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Prohibiting exclusionary housing practices by non-governmental officials authorized by law to restrict housing rights

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Among the housing restrictions that are defined in the Economic Fair Housing Act (EFHA) as regulatory barriers to housing opportunity, where they have economically exclusionary effects without sufficient justification, are: “Housing-related restrictions by non-governmental officials authorized by law to restrict residents’ housing rights (including, without limitation, associations of homeowners and their officials).” EFHA, Sec. (a)(2)(B)(viii).

Associations of homeowners can have detailed authority over land uses and even matters of aesthetics in their neighborhoods.¹ In particular, single-family housing developments with such associations can, and sometimes do, ban structures on a lot other than one single family dwelling and perhaps a garage or carport for cars. Those restrictions generally “run with the land”—that is, they are binding on both the original property owners and all subsequent owners—unless a law is enacted by the local, state or federal government that is inconsistent with the ban.²

¹ See, e.g., Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 Geo. Mason L. Rev. 827, 831 (1999) (“Generally speaking, neighborhood covenants are much more detailed than zoning regulations, controlling not only types of land uses but also matters of aesthetics. Such matters can include the color of the house paint, the placement of trees and shrubbery, the size and location of fences, the construction of decks and other housing extensions, the parking of automobiles in streets and driveways, and the use and placement of television antennas, among others.”).

² That’s because the ban generally is part of the original contractual requirements (often called the Covenants, Conditions, and Restrictions (CCRs)) that are recorded in the jurisdiction’s official land records before the community is built. “[A] court may refuse to enforce contracts that violate law or public policy.” *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) (citing authorities).

Associations of homeowners, and their agents, are subject to the federal Fair Housing Act. See, e.g., *Hartman v. Greenwich Walk Homeowners’ Ass’n*, 71 Fed. Appx. 135 (3d Cir. 2003) (court had jurisdiction over federal Fair Housing Act suit against HOA and its officers, although plaintiff tenant’s evidence was factually insufficient to avoid summary judgment for the defendants).

See generally, e.g., Robert G. Schwemm, *Housing Discrimination: Law and Litigation*, § 12B:1 (2021) (“anyone who commits one of the acts proscribed by the [federal Fair Housing Act’s] substantive provisions is liable to suit, unless he is covered by an exemption in §§ 3603(b) or 3607” of that statute). Those exemptions do not apply to associations of homeowners.

By 2020, an estimated 74+ million Americans lived under an association of homeowners (“community association”).³ The number of such associations in the United States has increased tremendously in recent decades—totaling more than 350,000 by 2020—up from about 10,000 in 1970.⁴

Associations of homeowners can serve a number of useful purposes. For example, they can:

- provide amenities to the community (such as tennis courts, gyms and/or recreational parks).
- keep common areas well maintained; and
- control eyesores and unruly behavior on homeowners’ lots, while avoiding disputes between individual neighbors.⁵

Associations of homeowners have been encouraged by many local governments.⁶ In fact, some local governments effectively require the developer to form such an association, in order to approve the residential development.⁷

Despite the advantages of such associations, however, it is crucial prohibit exclusionary barriers to housing opportunity being created by them, or by other non-governmental officials who are authorized by law to restrict residents’ housing rights.

³ Devon Thorsby, *Your guide to HOAs*, U.S. News (Jan. 24, 2023) (citing estimate by Community Associations Institute), posted at: <https://realestate.usnews.com/real-estate/articles/what-is-an-hoa>. (Those associations include homeowners associations (HOAs) for single-family home communities, as well as condominium associations, townhomes, master-planned communities and cooperatives. Any of those forms of association may apply to a single-family community.)

⁴ Foundation for Community Association Research (FCAR), *2019–2020 U.S. National and State Statistical Review*, p. 1. Homeowners associations (those for homeowners not in condominiums and co-ops) accounted for 58-63% of the total in 2020—a total of more than 200,000. *Id.* Condominium associations accounted for another 35-40% of the total, and associations of cooperative owners accounted for the remainder (2–4%). *Id.*

⁵ See, e.g., HOA Management, *Benefits of HOA Living*, posted at: <https://www.hoamanagement.com/hoa-living-benefits/> (accessed April 25, 2023).

⁶ Wikipedia, *Homeowner association*, posted at: <https://en.wikipedia.org/wiki/> (accessed March 13, 2023) (“Since the homeowners sometimes pay for roads, parks, and other services within the development, the local government may believe it can gain revenue from property taxes from owners in a development that costs the municipality little or nothing.”); citing Paul Bannister, *Homeowner associations: Devils or angels?*, Bankrate.com. (January 1, 2004).

⁷ See, e.g., Devon Thorsby, *Your guide to HOAs*, U.S. News (Jan. 24, 2023) (“The developer agrees to form an HOA in order for the local city or county to agree to the planned neighborhood and ensure basic utilities are provided for residents”), posted at: <https://realestate.usnews.com/real-estate/articles/what-is-an-hoa>.