

Chapter 9: Neighborhoods

Common Interest Communities: Standards of Review and Review of Standards

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The author is pleased to participate in this festschrift in honor of the superb teacher, scholar, and statesman Professor Daniel Mandelker. As Henry Adams observed, “[a] teacher affects eternity. He can never tell where his influence stops.” Professor Mandelker’s influence will continue to be felt for generations to come. His impeccable body of work has guided perceptions and shaped outcomes for the better. A prolific writer and beloved teacher, Dan has succeeded in the rarest of ways—as a great thinker unafraid to demonstrate compassion. Indeed, so much of his legacy is rooted in the precept that wisdom and compassion are indivisible. Notwithstanding his exceptionally impressive body of work and achievements, he remains modest, unassuming, and beneficent. When I think of Professor Mandelker, I am reminded of a statement attributed to Henry James: “Three things in human life are important The first is to be kind. The second is to be kind. And the third is to be kind.”

Headlines were made at the start of this new millenium as the Tampa Palms, Florida Community Association (Association) sought to enforce a restrictive covenant that would deny six-year old Brage Sassin his treehouse, one of the few sources of comfort available as the boy battles leukemia.¹ As reported in the *St. Petersburg Times*:

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1. See Amy Herdy, *Sick Boy’s Retreat Violates Rules*, ST. PETERSBURG TIMES, Jan. 9, 2000, at 1B.

Deed restrictions in Tampa Palms require removal of a treehouse, the only place where a boy with leukemia finds peace and solace To his parents . . . the treehouse is a symbol of hope, a reminder of the brief time doctors thought Brage had beaten cancer and he felt well enough to build it with his father Yet, the homeowners association that governs the Tampa Palms community has decided that the treehouse must come down: it violates deed restrictions. In a Nov. 9 letter to the Sassins, Tampa Palms community association manager Maura Lear said, “this association recognizes the extenuating circumstances in this case, and the element of compassion has not been overlooked If we had gone strictly by the book, a fine would have been imposed long ago. All this being said, however, I must make this critical point: Your treehouse structure is in direct violation of the Covenants, Conditions and Restrictions for Tampa Palms.”²

The treehouse, at fourteen feet above the ground, violates maximum height restrictions by six feet and thereby, according to the Association, threatened to decrease surrounding property values.³ Widely derided in the popular press, one editorial described the Association’s actions this way: “It’s not a story of deed restrictions gone mad but of people gone mad with rules and power, lacking compassion or discretion.”⁴ Ultimately, in the face of enormous national pressure, the Association backed down.⁵

This article addresses the propriety of common interest community (CIC) restrictions and governing board decisions rendered with increased frequency in this golden age of “privatization.”⁶ What are the standards to be applied by these private

2. *Id.*

3. *See Group Wants to Demolish Treehouse of Sick Child*, SUN-SENTINEL, Jan. 10, 2000, at 6B.

4. *Targeting Treehouse is Heartless*, Editorial, ST. PETERSBURG TIMES, Jan. 11, 2000, at 10A.

5. *See Happy Ending: Young Cancer Patient Can Keep Treehouse*, ATLANTA J., Jan. 12, 2000, at 1A.

6. “Privatization” is the term used to describe the “shift from government provision of functions and services to provision by the private sector.” George L. Priest, *Introduction: The Aims of Privatization*, 6 YALE L. & POL’Y REV. 1 (1988).

governing bodies? What is the appropriate standard of judicial review of their rules and determinations? The stakes are high, mindful that the last half of the twentieth century saw the proliferation of common interest communities in unprecedented numbers.⁷ Scores of people have moved into suburban housing developments, urban as well as suburban condominiums⁸ and cooperatives,⁹ and walled or gated

7. See, e.g., Patrick J. Rohan, *Preparing Community Associations for the Twenty-First Century: Anticipating the Legal Problems and Possible Solutions*, 73 ST. JOHN'S L. REV. 3, 5-6 (1999) [hereinafter Rohan, *Preparing Community Associations*] ("Whether one focuses on the housing pattern in large cities or upon suburbia, one is led inexorably to the conclusion that the age of community association living, as opposed to renting or owning a one-family home, is upon us. The rental market in every urban center is rapidly disappearing as high-rise buildings are torn down, devoted to commercial uses, or converted into condominium or cooperative housing."). Professor Rohan sets forth several reasons for the shift to community association living, including the continued growth of the retirement age population, commuters' preferences for developments, with their amenities, rather than larger, more isolated tracts, and the growing numbers of landlords who have felt compelled to abandon the rental market. See *id.*; see also 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, 829 (1999) ("As of 1998, there were about 205,000 neighborhood associations in the United States in which almost 42 million people lived, or about 15% of Americans. In the fifty largest metropolitan areas, more than half of new housing is now built in neighborhood associations." *Id.* at 863. (citations omitted). The Author goes on to note that "[b]y some estimates, neighborhood associations will house more than 50 million Americans, or about 20% of the population by the year 2000." *Id.* (citations omitted)); James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1137 (1998) (In past three decades, "common interest communities have evolved from an innovation in suburban residential development to its main staple. In the largest United States metropolitan areas, a majority of all new housing sold is now in common interest communities.").

8. See, e.g., Rohan, *Preparing Community Associations*, *supra* note 7, at 5-6. Professor Rohan states,

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communities.¹⁰ These forms of residential housing use elaborate covenants and other forms of restrictive servitudes to privately control and regulate land use and services.¹¹ Community or homeowners' associations are formed and a governing board of directors or trustees (board) elected to enforce these restrictions.

Courts are continuing to evolve guideposts for judicial review of these restrictions. They are also endeavoring to establish guidelines for when and under what circumstances board actions are a reasonable, appropriate and good faith exercise of power as opposed to an arbitrary and capricious abuse of vested authority. A growing number of cases to assess the propriety of board duties apply "a body of law looking superficially like that applied to officials of business corporations."¹² For instance, analogies are made to the business judgment rule of corporate law,¹³ which would impose upon

supra note 7, at 1138 (stating that in the past three decades, "common interest communities have evolved from an innovation in suburban residential development to its main staple. In the largest United States metropolitan areas, a majority of all new housing sold is now in common interest communities.").

9. The cooperative form of CIC, introduced in New York City in the nineteenth century, creates a corporate structure to hold title to the land and building, with each resident owning stock in the corporation and holding a renewable lease of a given unit. A board of directors, elected by the resident shareholders, oversees operations. *See* 2A PATRICK J. ROHAN & MELVIN A. RESKIN, COOPERATIVE HOUSING LAW AND PRACTICE §§ 9.01-02 (1998) (setting forth the governing structure of cooperative); Phillip N. Smith, Comment, *A Survey of the Legal Aspects of Cooperative Apartment Ownership*, 16 U. MIAMI L. REV. 305, 305-17 (1961) (outlining various species of cooperative structure).

10. *See* David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 778-93 (1995) (exploring the phenomenon of gated communities and concluding that residential associations in such communities be treated as "state actors," thereby obligated to meet constitutional due process and equal protection guarantees); *see also* Comment, *Public Gated Residential Communities*, 29 URB. LAW. 123, 124-25 (1997).

Long considered the domain of wealthy subdivisions on each coast, demand for gated communities in medium-sized mid-American cities has increased dramatically since the early 1980s . . . Typically, gated communities are private developments, planned as such. Mandatory homeowners' association dues provide not only for security measures, but for the general upkeep of the streets and common areas themselves.

Id.

11. *See* Rohan, *Preparing Community Associations*, *supra* note 7, at 4 (stating that "[c]ovenants now represent the backbone of community association arrangements of all types and should be recognized to be as necessary and beneficial as zoning or other measures passed by local governments").

12. ROBERT G. NATELSON, LAW OF PROPERTY OWNERS ASSOCIATIONS § 10.1 (1989).

13. *See, e.g.,* Lamden v. LaJolla Shores Clubdominium Homeowners Ass'n, 980 P.2d 950

governing boards the duty to act in accord with the “good faith exercise of business judgment.”¹⁴ By contrast, many, if not most, courts have cast board obligations in terms of “reasonableness,”¹⁵ with an appropriate definition of that term still in progress. Still others have tended to merge or blur the line between standards, imposing fiduciary duties, again borrowing from the law of corporations, in conjunction with some form of a rule of reasonableness.¹⁶

(Cal. 1999) (applying the business judgment rule to uphold the condominium board’s decision to treat termite infestation by “spot treatment” rather than fumigation); *Levandusky v. One Fifth Ave. Apartment Corp.*, 553 N.E.2d 318 (N.Y. 1990) (applying business judgment rule to assess propriety of cooperative board’s decision to deny permission to renovate); *Dockside Ass’n v. Detyens*, 362 S.E.2d 874, 874 (S.C. 1987) (concluding that the business judgment rule applies to a condominium association board decision to collect emergency assessments); *Schoninger v. Yardarm Beach Homeowners Ass’n*, 134 A.D.2d 1, 10 (N.Y. App. Div. 1987) (stating that the business judgment rule permits judicial interference only in face of fraud or other misconduct); *Schwarzmann v. Association of Apartment Owners of Bridgehaven*, 655 P.2d 1177, 1180 (Wash. Ct. App. 1982) (holding that when a board acts in accord with the business judgment rule standard, it would not be liable in tort); *Rywalt v. Writer Corp.*, 526 P.2d 316, 317 (Colo. Ct. App. 1974) (determining that when board acts in honest exercise of its obligations the court will not interfere); see generally Jeffrey A. Goldberg, Note, *Community Association Use Restrictions: Applying the Business Judgment Doctrine*, 64 CHI.-KENT L. REV. 653 (1988).

14. Goldberg, *supra* note 13, at 664-64.

15. See, e.g., *Nahrstedt v. Lakeside Village Condominium Ass’n*, 878 P.2d 1275 (Cal. 1994) (holding that a restriction on pets is reasonable); *River Terrace Condominium Ass’n v. Lewis*, 514 N.E.2d 732, 738 (Ohio Ct. App. 1986) (holding that the board’s decision to enter an individual unit to exterminate for cockroaches was reasonable); *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637, 640 (Fla. Dist. Ct. App. 1981) (holding that the board’s decision to drill a well was unreasonable); *Ryan v. Baptiste*, 565 S.W.2d 196 (198 Mo. Ct. App. 1978) (holding that the board’s installation of locks on doors to common areas was a reasonable exercise of authority); *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975) (holding that the board’s restriction prohibiting alcoholic beverages in clubhouse was reasonable); see generally Lewis A. Schiller, *Limitations on the Enforceability of Condominium Rules*, 22 STETSON L. REV. 1133 (1983).

16. See, e.g., *Papalexio v. Tower W. Condominium*, 401 A.2d 280, 285-87 (N.J. Super. Ct. Ch. Div. 1979) (applying a reasonableness test with strands of the business judgment rule to determine propriety of condominium association’s decision to impose penalties against unit owners who defaulted on obligation to pay portion of special assessment). See also *Dulaney Towers Maintenance Corp. v. O’Brey*, 418 A.2d 1233, 1238 (Md. Ct. Spec. App. 1980) (stating that “a council of unit owners in a condominium may delegate its powers of administration or management to a board of directors which may in turn make reasonable rules and regulations concerning conduct, not inconsistent with the master deed and declaration and bylaws, including the regulation or prohibition of pets”); *Holleman v. Mission Trace Homeowner’s Ass’n*, 556 S.W.2d 632, 635-36 (Tex. Civ. App. 1977) (providing examples of the melding of strands of both the business judgment and reasonableness tests).

Resorting exclusively to corporate law paradigms to pass on the correctness of all manner of community association restrictions and board actions is troublesome in several respects. First, it has been noted that “[w]hile most community associations are incorporated, the characteristics of the for-profit corporation and of a corporate community association in a common interest community are decidedly different.”¹⁷ Today, the majority of community associations are incorporated as not-for-profit corporations.¹⁸ Yet, to superimpose corporate or business models upon residential, family settings seems inconsistent with, if not a dehumanization of, the values, norms, and needs of home life.¹⁹ The determinations of community association boards, unlike corporate board resolutions, often have a very direct and sometimes profound impact on the lives of residents, literally affecting people where they live. (The Sassin family’s treehouse, noted at the beginning of this article, begs the point.²⁰) For that matter, courts borrowing from the corporate jurisprudence sometimes confuse the standards applied, by, for instance transmuting aspects of the business judgment rule into a rule of reasonableness, using the two concepts interchangeably, or seeming to articulate one standard when, in actuality, it appears as though the other was intended.²¹

As one state’s highest court has observed, “For the guidance of the courts and all other interested parties, obviously a single standard for judicial review of the propriety of board action is desirable, irrespective of the happenstance of the form of the lawsuit challenging that action.”²² If a uniform rule is indeed desirable, is

17. WAYNE S. HYATT & SUSAN F. FRENCH, *COMMUNITY ASSOCIATION LAW: CASES AND MATERIALS ON COMMON INTEREST COMMUNITIES* 299 (1998) [hereinafter HYATT & FRENCH, *COMMUNITY ASSOCIATION LAW*].

18. See Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303, 342 (1998) [hereinafter Hyatt, *Common Interest Communities*].

19. See EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 143 (1994). Professor McKenzie finds the corporate model inapposite to residential life, noting the possible “long term social and psychological effect on the American family of having the corporate model imposed on the home and its surroundings.” *Id.*

20. See *supra* notes 1-5 and accompanying text.

21. See *infra* notes 12-16 and accompanying text.

22. *Levandusky v. One Fifth Ave. Apartment Corp.*, 533 N.E.2d 1317, 1323 (N.Y. 1990) (imposing the business judgment rule to assess propriety of actions taken by cooperative

there a standard sufficiently malleable and inclusive to appropriately safeguard the interests at stake in each and every circumstance? As Yogi Berra is said to have remarked, "It's hard to predict. Especially with respect to the future." This notwithstanding, it would seem that the appropriate standard is one rooted in reasonableness, which, at its core, allows for an adjudicative posture that honors the fundamental underpinnings of association functioning and structure, is responsive to association aims, takes into account investment-backed owner expectations, and appreciates the potential for abuse.

A multi-factored reasonableness test anchored in whether the restriction or board decision at issue is rationally related to the association's purposes or imposes burdens that are disproportionate to any benefits would best achieve that delicate balance between board prerogative, the collective good, and individual welfare. Further, it would encourage courts to be explicit about the relevant considerations and values applied. The appropriate allocation of the burden of proof (which, as to originating restrictions, as well as those promulgated and made a matter of public record before the challenger acquired the unit, should reside with the challenger) coupled with the presumption of reasonableness for such restrictions, would allay concerns of judicial over-reaching. In other words, when the restriction is contained in the common interest community's declaration of covenants, conditions, and restriction (or by-laws, where those are required to be recorded and therefore a matter of public record), it should be presumed enforceable unless the unit owner proves, by a preponderance of the evidence, that it is unreasonable. Thus, the restriction is presumed to be reasonable unless proven otherwise. By contrast, when the rule, regulation, or decision is subsequently adopted or rendered by the board, rather than contained in the originating documents, the burden of proof would reside with the board to demonstrate the reasonableness of its actions.

A judicial posture grounded in considerations of reasonableness preserves the opportunity to consider the equities and protects against board abuse and unnecessary encroachments upon private behavior.

corporation's governing board).

The application of one standard to test both originating as well as subsequently rendered rulings is efficient. At the same time, the presumption of reasonableness afforded originating restrictions promotes stability and deters judges from substituting their judgment for that of the collective body. It recognizes that use restrictions are an integral part of any common interest community and that the success of any shared ownership arrangement depends in significant measure on the “subordination of individual property rights to the collective judgment of the owners’ association.”²³ Further, it acknowledges that originating restrictions, as “covenants running with the land,”²⁴ are a matter of public record and, as such, give at least record notice to all prospective purchasers, who presumably take “knowing of and accepting the restrictions to be imposed.”²⁵ Judicial deference in this context protects members’ reliance interests while honoring expectations and fostering stability.

On the other hand, subsequently-promulgated board rules, regulations, and bylaws that, by definition, were not contained in the originating scheme, are not entitled to the same degree of judicial deference. Here there is less of a likelihood that members took with record notice of the given rule. Additionally, subsequent adoptions may not enjoy the sort of mandate that one would expect to find associated with originating restrictions. Further, in those instances where a board has the discretion to either permit or prohibit a given use, enhanced judicial scrutiny is warranted to protect against “the tyranny of the minority.”²⁶ The presumption should favor the given use, unless the board demonstrates that its denial is reasonable.

As to both originating restrictions and subsequently-rendered board pronouncements, it is important that the construct of reasonableness be meaningful as well as explicit. Something more than judicial rubber-stamping is warranted when there is a risk that the association will promulgate and impose restrictions in a way that is inconsistent and incompatible with the collective aims and sense of

23. *Nahrstedt v. Lakeside Village Condominium Ass’n*, 878 P.2d 1275, 1282 (Cal. 1994).

24. *See infra* notes 29-31 and accompanying text.

25. *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637, 639 (Fla. Dist. Ct. App. 1981).

26. *HYATT & FRENCH, COMMUNITY ASSOCIATION LAW*, *supra* note 17, at 321.

the association members.²⁷ Courts should be encouraged to carefully and overtly balance the competing interests at stake, being sensitive to the purposes and fabric of the given community when taken as a whole.

To explore these premises, it is helpful first to review the structure and internal workings of the modern community association. Thereafter, it is instructive to assess courts' application of the business judgment rule and then the evolving rule of reasonableness, to provide a comparative frame of reference and theoretical as well as practical basis for review.

I. COMMON INTEREST COMMUNITIES: STRUCTURE, MECHANICS AND GOVERNING LAWS

In an early description to withstand the test of time, common interest communities are described as "residential private governments," possessing "much of the power and trappings of local municipal government but [arising] out of private relationships."²⁸ Restrictions on use are an integral, essential aspect of any common interest community, generally regarded as vital to preserving the stable, planned environment that shared ownership aims to foster.²⁹

27. See Clayton Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1411-12 (1994). Professor Gillette notes that "judicial intervention is not an unqualified benefit," and that judicial misconstruction of a given ambiguity would "impose on associations the very activities that a majority of the association had agreed to avoid," and thereby distort "the signals sent by covenants about the nature of the association." *Id.* at 1412. In addition, he makes the point that judicial review of the reasonableness of restrictions is warranted when "the risk of judicial error is outweighed by the possibility that the association will enforce covenants in a manner inconsistent with the common vision of the association members." *Id.*

28. Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 253 (1976).

29. In the academy considerable debate surrounds the value and propriety of this inherent restrictiveness. Some maintain that common interest communities are intrinsically coercive in nature, with many residents deprived of a meaningful choice in the matter because of the dearth of desirable housing alternatives in tight markets. See, e.g., Note, *The Rule of Law in Residential Associations*, 99 HARV. L. REV. 472, 481-82 (1985); Gregory Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 900-02 (1988); see also MCKENZIE, *supra* note 19, at 21 (stating that community associations are "illiberal and undemocratic"). Cf. Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1523 n.20 (1982) (stating that the "decision to join an association is as voluntary as a human decision can be"). One's position with respect to whether or not participation in a community association is essentially voluntary rather than forced invariably influences one's

Typically, restrictions are imposed in the community's declaration of covenants, conditions, and restrictions (CC&R) (alternatively called the "Declaration of Condominium") or by board-passed resolution or decision, usually rendered on a case-by-case basis in response to a given resident's application to do something not specifically allowed or proscribed by the CC&R. As to the former means of imposing restrictions, the CC&R or "Declaration of Condominium" is the community's master document, "containing the plan of development and ownership, the proposed method of operation, and the rights and responsibilities of owners within the association."³⁰ This document must be recorded prior to sales of the affected units. Thus, buyers are on record or constructive notice of its contents. Restrictions contained within this "master plan" of sorts are likened to "covenants running with the land."³¹

Typically, as an incident of ownership in the common interest community, members are required to join the community or homeowners association.³² A governing board, usually elected by and from the community's membership, enforces applicable restrictions and regulations,³³ sets policy and oversees the effectuation of that policy.³⁴ Further, "[t]he power to maintain property is very much part

view with respect to the appropriate standard of judicial review to be applied. *See infra* notes 50 146 and accompanying text.

30. WAYNE S. HYATT, *CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW* § 1.05 (b) (3) (2d ed. 1988) [hereinafter HYATT, *CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE*].

31. *See id.*

32. *See* MCKENZIE, *supra* note 19, at 126-49; JONATHAN B. ALTER, *THE LAW OF CONDOMINIA AND PROPERTY OWNERS' ASSOCIATIONS* 21-38 (1992).

33. *See* MCKENZIE, *supra* note 19, at 122 (stating that "[h]omeowner associations have full legal rights, limited responsibility for the individuals who operate them, a potentially infinite lifespan, and a dedication to . . . protection of property values. In carrying out this purpose, homeowner associations function as private governments.").

34. *See* HYATT & FRENCH, *COMMUNITY ASSOCIATION LAW* *supra* note 17, at 277.

Governing documents and state law dictate the composition of the board, frequency of meetings, notice requirements and other procedural matters relating to actual operation of the board of directors. Differences in the community's size and nature can result in different approaches to the board's structure and function. The larger the community, the greater the likelihood of a large board. In a resort or second-home community, boards meet less frequently, and it is common for them to meet by telephone conference call in addition to meeting in person.

Id.

of the basic function of a community association.”³⁵

The latter part of the twentieth century saw the advent of two significant bodies of law to address community association law. The Uniform Common Interest Ownership Act (UCIOA),³⁶ which does not yet enjoy widespread adoption,³⁷ was promulgated in 1982 and then amended in 1994 as a consolidation of the Uniform Condominium Act, the Uniform Planned Community Act, and Model Real Estate Cooperative Act.³⁸ While the UCIOA does concern itself with matters pertaining to the creation and termination of common interest communities, as well as issues of finance, elections, and meetings,³⁹ it does not endeavor to set limits or standards with respect to the sorts of restrictions that might be imposed upon residents. As Professor French has noted, it “leaves to other areas of law, including the general law of servitudes, the question whether there are substantive limits on the degrees of freedom the developer can require people to give up in order to become members of the common interest community.”⁴⁰ By contrast, the Restatement (Third) of Property: Servitudes⁴¹ represents a comprehensive response to the burst of common interest community development throughout the

35. *Id.* at 90.

36. UNIF. COMMON INTEREST OWNERSHIP ACT § 1 (1982) [hereinafter UCIOA].

37. *See generally* Susan F. French, *The Constitution of a Private Residential Government Should Include a Bill of Rights*, 27 WAKE FOREST L. REV. 345, 345-347 (1992) (describing UCIOA and citing to state alternative versions of comprehensive uniform acts).

38. *See generally* *Uniform Common Interest Ownership Act: Help or Hindrance?*, 11 COM. LEASING L. & STRATEGY (Sept. 1998):

The [UCIOA] automatically applies to all “common interest communities,” defined to include “all real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance or improvement of other real estate described in a declaration.” The term “ownership” includes any leasehold interest of 20 or more years (including renewals). However, the act is generally not applicable to a “nonresidential common interest community,” which is defined as a “common interest community in which all units are restricted exclusively to nonresidential purposes.”

Id.

39. Article 1 of the UCIOA sets forth generally applicable principles, Article 2 pertains to creation and termination of common interest communities, and Article 3 concerns management matters, such as elections, meetings and financial management. *See* UCIOA §1 et seq. (1982).

40. French, *supra* note 37, at 347.

41. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (Draft 1998); *see infra* notes 85-87 and accompanying text.

1970s, 1980s, and 1990s,⁴² and does set forth standards of care.⁴³

The scope and detail of land use restrictions imposed upon common interest community residents tends to be vast and often well beyond the ken of even a very aggressive public zoning scheme.⁴⁴ This, coupled with the broad rule-making and rule-enforcement functions entrusted to association boards, renders conflict inevitable. Indeed, empirical studies reveal dissension and strain when characterizing relations between association boards and association members.⁴⁵ It has been noted that “[a]ssociation residents often view the association board adversarially, seeing the board as an arms-

42. See RESTATEMENT (THIRD) OF PROPERTY: SERVIDITUDES §§ 6.20-22 (Draft 1998). See generally A. Dan Tarlock, *Touch and Concern is Dead, Long Live the Doctrine*, 77 Neb. L. Rev. 804, 821-828 (1998) (providing insightful discussion of Restatement’s treatment of servitudes as applied to common interest communities).

43. See *infra* notes 85-87 and accompanying text.

44. See Winokur, *supra* note 7, at 1174 & n.183.

Rather than broad dictates and classifications like those typical of many zoning ordinances, which decree various densities of residential or other uses, community association servitude regimes frequently regulate minute physical details of their unit appearances, including such details as the color of the curtain liners or swing sets, the location and content of planter boxes, and the sizes (to the 16th of an inch) of screws used to install balcony enclosures.

Id. The case law reflects the breadth and scope of the restrictions. See, e.g. Stone Hill Community Ass’n v. Norpel, 492 N.W.2d 409, 410 (Iowa 1992) (per curiam) (upholding association’s ban of flags, notwithstanding challenger’s First Amendment claims); Murphy v. Timber Trace Ass’n, 779 S.W.2d 603, 608 (Mo. 1989) (upholding restriction on hours during which “for sale” signs could appear); Korandovich v. Vista Plantation Condominium Ass’n, 19 Fla. L. Weekly 714 (Fla. Dist. Ct. App. 1994) (subjecting an association’s decision to ban supplemental address numbers posted next to storm doors to the rule of reasonableness); Killlearn Acres Homeowners Ass’n v. Keever, 595 So. 2d 1019, 1022 (Fla. Dist. Ct. App. 1992) (upholding restriction prohibiting satellite dishes); Amoco Realty Co. v. Montalbano, 478 N.E.2d 860 (Ill. App. Ct. 1985) (upholding restriction prohibiting use for business purposes); Dulaney Towers Maintenance Corp. v. O’Brey, 418 A.2d 1233 (Md. Ct. Spec. App. 1980) (upholding restriction prohibiting ownership of too many pets); Riley v. Stoves, 526 P.2d 747 (Ariz. Ct. App. 1974) (upholding age restriction). But see Chesapeake Estates Improvement Ass’n v. Foster, 288 A.2d 329, 332-33 (Md. 1972) (concluding that a ban on factory-built homes was unreasonable); Westfield Homes, Inc. v. Herrick, 593 N.E.2d 97, 102 (Ill. App. Ct. 1992) (deeming unreasonable an absolute ban on above-ground pools); Bear Creek Village Condominium Ass’n v. Clark, No. 10401 (Mich. App. March 23, 1989) (finding unreasonable a restriction outlawing dogs who exceed prescribed height and weight requirements); Kies v. Hollub, 450 So. 2d 251, 255-56 (Fla. Dist. Ct. App. 1984) (finding unreasonable an association’s rejection of light poles on tennis court).

45. See, e.g., STEPHEN A. WILLIAMS & RONALD J. ADAMS, DISPUTE RESOLUTION IN CONDOMINIUMS: AN EXPLORATORY STUDY OF CONDOMINIUM OWNERS IN THE STATE OF FLORIDA (1987).

length provider of services for which residents pay dearly, and which intrude upon residents activities in their own home.”⁴⁶

Community association politics and board decision-making have been described as complex and explosive:⁴⁷

Factors contributing to the volatility of association political life include (1) the diversity of backgrounds, interests, stages in the life cycle, and expectations of community residents; (2) the likelihood of conflicts over complaints about rule-violations by residents’ own children; (3) the omnipresent conflict between devotion of resources toward future property maintenance and maintenance of lower present assessment levels; (4) possessive feelings towards each resident’s home and freedoms to behave within that home and its environs as the resident chooses, which frequently confront detailed regulation of behavior within and around the home; (5) widespread ignorance and confusion among homeowners regarding the obligations to which they are subject, often not freely chosen by these residents when buying into the community; (6) the threat of changing rules and assessment levels applicable to association members; and (7) the juxtaposition of the friendship and neighborliness expected among association members with the conflicts, dissent, assessment and rule enforcement that are traditionally viewed in our society as distinctly unfriendly and non-neighborly.⁴⁸

Against this backdrop, and with increased frequency, courts have become the arbiters of disputes between governing boards and their members.⁴⁹ Judicial review provides an external check, a potential

46. Winokur, *supra* note 7, at 1175. Professor Winokur argues that additional empirical data is needed to provide more meaningful insight into how common interest communities function. He asks the important questions: “What types of communities are taking shape in our community associations? . . . How are residents’ lives, and their perceptions of their communities, enhanced, burdened or otherwise affected by present association practices?” *Id.* at 1175.

47. *See id.* at 1142, 1174-75.

48. *Id.* at 1143.

49. *See Kennedy, supra* note 10, at 761 (stating that “[a]s the number of residential associations has increased, the consequent litigation has arisen largely in the context of disputes between residential associations and their members over the content of frequently intrusive

safeguard against abuse. In this complicated setting, various standards (with varying levels of success) have been applied.

II. STANDARDS OF REVIEW AND REVIEW OF STANDARDS

A. *The Business Judgment Rule: Sustaining Premises and Drawbacks as Applied*

The business judgment rule, a standard applicable to corporate directors, is most often applied to review “management’s business decisions and use of corporate assets.”⁵⁰ It typically pertains “to shareholder derivative actions brought to challenge the propriety of management’s business decisions including such diverse matters as investment choices, the making of contractual commitments, long-range corporate planning and the decision as to whether it is in the corporate interest to pursue an action against a director for waste.”⁵¹ Nonetheless, it has been applied by courts to evaluate the actions of community association boards.⁵²

Rather than assess the reasonableness of a given CC&R or community association board decision, courts invoke the business judgment rule, imposing the same yardstick used to assess the integrity of corporate board actions.⁵³ The rule presumes that the governing board possesses the requisite authority to make the determination or ruling in question.⁵⁴ Neither the interests of the

rules and regulations.”); James L. Winokur, *The Mixed Blessings of Promissory Servitude: Toward Optimizing Economic Utility, Individual Liberty and Personal Identity*, 1989 WIS. L. REV. 1, 63-64 (1989) (discussing the increase in litigation between association boards and members).

50. *Levandusky v. One Fifth Ave. Apartment Corp.*, 553 N.E.2d 1317, 1324 (N.Y. 1990) (Titone, J., concurring).

51. *Id.* at 1325 (Titone, J., concurring) (citations omitted).

52. *See, e.g., In re Croton River Club, Inc. v. Half Moon Bay Homeowners Ass’n*, 52 F.3d 44-45 (2d Cir. 1995); *Schoninger v. Yardarm Beach Homeowners’ Ass’n*, 134 A.D.2d 1 (N.Y. 1987); *Schwarzmann v. Association of Apartment Owners of Bridgehaven*, 655 P.2d 1177, 1180-81 (Wash. Ct. App. 1982); *Papalexio v. Tower W. Condominiums*, 401 A.2d 280, 285-86 (N.J. Super. Ct. Ch. Div. 1979); *Levandusky*, 553 N.E.2d 1317, 1318 (N.Y. App. Div. 1990); *see generally* Goldberg, *supra* note 13.

53. *See* Schiller, *supra* note 15, at 1149-50.

54. *See Papalexio*, 401 A.2d at 286.

If the corporate directors’ conduct is authorized, a showing must be made of fraud, self-dealing or unconscionable conduct to justify judicial review. This presents an

individual owner nor of the community as a whole become the lynchpin for analysis. Rather, the standard asks whether the directors' conduct is authorized. If so, the restriction is upheld unless it represents the product of "dishonesty or incompetence."⁵⁵ To justify judicial review, a challenger must show "fraud, self-dealing or unconscionable conduct."⁵⁶ Thus:

[R]eview under the 'business judgment' rule is limited to determining whether the challenged action is 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes,' because 'courts are ill-equipped . . . to evaluate what are and must be essentially business judgments . . . [as to which] there can be no available objective standard' for measuring their correctness.⁵⁷

The New York Court of Appeals embraced the business judgment standard in *Levandusky v. One Fifth Avenue Apartment Corp.*,⁵⁸ establishing New York as the rule's leading champion. In *Levandusky* a co-op board denied an occupant permission to relocate certain kitchen pipes as part of a proposed remodeling plan. The resident went forward with the plans, and in response to the board's issuance of a "stop work" order brought suit to have the order lifted. The state's high court refused to second-guess the board: "[B]y definition the responsibility for business judgments must rest with the corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility."⁵⁹

issue of law rather than of fact. Although directors of a corporation have a fiduciary relationship to the shareholders, they are not expected to be incapable of error. All that is required is that persons in such positions act reasonably and in good faith in carrying out their duties. Courts will not second-guess the actions of directors unless it appears that they are the result of fraud, dishonesty or incompetence.

Id. (citations omitted).

55. *Id.*

56. *Id.*; see generally HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE, *supra* note 30, § 6.02(a)(1), at 212-18, 213 (setting forth predicates of business judgment rule, which include board members' obligation to act with "good faith, diligence, care and skill").

57. *Levandusky*, 553 N.E.2d at 132 (Titone, J., concurring).

58. 553 N.E.2d 1317 (N.Y. 1990).

59. *Id.* at 1322 (citation omitted).

Levandusky is significant for its articulation of several factors relevant to a determination of the propriety of board rulings. The given board action or decision at issue must be undertaken in furtherance of the purposes of the cooperative, within the scope of its authority and in good faith.⁶⁰ To set-aside a board ruling, the challenger must show a “breach of fiduciary duty in the form of bad faith, acts outside the board’s authority or discriminatory acts.”⁶¹ If the occupant “demonstrates that the board’s action has no legitimate relationship to the welfare of the cooperative, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board’s authority,”⁶² the board bears the burden of rebutting the presumption that its actions were unlawful.

The business judgment rule seems best applied when owners in common interest communities use the courts to challenge routine maintenance, repair, rehabilitation, or other ministerial decisions entrusted to their governing board’s discretion.⁶³ In these sorts of settings application of the rule is fitting because the board determination or action at issue involves a kind of business judgment. This is precisely the context in which the California Supreme Court recently chose to adopt the business judgment rule. In *Lamden v. La Jolla Shores Clubdominium Homeowners Association*,⁶⁴ a condominium unit owner sued the board for its decision to remedy termite infestation by using “spot treatment” rather than fumigation.⁶⁵ Alleging that the board’s determination to treat the problem locally rather than centrally diminished her unit’s value, the owner sought damages, an injunction and declaratory relief. The court issued the following response to its own query “under what standard should a court evaluate the board’s decision?”⁶⁶

60. *See id.*

61. *Id.*

62. *Id.*

63. *See, e.g.,* *Schoninger v. Yardarm Beach Homeowners’ Ass’n*, 134 A.D.2d 1, 9 (N.Y. 1987).

64. 980 P.2d 940 (Cal. 1999).

65. *See id.* at 942.

66. *Id.*

Where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise. Thus, we adopt today for California courts a rule of judicial deference to community association board decision-making that applies, regardless of an association's corporate status, when owners in common interest developments seek to litigate ordinary maintenance decisions entrusted to the discretion of their associations' board of directors.⁶⁷

The court was quick to point out that in California, neither the governing corporate statutes nor the common law business judgment rule protect noncorporate entities. Since the defendant before it was not incorporated, "the business judgment rule of deference to corporate decision-making, at least as we previously have understood it, has no direct application to the instant controversy."⁶⁸ Rather, the court adopted a rule, "analogous perhaps to the business judgment rule,"⁶⁹ that would defer to the board's competence and well-positioned ability to make ordinary if not mundane maintenance or repair decisions entrusted to its authority. The court noted that in this arena "common sense" suggests that judicial deference is appropriate,⁷⁰ mindful of "the relative competence, over that of courts, possessed by owners and directors of common interest developments to make the detailed and peculiar economic decisions necessary in the maintenance of those developments."⁷¹ Significant policy considerations favor such a posture:

67. *See id.* (citing *Levandusky v. One Fifth Ave. Apartment Corp.*, 553 N.E.2d 1317, 537-38 (N.Y. 1990)).

68. *Lamden*, 980 P.2d at 947.

69. *Id.*

70. *See id.* at 954.

71. *Id.*

A deferential standard will, by minimizing the likelihood of unproductive litigation over their governing associations' discretionary economic decisions, foster stability, certainty and predictability in the governance and management of common interest developments. Beneficial corollaries include enhancement of the incentives for essential voluntary owner participation in common interest development governance and conservation of scarce judicial resources.⁷²

The court hastened to add, however, that its deference to the governing board under the circumstances before it did not "foreclose community association governance provisions that, within the bounds of the law, might more narrowly circumscribe association or board discretion."⁷³

Previously, in *Nahrstedt v. Lakeside Village Condominium Association*,⁷⁴ the California Supreme Court had set forth a detailed standard of reasonableness to provide the means for assessing the enforceability of restrictions limiting the use of property within a common interest community and contained in the originating declaration.⁷⁵ *Lamden* did not disturb that formulation but found it inapplicable to the matter at bar, which involved the standard for judicial review of discretionary economic decisions made by the governing board.⁷⁶

While the business judgment rule may be useful when courts are asked to pass on the propriety of ordinary maintenance decisions, it falls short when applied across the board to cases involving the allegedly improper promulgation, implementation, and administration of the bylaws, rules, and restrictions governing owners' rights and responsibilities.⁷⁷ Certainly, the limited scope of judicial inquiry

72. *See id.*

73. *Id.* at 952.

74. 878 P.2d 1275 (Cal. 1994).

75. *See infra* notes 120-32 and accompanying text.

76. *See Lamden v. LaJolla Shores Condominium Homeowners Assoc.*, 980 P.2d 940, 948 (Cal. 1999).

77. *See generally* Robert G. Natelson, *Consent, Coercion, and "Reasonableness" in Private Law: The Special Case of the Property Owners Association*, 51 OHIO ST. L.J. 41 (1990).

[T]he business judgment rule is a doctrine employed to insulate officials from liability

permitted by the business judgment rule may well discourage lawsuits and protect board authority. But these ends are not necessarily always noble or desirable.⁷⁸ The imposition, enforcement, and administration of restrictions creates the significant potential for infringement of rights. Moreover, the context for any abuse is profoundly important. In the residential setting, persons affected adversely feel those effects quite literally where they live.⁷⁹ To apply a standard intended to resolve shareholder grievances against corporate boards to matters of home and lifestyle runs the risk of compromising both the collective welfare as well as individual liberties.⁸⁰ What is appropriate for the boardroom may not suit the living room.

A concurring member of the *Levandusky* court offered the astute observation that “the classic formulation of the [business judgment] rule is closely tailored to the open-ended decision making within a virtually limitless universe of economic options that typify business choices.”⁸¹ That universe, involving unmitigated business choices, may well be outside the courts’ orbit of expertise. By contrast,

for their acts; it is not a standard of validity. Moreover, at least in its common law form, the business judgment rule is founded upon principles of enterprise liability totally inappropriate for review of the preservation and mediation functions of the [property owners association.] It is hardly surprising, therefore, that despite their stated reliance upon the rule, the courts that purport to apply it to [property owners associations] actually impose reasonableness standards substantively indistinguishable from those utilized in other [property owner association] review cases.

Id. at 51.

78. See generally *Noble v. Murphy*, 612 N.E.2d 266, 271 & n.7 (Mass. App. Ct. 1993) (refusing to apply business judgment rule “as the measure of validity of the actions of a unit owners’ organization”).

79. See generally *Randolph C. Gwartzman, Note, An Exception to the Levandusky Business Judgment Rule: Owner and Shareholder Interests in Condominium and Cooperative Board Decisions*, 14 CARDOZO L. REV. 1021, 1024 (1993) (arguing that business judgment rule is inapposite to residential setting); *Todd Brower, Communities within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 207 (1992) (arguing for “a legal theory for judicial review of common interest developments which harmonizes the competing policies implicated in those developments in light of the role which residential associations play in the lives of their members and in larger society”).

80. See *Stewart E. Sterk, Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273, 275-76 (1997).

81. *Levandusky v. One Fifth Ave. Apartment Corp.*, 533 N.E.2d 1317, 1325 (N.Y. 1990) (Titone, J., concurring).

“courts’ extensive experience in reviewing licensing, zoning and other discretionary administrative matters renders them well-suited, rather than ‘ill-equipped,’ to deal with questions such as the rationality or arbitrariness of a board decision to grant or deny a shareholder’s application for permission to renovate.”⁸² It bears mentioning that courts have had extensive experience in reviewing and passing upon the reasonableness of servitudes.

For that matter, and typically without exception, the business judgment rule imposes on the unit owner the burden of proving by a preponderance of the evidence that the board acted in violation of its fiduciary obligation.⁸³ While in most circumstances this allocation is appropriate, in certain instances it should be up to the board to demonstrate that its decision was reasonable.⁸⁴

Significantly, the Restatement (Third) of Property: Servitudes tentative draft proposes that:

In addition to duties imposed by statute and the governing documents, the association has the following duties to the members of the common interest community: (a) to use ordinary care and prudence in managing the property and financial affairs of the community that are subject to its control.⁸⁵

The proposed section places the burden of proving a breach of duty on the unit owner and challenger, and when the contested action is one within the scope of association discretion, the owner bears “the additional burden of proving that the breach has caused, or threatens to cause, injury to the member individually or to the interests of the common interest community.”⁸⁶ The comments indicate that “[t]he business judgment rule is not adopted, because the fit between community associations and other types of corporations is not very

82. *Id.* at 1326 (Titone, J., concurring).

83. *See, e.g., id.* at 1322; *see also* DENIS J. BLOCK ET AL., *THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS* 12 (4th ed. 1998).

84. *See infra* notes 113-18 and accompanying text.

85. *RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES* § 6.13 (Tentative Draft No. 7, 1998).

86. *Id.*

close, and it provides too little protection against careless or risky management of community property and financial affairs.”⁸⁷

B. The Rule of Reasonableness as Applied

The past two decades have witnessed the development of a significant body of cases to apply a standard of reasonableness to community association actions.⁸⁸ Moreover, several states have imposed a reasonableness standard by statute, requiring that restrictions contained in the given declaration be “reasonable”⁸⁹ or that courts enforce common interest community regulations only when such enforcement would be “reasonable.”⁹⁰

Judicial application of a reasonableness test reveals some doctrinal confusion, particularly in the earlier jurisprudence. In some decisions courts invoked the rhetoric of the business judgment rule while actually applying a rule of reasonableness to the dispute at hand.⁹¹ For example, in *Hidden Harbour Estates, Inc. v. Norman*,⁹² an action brought by a condominium owner to enjoin the enforcement of a condominium association rule forbidding the use of alcoholic beverages in the development’s clubhouse, the court couched the relevant inquiry in terms of “whether the business judgment rule should be applied to insulate the good faith action of the board of managers of an unincorporated condominium from judicial review. We [the court] conclude that the rule should be so applied.”⁹³ In

87. *Id.* at cmt. b.

88. *See infra* notes 92-143 and accompanying text.

89. *See, e.g.*, MISS. CODE ANN. § 89-9-17 (1972 & Supp. 1999); R.I. GEN. LAWS § 34-36-10 (1995); UTAH CODE ANN. § 57-8-10(1) (1994).

90. *See, e.g.*, ALA. CODE § 35-9-9(3) (1991); CAL. CIV. CODE § 1354 (1982); N.J. STAT. ANN. § 46:8B-13(d) (West 1989 & Supp. 1999).

91. *See, e.g.*, *Rywalt v. Writer Corp.*, 526 P.2d 316, 317 (Colo. Ct. App. 1974) (stating that the business judgment rule should be the governing standard for assessing common interest community association board’s actions. However, in that case the court also evaluated the propriety of the actions in accordance with a sort of reasonableness lens.). *Cf. Papalexiou v. Tower W. Condo*, 401 A.2d 280 (285 N.J. Super. Ct. Ch. Div. 1979) (stating that a rule of reasonableness must be applied to ascertain the integrity of a condominium association’s decision to impose sanctions against those unit owners who failed to pay their fair share of a special assessment. Notwithstanding this unequivocal assertion, the court proceeded to apply the business judgment rule.).

92. 309 So. 2d 180 (Fla. Dist. Ct. App. 1975).

93. *Id.* at 182.

actuality, the court imposed a rule of reasonableness, finding that the association could adopt reasonable rules and that its rule prohibiting the use of alcohol was indeed reasonable.

In passing favorably on the association's action, the *Norman* court set forth the following often-cited test:

[T]he association is not at liberty to adopt arbitrary or capricious rules bearing no relationship to the health, happiness and enjoyment of life of the various unit owners. On the contrary, we believe the test is reasonableness. If a rule is reasonable, the association can adopt it; if not, it cannot. It is not necessary that conduct be so offensive as to constitute a nuisance in order to justify regulation thereof. Of course, this means that each case must be considered upon the peculiar facts and circumstances thereto pertaining.⁹⁴

The court did not outline the contours of its "fact-sensitive" inquiry. (Later cases nicely advance a fact-specific approach rooted not in the circumstances peculiar to the individual unit owner but instead in consideration of the given community's unique character and purposes when viewed as a whole.⁹⁵) Nor did it expressly allocate the burden of proof. It did however, take notice

that inherent in the condominium concept is the principle that to promote the health, happiness and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub-society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization. The Declaration of Condominium involved herein is replete with examples of the curtailment of

94. *Id.*

95. *See infra* notes 140-46 and accompanying text.

individual rights usually associated with the private ownership of property.⁹⁶

As to such restrictive “curtailments,” the court did not distinguish between those regulations contained in the CC&R and those later promulgated by the community association’s board. This distinction would come later, in *Hidden Harbour Estates, Inc. v. Basso*,⁹⁷ when the same court again invoked a standard of reasonableness, this time to conclude that a mobile home condominium association had failed to demonstrate that its denial of permission to drill a shallow well was reasonably related to the association’s legitimate objectives.⁹⁸ The court did not define reasonableness with any precision but did, to its credit, make the important distinction between restrictions found in the Declaration of Condominium itself and those put forth by the association’s governing board. The former category enjoys “a very strong presumption of validity,”⁹⁹ insofar as those restrictions were agreed to on purchase.¹⁰⁰ The court observed that “[s]uch restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right.”¹⁰¹ In essence, the court would afford virtually categorical enforcement to use restrictions contained in the originating Declaration of Condominium, to protect owners’ reliance interests as well as to avoid placing such restrictions in a state of flux or uncertainty.¹⁰² Under this restriction-protective posture, even restrictions that “may have a certain degree of unreasonableness” would withstand challenge in the courts.¹⁰³

96. *Norman*, 309 So. 2d at 181-82.

97. 393 So. 2d 637 (Fla. Dist. Ct. App. 1981).

98. *See id.* at 640.

99. *Id.* at 639.

100. *Accord* *Ortega v. Kingfisher Homeowners Ass’n*, 442 S.E.2d 202, 203-04 (S.C. Ct. App. 1994) (binding a time-share condominium owners by originating restrictions); *Chateaux v. Daniels*, 754 P.2d 425, 427 (Colo. Ct. App. 1988) (holding a condominium unit owner liable for community assessments as set forth in originating declaration of covenants); *Chateau Village N. Condominium Ass’n v. Jordan*, 643 P.2d 791, 792-93 (Colo. Ct. App. 1982) (stopping unit owner from objecting to restrictive covenants contained in master declaration).

101. *Basso*, 393 So. 2d at 639-40.

102. *See id.*

103. *Id.* at 640.

By contrast, the *Basso* court found that the second category of restrictions (those later passed by the community association's board) must satisfy a requirement of reasonableness "to somewhat fetter the discretion of the board of directors."¹⁰⁴ The court continued: "By imposing such a standard, the board is required to enact rules and make decisions that are reasonably related to the promotion of health, happiness and peace of mind of the unit owners."¹⁰⁵ Here, the presumption favors allowing the particular use in question, unless it is "demonstrably antagonistic"¹⁰⁶ to the community's legitimate objectives. Again, the court failed to explicitly allocate the burden of proof, although implicitly it would seem that as to recorded restrictions the burden of demonstrating a patent lack of reasonableness would fall on the challenging unit owner, whereas the board would have to demonstrate the reasonableness of subsequently promulgated rules and decisions.

Basso has been applied judiciously in a number of controversies arising throughout the nation,¹⁰⁷ although decisions tend to blur the distinction between those restrictions contained in the originating documents and those subsequently imposed by the governing board. For example, in *Noble v. Murphy*¹⁰⁸ the appeals court of Massachusetts found that a condominium use restriction prohibiting pets and contained in the originating documents "was reasonably related to the promotion of the health, happiness and peace of mind of the unit owners."¹⁰⁹ Thereafter, the court noted that "a somewhat

104. *Id.*

105. *Id.*

106. *See id.*

107. *See infra* notes 108-12, 133 and accompanying text. In Florida, a more recent decision applied the rule of reasonableness to all forms of subdivision plat amendments. (The subdivision plat is essentially the equivalent of a condominium declaration.) *The Holiday Pines Property Owners Ass'n v. Wetherington*, 596 So. 2d 84 (Fla. Dist. Ct. App. 1992) court stated that

[i]n determining the enforceability of an amendment to restrictive covenants, the test is one of reasonableness. While traditionally a reservation of the right to amend restrictions would allow the grantor to change the entire character of a subdivision, the modern view is that a reserved power to modify restrictions must be exercised in a reasonable manner so as not to destroy the general plan of development.

Id. at 87.

108. 612 N.E.2d 266 (Mass. App. Ct. 1993).

109. *Id.* at 270 (quoting *Hidden Harbour Estates, Inc. v. Basso*, 393 So.2d 637, 640 (Fla.

different standard of review may be implicated where, in contrast to this case, a restriction is promulgated after the owner who is in violation of the rule acquires his unit.”¹¹⁰ In actuality, the court interposed the two *Basso* standards, applying the reasonable relation test to an originating restriction. Later, the court did articulate the “very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed.”¹¹¹ It also observed that no fundamental public policy or constitutional provision was at stake on the facts at bar. It then set forth the policy imperatives at work:

By insulating properly-enacted and evenly-enforced use restrictions contained in the master deed or original by-laws of a condominium against attack except on constitutional or public policy grounds, already crowded courts and the majority of unit owners who may be presumed to have chosen not to alter or rescind such restrictions will be spared the burden and expense of highly particularized and lengthy litigation.¹¹²

Putting aside its ambivalent if not confused process of deduction, *Noble* gets to the right result. Across the board, as to both originating restrictions as well as subsequently promulgated rules and board decisions, courts ought to apply a reasonableness standard rooted in consideration of the association’s legitimate objectives and an assessment of the rational relationship of the given action to those objectives. This focus, coupled with examination of whether the burdens imposed are disproportionate to the benefits, presents the predicate for any meaningful application of a reasonableness test.

Much of the scholarship on the subject of reasonableness, however, is sharply divided on issues pertaining to the appropriate standard of review. Mindful of the potential for coercion, loss of personal autonomy and overly excessive regimentation, some theorists advocate a standard requiring even more than a rational

Dist. Ct. App. 1981)).

110. *Noble*, 612 N.E.2d at 270.

111. *Id.*

112. *Id.* at 271.

relationship.¹¹³ This view would oblige association boards to demonstrate the validity of their regulations by a standard of reasonableness that takes on procedural as well as substantive dimensions.¹¹⁴ Hence, community associations would be subject to a standard of review that is harsher than that applied to local government.¹¹⁵ In the public domain, courts called upon to determine the propriety of a given municipality's actions typically apply the rationality standard. To impose a harsher standard of review upon community associations flies in the face of accepted approaches to voluntary undertakings and privately bartered-for exchange.¹¹⁶ Those who would make this point are divided as well, with some urging judicial laissez-faire in most cases¹¹⁷ and others finding a more

113. See, e.g., Gregory S. Alexander, *Freedom, Coercion and the Law of Servitudes*, 73 CORNELL L. REV. 883, 900-02 (1988) (articulating a need for a higher standard of review); Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 7 (1989) (stating that "communitarian theory justifies substantive judicial review under the reasonableness standard") [hereinafter Alexander, *Dilemmas of Group Autonomy*]; Glen O. Robinson, *Explaining Contingent Rights: The Puzzle of "Obsolete Covenants,"* 91 COLUM. L. REV. 546, 577-79 (1991) (replying to Alexander); Sterk, *supra* note 80.

114. See, e.g., Alexander, *Dilemmas of Group Autonomy*, *supra* note 115, at 7.

With respect to the specific debate over residential associations, I argue that communitarian theory justifies substantive judicial review under the reasonableness standard as a dialogic form of legal intervention. The experience with residential associations indicates why we should reject strong group autonomy for social groups in general as a social condition that would pervert, rather than advance, the ideal of a community.

Id.

115. See generally Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461 (1998) (advancing several theories of state action with relevance to common interest communities); Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: "The State Will Make the Call,"* 30 VAL. U. L. REV. 509 (1996) (exploring common interest communities and board actions as possible "state action.")

116. The so-called "contract argument" would have courts defer for the most part to principles of freedom of contract and show respect for the structure and rules created by unanimous private agreement. See Richard Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 922-25 (1988). Still, freedom of contract is not an absolute, and is curtailed by limiting doctrines such as unconscionability. See U.C.C. § 2-302 (1999) (providing that if the court, as a matter of law, finds a contract for the sale of the goods unconscionable in whole or in part, it may refuse to enforce the contract, invalidate the objectionable clause(s) or so modify the offensive part(s) as to avoid an unconscionable result).

117. See, e.g., Robert Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV.

moderate middle ground, advocating that courts avoid intrusions into the internal workings of common interest communities, but finding that judicial intervention is warranted when board actions are unreasonable.¹¹⁸

Outside the academy, compelling court pronouncements endeavor to give life to the meaning of reasonableness by making the point for a rational basis approach that would neither presume to replace association judgments with judicial second-guessing nor impose a set of external values that are inconsistent with the association's original purposes.¹¹⁹ A sound approach presumes restrictions contained in the common interest community's declaration of covenants and conditions enforceable unless the challenger sustains the burden of proving that the restriction is unreasonable. The presumption favoring reasonableness and the allocation of the burden of proof in this way vindicates a vision of common interest communities as essentially consensual, privately-ordered systems, which, absent a showing to the contrary, provide the opportunity for meaningful choice (members may enter or leave as they choose) without undue heavy-handedness. Concurrently, the opportunity for judicial review offers a safe harbor from disproportionately burdensome restrictions and board oppressiveness. It acknowledges that while community governance may be democratic in form, it may be coercive in substance.

In *Nahrstedt*, a much-publicized case, the California Supreme Court concluded that a restriction "will be enforced unless it violates public policy; bears no rational relationship to the protection, preservation, operation or purpose of the affected land; or otherwise imposes burdens on the affected land that are so disproportionate to

1519 (1982) [hereinafter Ellickson, *Cities and Homeowners Associations*]; Reichman, *supra* note 28.

118. See, e.g., Gerald E. Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589 (1982) (replying to Ellickson, *Cities and Homeowners Associations*, *supra* note 119); Robert Ellickson, *A Reply to Michelman and Frug*, 130 U. PA. L. REV. 1602 (1982); Richard Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906 (1988) (conceding room for judicial gap-filling).

119. See, e.g., Valeti v. Hopkins, 926 P.2d 813 (Or. 1996); *Nahrstedt v. Lakeside Village Condominium Ass'n*, 878 P.2d 1275 (Cal. 1994); *Korandovich v. Vista Plantation Condo Ass'n*, 634 So.2d 273 (Fla. Dist. Ct. App. 1994); *Worthington Condominium Unit Owners' Ass'n v. Brown*, 566 N.E.2d 1275 (Ohio Ct. App. 1989).

the . . . beneficial effects that the restriction should not be enforced.”¹²⁰ In that case Ms. Nahrstedt, a condominium owner, challenged the association’s enforcement against her of a pet restriction contained in the recorded Declaration of Condominium. When the association issued a twenty-five dollar fine because of the three cats kept in her unit (a neighbor complained), Ms. Nahrstedt sued.¹²¹

Interestingly, in California “reasonableness” as a standard is imposed by statute: “The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development.”¹²² The state’s high court concluded, as a matter of law, that the pet restriction was not arbitrary but rationally related to legitimate association purposes, including the protection and preservation of the health and quiet enjoyment of its residents.¹²³ In so ruling, the court was sensitive to the essential underpinnings of association function: “Subordination of individual property rights to the collective judgment of the owners association together with restrictions on the use of real property comprise the chief attributes of owning property in a common interest development.”¹²⁴ Thus, an originating restriction enjoys the presumption of enforceability unless its opponent sustains the burden of proving that the restriction is unreasonable.¹²⁵ Such a posture appreciates the centrality and importance of restrictions “as the primary means of achieving the stability and predictability so essential to the success of a shared ownership housing development.”¹²⁶ It deters those who would otherwise be inclined to seek judicially-created exemptions and fosters certainty and predictability.

The *Nahrstedt* court rejected a fact-specific approach that would look to those facts and circumstances peculiar to the objecting unit

120. 878 P.2d 1275, 1287 (Cal. 1994).

121. See Carl B. Kress, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association*, 42 U.C.L.A. L. REV. 837, 838 (1995).

122. CAL. CIVIL CODE § 1354 (West Supp. 1998).

123. See *Nahrstedt*, 878 P.2d at 1290.

124. *Id.* at 1282.

125. See *id.* at 1287.

126. *Id.*

owner, but did endorse a fact-sensitive inquiry based upon consideration of the particular common interest community's purposes as a whole.¹²⁷ In this way, the court vindicates an important mission articulated by Professor Ellickson:

[R]espect for private ordering requires a court applying the reasonableness standard to comb the association's original documents to find the association's collective purposes, and then to determine whether the association's actions have been consonant with those purposes. To illustrate, the reasonableness of a board rule banning alcoholic beverages from the swimming pool area cannot be determined in the abstract for all associations. So long as the rule at issue does not violate fundamental external norms that constrain the contracting process, the rule's validity should not be tested according to external values, for example, the precise package of values that would constrain a comparable action by a public organization. Rather, the validity of the rule should be judged according to the enacting association's own original purposes.¹²⁸

Judicial examination grounded in recognition of the association's own aims avoids the type of case-by-case review that, in the *Nahrstedt* court's words, "would impose great strain on the social fabric" of the community and "put the owners and the homeowners association in the difficult and divisive position of deciding whether particular [restrictions] should be applied to a particular owner."¹²⁹ In that case the pet restriction was not arbitrary, did not violate

127. *See id.* Here, the court's standard could be at odds with the proposed Restatement's approach, which, as previously noted, would allow the unit owner the opportunity to prove "that the breach has caused, or threatens to cause, *injury to the member individually* or to the interests of the common interest community." Restatement § 6.13; *see supra* note 85-87 and accompanying text (emphasis added). Recently, the California Supreme Court recognized the possibility that, "[d]epending upon how it is interpreted," the Restatement's standard might be inconsistent with the standard set forth in *Nahrstedt*. *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 980 P.2d 940, 952 & n.9 (Cal. 1999).

128. Professor Ellickson urges that courts refrain from entering the fray in most cases. *See Ellickson, Cities and Homeowners Associations, supra* note 119.

129. *Id.* at 1530 (citations omitted); *Nahrstedt v. Lakeside Village Condominium Association*, 878 P.2d 1275, 1288 (Cal. 1994).

applicable public policy, and was not disproportionately more burdensome than beneficial to the community as a whole.¹³⁰

At the same time, the *Nahrstedt* court's move away from a categorical, nearly wholesale endorsement of originating restrictions in favor of a more equitable balancing test (whose presumptions rightly favor the board) protects against unfair surprise and undue hardship. Rather than serve a blind rubber-stamp function, it offers the possibility of meaningful judicial redress in the face, for example, of a restriction that is disproportionately burdensome or disparately applied.¹³¹ Certainly, more exacting scrutiny of the individual unit owner's challenge is appropriate when the restriction at issue is unequivocally recited in the community's declaration of covenants, conditions, and restrictions.¹³² In such instances, a strong presumption of validity should attach, insofar as each unit owner purchases with at least constructive knowledge of the restrictions to attend ownership. Nonetheless, *Nahrstedt* appreciates that there could be circumstances in which that presumption could, and should, be overcome. In this way it improves upon the more unconditionally approving posture advanced in decisions such as *Basso*.

By contrast, *Basso* sets forth a meaningful standard of review when courts are faced with challenges to subsequently promulgated rules or decisions.¹³³ Review based on reasonableness should be

130. *Nahrstedt*, 878 P.2d, at 1290. The sole dissenting judge, the Honorable Armand Arabian, took exception to this conclusion, finding the pet restriction arbitrary and unreasonable. *See id.* at 1292. For a detailed exposition of the dissent's position, *see* Armand Arabian, *Condos, Cats and CC&Rs: Invasion of the Castle Common*, 23 PEPP. L. REV. 1 (1995).

131. *See, e.g.*, *Riss v. Angel*, 934 P.2d 669 (Wash. 1997). In *Riss* the board had originating power to "disapprove the design, finishing or painting of any construction that is not suitable or desirable for any reason, aesthetic or otherwise." *Id.* at 673. With that authority, the board imposed upon the challenger unit owner restrictions that were "more burdensome" than those specifically recited in the governing CC&R, such that the owner would be obliged to build on his lot a home smaller than the one it replaced. *See id.* at 674. The Washington Supreme Court departed from precedent to conclude that community association boards must act reasonably and in good faith, and that while the general standard was enforceable, the board's decision was unreasonable. *See id.* at 679. *Cf. Valenti v. Hopkins*, 926 P.2d 813, 814 (Or. 1996) (holding that a restrictive covenant deeming the architectural control committee "the sole judge of . . . suitability" rendered the committee's decision non-reviewable absent showing of bad faith).

132. *See Nahrstedt*, 878 P.2d at 1284.

133. *See generally* Joseph E. Adams, *Community Associations: 1998 Survey of Florida Law*, 23 NOVA L. REV. 65 (1998) (providing overview of caselaw development).

applied with consistency to ensure that governing boards only “enact rules and make decisions that are reasonably related to the promotion of the health, happiness and peace of mind of the unit owners.”¹³⁴ As to regulations subsequently adopted, however, the board should have the burden of proving the reasonableness of its actions. In *Basso* the court ruled that in matters in which the governing board is vested with discretion to permit or deny a given use, “the board must allow the use unless the use is demonstrably antagonistic to the legitimate objectives of the condominium association . . .”¹³⁵ There, the court found that the board’s denial of permission to one of the community’s residents who sought to drill a well was not reasonably related to the board’s objectives. The board’s exercise of authority was unreasonable in view of the fact that the drilling did not (contrary to the board’s predictions) compromise the community’s common wells or stain common areas.

Subsequently, in *Worthinglen Condominium Association v. Brown*,¹³⁶ an Ohio appellate court embraced the premise that condominium owners enjoy some expectation of reasonableness as concerns the discretionary judgments and amendments promulgated by a board or association. In arriving at the appropriate standard, the court established first that it would “examine condominium rules and regulations in the context of the unique character of condominium living,”¹³⁷ mindful that a unit buyer voluntarily relinquishes some freedoms and willingly submits to the condominium form of private ownership.¹³⁸ However, the court continued:

We do not, though, endorse the view that a person who voluntarily enters the ranks of condominium ownership surrenders all individual property rights. Individual property receives some protection in the condominium arrangement, although less than that accorded non-condominium property

134. *Hidden Harbour Estates, Inc. v. Basso*, 393 So.2d 637, 640 (Fla. Dist. Ct. App. 1981).

135. *See generally* Adams, *supra* note 135, at 90-103 (providing overview of caselaw development).

136. 566 N.E.2d 1275 (Ohio Ct. App. 1989).

137. *Id.* at 1277.

138. *See id.*

. . . Accordingly, we adopt the reasonableness test, pursuant to which the validity of condominium rules is measured by whether the rule is reasonable under the surrounding circumstances. If the rule is unreasonable, arbitrary or capricious in those circumstances, it is invalid.¹³⁹

The *Worthinglen* court advanced several inquiries relevant to a consideration of reasonableness: (1) whether the rule or board determination is arbitrary or capricious, without a rational relationship to legitimate community aims; (2) whether the rule or determination is rendered even-handedly or instead in a discriminatory manner; and (3) whether the rule or determination was made in good faith for the common welfare of the owners and occupants of the condominium.¹⁴⁰ The first factor embraces the test set forth in *Norman*.¹⁴¹ The second inquiry is intended to “protect against the imposition by a majority of a rule or decision reasonable on its face, in a way that is unreasonable and unfair to the minority because its effect is to isolate and discriminate against the minority. It provides a safeguard against the tyranny of the majority.”¹⁴² The last prong finds the court melding elements of the business judgment rule into its standard, citing precedent in which “the good faith required of a corporate board of directors is analogized to that required of a condominium board of managers. Both boards owe a duty of good faith in managing property held in common by a group of owners.”¹⁴³

III. THE APPROPRIATE STANDARD: A MULTI-FACTORED REASONABLENESS TEST

It is essential that any reasonableness test be sufficiently adaptable and responsive to the aims, purposes, and fabric of the given community at bar, taken as a whole. The aim should be a standard “that balances multiple interests, preserves the community

139. *Id.* (citations omitted).

140. *Id.* at 1277-78.

141. *Hidden Harbour Estate, Inc. v. Norman*, 309 So. 2d 180, 180 (Fla. Dist. Ct. App. 1975).

142. *Worthinglen*, 566 N.E.2d at 1278.

143. *Id.* (citations omitted).

association's functions, protects flexibility, provides the powers necessary to permit an association to remain dynamic during periods of change, and yet reasonably protects the property owners' reliance interests and their expectations for an appropriate degree of certainty."¹⁴⁴ Courts should be encouraged to be explicit in balancing the values and interests at stake.

The appropriate lens, while honoring the essential predicates for successful association functioning, must nonetheless appreciate the potential for association overreaching and abuse. Courts are and should be an appropriate external check against disproportionately burdensome restraints. To this end, a multi-factored formulation should be applied to determine reasonableness, rooted in consideration of (1) the association's original documents to discern its collective aims and purposes; (2) whether the governing documents clearly recited the restriction now at issue; (3) whether the restriction bears a rational relationship to the association's original purposes and legitimate aims; (4) the restriction's impact on the consideration exchanged at the onset; (5) whether the restriction, reasonable at the time it was executed, is now rendered unreasonable as a consequence of changed circumstances; (6) whether the restriction offends compelling public policy; (7) whether the restriction is disproportionately more burdensome than beneficial to the community as a whole; and (8) whether the restriction has been applied consistently and evenhandedly, without disparate or discriminatory effects.¹⁴⁵

To protect buyers' expectations, promote stability, and foster certainty, significant deference should be given to restrictions contained in the common interest community's originating declaration of covenants, conditions, and restrictions, with the presumption favoring reasonableness. As to originating restrictions,

144. Hyatt, *Common Interest Communities*, *supra* note 18, at 323-24.

145. In *Davidson Brothers v. Katz*, 579 A.2d 288 (N.J. 1990), the New Jersey Supreme Court set forth a multi-factored reasonableness test to determine whether an anti-competition covenant would bind successors. In so doing, the court replaced the traditional "touch and concern" requirement in the law of servitudes. For discussion of the propriety of resort to a multi-factored test in that setting, see Paula A. Franzese, "Out of Touch:" *The Diminished Viability of the Touch and Concern Requirement in the Law of Servitudes*, 21 SETON HALL L. REV. 235 (1991).

as well as those promulgated and made a matter of public record before the challenger acquired the unit, unwarranted judicial intrusion into privately-ordered affairs should be avoided. Absent just cause one should not expect judicial displacement of privately allocated rights, duties, and expectations that existed from the inception.¹⁴⁶ Thus, in this setting the challenger should bear the burden of proving, by a preponderance of the evidence, that the restriction is unreasonable. Conversely, those board decisions and rules that are subsequently adopted for community governance should not enjoy the same degree of judicial deference. Here, the board must demonstrate the reasonableness of its actions.

Thus, restrictions contained in the common interest community's declaration of covenants and conditions should be enforceable unless the challenger sustains the burden of proving otherwise. A strong presumption of validity should attach to originating restrictions. By contrast, the board should have the burden of demonstrating the reasonableness of its subsequently-rendered decisions and rules for community governance. Here, no presumption of validity would attach as the court balances the collective benefits of the restriction against its burden on private behavior.

IV. CONCLUSION

A reasonableness review that explicitly articulates the considerations at work encourages judicial decision-making informed by the values of the community association's purposes as a whole. The imposition of one standard to test both originating as well as subsequently promulgated restrictions is efficient. An integrated, comprehensive formulation aims to vindicate justifiable expectations and reliance interests while rejecting rules and regulations that are disproportionately burdensome or irrationally conceived. In this way, courts provide meaningful protection from the potential tyranny of the collective or of the minority. The appropriate allocation of the

146. The point has been made that the judicial process is thoroughly ill-equipped to resolve conflicts between common interest community members, and that arbitration and mediation techniques are far preferable to the delay, cost, memorialization and hostilities engendered by resort to the courts. See Scott E. Mollen, *Alternative Dispute Resolution of Condominium and Cooperative Conflicts*, 73 ST. JOHN'S L. REV. 75, 89-90 (1999).

burden of proof, with the presumption favoring the reasonableness of originating restrictions, guards against judicial over-reaching.

A multi-factored reasonableness test grounded in the association's own original aims affords the flexibility necessary to weigh the competing interests at stake with the prevalent presumption being that privately bargained-for expectancies should not be disturbed. A contrary presumption as to originating restrictions would portend unpredictability as well as the potential for compromise of principles of freedom of contract. It has been observed that "individual autonomy and community self-governance are two sides of the same coin."¹⁴⁷ Too active a judicial role is not desirable in the context of community association governance, insofar as the commonality of interest and interdependence of association members should, at least in theory, provide its own internal check against abuse and faulty governance.¹⁴⁸

Nonetheless, the opportunity for meaningful redress by the courts must be preserved. Judicial review grounded in reasonableness supplies the external check in those instances when the theory of internal checks yields to harsh reality. Common interest community governance "contains elements of both coercion and consent"¹⁴⁹ and inherent in board action is the potential for abuse.

147. Glen O. Robinson, *Communities*, 83 VA. L. REV. 269, 291 (1997).

148. Sterk, *supra* note 80, at 333.

149. Natelson, *supra* note 77, at 44.