage common areas in private communities, condominiums as well as single-family residential developments. While they are responsible for the common areas and sometimes provide services such as trash pickup, their main purpose is to protect the investment of the property owners in the community. They do this largely through enforcement of the rules agreed upon in the community's governing document: the declaration of covenants, conditions, and restrictions (CC&R).

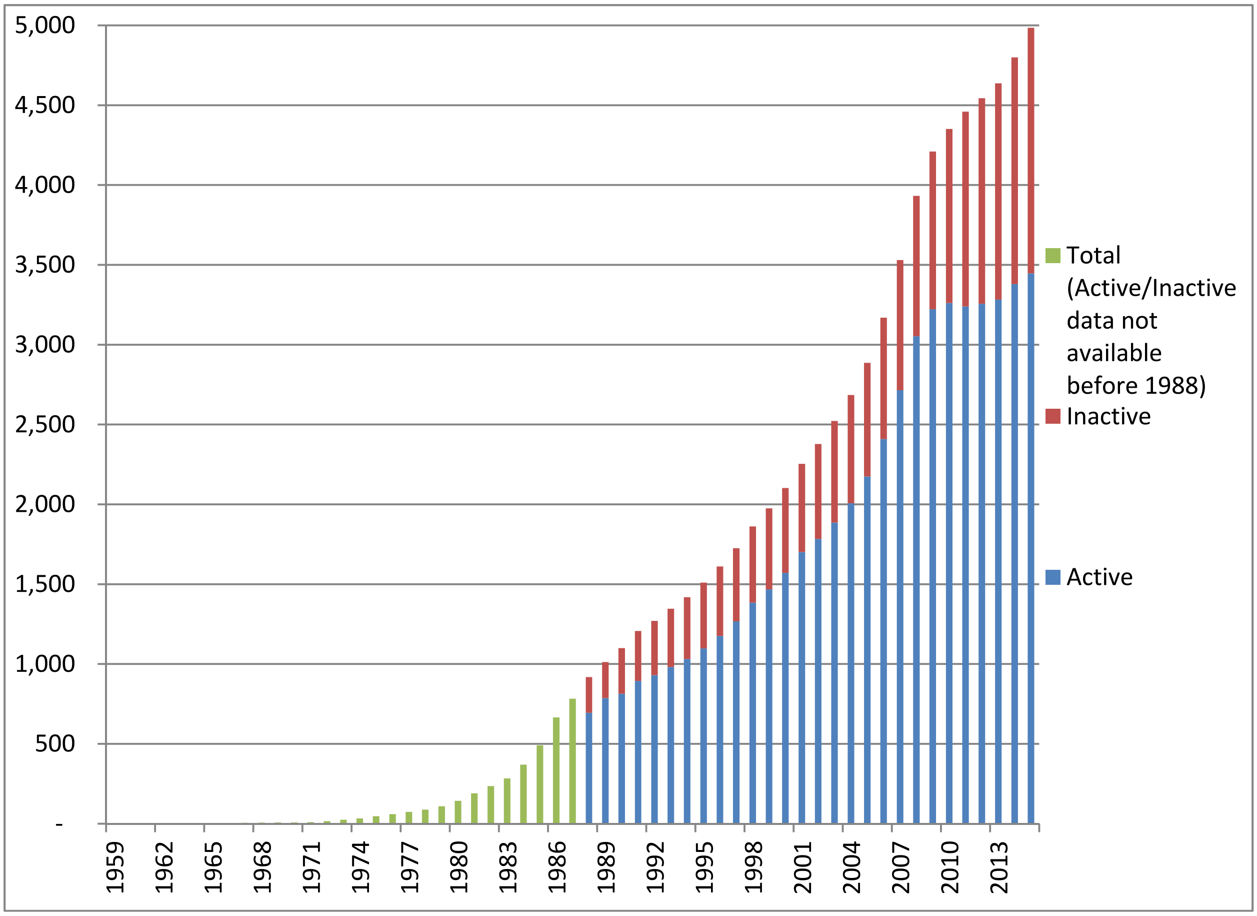
In many ways, HOAs are like small, private governments. Their boards of directors enforce CC&Rs, HOAs' equivalent of laws, and are similar to executive branches of public governments. They collect regular assessments from the owners and use them to maintain amenities and provide services, in some cases including private roads and private security, and they can levy special assessments on property owners to pay for unexpected repairs and other expenses. Moreover, like unpaid taxes owed to governments, unpaid fines and assessments owed to HOAs can become a lien on your home and lead to foreclosure. The number of HOAs has grown extensively in the second half of the last century, largely in response to government laws and regulations encouraging or requiring their use, and it has become increasingly difficult to find homes without HOAs in some communities.

Prevalence of HOAs

Although there were still less than 500 HOAs nationwide in 1964,[6] by 1970, there were an estimated 10,000 nationwide, serving 2.1 million residents in 701,000 units. By 2013, an estimated 65.7 million people (24% of the US population) lived in 26.3 million units in communities governed by 328,500 HOAs.[7] Single-family residential communities account for about half of those totals, condominiums for 45 to 48%, and cooperatives for 3 to 4%. While a comparable breakdown is not available for Tennessee, there are an estimated 930,000 Tennesseans living in communities governed by HOAs.[8] Since the first HOA was incorporated in Tennessee in 1959, 4,985 HOAs have formed in the state of which 3,447 are still active.[9] See figure 1.

[6] McKenzie 2011.
[7] Foundation for Community Research, 2014.
[8] Ibid.
[9] Tennessee Secretary of State.

Figure 1. Number of Active and Inactive Homeowners Associations in Tennessee



Model HOA Legislation

With the increasing number of HOAs, the need for HOA laws grew. The development of HOA laws began with condominiums. Recognizing the potential problems within condominiums early on, the federal government started requiring states to adopt laws governing the management of condominiums as a prerequisite for the Federal Housing Administration providing mortgage insurance for condominiums. The FHA drafted the Model Horizontal Property Act in 1961 to provide a model for states as they drafted their own condominium laws. Tennessee enacted its Horizontal Property Act in 1963, authorizing the creation of condominiums in the state.

These first condominium laws recognized the legal concept of a condominium but did not deal with issues such as abuses of operation. The need for a more comprehensive condominium law led the Uniform Law Commission (ULC) to draft the Uniform Condominium Act (UCA) in 1977. The Act covers the creation, alteration, termination, and management of condominiums and the protection of purchasers. The Tennessee Bar Association drafted what became the Tennessee Condominium Act of 2008, which is based on language in the UCA, but the

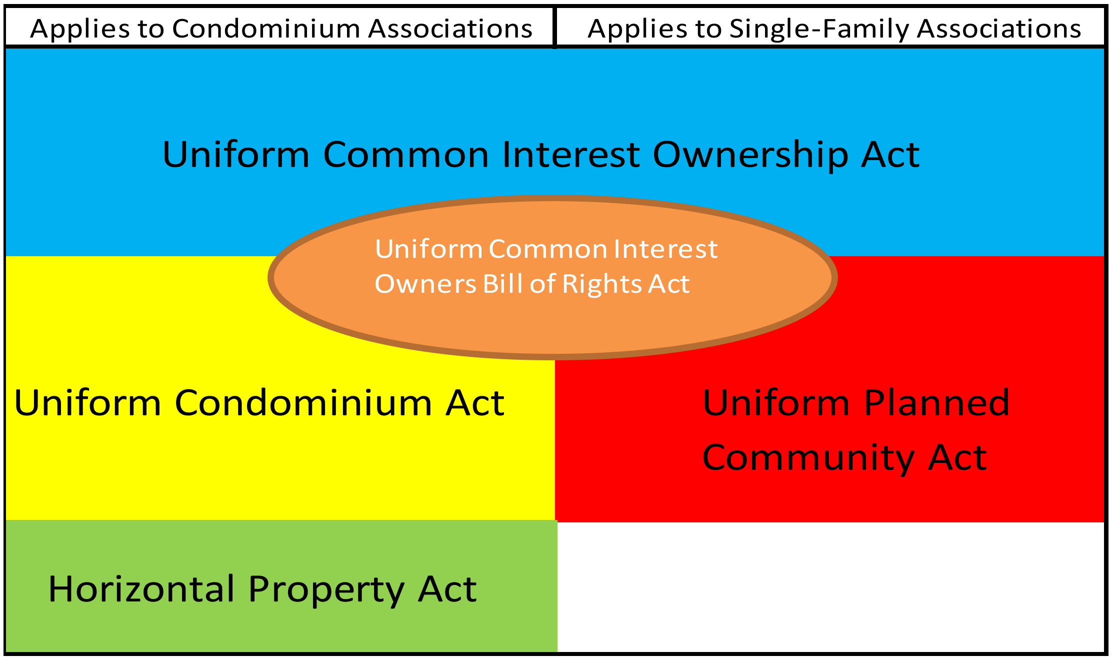
Tennessee law omits some of the sections on the management of condominiums, most of the sections on the protection of purchasers, and the entire article establishing an administrative agency to regulate condominiums. See appendix C. The Tennessee Condominium Act was drafted because there were some concerns that the Horizontal Property Act was outdated and did not adequately anticipate the various circumstances under which condominiums were being created. The Horizontal Property Act left many questions unanswered so that builders and owners had very little certainty about how to deal with the issues that arose as more and more condominiums were created.

After drafting the UCA, the ULC drafted a model act for planned communities. In 1980, the ULC drafted the Uniform Planned Community Act (UPCA), based directly on the UCA. The main difference in the UPCA and the UCA is the way common areas are treated since the common areas are vested in homeowners in the case of condominiums and in the HOA in the case of single-family communities. See figure 2.

Rather than focus on one kind of development, the Uniform Common Interest Ownership Act, originally drafted in 1982, governs both condominiums and planned communities—and the ULC intended it to "succeed and subsume" both the UCA and the UPCA. It was drafted "to address a growing demand in the states for a legislative solution for growing tensions between the elected directors of unit owners' associations and dissident individual unit owners within those associations." It also deals with issues not in the Tennessee Condominium Act.

The ULC drafted the Uniform Common Interest Owner Bill of Rights Act in 2008 for states unwilling to enact the entire Common Interest Ownership Act. The Bill of Rights Act deals with some of the same issues as the Common Interest Ownership Act but omits some of the general provisions and sections on the management of communities with HOAs; almost all of the protections of purchasers; all of the sections on the creation, alteration, and termination of communities; and the entire article establishing an administrative state agency to oversee these developments. Currently, the Tennessee Bar Association is working on legislation that would apply to single-family residential developments governed by an HOA. Summaries of the model acts are in appendixes E through I. Appendix J compares Tennessee condominium law with the model acts.

Figure 2. Model HOA Laws



Most HOAs in Tennessee are not required to have insurance

Like most states, Tennessee does not require HOAs for single-family residential communities to carry property or liability insurance. Only thirteen states do.[10] However, most states require condominium HOAs to carry both property and liability insurance.[11] Tennessee requires this only for condominiums built after January 1, 2009. Older condominiums don't have to carry either.[12] Without insurance, HOAs risk being unable to cover large, unexpected expenses and may not be able to collect sufficient funds from their residents either.

HOAs without property insurance may not be able to pay for repairs or replacements when disasters occur, and the regular assessments that homeowners pay to HOAs may not be adequate to pay for insurable losses. In those cases, homeowners might have to pay a special assessment to the HOA or leave the common property unrepaired. Cities could decide to step in and repair common property to remove health and safety hazards but would likely assess homeowners for the expense. Without liability insurance, homeowners are responsible for

[10] Alaska, California, Colorado, Connecticut, Delaware, Minnesota, Nevada, North Carolina, Ohio, Oregon, Pennsylvania, Vermont, and West Virginia.

[11] Tennessee Code Annotated, Section 66-27-413.

[12] Thirty-one states require HOAs to carry both property and liability insurance: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington, and West Virginia. Florida and Hawaii require HOAs to carry property insurance but don't require them to carry liability insurance:

paying liability claims against their HOA. The HOA would be responsible for paying the claim, but HOAs typically do not have monetary reserves that are not already dedicated to expected expenses. Like with property damage, HOAs would likely have to charge homeowners a special assessment or increase the amount of the regular assessment. Either way, homeowners would pay liability claims that could have been covered by insurance.

Recognizing the importance of HOAs having adequate coverage, the Tennessee House of Representatives passed House Resolution 170 in 2012, directing the Commission to study the responsibility of HOAs to insure their obligations and recommend solutions to enable individual homeowners, upon request, to obtain at regular intervals from their respective HOAs a report citing a certificate or memorandum of insurance; proof of policy coverage available; and names, addresses, and phone numbers for HOAs' designated insurance carriers and banking institutions holding funds in escrow. Not only is it a good business practice to insure obligations and notify homeowners that you have done so, but the model acts require it, as do most states, even those that haven't adopted the model acts.

The resolution was the result of concerns raised following the May 2010 flood when homeowners complained that their HOAs were not adequately insured to cover damage to common areas. Property insurance would have covered damage from the rain but not from the flood. Only flood insurance would cover damage from floods, and unless property is in a flood plain no state requires flood insurance. Only two states require flood insurance for properties in flood plains,[13] but mortgage companies generally do.

All of the uniform acts except the Uniform Common Interest Owners Bill of Rights Act (Bill of Rights), which does not deal with the issue of insurance coverage, require HOAs to maintain insurance and enable owners to get insurance coverage information. The Uniform Condominium Act (UCA), Uniform Planned Community Act (UPCA), and Uniform Common Interest Ownership Act require HOAs to maintain property and liability insurance on the common areas.[14] These acts also include language that insurers must provide information about HOAs' insurance coverage to owners upon request.

Thirty-one states require HOAs to notify insurance notifications to be provided to condominium owners[15] either periodically or, as in Tennessee,[16] upon request. Five of those states go further and require that all condominium unit owners be notified of any change in coverage.[17] Sixteen states require HOAs in single-family residential communities to provide

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[13] Connecticut requires it for all HOAs (Connecticut General Statutes, Sections 47-83, 47-255); Hawaii requires it only for condominiums (Hawaii Revised Statutes Annotated, Section 514-A-86(a)).
[14] Section 3-113.
[15] Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, Texas, Utah, Vermont, Virginia, Washington, West Virginia.
[16] Tennessee Code Annotated, Sections 66-27-202, 66-27-502 and 66-27-503.
[17] California, Colorado, Indiana, New Hampshire, New York.

insurance information when requested by owners.[18] California is the only state that extends to single-family HOAs the requirement that they notify homeowners if there is any change in coverage.[19]

Challenges that arise when developers have financial problems

With the decline in demand for housing and in housing prices that followed the Great Recession of 2007-2009 and the burst of the housing bubble, many residential developers began to struggle to meet their obligations to complete infrastructure and maintain common areas. Without the cash flow from the sale of lots or homes, developers simply did not have enough money. Making matters worse, in some cases, the bonds guaranteeing the completion of infrastructure lapsed, and even now, some homeowners continue to live in communities where the infrastructure was never completed and where the common areas are not maintained.Developers maintain control over HOAs during construction until a date or some other event in order to protect their investment. The event or date is specified in the declaration in single-family residential and older condominium developments in Tennessee; there is no statutory requirement governing the transfer or even requiring that it occur. For newer condominiums, those constructed after January 1, 2009, Tennessee requires developers to transfer control no later than 120 days after 75% of units have sold or either five or seven years after the first sale, depending on the number of units.[20] The uniform acts are slightly different. The UCA, UPCA, and Common Interest Ownership Act all require the developer to transfer control after 75% of units have sold but requires this transfer to take place no more than 60 days after the event instead of the 120 days allowed in Tennessee. These acts also require the transfer to occur within two years after the *last* sale instead of the five or seven years after the *first* sale as in Tennessee. The uniform acts also require a transfer to occur two years after the right to add new units was last exercised; there is no similar language in Tennessee's law. The Bill of Rights does not deal with the transfer issue.

Ensuring that developer-controlled HOAs maintain common areas

Currently, when developer-controlled HOAs fail to maintain common areas, homeowners' only course of action is litigation to enforce the developer's contractual obligations. They can sue for breach of covenant under common law; for a breach of duty to maintain the common areas if the HOA is organized as a nonprofit corporation, for-profit corporation, or director managed LLC;[21] or in newer condominium developments, for breach of fiduciary duty.[22] These may not be good options if the developer is insolvent or has filed for bankruptcy.

[18] Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Minnesota, Nevada, New Mexico, North Carolina, Pennsylvania, Texas, Utah, Vermont, West Virginia.
[19] California Civil Code, Section 5810.
[20] Tennessee Code Annotated, Section 66-27-403.
[21] Tennessee Code Annotated, Sections 48-58-403, 48-18-403 and 48-239-115.
[22] Tennessee Code Annotated, Section 66-27-403.

Florida's law provides another option for owners who are dealing with developers that aren't maintaining common areas. Owners can force a transfer of HOA control from the developer to the owners when the developer fails to maintain the common areas.[23] There is a rebuttable presumption that the developer has abandoned the common areas if he or she failed to pay the assessments for two years or more. Transfer is also required when the developer files Chapter 7 bankruptcy, the property is foreclosed on, or a receiver is appointed for the developer. While transferring control of the HOA under these circumstances gives homeowners control over the common areas, it does not ensure that they have the financial means to maintain them. Nevertheless, providing homeowners this option could increase the likelihood that the common areas will not deteriorate.

Adopting a similar law in Tennessee may raise a constitutional issue for existing developments if the event triggering the transfer is specified in the declaration. Article I, Section 10, of the US Constitution and Article I, Section 20, of Tennessee's constitution forbid legislation that would impair the obligations of existing contracts. A contract may be impaired only if the law is an exercise of the state's police power to protect the health, morals, and general welfare of the people.[24] Requiring developers to transfer control of HOAs in order to protect the welfare of its residents would probably be a valid exercise of the legislature's police powers and would not violate the US or state constitutions..

Guaranteeing construction of subdivision infrastructure

Local governments that regulate the subdivision of land routinely require developers to guarantee that funds will be available to complete any infrastructure included in subdivision plans,[25] usually through letters of credit or surety bonds. Other methods, including escrow accounts, cashier's checks, and certificates of deposit, are used far less often because they tie up developers' financial resources. The traditional method of guaranteeing infrastructure is through surety bonds, but they are falling out of favor partly because local governments sometimes have to sue to cash the bond. A surety bond is obtained from a surety company, and the company is then obligated to pay the agreed upon amount to complete the project.[26]

Unfortunately, there have been several instances in Tennessee where developers have become insolvent or have filed for bankruptcy and were unable to complete the planned infrastructure; the local government had allowed the guarantee to lapse; and no funds were available to complete the infrastructure. Had the local government required an automatically renewing letter of credit, the funds would have been available.

Letters of credit are used most often because they make it easier for local governments to get the money for completion of the infrastructure and can be less costly for developers. Banks

[23] Florida Statutes, Section 720.307.
[24] *Marr v. Bank of W. Tenn.*, 72 Tenn. 578 (1880); *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123, 28 S.W. 668 (1894).
[25] Tennessee Code Annotated, Sections 13-4-303 and 13-3-403.
[26] Pealer 2006.

issue letters of credit, in this case to guarantee completion of infrastructure, to credit-worthy customers as a way to ensure the infrastructure work that the customer has promised to complete is actually completed. [27] In order to collect on a letter of credit, the local government presents proof of default by the developer, and the bank issues a check for the amount indicated in the letter. Developers with good credit but little performance history may find it easier to get letters of credit. And letters of credit can be made to automatically renew, preventing any lapse in coverage.

Authority of HOAs over homeowner conduct and penalties for violations

HOAs enforce the rules in the declaration of covenants, conditions, and restrictions. Homeowners contractually agree to follow these rules when they purchase their homes. The declaration typically gives the HOA the power to impose fines to help ensure compliance with these rules. These rules can become a source of tension when some owners do not approve of them. The rules may restrict conduct, such as placing political signs on an owner's private property, and they may even restrict the use of public property, such as public streets, within its boundaries. Some homeowners do not believe that this is fair and are especially upset because these restrictions can lead to fines, liens, and eventually foreclosure on their property.

Other states have passed laws limiting HOAs' power to regulate parking, signs, or to impose fines, liens, and foreclose on homeowners' properties. If Tennessee's legislature were to adopt similar laws, there might be an impairment of contracts issue for existing developments. These laws could likely only be applicable to condominiums and single-family developments created after the passage of the law.

Regulation of Political Signs by Homeowners Associations

Residents in some developments want to put up political signs but can't because of their developments' rules. Individuals can contract away their right to display political signs when they buy homes or condominiums in developments governed by HOAs in Tennessee. Although the First Amendment of the US Constitution and Article 1, Section 19, of Tennessee's constitution protect free speech rights from government restriction, they do not apply to private entities except under very limited circumstances, for example, when private entities serve a public purpose. Those constitutional protections, however, are not absolute. Even in the case of governments, both the US Supreme Court[28] and the Tennessee Supreme Court have held that all speech is subject to reasonable, content-neutral regulation, such as time, place, and manner restrictions.[29] A government-imposed ban on political signs would be

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[27] Ibid.
[28] *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S. Ct. 2038 (1994).
[29] *H & L Messengers, Inc. v. Brentwood*, 577 S.W.2d 444 (Tenn. 1979); See also *Freeman v. Burson*, 802 S.W.2d 210 (Tenn. 1990).

subject to the highest judicial scrutiny and would almost certainly be unconstitutional. However, because HOAs are private entities and not an arm of government, they can regulate or even ban political signs.[30]

Legislation to regulate HOAs' ability to restrict political signs was introduced during the 108th General Assembly. Senate Bill 2198 by Johnson, House Bill 2060 by Durham, would have forbidden HOAs to limit or prohibit the display of political signs unless expressly authorized by local governments. Allowing local governments to authorize rules banning or regulating political signs might qualify as a state action and subject HOAs to state and federal free speech protections. Although court cases indicate that mere permission in general does not amount to state action,[31] freedom of speech is given greater protection than many other constitutional rights at both the state and the federal level,[32] and courts may find a local government authorization to restrict speech unconstitutional.

No other state involves local governments in these decisions, but ten states limit HOAs to regulating the time, place, and manner of display of political signs. Five of these states—Colorado, Delaware, Kansas, Nevada, Texas—have laws that apply to all HOAs. Indiana, Maryland, and North Carolina limit HOAs' control over political signs only in single-family HOAs, while Arizona and North Dakota limit them only for condominiums. Of these ten states, all but Maryland allow reasonable size restrictions on political signs. The "reasonable" size of a sign ranges between four and twenty-four square feet or is described as what is "commonly displayed during election campaigns."[33] Six states allow restrictions on the number of signs to be displayed, but the number cannot be less than one or the number allowed by applicable city law.[34] Eight states allow HOAs to regulate the period during which signs may be displayed.[35] These states forbid associations to prohibit signage for 45 to 90 days before an election and up to 10 days afterward. Delaware also allows regulation of the time, place, size, number, and manner of displaying signs, but its statute gives no guidance for implementing these restrictions.

The Uniform Common Interest Ownership Act and the Uniform Common Interest Owners Bill of Rights Act (Bill of Rights) include language that protects homeowners' right to display political signs. Both acts forbid HOAs to ban "signs regarding candidates for public or association office or ballot questions" but allow reasonable time, place, and manner

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[30] New Jersey and Missouri courts have held that the free speech provisions of their state constitutions are broader than the protection in the US Constitution. In those states, the state constitutions protect free speech rights from restriction by private actors. See *Lamprecht v. Tiara at the Abbey Homeowners Ass'n*, unpublished, 12 JE-CC00227 (MO Cir. Ct. Oct. 3, 2013) and *Mazdabrook Commons Homeowners' Ass'n v. Khan*, 2010 N.J. Super. Unpub. LEXIS 2170 (App.Div. Sept. 1, 2010).
[31] American Manufacturers Mutual Insurance Company v. Sullivan, 526 US 40, 143 L. Ed. 2d 130, 119 S. Ct. 977 (1999).
[32] See Leech v. American Booksellers Association, 582 S.W.2d 738 (Tenn. 1979).
[33] Indiana.
[34] Arizona, Colorado, Indiana, Nevada, North Carolina.
[35] Arizona, Colorado, Kansas, Maryland, North Carolina, North Dakota, Texas.

regulations.[36] Neither the Uniform Condominium Act (UCA) nor the Uniform Planned Community Act (UPCA) have provisions governing political sign restrictions.

Both the state laws and the uniform acts appear to be constitutional because they protect the right to display political signs rather than restrict it. While restrictions on speech must normally be content-neutral, and political viewpoints are a type of content, political speech may be afforded more protection than other types of speech as long as all political speech is afforded the same protection.[37]

HOA Regulation of Parking on Public Streets

HOAs often forbid parking on the streets within their boundaries for safety and aesthetic reasons. Vehicles parked along the street obscure the view of drivers, potentially endangering pedestrians by increasing the likelihood of "dart-out" accidents. If streets are clogged with parked vehicles, it might be difficult for emergency vehicles to reach residents. Some people may also not like the look of vehicles parked on the streets.

Tennessee law does not prevent, restrain, or limit the power of HOAs to regulate parking, even on public streets. The condominium laws do not cover this issue, and Tennessee courts have not ruled on it. Owners are free to grant their HOAs the right to regulate parking on streets by contract. Depending on the language in the covenant, an owner might even be responsible for a guest's violation of the parking rules. Senate Bill 2198 by Johnson, House Bill 2060 by Durham, would have changed this and forbidden HOAs to prohibit parking on public streets unless expressly authorized to do so by the county or municipal legislative body, placing the burden of keeping them clear solely on local governments.

Court decisions in other states allow HOAs to regulate parking on public streets as long there is no state law to the contrary. Courts in Missouri[38] and New Jersey[39] have held that HOAs may regulate parking on public streets. In both states, HOAs fined homeowners for parking commercial vehicles on public streets in violation of the associations' regulations. The courts concluded that public ownership of the streets was irrelevant, and the associations were not precluded from enforcing valid contracts between the parties.

Only Arizona and Nevada limit HOAs' power to regulate parking on public streets by statute. A new Arizona law will prohibit HOAs from enforcing parking on public streets once the period of developer control has ended.[40] It does not apply to condominiums. Nevada HOAs cannot regulate the parking of passenger vehicles, and their power to regulate the parking of utility vehicles under certain weight limits, emergency and law enforcement vehicles, and vehicles

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[36] Uniform Common Interest Ownership Act, Section 3-120(d); Bill of Rights, Section 17.
[37] Ammori 2009.
[38] Maryland Estates Homeowners' Ass'n v. Puckett, 936 S.W.2d 218 (Mo. Ct. App. 1996).
[39] *Verna v. Links at Valleybrook Neighborhood Ass'n*, 371 N.J. Super. 77, 52 A.2d 202 (NJ App. Div. 2004).
[40] Arizona Revised Statutes, Section 33-1818.

used for official state business is severely restricted. They can, however, regulate the parking of recreational vehicles, trailers, watercraft, and commercial vehicles.[41]

Unpaid fines can lead to liens and even foreclosure

If owners fail to pay assessments or fail to comply with rules and regulations, they may be subject to fines. Tennessee law does not restrict fine amounts that can be imposed by single-family HOAs and condominiums built before January 2, 2009. For condominiums developed after January 1, 2009, the law requires the fines to be reasonable.[42] However, no statute or case law defines what a reasonable fine is; therefore, fines can be several hundred dollars or more. Some owners feel the fines they have to pay are excessive.

Senate Bill 2198 by Johnson, House Bill 2060 by Durham, would have protected homeowners that have been fined by limiting fines charged by all HOAs to the amount of one month's assessment. This would effectively impose a cap on fines by HOAs and provide owners with a sense of predictability. However, HOAs with low monthly dues could have difficulty using fines as an effective rule-enforcement tool. Because methods for calculating monthly dues may vary within associations, for example based on a home's square footage, it is possible that some members of the association would be subject to heavier penalties than others would be. Furthermore, the law as written would restrict HOAs' power to levy fines for continuing violations, which could otherwise build up to exceed monthly assessments.

Only six states place a cap on HOA fines by statute; no states tie it to monthly assessments. Florida[43] and Nevada[44] allow HOAs to impose fines up to $100. Fines for continuing violations are capped at $1,000 unless specifically authorized in the association's bylaws. If the violation in question has a "substantial adverse effect on the health, safety or welfare" of the association's members, Nevada will not apply the $1,000 cap so long as the fine is "commensurate with the severity of the violation." North Carolina caps daily damages at $100, and Rhode Island and Utah cap daily damages at $500. Finally, Virginia places the heaviest restrictions on HOAs by capping fines for single occurrences at $50, by capping fines for continuing violations at $10 per day, and by limiting the period that HOAs can fine continuing violations to 90 days.

Owners who fail to pay fines or monthly assessments could be subject to liens on their properties. For newer condominiums, liens for nonpayment of fines or assessments attach automatically and without notice as soon as the fine or assessment becomes due, even if it is only a few dollars.[45] In other developments governed by HOAs, the same thing may be done by the declaration. These liens are automatically removed when the fines or assessments are paid, but homeowners who don't pay will have to go to court to get their liens removed.

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[41] Nevada Revised Statutes Annotated, Section 116.350.
[42] Tennessee Code Annotated, Section 66-27-402.
[43] Florida Statutes, Section 720.305.
[44] Florida Statutes, Section 720.305; Nevada Revised Statutes, Sections 116.31031 and 116B.430.
[45] Tennessee Code Annotated, Section 66-27-415.

Senate Bill 2198 by Johnson, House Bill 2060 by Durham, would have made it more difficult for HOAs to attach liens by requiring a judicial hearing before a lien could attach. The HOA would have to prove by clear and convincing evidence that the homeowner was past due on required payments before attaching a lien. Maryland is the only state that requires a judicial hearing before attaching a lien.[46]

Many states limit the ability of HOAs to attach liens or require HOAs to provide notice when a lien attaches. Eighteen states require HOAs to record their liens.[47] Seven of these eighteen states also require the HOA to send the homeowner notice of the lien.[48] Nevada requires only condominium HOAs to record their liens. Michigan[49] and Oregon[50] require liens to be recorded before foreclosure but do not otherwise require recording. Arizona[51] and California[52] do not allow HOAs to attach liens for fines, only unpaid monthly assessments. Florida single-family HOAs cannot attach liens for fines less than $1,000 and condominiums cannot attach liens for fines at all.[53] New Jersey does not allow liens for late fees.[54]

In Tennessee, once a lien has attached, an HOA can foreclose on a property.[55] An HOA may exercise judicial foreclosure or, if its declaration provides, it may exercise non-judicial foreclosure. The ease with which an HOA can foreclose could lend itself to abuse. Other states protect homeowners by requiring a minimum lien amount before foreclosure can take place or by otherwise restricting the power of HOAs to foreclose. Arizona[56] and California[57] do not allow foreclosure for liens less than $1,200 and $1,800 respectively, or until the amount has been delinquent for one year. Georgia requires at least a $2,000 lien.[58] Delaware[59] and Vermont[60] require the lien to be equal to three months' assessments before foreclosing. Maryland does not allow foreclosure of liens that include fines.[61] Hawaii,[62] North Carolina,[63] and Vermont[64] do not allow non-judicial foreclosure for liens composed entirely of fines while

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[46] Maryland Real Property Code Annotated, Section 14-203.
[47] California, Connecticut, Florida, Idaho, Louisiana, Maryland, Massachusetts, Mississippi, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Virginia, West Virginia, Wisconsin
[48] California, Maryland, Massachusetts, North Carolina, Oklahoma, Virginia, West Virginia
[49] Michigan Compiled Laws Service, Section 559.208.
[50] Oregon Revised Statutes, Sections 94.709 and 100.450.
[51] Arizona Revised Statutes, Sections 33-1256 and 33-1807.
[52] California Civil Code, Sections 5725 and 6824.
[53] Florida Statutes, Sections 718.303 and 720.305.
[54] New Jersey Statutes, Section 46:8B-21.
[55] Tennessee Code Annotated, Section 66-27-415.
[56] Arizona Revised Statutes, Sections 33-1256 and 33-1807.
[57] California Civil Code, Section 5720.
[58] Official Code of Georgia Annotated, Sections 44-3-109 and 44-3-232.
[59] 25 Delaware Code Annotated, Section 81-316.
[60] 27A Vermont Statutes Annotated, Section 3-116.
[61] Maryland Real Property Code Annotated, Section 14-204.
[62] Hawaii Revised Statutes, Section 514B-146.
[63] North Carolina General Statutes, Sections 47C-3-116 and 47F-3-116.
[64] 27A Vermont Statutes Annotated, Section 3-116.

Nevada does not allow single-family HOAs to exercise non-judicial foreclosure on liens for fines unless there is a public safety risk.[65]

Two of the uniform acts, Common Interest Ownership Act and the Bill of Rights, have language in them to prevent abuse of the power of foreclosure by HOAs. They require that the lien be equal to three months' assessments before foreclosing. They also do not allow foreclosure on fines until the HOA has a judgment against the owner.

Local Governments Owning Property Subject to HOA Dues

A complication for local governments that sometimes follows a homeowner's failure to pay assessments or fines is a failure to pay property taxes as well. When property taxes go uncollected for five years, local governments are required to take the properties to a tax sale.[66] To acquire such properties at tax sales, a bidder must pay at a minimum the total taxes, penalties, costs, and interest owed.[67] If no bidders offer this amount, local governments are required to bid that amount and become the owners.[68] If the property is subject to an HOA agreement, the local government must pay the HOA assessments from that point forward.[69] After purchasing the properties, local governments must hold the properties for one year, during which period the former property owners may redeem the properties by paying the taxes and other costs owed, including any HOA assessments that accrue during the year the local governments own the properties.

In some counties, HOA assessments have become burdensome for local governments, which are bound by the rules in the HOA declaration just as any other owner would be. For example, Loudon County is accumulating about $36,000 per month in unpaid HOA assessments on undeveloped properties.[70] When Coffee County purchased over 400 undeveloped lots at tax sales and did not pay the HOA assessments, the HOA sued to collect them. The Tennessee Court of Appeals held that the county owed the HOA for unpaid assessments because restrictive covenants are enforceable like any other contract, even against governments.[71]

The General Assembly made it easier for counties to avoid HOA assessments on undeveloped property when it passed Public Chapter 814, Acts of 2014, which allows local governments to transfer undeveloped property acquired at a tax sale to HOAs to satisfy what the county owes the HOA if both parties agree. The idea for this came from a situation in Hickman County

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[65] Nevada Revised Statutes Annotated, Section 116.31162.
[66] Tennessee Code Annotated, Section 67-5-2406.
[67] Tennessee Code Annotated, Section 67-5-2501.
[68] The local government is not required to bid if the environmental risk is too great. Also, when any land must be sold for payment of delinquent county taxes only, county legislative bodies may decide not to bid on non-buildable parcels such as common open areas. See Tennessee Code Annotated, Section 67-5-2506.
[69] Tennessee Code Annotated, Section 67-5-2501 and Travis v. Trustees of Lakewood Park, 2010 Tenn. App. LEXIS 561 (Tenn. Ct. App. Sept. 3, 2010).
[70] Chip Miller, Loudon County Trustee , interview by Michael Mount, December 2, 2014.
[71] *Travis v. Trustees of Lakewood Park*, 2010 Tenn. App. LEXIS 561 (Tenn. Ct. App. Sept. 3, 2010).

where the county did exactly that.[72] Hickman County acquired more than 100 lots at tax sales when no one bid the minimum, the amount of taxes and other related costs owed. The lots, intended to be lakeside lots, lost most of their value when the proposed lake did not hold water. When the county took ownership of the lots, it began to owe HOA assessments. Hickman County resolved this problem by transferring undeveloped lots to the HOA to settle the amount it owed the HOA.

Two earlier bills that failed to pass attempted to empower local governments to deal with this issue in different ways. Senate Bill 3129 by Stewart, House Bill 2430 by Matheny, introduced in 2012, would have simply exempted state and local governments from HOA assessments. The House State and Local Government Subcommittee discussed rewriting the bill to remove the current statutory requirement that local governments force the sale of the property for the amount of taxes owed and related costs and bid that amount themselves if no one else does. If that amendment had passed and no one bid the minimum, the unpaid taxes would have continued to accrue against delinquent property owners. The House bill failed for lack of a second in the House State and Local Government Subcommittee. The Senate bill was sent to the Senate State and Local Government General Subcommittee and no further action was taken on it. A bill introduced in 2013, Senate Bill 990 by McNally, House Bill 382 by Matheny, would have gone further than the amendment discussed in 2012. It would have created an alternate method for the government selling insolvent property at tax sales, reducing the minimum bid by 10% increments until a bidder other than the local government bids. Four other states[73] have adopted laws that allow local governments to force the sale for less than the taxes owed. Tennessee already allows the sale of properties for less than the taxes and associated costs owed, but only after the one-year redemption period, not at the tax sale.

[72] *Boles v. National Development Company,* 2005 Tenn. App. Lexis 247 (Tenn. Ct. App. 2005).

[73] Minnesota, North Dakota, Pennsylvania, and Wisconsin.

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Appendixes