

DISPUTE RESOLUTION IN A COMMUNITY ASSOCIATION

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I. INTRODUCTION

A community association¹ is created by a recorded declaration containing a complex system of covenants on real property. These covenants establish conduct guidelines for occupants of the dwellings in the community. In addition, these covenants authorize the community association to enforce these guidelines in the event of a violation. Inevitably, there is a deviation from the guidelines established by the covenants and the problem arises of how the community association will resolve the resulting dispute. Such dispute resolution is generally more delicate and emotional than resolving a dispute between a landlord and a tenant since a community association dispute is between neighbors who jointly own or use property and typically pits the

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1. The term "community association" includes condominium and home owner associations. Both associations are "mandatory membership associations," that is an individual, on the basis of his or her ownership of a unit in a condominium or a lot in a home owners association, automatically becomes a member of the association. A basic difference in a condominium and a home owner association is in a condominium the common property is owned in undivided percentage interests by the individual owners and in a home owner association the common property is owned by the association itself. In addition to a recorded declaration, a condominium also is subject to the terms of a jurisdiction's condominium enabling statute. A home owner association is solely supported by the recorded declaration of covenants.

membership association against one of its members or a member's tenant.

There are numerous types of disputes which can arise in a community association. Disputes have ranged from the typical complaints concerning a dog or motor vehicle to complaints concerning a neighbor practicing witchcraft² or an exhibitionist neighbor visiting other neighbors. While each dispute is unique, there are common themes which surface after reviewing some actual association controversies. This Article will outline several specific disputes that have taken place in associations and how the courts have resolved these disputes, and then will outline several alternative procedures for resolving disputes in a community association which do not require judicial intervention and litigation. By no means, however, will these suggestions always prove effective.

II. *EXAMPLES*³

For the last several years there has been an upswing in litigation concerning internal disputes within a community association. This upswing may exist because associations are maturing and growing more mindful of the requirements contained within their legal documents. The increased number of court cases also may result from increased unit owner involvement in the association, thus increasing the potential for interpersonal conflict.⁴

Few recent cases have involved claims for monetary damages. Instead, the cases typically have involved questions of the validity of association action, taken by the board of directors or membership vote, or action taken by indi-

2. After careful review of the facts it was advised that the practice of witchcraft out of a unit in the condominium was the operation of a business, especially since the homeowner practicing witchcraft was carrying on seances for which third parties paid to be in attendance. Operating a business from one of the units was expressly forbidden by the condominium documents. The case never proceeded to litigation, however, since after receiving violation warning letters from the association counsel, the owner who practiced witchcraft sold her unit and moved.

3. Many of the cases used as examples are reported in the *COMMUNITY ASS'N L. REP. (CALR)*. The CALR is part of an ongoing program of education for persons involved in condominiums, planned unit developments (PUD) and townhouse communities. It is published monthly by the Community Associations Institute, 1832 M Street, N.W., Washington, D.C., 20036. The Community Associations Institute is a national membership organization formed to research and distribute information on the most advanced and effective ways to establish, finance, operate and maintain the common facilities and services in condominiums, PUD, and townhouse communities.

4. A prime reason for the increased internal conflict in the association is the failure of many community association homeowners to understand the concept of the development in which they live. Education of homeowners to the condominium form of ownership, for example, traditionally has not been given serious attention during the sales period of the units.

vidual members of the community association. The remedy generally sought in these cases was either affirmative or restraining injunctive relief. A common thread between all cases, however, was that the judicial solution to the conflict required time and money.

A. The Problem: A unit owner's architectural violation.

1. *The Unwanted Change*⁵

a. *Raleigh Square Condominium Ass'n v. Womack*.⁶ The case involved a woman who purchased a unit at the Raleigh Square Condominium in August 1977. Soon thereafter, her roommate, who happened also to be a sales agent for the developer, requested the board of directors to allow her to add concrete sidewalks and "astroturf" outside the patio adjacent to her unit. The sidewalks were to extend from the rear boundary of the patio to an already existing common area sidewalk. The request was made in writing to the board and cited certain sections of the condominium declaration which were believed to authorize the board to allow the change. In response to this request, the board of directors of the condominium association sought a legal opinion to determine whether it had the authority to approve the change. The advice was that the board's authority did not exist under the condominium declaration since it contained no provisions which would allow the board to approve individual homeowner improvements on the common area grounds of the condominium.⁷

5. The unwanted change, for the purposes of this Article, is a change which the association opposes. Generally, the unwanted change results from the action of an individual homeowner who decides to "improve" the common property without the consent of the proper parties, such as, the board of directors, the architectural standards committee, or the membership, depending upon the provisions of the association documents.

6. No. C-34427 (Ga. Super. Ct. of Fulton County 1978).

7. The defendant presupposed that the board of directors had the authority to approve the request for the additions on the basis of the following covenants:

Whenever it is desired that structural changes or additions be made to the common areas and facilities, the following provisions will control:

A. *Required Vote.*

If the vote to make any such change or addition is at least 75% or more of the total vote of the Association, the proposed change or addition and the cost thereof shall be born by the residence owners in their respective percentages of undivided interest in the common areas of the facilities.

B. *Excessive Additional Cost.*

If the cost of such a change or addition is greater than 3% of the total value of the property in the condominium, any residence owner who voted against the change or addition

The defendant, after notification of this advice, through her roommate, began making improvements similar to those which originally were requested. The improvements included concrete sidewalks extending from the rear of the patio approximately ten feet to an existing concrete common area sidewalk. Additionally, some concrete was placed in a limited common planting area.⁸ After several unheeded warnings that the sidewalks must be removed, the association had to resort to litigation since no other mechanism for dispute resolution existed.

but was required to bear a proportionate amount of the cost may require the Association to buy his residence at a price determined by appraisal.

Whenever a residence owner desires to make any change, alteration, or change in color or paint or decor in his residence which will affect the exterior appearance of his residence, he shall do so only at his own expense and after prior written consent of the Association. Nothing herein shall be construed to require action by anyone other than the Board of Directors by majority vote. Such approval shall not be unreasonably withheld. In the event a residence owner desires to make a structural change in this residence, he may do so only at his own expense and only after 75% of the total vote of the Association (and the consent of voting owners, which consents shall not be unreasonably withheld).

In addition, defendant relied on a paragraph in the by-laws which stated:

Powers and duties of the Board of Directors shall consist of those powers and duties specified in the Act, the Declaration and these By-laws to be exercised and performed by the Board of Directors, such powers and duties to include but not be limited to... consideration and approval or disapproval of the exterior changes by the members of their residences as provided in the Declaration.

In contrast to these covenants relied on by the defendant, other covenants contained in the declaration were raised by the board of directors of the association. One of the covenants stated that "there shall be no alteration or further improvement to the common area and facilities except as provided in the Declaration." Additionally, the condominium statute to which the condominium was submitted stated that "no owner shall do any work which would jeopardize the soundness or safety of the property, reduce the value thereof or impair any easement or hereditament without every such case the unanimous consent of all the other apartment owners lien first obtained."

A hereditament is something capable of being inherited. Obviously, a condominium owner's unit and interest in the common area is inheritable and, therefore, the unit and the interest in the common area could be considered a hereditament. Arguably, since every owner has a right to use the common area for its intended purposes, which could be construed as an easement to use the common area, any permanent improvement added to the condominium's common area could, perhaps, be considered something which "impairs...an easement and hereditament" and would, therefore, require the unanimous consent of all the other unit owners.

8. By statute, limited common area in a condominium is generally defined as part of the condominium common area which is limited in use to one or more but less than all condominium units and owners. The area is, however, a common area still owned by all the condominium homeowners in percentage interests. *See, e.g.*, GA. CODE ANN. §§ 85-1602(e)(r) & 1603(b)(j) (1978); MD. REAL PROP. CODE ANN. § 11-101(b)(1) (1974); VA. CODE § 55-79.41(g) (1978).

One issue arising from the situation was whether the defendant could legally install the concrete sidewalks in light of the covenants contained in the condominium declaration. Additionally, defendant raised several peripheral issues, including whether the unauthorized sidewalk was considered in the purchase price of her unit and, therefore should be allowed.

When the defendant homeowner did not respond to the association's lawsuit, the association moved for a default judgment. In March 1978, the condominium association received a default judgment requiring the violating homeowner to remove the concrete sidewalks. The case, however, did not terminate there for defendant homeowner moved to set aside the default judgment, raising several grounds in her motion.⁹

At the initial hearing of the motion the trial judge suggested he could not make a decision whether to set aside his original default judgment until he viewed the premises.¹⁰ After viewing the premises, he allowed both parties the opportunity to argue their cases and entered his final order requiring the homeowner to remove the concrete sidewalk. The judge correctly resolved the dispute. He found that a breach of a covenant on the common area of the condominium could be cured by injunctive relief and that installation of the concrete sidewalk violated a covenant restricting unauthorized improvements on the common area of the condominium and thus entitled the plaintiff-association to summary relief as a matter of law.¹¹

9. These grounds included (1) that the board of directors did not represent the members of the condominium association; (2) that the sidewalk was construed by the developer's agents prior to defendant consummating ownership of the condominium and that such sidewalk was considered in the sales price, the appraisal and the mortgage on defendant's unit; (3) that other sidewalk alterations existed on the common area adjacent to several townhouses similar to defendant's; and (4) that the association's action represented an unfair singling out of and discrimination against the defendant without just cause. *Raleigh Square Condominium Ass'n v. Womack*, No. C-34427 (Ga. Super. Ct. of Fulton County 1978).

10. Whether this was within the authority of the trial judge was not a contested issue since all parties wished only to resolve the question of the sidewalk.

11. In addition to these findings, the judge made certain findings on the items outlined in note 9 *supra*. He held that the statute applicable to the condominium allowed the board of directors to proceed in the litigation and that the board of directors and the association were entitled to have the sidewalk removed; that the purchase price of a condominium unit included the value of a unit plus its percentage interest in the common area and that the purchaser of a unit in a condominium could not validly claim that the purchase price included an unauthorized common area improvement, which violates a covenant in a condominium declaration.

The covenants did not allow the board of directors to authorize the improvement. The wording of the covenants is such that Paragraph A of the covenants outlined in note 7 *supra* would allow 75% of the total vote of the association to approve an association improvement. This is obviously the case since Paragraph A speaks in terms of the cost being borne by all the residence owners and not only by the residence owner requesting a change. Also, Paragraph B implies

b. *Nugent v. Lake Village Homeowners Ass'n*.¹² In this case plaintiff-homeowner submitted to the board of directors a plan for the construction of a deck extending over the common area of the homeowners association.¹³ The association's architectural control committee became concerned about the legality of allowing such an extension. The committee decided to take no action on the application until a legal opinion could be obtained. The board of directors of the association ratified this position. Based on the legal opinion, which essentially stated the board of directors could prohibit such encroachments,¹⁴ the association denied plaintiff's

that the changes contemplated are association, not individual, changes. Why else would the association be required to buy out a dissenting owner unless the change made was an association change?

In any case, the remaining parts of the paragraph clearly give no authority to the board of directors to allow a structural change on the common area. The remaining parts of the covenant allow the board of directors to approve a change in color of the paint or decor *in all owner's residences which will affect the exterior appearance of a residence*. This provision does not allow the board of directors to approve a change on the grounds of the condominium. Otherwise, a structural change in the residence could only be perfected by receiving 75% of the total vote of the association. Nowhere in this covenant is the board of directors on its own accord allowed to approve a change on the common area grounds of the condominium.

The by-laws provision outlined in note 7 *supra* does not change this but instead verifies that the board has the authority to approve exterior residence changes by the members. The by-law provision does not speak in terms of the common area grounds of the condominium.

On the other hand, the provision upon which the association relied clearly established that the board of directors had no authority to approve the change since the changes on the common area would only be allowed under the applicable provisions of the declaration. Nowhere in the declaration was the board of directors given the authority to allow change on the common area other than on the exterior of units.

12. No. 8288 (Nev. Dist. Ct. 1978).

13. This case involved a home owner association which owns the common area. In such cases the association possibly could maintain a claim in trespass against a homeowner who uses the common area in an unauthorized way. The author is familiar with a case which never proceeded to litigation in which a homeowner in a home owner association placed concrete blocks and certain landscaping on the common area. The blocks and landscaping were viewed as objectionable and a trespass on the common area by the board of directors. Because of this, the board proceeded to have the landscaping and blocks removed and neatly placed on the homeowner's patio despite threats by the homeowner that he would file suit against the association's board of directors for discrimination if such action were taken. The homeowner felt there were other similar violations existing on the common area. After weighing the risk involved with self-help and the expense and time of suing for removal of the blocks and landscaping, the board resorted to self-help. This was done, however, only after the board carefully considered preventive measures needed to protect the homeowner's chattels and only after the jurisdiction's case law was reviewed and found to support such self-help.

14. The legal opinion stated that the board of directors could prohibit all encroachments on the common area. Alternatively, the opinion stated that the board could permit "minor encroachments" of one or two feet onto the common area. The attorney also recommended

request for the deck which was ten feet over the common elements.

Plaintiff then resubmitted the request several times before the board considered it and, then, referred it to counsel and proceeded to take no further action. A month and a half later, the board, on the advice of its counsel, had the declaration amended to permit limited encroachments over the common area. The encroachments allowed, however, could not exceed three feet. Thereafter, plaintiff sued the association in an attempt to have a court permit plaintiff to construct a deck on the common area.

The court had to decide whether the board of directors was required to approve plaintiff's request, since extensions over the common elements had been approved in the past. Also, the court confronted the issue whether the board acted arbitrarily and unreasonably for there was an apparent delay on a decision in the instant matter while an amendment concerning the three-foot extension was considered.

The court found in favor of defendant—Lake Village Homeowners Ass'n. In an oral opinion, the court held the declaration contained no provision allowing private use of the common elements by an individual homeowner. The court recognized that traditionally uniform minor encroachments of less than three feet had been allowed and that these uniform encroachments were not considered to be arbitrary or capricious. Similarly, the court found that the only ten-foot type decks allowed were ones built on private property of particular homeowners, and not those built over common grounds of the association. Otherwise, common area encroachments did not exceed three feet.

The court, while deciding for the association, indicated a concern and interest in seeing this type of dispute resolved outside the court whenever possible. Specifically, the judge stated:

I think that it is unfortunate that this matter could not have been resolved in a more satisfactory manner. The location of this particular deck appears to be in an area which would not create a great deal of problem to the adjoining residence... The area which was desired to be constructed over is an area which really appears to me to be not usable for any particular purposes, and would possibly enhance his enjoyment of his particular residence... To allow him to construct within the guidelines prescribed by the Board... would be something that would be in the best interest of all the parties concerned in this particular proceeding.

that guidelines be established if the board decided to permit "minor encroachments." Establishing objective criteria on which approval of an architectural change will be based reduces the risk of a board or a committee being accused of discrimination by the disgruntled homeowner whose proposed change is denied.

Although I must find for the defendants Association and against the plaintiffs in my judgment in this matter, I simply point that out to counsels and to the parties, because it seems to me that that is a solution that all of you could reasonably live with, as long as the ruling has been made and the precedent has not, in fact, been established to allow unwanted extension of buildings and decks, or any other private uses of property, over common area in excess of three feet, which has previously been specified.¹⁵

2. *The Wanted Change*¹⁶

a. *Grimes v. Moreland*.¹⁷ In this case, several condominium unit owners desired to put in fences and air conditioning compressors on the common area. The association membership amended the condominium documents by a seventy-five percent vote of the unit owners, thus allowing individual owners, upon receiving the consent of the board of directors, to install on the common area fences or air conditioning compressors.¹⁸ This amendment was necessary because nowhere in the condominium documents did the board of directors originally have the right or power to allow an individual homeowner to make common area improvements.

One homeowner proceeded, after receiving written permission, to build a redwood fence, roughly six feet high, enclosing a rectangular area on the common area to the rear of his unit. Other homeowners received permission to place air conditioning compressors on the common area of the condominium. These compressors were two feet wide, three feet long and two feet high. The problem was, however, that another homeowner objected to these fences and air conditioning compressors.

The court stated the issues as (1) whether the placing of fences and air conditioning compressors in the condominium common area constituted a

15. Oral opinion furnished by letter.

16. The "wanted change" is that change which the association desires to approve either for the interests of all or for the particular benefit of a homeowner to alleviate an undue hardship. For example, a condominium association wished to allow a homeowner to build a patio outside the back of her unit so that her mother who was ill could be in the sunshine. The problem was that the documents did not contemplate any limited common area patio or any patio whatsoever and, further, restricted sunbathing or lounging on the common elements. To rectify this situation there was proposed an amendment to the condominium declaration which required unanimous consent for approval.

17. 41 Ohio Misc. 69, 322 N.E.2d 699 (Ct. Com. Pleas 1974).

18. In September 1971, the amendment was adopted and the board of directors proceeded to entertain requests for fences and air conditioning compressors to be placed on the common area by individual owners.

“use” of the property requiring association board approval, (2) whether such action was in compliance with the provisions of the declaration, amended by a seventy-five percent vote of the unit owners, or (3) whether such action was a “taking” of a percentage of each unit owner’s undivided interest in common area property. If the placing of such fences and air conditioning compressors constituted a “taking,” such action could have been authorized only by a unanimously approved amendment to the association’s declaration.

The court concluded that placing fences and air conditioning compressors on the condominium common area constituted a taking of property and an ouster of the condominium unit owners from a percentage of their undivided interest in common areas. Therefore, in order to authorize such action, the association membership had to unanimously vote to amend their declaration. As correctly concluded by the court, under the condominium declaration, and under the jurisdiction’s condominium statute in effect at the time of the case, allowing the erection of fixed objects on the common areas constituted a taking of property which was the subject of the undivided interest of all owners. To hold otherwise would have allowed the unit owners in control of seventy-five percent of the association voting power to take the common area from those with the remaining twenty-four percent by amending the declaration. The correct conclusion, therefore, was that the installation of compressors and the erection of fences, without unanimously approved amendments to the declaration, was improper.

B. The Problem: Parking.

*Holleman v. Mission Trace Home-owners Ass’n.*¹⁹ Under a recorded declaration of covenants, conditions and restrictions, the board of directors had the right to adopt certain parking rules. This declaration was consistent with the San Antonio, Texas ordinance on planned unit developments. Additionally, these documents indicated that the owners had a guaranteed right to at least two parking spaces, as well as an easement of enjoyment in the association common area. The board of directors adopted restrictions on parking in driveways after the individual plaintiff-unit owner had purchased his home. The unit owner disagreed with the restrictions on parking in the driveway.

The issue in the case was whether the association’s board of directors had a right to regulate parking in the driveway adjacent to the association’s lots. The court upheld the board’s authority to restrict parking in driveways. The rule adopted by the board was within its authority to make “reasonable rules.” The court found that the driveways were common areas except for

19. 556 S.W.2d 632 (Tex. Ct. App. 1977).

thirteen feet owned individually by one homeowner which was beyond the jurisdiction of the board's regulation. Expressly, the court stated that the planned unit developments "present a relatively new and unique concept in cooperative living because of its mini-government which is empowered pursuant to its Declaration and By-laws to enact rules and regulations."²⁰

C. The Problem: Sales or Leases, including the Right of First Refusal.

1. *Leases*

a. *Glenvale Condominium v. Driscoll*.²¹ Plaintiff, a member of a condominium association, disagreed with the association's position requiring each owner who sought to lease a unit to submit certain information including name, address, telephone number of the proposed lessee and a copy of the lease agreement, prior to the lease being consummated. This provision was contained in the association's by-laws. Plaintiff challenged this provision as an invasion of his privacy.

The issue was whether the association could require certain information concerning who was to occupy a unit. Basically, this provision is necessary so that the association will know who resides on the premises. For reasons such as security, this provision is important to many associations.

The court, ruling in favor of the association, held that the provision concerning leasing was "completely reasonable" since each individual had to comply with its terms and conditions. A mandatory injunction was issued and plaintiff was required to submit the leasing information to the association.

b. *Seagate Condominium Ass'n v. Duffy*.²² Condominium owners amended their condominium declaration to add a restriction concerning the leasing of units. The amendment was approved by ninety-six percent of the association members. The plaintiff unit owner did not object to the amendment until it was implemented against her. The amendment to the declaration prohibited the leasing of the condominium units to "others as regular practice for business, speculative investment or other singular purposes..." The amendment also contained a provision which allowed the board to permit limited leasing in order to avoid hardships when, for example,

20. *Id.* at 635.

21. No. 53418 (Va. Cir. Ct. 1977).

22. 330 So. 2d 484 (Fla. 1976).

an owner was transferred in employment, requiring such owner to move prior to selling his unit.

Again, the issue was whether the amendment was valid and whether the plaintiff would be subject to it. The court upheld the restrictions, holding that they were neither unlimited nor unreasonable and should be enforced. The court specifically found reasonable the protection of the lifestyle of unit occupants owning residences for other than business purposes. The court reiterated the position that the uniqueness of problems created by condominium living and the resulting necessity for greater control over the limitation on the rights of individual owners have been recognized.²³

2. Sales.

a. *Hoover and Morris Development Co. v. Mayfield.*²⁴ A condominium association, controlled by a developer, filed suit to evict the prospective purchaser of a unit and to enjoin the present owner of a unit from selling the condominium unit. The complaint arose because the declaration required any condominium unit owner seeking to sell, rent or lease a condominium unit to give notice to the condominium association's board of directors. The condominium declaration required that such notice contain a true copy of a bona fide offer bearing the signature of all parties and the terms of the sale or lease. The condominium declaration further provided that if an owner attempted to sell or lease his unit without affording the other owners, the board of directors or the association the right of first refusal, any sale or lease would be null and void.

When the present unit owner decided to sell the unit to a tenant who had been occupying the premises, the owner furnished the board of directors a certain notice which informed the board of the name of the purchaser, the price of the sale, the date of the closing of the sale, and the employment of the husband and wife who were to purchase the unit.

The question presented was whether the notice of intent to sell the unit conformed with the condominium declaration's requirement that a bona fide offer bearing the signature of all parties be presented to the association so that it and the owners could decide whether to exercise their right of first refusal. The court found that the notice of intent did not meet the requirements contained in the declaration, which did not require a notice of intent but instead required the unit owner to furnish a true copy of a bona fide offer from the prospective purchaser or tenant. The notice of intent was merely a

23. *Id.* at 486.

24. 233 G. 593, 212 S.E.2d 778 (1975).

letter signed for the seller by his agent and was not a bona fide offer. The only offer term contained in the notice was the purchase price. Most importantly, the court held that a condominium owner must "comply strictly" with the condominium declaration. Based on the specific facts of this case, however, the court found that there was a waiver of the right of first refusal.

D. The Problem: Maintenance Responsibilities

1. *Old Virginia Ass'n v. Rivers*.²⁵ This case involved a suit by an association against an owner who refused to pay his condominium monthly assessments. The defendant unit owner took the position that he was not obligated to pay assessments because he believed the association had not performed services required under the condominium declaration, and when the association had performed, had done so negligently, permitting water to damage his unit.

The issue was whether a unit owner was relieved of his obligation to pay assessments because of his belief that the association had not performed its duties. In a precise and correct holding the court found that:

Payment of the association assessments is for the mutual benefit and protection of all members of the association and may not be legally withheld by an owner because of the association's failure to perform services. The obligation to pay assessments is created by an affirmative covenant running with the land. The defendant had no legal right to withhold assessments because of alleged acts of the association including alleged water damage caused by the association's misconduct. Disputes with the association of the type raised by the defendant, if recourse is had to the court, may be properly raised only by bringing an action as Plaintiff or a counter-claim as counter-claim Plaintiff.²⁶

2. *Country Club Estates Ass'n v. Gronick*.²⁷ A condominium association sued certain unit owners who had refused to allow contractors to install aluminum trim on the outside of their units. The decision to install this aluminum trim had been made by the board of directors. Under the governing documents of the condominium, this decision was one that could be made solely by the board. No special assessment was necessary for the improvement. The defendant owner contended that the aluminum trim was not an act

25. No. 604038 (Ga. St. Ct. of Fulton County 1977).

26. *Id.*

27. No. 77-8523 CZ (Mich. 1978).

of repair, maintenance or replacement authorized by the association.

The issue was whether the owners could successfully prevent the association from performing a maintenance responsibility. The court, once again, noted that ownership of a condominium unit is subject to conditions imposed by the condominium statute, the declaration and the authorized rules and regulations of the association. In this case, one of the conditions was that the common elements were subject to a permanent easement in favor of the condominium association for the maintenance and the repair of such elements. This permanent easement included an easement to maintain and repair "the exterior of the structure and all external improvements." There was no challenge to the position that the exterior of a unit was part of the common area subject to this easement. The court held that:

The installation of aluminum trim over the wooden fluting dentil work on the outside of the Defendant's unit is an act of maintenance within the province of an association. Absent the need for a vote of all co-owners (where funds are available without assessment of the members) the Association Board is necessarily given discretion in determining the most efficient and practical way to maintain the external portion of the buildings. This discretion is granted by the association through the applicable state statute and by the co-owners of the apartments. The term maintenance should be construed liberally in favor of the condominium association. The utilization of aluminum trim in lieu of yearly painting or other required work is a reasonable method of upkeep, for which the association is responsible.²⁸

The defendant also argued that to permit the installation of the trim would deprive each owner of control over the exterior of his unit. Again, the court held against the defendant and found that this lack of control is well known in modern condominium living and must be endured by all who buy into the development. The defendant was enjoined from further rejecting or interfering with the contractor's work of installing the aluminum trim on the exterior of the units.

E. The Problem: Pets.

1. *Northcrest Home Owners Ass'n v. Friedman*.²⁹ One unit owner's dog bit another unit owner. After this incident, the board of directors held a special meeting to consider the incident, resolved that the owner of the dog

28. *Id.*

29. No. N966677 (Ga. Super. Ct. of Fulton County 1977).

would have to remove the dog from the condominium property. The decision was made that the association's counsel should seek a temporary restraining order against the owner and, subsequently, a mandatory injunction prohibiting the unit owner who owned the dog and the guest occupying his unit from bringing or keeping the dog on the common elements of the condominium or in the individual unit. The board was acting in accordance with the authority of the condominium declaration which stated that the board could determine that a pet "endangers the health or unreasonably disturbs the owner of any townhouse" and, if so found, could forbid the animal from being on the property.

The issue was whether a dog who had created a safety problem on the condominium property could be prevented from coming on the property in accordance with the declaration's provisions.

The court granted the temporary restraining order and, in a consent judgment, the mandatory injunction prohibited the owner from bringing his dog on the common elements or keeping his dog in his unit. Specifically, the injunction held that the defendant was enjoined from "bringing or allowing to be kept in or on any private residence...or in or on any part of the common area..." the unit owner's dog.

III. ALTERNATIVE POSSIBILITIES

Most of the examples above demonstrate that the courts can resolve a dispute in a community association. The examples also illustrate, however, that a resolution in the courts causes all parties substantial time and money. The time duration for resolving the dispute in court, generally, injures the best interests of the entire community. During the court proceeding the problem festers among the same people and neighbors whose cooperation is necessary for the community association to operate efficiently. The expense of the proceeding usually is an unforeseen item adversely affecting the association because its income is almost always entirely generated from assessments levied against the members. In many situations additional assessments levied on the membership to support judicial enforcement of a covenant or rule against a member leads to further problems in collecting the assessment from a minority of homeowners who fail to appreciate the importance of such enforcement.

While some disputes inevitably wind up in court, there are several possibilities short of litigation which might lend themselves to resolution of various community association disputes. The alternatives will not always lead to extra judicial dispute resolution and, obviously, should not be viewed as a replacement for the judicial system. In many instances, however, the sugges-

tions may prevent a dispute from arising, or decrease the time and money necessary to resolve a community association dispute. Moreover, these suggestions would likely decrease the work load of the judiciary and lead to a better and more congenial living environment for those in the community association. Some of the alternatives, technically, are not alternative enforcement mechanisms. They are, instead, a means of dispute avoidance. They are preventive in nature and would assist the community association prior to the occurrence of an actual dispute. Other alternatives are curative, that is, of assistance after a dispute has surfaced.

A. Preventive Alternatives

1. *Legal Documents.* A good set of community association legal documents, that is, a declaration, the by-laws and, in some cases, articles of incorporation, will often enable the association and its membership to avoid a controversy. Many association disputes would never arise if the draftsman of the association documents created legal documents which contemplate and fit the concept of the community in its development state and as an ongoing enterprise. Boiler plate documents can be disastrous. A well drafted set of community association documents is flexible, unique to the community and realistic.³⁰

(a) *Architectural Change Provisions.* Some good examples where, perhaps, controversies could have been avoided by well-thought-out documents can be seen in some of the above cases concerning architectural violations.

The *Raleigh Square* case clearly demonstrates two points concerning document drafting. First, it is always wise to have clear headings on sections of an association document. Had this been the case in *Raleigh Square*, the association could have shown the defendant that the section she relied on to suggest the board did have authority to allow her to change actually gave the board authority to act only in a different situation. Distinct section headings, while seemingly an insignificant item, do assist associations and their members in understanding the purposes of certain covenants.

Second, *Raleigh Square* highlights a particular provision in community association legal documents which needs to be drafted clearly. This provision concerns the board of directors' right to allow changes in the common area. Much time and expense was necessary to review the condominium's documents and, subsequently, debate an issue which might have been avoided had

30. Hyatt, *Community Associations: How to Draft Documents That Work*, 7 REAL EST L. J. 26 (1978).

the documents clearly specified the board's right to approve or to disapprove individual homeowner changes in the common area. Without its rights having been clearly spelled out, the board of directors in *Raleigh Square* was, as a fiduciary over the interests of the association members, quite concerned with allowing an individual homeowner to violate the covenants. Once the homeowner refused to remove the architectural violation, the case had to proceed to court, regardless of whether the board would have had objection to the change.³¹

The *Grimes* case also illustrates how a dispute might have been avoided had the association documents contained necessary and clearly drafted provisions. Had the original association documents designated certain items as limited common areas and/or anticipated problems of the nature illustrated in the case, the issue might have been resolved without need of litigation. Artful drafting of the documents could have created limited common element fencing around patios and could have provided that air conditioning compressors, if placed on the common areas, would be the responsibility of the individual owners.

(b) *Rule Adoption and Modification Provisions.* Another area of concern in drafting community association documents should be rule adoption and modification provisions. As indicated in the *Holleman* case, if a set of association legal documents is drafted properly to include the right of the board of directors to adopt rules, courts will enforce these rules, provided they are reasonable. While none of the above cases addressed the specific problem of a community association's power to repeal a rule, repeatedly community association documents appear which contain a provision allowing the board of directors to adopt rules and regulations, but requiring a majority of association membership to repeal them. What might appear on its face to be democratic is, in reality, completely unworkable. Since the

31. An example of a provision that should be incorporated in a community association declaration and which would assist in the issue of architectural violations present in the *Raleigh Square* case would be the following:

No owner, occupant, lessee or lessor, or any other person may make an exterior change, alteration or construction, nor erect, place or post any sign, object light, or thing on the exterior of the buildings or on any common element without first obtaining the written approval of the Board or its delegate. Application shall be in writing and shall provide such information as the Board may reasonably require. The Board or its delegate shall publish written architectural standards for exterior alterations or additions and any request in substantial compliance therewith shall be approved. In the event that the Board or its delegate fails to approve or disapprove such application within sixty (60) days after it shall have been submitted, its approval will not be required and compliance with this section will be recognized.

association is an on-going enterprise requiring the flexibility to adopt to changed circumstances, and, since the board of directors needs the business discretion enabling it to react to changed circumstances, the association documents should give the board the right to adopt, modify and repeal rules and regulations. Obviously, in the event a majority of the membership disagrees with certain rules, provisions concerning the membership's right to remove directors are present.

(c) *Right of First Refusal Provisions.* Some of the cases discussed above concerned the right of first refusal. A community association's right of first refusal requires a member homeowner to give notice to the association of an impending sale and authorizes the association to buy the house or to substitute a buyer for the one proposed by the owner.

Before placing this provision in the association documents, a draftsman should always ask himself why. Many draftsmen almost automatically have placed the right of first refusal in community association documents. In reality, the community association is hard pressed to use the provision, if only for the reason of the expense involved. Additionally, in many cases, the association completely disregards the administrative process of accumulating information and passes on every sale. The right can become, however, a substantial liability in the event claims of discrimination arise.

In one case involving the right of first refusal which never resulted in litigation and which is not outlined above, a seller filed a federal housing discrimination complaint alleging an association rejected the buyer on the basis of race. After incurring legal defense expenses, the association demonstrated that it never rejected the buyer. Instead, the association took a position of "no action", since proper information had not been received. The association never knew the race of the buyer and was uncertain whether an actual buyer ever existed.

The case shows that when a right of first refusal is present, the door is open for unfounded discrimination claims, which can result in unnecessary dispute. Once a discrimination claim is pending, past use of the right comes into question to resolve the issue whether the right has been continuously used as a means to discriminate. Records frequently do not exist, however, because the right has been perceived by the association as administratively burdensome and impractical. There is, therefore, no "track record" to demonstrate how past cases have been handled by the association or to verify that a case in question was not handled differently, because of a discriminatory purpose, from past situations. The case also shows that the right was only used to gather information for the association records. This alone accounts for the association's refusal to act until it received the name of the prospective buyer. The buyer's name was at least important for meeting notice and assessment billing purposes.

Since the right of first refusal often creates the potential for disputes resulting in liability, draftsmen should consider whether the right is desirable. Associations also should consider whether to remove the right from their documents. Replacing the right of first refusal with a sale-and-lease-notice and information-gathering provisions, without an association right to approve or reject buyers, serves the purpose for which many associations now employ the right of first refusal, namely, record keeping. Such a provision, as indicated in the *Glenvale* case, should be enforceable.

2. *The Statute.* A further problem, illustrated by *Grimes*, is the existence of statutory provisions unduly restraining amicable dispute resolution in a community association. Two examples are readily apparent. The first pertains to the creation of limited common elements. The second pertains to the establishment of a condominium owner's percentage interest in the common area and the owner's proportionate payment of the common expense.

Many condominium statutes expressly require that the original declaration set forth what is to be limited common element. This designation would then be permanent. In the last few years, several jurisdictions have adopted condominium statutes which allow more flexibility in this area. For example, Georgia,³² Virginia,³³ and the District of Columbia³⁴ have enacted statutes allowing assignment or reassignment of limited common elements. These provisions could assist the association membership by allowing it to determine what parts of the common area are best limited in use to only a few homeowners. Specifically, a statutory provision of this sort might have avoided the dispute raised in *Grimes*.

The condominium statutes which allow assignment or reassignment of limited common elements contain several statutory requirements which must be met either in the declaration or under the statute. For this reason, it is extremely important that a draftsman heed the provisions of these sections if potential benefits are to be available to a community association at a later time.

Several condominium statutes allow a disproportionate assessment of common expenses as well as independent establishment of a unit's percentage interest in the common area from its assessment contribution.³⁵ Prior to the enactment of such provisions, all common expenses had to be allocated, without deviation, uniformly among all unit owners on the basis of a unit's

32. GA. CODE ANN. § 85-1619e (1978).

33. VA. CODE ANN. § 55-79.57 (Supp. 1979).

34. D.C. CODE ANN. CODE § 5-1223 (1977 & Supp. 1979).

35. See, e.g., D.C. CODE § 5-1221 (Supp. 1979); GA. CODE ANN. § 85-16E (1978); VA. CODE § 55-4.2 (1977)

percentage interest in the common area. In turn, the interest in the common area was, by statute, required to be based on square footage of a unit, unit value or, alternatively, an equal pro rata distribution of the assessment among all units. One obvious problem with this provision is that if assessments are based on square footage of units, a “we” versus “they” mentality inevitably develops between the larger and smaller unit owners. Alternatively, if assessments are allocated equally among all units, a dispute looms over the community concerning the issue of some owners’ receiving a greater benefit for a contribution to the common expense equal to that given by other owners.

A prime example of the latter potential conflict occurred in a condominium community where a draftsman gave each of fifty condominium units an equal two percent undivided interest in the common area. The applicable condominium statute required each homeowner to pay an equal assessment. Homeowners of smaller-sized units complained that their utility bill payments were disproportionately high because they were contributing an amount equal to that contributed by larger-unit owners. The homeowners decided amendments to the condominium declaration were needed to resolve this and several other community issues.

The jurisdiction in which the condominium was located had adopted a new condominium statute which contained a provision allowing disproportionate assessment of common expenses. In unanimously approved amendments to the condominium declaration, a provision allowing for assessment for utility service based on square footage was passed. Otherwise, other contributions for services, except blanket insurance coverage, were kept equal. Because the statute in effect at the time of the adoption of the amendment allowed disproportionate assessment of the common expense, and no longer required percentage interest in the common area to determine the assessment to be paid, the change was accomplished without changing percentage interests in the common area, a move which would have had lenders obviously concerned about their mortgage securities. Most importantly, however, a dispute concerning what was viewed as inequitable allocations of common expenses was avoided.

In a more general sense, a clearly written and comprehensive condominium statute supporting a condominium association would assist in preventing dispute. Not until 1974, when the State of Virginia adopted “a second generation” condominium statute, did such a condominium statute exist in any state. Several states have since followed Virginia’s example and, most recently, the American Bar Association Committee on Uniform Laws approved the Uniform Condominium Act which incorporates many favorable provisions of the second-generation type associations. It is a compliment

to the organized bar that the Uniform Condominium Act contains, for example, provisions allowing for the assignment and reassignment of limited common elements,³⁶ the independent establishment of the assessment contribution and percentage interest in the common area, and the disproportionate levying of assessments.³⁷

(3) *The Legal Audit*. The board of directors may well prevent internal disputes within a community association by seeking a legal audit. A legal audit is a review of the legal situation at the community association. Much like a financial audit, the legal audit reviews the composite legal picture of a community association. The documents, rules and regulations, board resolutions, insurance, budget, contracts and various other items may be reviewed to determine whether the community is likely to confront certain impending problems.

There are several examples of situations where imminent problems may be averted by a legal audit. The inadequacy of condominium insurance might go unrealized unless someone conversant with insurance reviews an association's insurance policy. Insurance discovered to be inadequate after a casualty loss most certainly will result in a community dispute.

A review of the association documents to determine what architectural changes a board of directors could allow might also prevent situations such as that in *Grimes*. Such a review might reveal needed amendments such as those required in *Raleigh Square* or *Nugent*. Additionally, a review could reveal the extent of the association's regulatory jurisdiction, an issue brought to the court's attention in *Holleman*. Obviously, a legal audit also should determine whether the association covenants have been adhered to, thus preventing potential future actions against a board of directors for claims such as the breach of the board's fiduciary duty to homeowners or the use of a first refusal right in a haphazard fashion, indicating discrimination.

(4) *Miscellaneous*. There are several miscellaneous mechanisms by which an association might prevent internal disputes. Newsletters, open board meetings and clearly drafted rules are but three of these mechanisms.

A newsletter is an excellent means of keeping all homeowners informed. Informed homeowners are, in turn, more apt to understand how and why association policy has been formed, thus lessening discontent. A newsletter also can assist in dispute resolution by publication of a factual accounting of the events surrounding the dispute.

Open board of directors' meetings open the workings of the association to

36. UNIFORM CONDOMINIUM ACT § 2-109.

37. *Id.* § 2-108.

the sunshine.³⁸ Even though it might be highly unlikely that any impropriety is to be undertaken in a closed meeting, the appearance of impropriety leads to homeowner discontent. Closed board meetings can only result in the appearance of impropriety.

A third mechanism to prevent community association disputes is the board of directors' drafting clear rules and regulations when exercising the association's rule-making power. This point can best be illustrated by a condominium association which passed a rule regulating erection of screen doors. The rule stated that aluminum-framed storm windows with aluminum finish could be placed on the units. Without board approval, a homeowner placed a white aluminum screen door on his home. The board wished to challenge this action since it was believed the white aluminum screen doors violated the association rule. Upon reflection, the board realized that its rule did not clearly specify that the aluminum screen doors in the community needed to be the natural silver-like unfinished aluminum. An unnecessary dispute was created.

B. *Curative Mechanisms*

Obviously, attempts at preventing disputes in a community association might not always be successful. In that event, the recourse generally is to go to court. Experience has shown, however, that there are many community association disputes which can be resolved in a less expensive, quicker yet equally equitable fashion. Some of these mechanisms are internal to the association; some are external, that is, involving a third party.

1. *Internal Mechanisms*

a. *The refining power.* One means of resolving a community association dispute is to empower the association with the right to fine its members for violations of covenants, rules and regulations. The fine compels adherence to the standards of the community. Some condominium statutes, Georgia's for example, allow a condominium association to fine its members for violation of a provision in the documents or a board rule or regulation.³⁹ Otherwise, in the case of a condominium created pursuant to a condominium statute not granting an association's power to fine, a jurisdiction's statutory or case law

38. "A day with a closed meeting is like a day without "sunshine." Continuous days without 'sunshine' cause the tree of democracy to wither and die." *Accardi v. Mayor of North Wildwood*, 145 N.J. Super. 532, 550, 368 A.2d 416, 426 (1976).

39. GA CODE ANN § 85-1613e (1978).

would have to be reviewed to determine if fines are permissible. Under all circumstances, the fining power should be expressly incorporated into the association documents.

The fining provision is effective in resolving association disputes. For example, where a dog continuously barks creating a general nuisance throughout the community, without existence of the fining power, a community association would need to take this issue to court. Furthermore, cases concerning recreational vehicles illegally parked on the common area are examples of situations where the fining power can assist in dispute resolution. With the fining power, the board can attempt to resolve these issues internally, and if neighborly communication fail, the fining power can be employed. Obviously, it is not suggested that the fine be indiscriminately or arbitrarily used but rather, in the proper case, complimented with a form of a due process procedure.

The fining power should be tied to an association's lien rights. The procedure would operate such that once a fine is levied, it is a lienable charge, if not paid. In a suit on a lien, the association documents or condominium statute should provide the association the right to collect attorney's fees.

b. *Due Process.* Prior to the association instituting a fine for covenant or rule violation or, exercising its adjudicative powers, the association should adhere to some form of due process. The due process procedure can assist in dispute resolution by forcing face-to-face confrontations between disputing parties and by furnishing a forum to air grievances. In many cases what superficially appears to be an irreconcilable controversy deteriorates into a mere communication misunderstanding when the parties meet face to face. Furthermore, attempting dispute resolution by assessing a fine, by implementing such other enforcement mechanisms as suspension of the right to vote, or suspension of the use of community facilities without affording the alleged violator an opportunity to present his or her side of the issue, opens a door for real or imagined abuse. Most importantly, not affording the violator the opportunity to be heard generally results in litigation to collect the fine.

Aside from the practical benefits of employing a due process procedure, increasingly there is reason to believe such a procedure is, either by statute or judicially, legally required. For example, in Virginia under the Subdivided Land Sales Act of 1978,⁴⁰ a community association is compelled to follow a procedure affording a hearing before a sanction can be imposed for violation of a covenant or a rule or regulation. This Act is not a condominium statute

40. VA. CODE § 55-344 A(8) (Supp. 1979).

but instead applies to community associations where a substantial number of lots are sold under installment contracts. Surely, this hearing at least should adhere to basic due process principles, such as notice and the opportunity to be heard. Concluding otherwise would effectively make the requirement of a hearing meaningless. The Uniform Condominium Act also requires a condominium association to afford a due process procedure before a fine can be imposed.⁴¹

While courts have not yet directly considered the issue whether a community association is required to follow due process procedures in exercising its adjudicative powers,⁴² it can be concluded that the judiciary in some jurisdictions, if confronted with the issue, would require adherence to due process dictates. This conclusion can be reached in light of the judicial view that community association rules are more similar to municipal by-laws than to private deed restrictions.⁴³ The community association's imposition of a penalty for violation of a rule or covenant therefore is functionally equivalent to the imposition of a penalty by a municipality's judiciary for violation of an ordinance.⁴⁴ Hence, in exercising the right of enforcement through its adjudicative powers under its declaration and the state statute, the community association should be given the responsibility for observing due process⁴⁵ guarantees.

For these practical and legal reasons, the association should adopt a stan-

41. Uniform Condominium Act § 3-102(a)(11). In the Comment to this section, the draftsmen state that the power to fine is given to the association to provide the association "with sufficient powers to exercise its 'governmental' functions as the ruling body of the condominium community." *Id.* at Comment 5.

42. *But see* Holmes v. Brown, 146 Ga. 402, 91 S.E. 408 (1917), where a member of an unincorporated association (a union) would have been wrongfully suspended if internal trial occurred without notice, in his absence and without a written charge made against him. It should be noted, however, that the association's by-laws required that these protections be followed.

43. Johnson v. Keith, 368 Mass. 316, 331 N.E.2d 879 (1975).

44. See Illinois Migrant Council v. Campbell Soup Co., 438 F. Supp. 222 (N.D. Ill. 1977), *rev'd on its facts*, 574 F.2d 374 (7th Cir. 1978) where it was found that a company town was the "functional equivalent of a municipality" and that the company town, although private property, had taken on such public aspect that plaintiff council could not be barred access without violating its rights under the United States Constitution. The court looked to aspects such as the town's power to enforce a disciplinary code and the town providing services such as fire protection, sewage and garbage disposal, water, outside lighting, snow removal, recreational facilities, and other similar "governmental" services to determine that the defendant private town was the functional equivalent of a municipality.

45. See Hyatt & Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 WAKE FOREST L. REV. 915, 924-25 (1976).

dard of conduct for itself before internally enforcing a covenant or rule. For example, after receiving a complaint concerning certain actions of the unit owner, the association should notify the violator of the complaint and give him an opportunity to cure the situation. If the situation persists, the association should request the violator to appear at a hearing to be held by, perhaps, a covenants committee which consists of other members of the association and, quite possibly, members of the board of directors. The opportunity to present his side of the issue should be given to the alleged violator at the hearing. At the same time, the complaining party or parties should be able to present their views. On the basis of what has been presented to the committee, a sanction could be imposed. This is where the fining power can work quite successfully.

Once determined that a violation has occurred and a sanction is imposed, the violator should have the additional opportunity to appeal this decision to the entire board if the covenants committee did not include board members. If the covenants committee included board members, the appeal board should exclude those board members who sat as the covenants committee.⁴⁶

46. A provision which could assist the implementation of this due process procedure and could be incorporated into community association declarations is as follows:

Section 1.

Procedure. The Board shall not impose a fine, suspend voting, or infringe upon any other rights of the member or other occupant for violation of rules or the provisions of the declaration unless and until the following procedure is followed:

(a) *Demand.* Written demand to cease and desist from an alleged violation shall be served upon the alleged violator specifying:

(i) The alleged violation; (ii) the action required to abate the violation; and (iii) the action required to abate the violation; and (iii) the time during which the violation may be abated without further sanction, if such violation is a continuing one or a statement that any further violation of the same rule may result in the imposition of sanction after notice of hearing if the violation is not continuing.

(b) *Notice.* Within twelve months of such demand, if the violation continues past the period allowed in the demand for abatement without penalty, or if the same rule is subsequently violated, the board shall serve the violator with written notice of a hearing to be held by the board or committee to be established by the board in session. The notice shall contain:

(i) The nature of the alleged violations; (ii) the time and place of the hearing, which time shall be not less than ten days from the giving of the notice; (iii) an invitation to attend the hearing and produce any statement, evidence and witnesses on her or his behalf; and (iv) the proposed sanction to be imposed.

(c) *Hearing.* The hearing shall be held in executive session by the board pursuant to this notice affording the member a reasonable opportunity to be heard. Prior to the effectiveness of any sanction hereunder, proof of notice and the invitation to be heard shall be placed in the minutes of the meeting. Such proof shall be deemed adequate if a copy of the

c. *Internal Administrative Process of the Community Association.* Several issues exist regarding the relationship between the community association's administrative process and the judicial process in dispute resolution. Two of these issues, the timing of judicial intervention and the scope of judicial review, are significant since answers to these issues will reveal when and how much judicial review will be exercised by a court over an association's internal attempt to resolve a dispute. While neither issue has been resolved conclusively by the courts, there is some case law which indicates a judicial reaction to them.

An analogy between a community association and an administrative agency could assist courts in this endeavor. At the same time, solving these issues by use of such an analogy would stimulate the association's internal dispute resolution. The timing and scope of judicial review could then be found in a recognized, available body of case law giving deference to the association's internal dispute resolution mechanisms. There are several reasons why an analogy between a community association and an administrative agency can be justified.

First, an administrative agency in nature is analogous to that of a community association. An administrative agency is a governmental authority created under local, state or federal law.⁴⁷ The community association, created by and enforced through state law and action, together with its police power authority to affect property rights, make the association analogous to a government. Indeed, several courts have referred to the community association as a mini-government.⁴⁸

Second, the functions of an administrative agency and a community association are somewhat analogous. As in the case of an administrative

notice together with a statement of the date and manner of delivery is entered by the officer or the director who delivered such notice. The notice requirement shall be deemed satisfied if a violator appears at the meeting. The minutes of the meeting shall contain a written statement of the results of the hearing and the sanction, if any imposed.

(d) *Appeal.* Within fifteen days following the hearing held pursuant to this section, the alleged violator may appeal the decision of the committee to the board sitting *en banc* if the committee does not include any board members. If the committee established pursuant to this section contains board members the appeal shall be to the board of directors, excluding those members who sat on the committee at the hearing held pursuant to this section. On appeal, the sanction imposed may be reversed, modified, or upheld at the discretion of those hearing the appeal.

47. An administrative agency is "a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rule making." 1 K. DAVIS, *ADMINISTRATIVE LAW TREATIES* § 1:2 (2d ed. 1978).

48. *Johnson v. Keith*, 368 Mass. 316, 331 N.E.2d 879 (1975); *Holleman v. Mission Trace Homeowners Ass'n*, 556 S.W.2d 632 (Tex. Ct. App. 1977).

agency, the community association's primary function is to advance the will and well-being of the people. The association is created to perform activities necessary to advance the health, safety and welfare of its membership or the people over which it has control.⁴⁹

Third, the community association's powers resemble those of an administrative agency. Much like an agency, the association has rule-making powers. The association also adjudicates disputes, provides for enforcement of its judgments by assessing fines, and suspends the rights to vote and use association facilities.⁵⁰

Since community associations and administrative agencies are similar, the principles of judicial review of agency actions might aptly be applied to association actions. Of course, there are many dissimilarities between associations and agencies, suggesting that judicial review principles should not be blindly applied. For example, the clearest distinction is that the association is a privately owned enterprise.⁵¹

49. See *Department of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 222, 334 A.2d 514, 522, (1975), wherein the court stated:

The primary function of administrative agencies is to advance the will and weal of the people as ordained by their representatives—the Legislature. These agencies are created in order to perform activities which the Legislature deems desirable and necessary to forward the health, safety, welfare and morals of the citizens of this State. While these agencies at times perform some activities which are legislative in nature and thus have been dubbed as quasi-legislative duties, they in addition take on a judicial coloring in that frequently, within the exercise of their power, they are called upon to make factual determinations and thus adjudicate, and it is in that sense that they are also recurrently considered to be acting in a quasi-judicial capacity. This dual role which administrative agencies play has long been accepted in this State as being constitutionally permissible.... However, this authority is not the same and, therefore, is distinguishable from the exercising of the 'judicial powers' of this State.

See URBAN LAND INSTITUTE COMMUNITY ASSOCIATIONS INSTITUTE, *MANAGING A SUCCESSFUL COMMUNITY ASSOCIATION* 3 (1974) (an important aspect of the community association lies in its basic nature as a privately owned and operated vehicle of service to a specific community).

50. It is this point which creates in community association law an issue similar to a long-standing issue existing in administrative law; that is, whether a community association, in acting as a mini-government, is performing a quasi-legislative or quasi-judicial function. Since a community association has the power to legislate and to adjudicate it is, actually, acting in both capacities. This dual capacity, similar to the dual capacity of an administrative agency, would indicate that a community association is exercising a power similar to what some courts have described as an administrative agency's "administrative power." See *Bentley v. Chastain*, 242 Ga. 348, 249 S.E.2d 38 (1978); *Department of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 334 A.2d 514 (1975).

51. The importance of this should be noted since some community association disputes probably can be resolved only by litigation. An example of this is association assessment collection and lien foreclosure.

1. *Timing of Review.* Frequently, before resorting to a meaningful internal problem a community association will seek immediate judicial redress of grievances against its members. Conversely, association members often seek judicial dispute resolution before any significant internal attempts are made at resolving the dispute. In the administrative law area, internal administrative remedies, whether created by the legislature, the agency, or imposed by due process principles, must be exhausted before a dispute is justiciable in the courts. Since a community association is required either by statute or by judicial decisions to adhere to at least minimal due process protections, an internal mechanism for dispute resolution should exist. At least in those cases where a form of due process procedure is statutorily required, courts should require exhaustion of the legislatively outlined internal enforcement process as a precondition to hearing the case. Because of the separation of powers doctrine, this judicial restraint appears appropriate in light of the policy and letter of legislation giving the association discretion to establish a dispute-resolution mechanism consistent with due process. Otherwise, in the absence of a statute requiring a due process procedure, it would be somewhat inconsistent if the judicial conclusion requiring at least minimal protections of due process, such as prior notice and a hearing, did not also indicate that this procedure must be used prior to judicial involvement in the dispute.⁵²

2. *Scope of Review.* Administrative law textwriters urge courts reviewing administrative decisions to focus upon the extent of discretion delegated to that agency and whether the agency acted within the limits of its discretion.⁵³ The key is controlling discretion through administratively established standards and safeguards.⁵⁴ Therefore, the only review author-

52. Some older case law indicates, at least in an unincorporated association, that redress for an internal dispute must first be handled within the organization. In *Holmes v. Brown*, 146 Ga. 402, 405, 91 S.E. 408, 409 (1917) the court specifically held:

A member of a voluntary association (a union) should avail himself of his remedies within the organization...as against any attempt to exclude him from the organization. When these remedies are exhausted, a member who has been disfranchised, suspended, or expelled in violation of the constitution and by-laws may appeal to a court of equity for the protection of his property rights incident to membership.

See *Bowden v. Kennedy*, 186 Ga. 174, 178-79, 197 S.E. 325, 327 (1938) (if plaintiff-members of an unincorporated political association having no constitution or by-laws have any rights which have been violated, they must first seek redress within the organization). It should be noted that community associations are mandatory membership associations.

53. I F. COOPER, *STATE ADMINISTRATIVE LAW* 91 (1965); 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 3:15 (2d ed. 1978).

54. In the most recent edition of this treatise, Kenneth Culp Davis urges that the standards and safeguards should be administratively established so that the agency operates under its own rule of law. 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 3:14 (2d ed. 1978). Standards such

ized in review of administrative agency decisions is that inherent in the power of the judiciary. Hence, the limited questions for review are whether the agency acted beyond the discretionary powers conferred upon it, abused its discretion, or acted arbitrarily or capriciously with regard to an individual's constitutional rights.⁵⁵

These questions and this perception of the limited scope of review of an administrative agency's decisions are, without notable comment, being employed by courts in review of a community association's actions or decisions.⁵⁶ While many court cases are in the area of architectural changes, there is no reason not to extend the logic of these cases into other issues confronting the community association.

(1) *The Power of the Association.* If administrative law principles pertaining to judicial review were used to determine the scope of judicial review of a community association decision, the first question for the court would be whether the association has acted beyond the powers conferred upon it.⁵⁷ *Country Club* and *Northcrest Homeowners* are judicial examinations of the authority of an association's board of directors. In *Gronick and Friedman*, it was found that the association had acted within its discretionary powers concerning maintenance and pet regulation, respectively. The case of *Mavrakis v. Plaza Del Sol. Ass'n*⁵⁸ is another illustration of a reviewing court raising this question, but in *Mavrakis* the association was found to have acted beyond its powers.

In *Mavrakis*, the condominium declaration, by-laws and articles of incorporation permitted condominium units to be used by, among others, the owner's family and guest in the owner's absence. The condominium association's board of directors attempted, by adoption of a rule, to limit a unit's occupancy to only an owner's "immediate family." Additionally, limitations were placed on the duration of an owner's family occupancy. The plaintiff-owner filed suit alleging that the rule exceeded the board's powers. The board countered by alleging that it had the discretionary power to promote the unit owner's health, happiness, and peace of mind and that the use of common

as those adopted in *Nugent v. Lake Village Homeowners Ass'n* are, therefore, to be encouraged.

55. See *Bentley v. Chastain*, 242 Ga. 348, 249 S.E.2d 38 (1978).

56. Numerous courts have determined that the standard for review in cases concerning architectural covenants is whether the controlling entity acted arbitrarily, capriciously or unreasonably in denying or approving a change. This determination is based on covenants law.

57. In a condominium, the source of these powers is the condominium declaration, by-laws and statute. In an HOA, the source of these powers generally is only the declaration and by-laws.

58. No. 77-6049 (Fla. 1978).

property was subject to the association's rules and regulations. The court held that while the regulation itself was not unreasonable, the method of its adoption was improper. Hence, the rule was unenforceable. Although the restriction could have been imposed by an amendment to the declaration, the restriction imposed by rule was beyond the board's powers in light of the declaration's provision.⁵⁹

(2) *Abuse of Discretion*. If the principles of administrative law were used by analogy to determine the scope of review of a community association's decision, a reviewing court's second question would be whether the association abused its discretion. Typically, this question arises in two different situations. The first would involve an association's action on an existing provision; the second would involve an association's action to adopt a rule or policy.

(i) *Action on an existing provision*. Two types of cases illustrate an association's action on an existing provision. The first concerns a situation similar to *Raleigh Square* but with the added element that an association does not act timely. *Plaza Del Prado Condominium Ass'n v. Richman*⁶⁰ is such a case.

In *Richman*, like *Raleigh Square*, the community association sought to have an individual unit owner comply with certain architectural control provisions. The provision in *Richman*, however, concerned removal of a porch railing and not a sidewalk. An important distinction between *Richman* and *Raleigh Square* is that in *Richman* one year had elapsed between the time of the installation of the violation and the time objections were raised and, as stated by the court, the board was under a duty to assert itself sooner. The court found that the association, by not doing so, was estopped from objecting to the violation because it had not acted more quickly. While the association had the authority to object to an unauthorized improvement on the common area, to raise no objections to the violation for a one-year period and then to attempt to require removal was viewed, basically, as an abuse of

59. See *Rywalt v. Writer Corp.*, 34 Colo. App. 334, 526 P.2d 316, (Ct. App. 1974). On the basis of a by-law provision which gave the board of directors of homeowners association all powers, duties, and authority vested in or delegated to the association, and not reserved to the membership, the court found that a board decision to build a second tennis court on the common property was valid. The court stated:

The good faith acts of directors of profit or non-profit corporations which are within the powers of the corporation and within the exercise of an honest business judgment are valid. Courts will not, at the instance of stockholders or otherwise, interfere with or regulate the conduct of the directors in the reasonable and honest exercise of their judgment and duties.

34 Colo. App. at 337, 526 P.2d at 317.

60. 345 So. 2d 851 (Fla. Dist. Ct. App. 1977).

the association's discretion.

The second type of situation is represented by cases like *Pinewood Greens Homeowners Ass'n v. Murtha*,⁶¹ *Vinik v. Taylor*⁶² and *Sypol v. Mannes*.⁶³ In each of these cases, the reviewing court found that an abuse of discretion had not occurred because there had been adherence to either a standard established by the association documents or the judicially established standard of objective reasonableness. In administrative law, a focus for review of an agency's decision is to determine whether the agency's discretion has been exercised through established standards and whether there has been an abuse of agency discretion in that these standards were not followed.

In *Pinewood Greens*, the declaration provided that proposed additional homeowner fencing would be scrutinized according to the workmanship, design, color, material and harmony of the fence to the project as a whole. A homeowner, without board approval, installed fencing which did not conform to the style or design of existing fencing. The judge found that the architectural committee acted reasonably in declining to approve the fence erected by the defendants.

The *Pinewood Greens* case further indicates the limited scope of review employed by some courts reviewing association decisions, for the judge found that he would not substitute his opinion of taste for the association's architectural committee decision, after he determined it acted reasonably. In essence, the holding echoed a previous decision by a Florida judge in *Vinik* (later, again echoed in *Sypol*) where it was acknowledged that:

Such difficulties as we have had with this appeal have, upon reflection, been engendered by a peripheral opinion which falls outside the scope of our appellate judicial function. Quite frankly we are in disagreement with the decision reached by the Board, in approving this alteration by the Defendants, as we feel, as did the objectors, that the alteration materially changed the exterior appearance of the building. If succeeding applicants are loosely granted such approval, it could lead to a hodge-podge or bizarre outward appearance, with some balconies enclosed and some not, and different architectural treatments given sway. It could very well harm or destroy the symmetry and attractiveness of the building as a whole. Regardless, this is not our problem. The unit owners have clearly delegated this discretion and authority to their elected Board of Directors. If they are aggrieved, they can make their views known to their Board of Direc-

61. No. 48301 (Va. Cir. Ct. 1976).

62. 270 So. 2d 413 (1972).

63. No. 76-7912 (Fla. Cir. Ct. 1977).

tors and obtain redress, or else, replace the Board according to the By-laws.⁶⁴

Broad language that a court will not substitute its judgment for that of an association's board of directors is clearly analogous to judicial opinions about administrative agencies. It is axiomatic in administrative law that overbroad judicial review would have the effect of substituting the judgment of a judge or jury and should be avoided. When courts acknowledge that they will not substitute their opinions for a community association's reasonable opinion, at least in those cases concerning approval or rejection of architectural changes, it appears that an association decision should not be taken lightly.

(ii) *Adoption of a Provision*. Several cases illustrate the situation where the association adopts a provision and a reviewing court limits the scope of its review to a determination of whether the association had abused its discretion.⁶⁵ Typically, these cases involve a question of the reasonableness of the adopted provision. For example, in *Hidden Harbour Estates, Inc. v. Norman*⁶⁶ the court of appeals isolated this issue, indicating that if "a rule is reasonable the association can adopt it; if not, it cannot."⁶⁷ This is similar to the decision of a Missouri court⁶⁸ in a case about whether a condominium association's board of directors had the right to install locks on doors providing entry to common passageways of the condominium building. The association's asserted right derived from a by-law provision granting the association board the power to adopt reasonable rules. The court acknowledged that "in reviewing the action of the board in this case, we believe the standard to be applied is reasonableness."⁶⁹ Again, as in administrative law cases, the focus of review was whether the association acted to

64. 270 So. 2d at 417.

65. See *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180 (Fla. Dist. Ct. App. 1975) and *Ryan v. Baptiste*, 565 S.W.2d 196 (Mo. Ct. App. 1978). See also *Seagate v. Duffy*, 330 So. 2d 484 (Fla. 1977).

66. 309 So. 2d 180 (Fla. Dist. Ct. App. 1975).

67. *Id.* at 182.

68. *Ryan v. Baptiste*, 565 S.W.2d 196 (Mo. Ct. App. 1978).

69. *Id.* at 198. The court also noted:

The Board of Managers of Burtonwood is the designated decision-making body of the condominium association and exercises broad discretion in the maintenance and operation of the development. Nevertheless, the Board is not at liberty to promulgate arbitrary and capricious rules which bear no relationship to the health, happiness and enjoyment of the unit owners.

Id.

adopt its policy in accordance with a standard and, impliedly, whether that standard was abused.

(iii) *Constitutional Rights*. The last question for a court to employ in review of a community association's decision, if the principles of review of an administrative agency's decision were applied by analogy, is whether the community association acted arbitrarily or capriciously with regard to an individual's constitutional rights. This question should be asked where, for example, association provisions are enforced against a violator without his actual or constructive notice or where there was enforcement of undistributed or unpublished rules or architectural covenants without any understandable standards.

Many courts limited the scope of their review of an association's internal dispute-resolution to the three basic questions mentioned above; namely, the three questions encountered in judicial review of administrative agency decisions. While this position has not been judicially formalized by comparing a community association with an administrative agency, it nevertheless is intriguing to note the analogous patterns of review in an administrative agency and a community association. Taking into consideration the initial analogy and noting the similarity of review afforded agency and association decisions, one can realistically expect some further judicial clarification of the scope of review of a community association's dispute-resolution action. Such judicial clarification may be premised upon precedent from the administrative law area.⁷⁰ This could facilitate internal resolution of disputes by furnishing the association a reliable expectation as to when and how much judicial review of an association decision there will be.

2. *External Mechanisms*

Aside from the potential for resolving disputes internally, thus precluding litigation, community associations show how external dispute resolution mechanisms short of litigation could be employed. Two types of external mechanisms are apparent.

70. Review of decisions by organizations analogous to an administrative agency is subject to a similar scope of review. *See, e.g.* *Kirton v. Biggers*, 135 Ga. App. 416, 419, 218 S.E.2d 113, 116 (1975), wherein the court stated:

As long as no abuse of...discretion (by the county commissioners) is shown, this court should not substitute its findings of facts or construction of the evidence for that of the governmental body...Although the county board of commissioners is not an "agency" as defined (under state law)...nevertheless, the scope and criteria of judicial review of such body's decisions is closely analogous to that of an "agency...."

a. *State Established Mechanisms.* Once such mechanism is provided where a state sets up an arbitration-type process. Such a process has been employed in Florida for the past two years. Section 718-501 of the Florida Statutes relating to condominiums establishes an advisory board within the "Division of Florida Land Sales and Condominiums."⁷¹ This board was established, among other reasons, for the purpose of providing a means of arbitration of disputes between individual condominium owners and the community association. The board consists of owner and developer representatives. Each existing residential unit contributes one dollar per year to fund the board. Additionally, upon the first sale of a unit, a ten-dollar assessment is collected to fund the board. The funds go into a trust fund and are not directly available for operational expenses. According to some commentators, this has created severe personnel shortages at the advisory board.⁷² In a recent count, the advisory board was shown to have a backlog of one thousand cases on its calendar because of personnel shortages.

Many of the disputes submitted to the advisory board involve situations where the association is still controlled by the developer. Often, however, issues are presented concerning disputes between a unit owner and the association or management decision.

Because of case backlogs and the still persistent problem of the time it takes to resolve a complaint, several suggestions have emerged as to how to improve the Florida arbitration procedure. Senate Bill 305⁷³ and House Bill 332,⁷⁴ proposed by two Florida legislatures, would have allowed the advisory board to employ hearing officers to assist in the arbitration procedure. The proposed bills would subject hearing officers to the Florida Administrative Procedures Act. Strict control over the taking of testimony and the finding of law and fact would have been required. Under the bills, the advisory board would have been empowered to modify any legal conclusions of the hearing officers. The board's review power over fact findings would have been more restricted, however. By statute, advisory board decisions would not have been binding upon the parties; the issue still could have been presented to a court for its review in a full trial.

Even though the two Florida bills died in committee,⁷⁵ the arbitration provisions of these two bills were added to House Bill 307 which was approved

71. FLA STAT ANN. § 718.501 (West Supp. 1978).

72. See COMMUNITY ASS'N L. REP 1 (May 1978).

73. FLA S. 305 (1978).

74. FLA H. R. 332 (1978).

75. See COMMUNITY ASS'N L. REP 8 (September 1978).

by the Florida governor in 1978.⁷⁶ This bill expands the power of the State Condominium Advisory Board by giving it the authority to utilize hearing officers to resolve disputes between the condominium association and individual unit owners.

The State of Hawaii similarly introduced Senate Bill 1554-78⁷⁷ and House Bill 3087-78,⁷⁸ which would amend Section 514-200 of the Hawaiiin "Horizontal Properties Regime Act." The amendment essentially provides for a grievance committee of the board of directors or a grievance procedure involving the managing agent through which apartment owners could regularly seek remedies or solutions to problems beyond the scope of the powers of the resident manager to immediately solve.⁷⁹ An appeals mechanism is established for the aggrieved party to seek review of a decision. The Hawaiiin Condominium Commission would review the decision. The bill states that it does not create, however, an exclusive remedy or establish a prerequisite to the pursuit of other available remedies.

From the Florida and Hawaii proposals, it is obvious that some states are interested in resolving community association disputes without litigation. While there is no track record for these type mechanisms, aside from the Florida experience, burdened with inadequate funding, it is at least clear that dispute resolution in a community association is an issue in which state legislatures are beginning to show some interest.

It would seem that the use of a legislative arbitration procedure might be premature since community associations, themselves, have not yet fully matured. The nation's community associations are now beginning to take upon themselves, as opposed to the developer, the administration of the association.

A prime benefit from these community associations is that the community is self-regulated through its recorded covenants. While several standards similar to those applicable to municipalities are most probably applicable to the community association,⁸⁰ it is questionable whether a state-legislated arbitration procedure would be beneficial. Given the opportunity to resolve disputes internally, many associations have been able to accommodate the needs of the community.⁸¹ While there are several examples of the need to

76. *Id.*

77. HAWAII S. 1554-78 (1978).

78. HAWAII H. R. 3087-78 (1978).

79. See COMMUNITY Ass'n L. REP. 5 (1978).

80. See text accompanying notes 25-28 & 30-31 *supra*.

81. This observation is based on the personal experience of the author in representing community associations.

resort to a court for dispute resolution, there are a myriad of disputes which have been resolved in community associations without resort to courts. Establishing a formalized, legislated system of arbitration could seriously undercut one of the advantages of a community association; that is, being a private community restricted by private residential covenants. In this vein, judicially established precedent concerning internal due process and the timing and scope of judicial review could establish an internal dispute resolution mechanism comparable to the Florida or Hawaii external mechanisms without sacrificing the private nature of the community.

b. *Privately Established Mechanisms.* A second external alternative for community association dispute resolution might well be use of a procedure similar to that increasingly being employed by municipalities throughout the country for dispute resolution of "minor offenses." One such program is the American Arbitration Association's Community Dispute Service in Rochester, New York.⁸² This service has been provided by the American Arbitration Association to divert minor disputes away from the courts, and is typical of several existing informal private mechanisms employing mediation and arbitration. These mechanisms are inexpensive, fair and prompt.

The prime purpose of this type of service is to mediate and, if unsuccessful, arbitrate a dispute. Usually, under the existing programs, cases are referred from the local courts.⁸³ The mediator, a layman or an attorney, but not a judge, listens to both sides of a dispute. In many cases under the present American Arbitration Community Dispute procedure, the mediator talks to the conflicting parties separately to determine what kind of settlement they might accept. The goal is to have the parties reach an agreement with which both sides are comfortable. In the event mediation is unsuccessful, generally the parties agree to have the mediator act as an arbitrator. The director of the Rochester program views this program as one especially useful in handling cases involving a problem between people who already know each other, and he estimates ninety percent of the Rochester cases involve an ongoing relationship.⁸⁴

A private-type mediation or arbitration program seems more amenable than a state legislated one to use in a community association because of the possible adverse consequences to the private community once it is subjected to a governmentally supervised program. Despite this, however, a privately arbitrated resolution of several types of community association issues might

82. *Community Dispute Services, Designed to Settle Personal Disagreements Quickly, Are Expanding*, Wall St.J., Oct. 27, 1978, at 48, col. 4.

83. *Id.* at col. 1-2.

84. *Id.*

not be appropriate. For example, in architectural violation cases, why would an arbitrator's decision about the aesthetic appropriateness of proposed change be any more reasoned or "valid" than a decision made by those people who actually live in the community? Why would an arbitrator be better qualified than the people who live in the community to resolve issues involving the timing or type of maintenance to be performed on the common property as in the case of *Country Club*?

In both these type situations, or in other situations involving association discretion, the association's elected officials are the proper parties to exercise their sound business discretion. This, however, would not necessarily mean that other issues might not be amenable to private arbitration. For example, a question concerning the association's authority to act could be an appropriate question to arbitrate. Interpretation of covenant authority, however, should not be left to those unfamiliar with community association principles or law. Presently, in this relatively new field, there are not many versed in its intricacies.

Even if certain association issues might be appropriately arbitrated, binding arbitration may be unsuitable in a community association. It might leave both sides unhappy to impose a third party's decision on neighbors who must interact in order for the community association to operate effectively. Alternatively, as in the case of the Boston Urban Court Program, mediation is suitable in a community association because the association and its members would resolve their disputes.

IV. CONCLUSION

Even though the historical record of homeowner operation of the modern-day community association is short, it already is clear that the potential for interpersonal conflict within these associations is great. Some community association disputes inevitably will wind up in court. Judicial involvement in these cases, therefore, poses a prime opportunity for the courts to create justifiable and reasoned precedent to assist associations in resolving their disputes without continued litigation. Giving deference to the reasoned decisions of elected association representatives by limiting review of official decisions to questions of power, abuse of power or discretion, and protection of constitutional rights, should be a first step by the judiciary. Likewise, courts should refrain from reviewing community association disputes until the association has attempted resolution internally. This internal process should include a hearing with at least minimal due process protection. Coupling these principles with the legislated clean-up of problem provisions in condominium statutes likewise would assist dispute resolution. Lastly, a profes-

sional understanding by those working with community associations that the community association and its membership interest are collective could be the stepping stone to allowing the people themselves to arrive at reasoned, meditated resolutions to their community association disputes.

