It seems that more developers are creating homeowners' associations to manage infrastructure in subdivisions and planned unit developments. How are homeowners' associations formed and how do they operate? What can we do to make sure these associations function as planned?

A homeowners' association (HOA) is a legal entity created by a real estate developer for the purpose of managing a development of homes. Most Vermont HOAs are non-profit corporations, subject to Vermont statutes that govern other non-profit corporations. Depending on the size of the development, the HOA may also be subject to the Vermont Common Interest Ownership Act. 27A V.S.A. §§ 1-101 et seq.

Based on corporate filings with the Vermont Secretary of State some 400 HOAs appear to be operating in Vermont. While HOAs are relatively rare in many parts of the state, they are very common in the rest of the country. According to the Community Associations Institute, HOAs governed 24 million American homes and 59.5 million residents in 2008. The total annual operating revenue for all community associations in the United States was more than $41 billion.

An HOA is typically created when the developer files a declaration of covenants, conditions, and restrictions in the town land records. Under these declarations, each lot or unit owner in the development is a member of the HOA. The declarations usually contain a description of the development's common elements – things like roads, open space, and recreational amenities – and vest responsibility for management of the common elements with the HOA. The declarations also provide a method for the HOA to assess lot owners for a share of the cost of maintaining the common elements.

In essence, an HOA operates like a private government. It has an elected governing board and officers. Residents hold annual meetings and adopt budgets to fund HOA operations. HOAs have an enforceable right, created through the declarations, to "tax" residents for services through the levy of assessments and, like property taxes, unpaid assessments are usually an enforceable lien against property in the development. HOAs can also regulate use of property within the development and enforce those use restrictions in court.

Unfortunately, problems within an HOA can cause it to fail to run as planned. Members stop paying assessments and the HOA stops maintaining the development infrastructure. In these cases, residents sometimes turn to the municipality for help, but there are a few things a municipality can do through the zoning and subdivision approval processes to prevent or mitigate some of these problems.

The first to is to anticipate the HOA's failure and require infrastructure in all new developments – roads, water lines, and sewer lines – to be built in accordance with town specifications. Along these lines, the municipality can require the developer to post a performance bond and can adopt a process for issuance of certificates of completion under 24 V.S.A § 4464(b)(2). So if the HOA is unsuccessful and the municipality ultimately takes over the infrastructure, this can insure that the infrastructure has been properly constructed and meets the municipality's specifications.

The next is to have the municipality's attorney review the proposed declarations. The attorney can help the zoning board, planning commission, or DRB determine whether the declarations adequately describe the infrastructure that will be the responsibility of the HOA, whether responsibility for these common elements will be legally transferred to the HOA, and whether there is a process to levy and enforce assessments for infrastructure maintenance costs. Under 24 V.S.A § 4440(d), the municipality can establish procedures for requiring the developer to pay the cost of this legal review.

The board might also require the applicant to submit a maintenance plan and capital budget for development infrastructure and a proposed annual operating budget for the HOA. The plan and budget could project repair and replacement events and costs that the HOA will encounter over the next 20 or 30 years. The budget would include all operating expenses for the HOA, (e.g., common area maintenance, electrical, insurance, landscaping, road maintenance, snowplowing, contribution to reserves, legal fees, postage). From this, the board could specify minimum financial reserves that the HOA must maintain so that the HOA could weather a difficult financial period if one should arise.

As Vermont's HOAs continue to grow in number, they'll likely suffer the same growing pains that are inherent in any developing organization. But municipalities can help keep problems to a minimum by giving some consideration to future operations of the HOA and taking a few proactive steps to mitigate those problems.

Jim Barlow, Senior Staff Attorney
VLCT Municipal Assistance Center

***VLCT News,* October, 2009**