

COMMON INTEREST COMMUNITIES: EVOLUTION AND REINVENTION

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I. INTRODUCTION

Nothing will ever be attempted if all possible objections must first be overcome. Samuel Johnson

Blame it on Disney. The nature of planned communities¹ has changed, and each word in the term “common interest community”² has gained new meaning. The development industry and professionals supporting it seek to “build community”³ through creation of “social infrastructure.”⁴ The community association⁵

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1. Lloyd Bookout, Jr. defines a planned unit development as “a land development project that 1) is planned as an entity, 2) groups dwelling units into clusters, 3) allows an appreciable amount of land for open space, 4) mixes housing types and land uses, and 5) preserves useful natural resources.” LLOYD BOOKOUT, JR., *RESIDENTIAL DEVELOPMENT HANDBOOK* 144 (2d. ed. 1990).

2. See UNIF. COMMON INTEREST OWNERSHIP ACT § 1-103 (1982) (defining “common interest community”) [hereinafter UCIOA]; RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.2 (Council Draft No. 8, 1997) [hereinafter RESTATEMENT]. Common interest communities can be created expressly or by implication. The essential elements are sharing of benefits and of responsibility. See, e.g., *Citizens for Covenant Compliance v. Anderson*, 906 P.2d 1314, 1316 (Cal. 1995) (noting, “Planned communities have developed to regulate the relationships between neighbors so all may enjoy the reasonable use of their property.”); *Perry v. Bridgetown Community Ass’n, Inc.*, 486 So. 2d 1230, 1233 (Miss. 1986) (noting the diversity in land use as society has become more complex); *Lake Tishomingo Property Owners Ass’n v. Cronin*, 679 S.W.2d 852, 856 (Mo. 1984) (determining that a common interest community can be created by implication).

3. See generally John T. Martin, *Building “Community,”* URB. LAND, Mar. 1996, at 28 (noting that many homeowners feel that the surrounding community is far more important than the house itself).

4. See generally LLOYD BOOKOUT, JR., *TRENDS AND INNOVATIONS FOR MASTER PLANNED COMMUNITIES* (1998) (discussing the trend among developers of planned communities to emphasize community). A ULI-sponsored workshop, “Developing Master-Planned Resort Communities - 2000 and Beyond,” held in January, 1997, dealt with community building.

5. “The term ‘community association’ is increasingly used as a generic term inclusive of all forms of housing that require a mandatory membership association.” WAYNE S. HYATT, *CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW* § 1.05(a)(1) (2d ed. 1988) [hereinaf-

also has new purposes and responsibilities and, consequently, is evolving in several significant ways. Many quite correctly credit Disney Development Company and its common interest community, Celebration,⁶ with beginning this positive evolutionary phase and its emphasis upon a genuine, active community. As other forward-looking, creative developers⁷ build upon that project's experience, the evolution accelerates.

The response from scholars and thoughtful practitioners, however, has not kept pace with the acceleration. In fact, one commentator has observed that one reason that community governance structures may have fallen short of their potential is that "academics have not addressed the subject in earnest."⁸ Be that as it may, the subject has not received the depth of coverage in a fully informed manner that is required to assure that the legal evolution will keep pace with the practical evolution.

The concentration on communitarian,⁹ liberal,¹⁰ economic,¹¹

ter HYATT]. C. James Dowden stated the following regarding the term community association:

This term will be used generically to refer to all automatic membership owner associations in real estate developments. Inasmuch as all automatic membership owner's associations are organized and operated in a similar fashion and perform the same basic functions, this term is used to describe all such associations. Increasingly, the term *community association* is being accepted in the development field. The community association is distinguished from the voluntary, civic, or club type of association by the provision for mandatory membership which is a part of the owner's deed.

C. JAMES DOWDEN, URB. LAND INST. AND COMMUNITY ASS'N INST., CREATING A COMMUNITY ASSOCIATION: THE DEVELOPER'S ROLE IN CONDOMINIUM AND HOMEOWNER ASSOCIATIONS 1 (2d rev. ed. 1976).

6. The planning process for Celebration took over eight years during which Disney obtained input from various sources to determine Celebration's focus: health, education, technology, place, and community.

7. DC Ranch, L.L.C., is developing DC Ranch in Scottsdale, Arizona. See *infra* note 85 and accompanying text for a discussion of DC Ranch. DMB Ladera, L.L.C., and Rancho Mission Viejo, L.L.C., are developing Ladera at Rancho Mission Viejo in San Juan Capistrano, California. Other developments will be used in the course of this article to illustrate the common interest community trend and its application. Most developments are in the formation stage, but some are in operation. Some, such as Summerlin, Woodbridge, Rancho Santa Margarita, and the Del Webb Sun Cities, have many community attributes and have contributed significantly to the "idea pool."

8. EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 140 (1994).

9. See, e.g., Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 23 (1989) (asserting that communitarian theory argues that collective social entities serve as the main sources of obligation and value).

10. See generally Frank I. Michelman, *Universal Resident Suffrage: A Liberal Defense*, 130 U. PA. L. REV. 1581 (1982) (arguing for a liberal analysis in community association governance).

11. Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L.

or other theories of interpretation or analysis¹² all serve a purpose; however, most analyses have concentrated on an important but limited issue of the right of the individual within the group. Analysts miss the essential point: community association law is a *sui generis*,¹³ essentially quite new, and predominately judge-made law that is itself evolving. The evolution must keep pace with the industrial evolution and must be multidimensional. Scholarly participation should seek suggested lines of analysis and pragmatic responses and identify some of the challenges.

These issues are significant far beyond the real estate industry and the legal community that supports the real estate industry. As community associations reach beyond their geographic boundaries to become more involved in the broader community, as they perform more community services for their own members, and as they build public and private alliances to provide many different services that were formerly public services,¹⁴ the legal, political,¹⁵ social,¹⁶ and economic¹⁷ consequences and effects increase

REV. 1519, 1539 (1982) (discussing the economic theory of voting rights under homeowners' association membership).

12. Much commentary is of a social-political orientation. Some is well-founded in factual and legal understanding. Some is not. Some has been a by-product of legal studies movements and philosophical approaches to property structures. All commentary has served a purpose in the discussion.

13. *Sui generis* is defined as the only one "of its own kind or class." BLACK'S LAW DICTIONARY 1434 (6th ed. 1990).

14. Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 644 (1993). See RESTATEMENT, *supra* note 2, § 6.6(b) (giving the association the power to grant easements and licenses).

15. See Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41, 57 (1995) (discussing the political effects of privatization of municipal services); George W. Liebmann, *Devolution of Power to Community and Block Associations*, 25 URB. LAW. 335, 343 (1993) (discussing the political power shift to communities).

16. "Designers of American [common interest developments] dwell on the physical plan but slight the social and economic structure of the community . . . and do not create real, self-sufficient communities with a full economic base." MCKENZIE, *supra* note 8, at 18. See also *Murphy v. Timber Trace Ass'n*, 779 S.W.2d 603, 608 (Mo. Ct. App. 1989) (holding in favor of a restrictive covenant because the court thought that "the public policy the Uniform Condominium Act enacts [is] in favor of the social benefits of planned community developments"); Justin D. Cummins, *Recasting Fair Share: Toward Effective Housing Law and Principled Social Policy*, 14 LAW & INEQ. J. 339, 347-48 (1996) (showing that community associations can stabilize and mobilize social resources for advancement, but people in low-income, central-city communities are socially isolated from the community association); William C. Jensen & Cynthia L. McNeill, *Colorado Common Interest Ownership Act - How it is Doing*, 25 COLO. LAW. 17, 17-18 (1996) (showing that the unit owner's association is responsible for the "social cohesiveness of its owners").

17. See Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273, 297 (1997) (noting that residents of community associations are typically less economically diverse than the municipality in

and implicate corporate,¹⁸ municipal,¹⁹ constitutional,²⁰ and other areas of law as well as social and public policy concerns.²¹

which the community association is located, making a consensus on economic decisions easier to achieve). *See also* Cummins, *supra* note 16, at 347-48 (showing that community associations can also stabilize and mobilize economic resources for advancement); Marvin J. Nodiff, *Decision-Making in the Community Association: Do the Old Rules Still Apply?*, 52 J. MO. B. 141, (1996) (noting that community association board functions “involve business decisions related to economic choices”).

18. *See* Wayne S. Hyatt, *The Business Judgment Rule and Community Associations: Recasting the Imperfect Analogy*, 1 J. COMMUNITY ASS'N L. 2, 3-11 (1998) (discussing the applicability of the business judgment rule in community associations). *See also* Constance R. Boken, *Developer's Fiduciary Duty to Condominium Associations*, 45 S.C. L. REV. 195, 198 (1993) (describing that states often look to corporate law to determine the exact fiduciary relationship between a developer and a condominium association); Susan F. French, *Tradition and Innovation in the New Restatement of Servitude: A Report From Midpoint*, 27 CONN. L. REV. 119, 128-29 (1994) (noting that community associations have no traditional body of law governing them; thus, corporate, municipal, and trust law must be applied by analogy). *See generally*, *In re Croton River Club, Inc.*, 52 F.3d 41 (2d Cir. 1994) (discussing the business judgment rule).

19. *See* *Johnson v. Keith*, 331 N.E.2d 879, 882 (Mass. 1975) (holding that restrictions in by-laws and master deed of condominium association resemble municipal by-laws more than deed restrictions); French, *supra* note 18, at 127 (noting that because community associations have no traditional body of law governing them the courts must apply corporate, municipal, and trust law by analogy); Jeffrey A. Goldberg, *Community Associations Use Restrictions: Applying the Business Judgment Doctrine*, 64 CHI.-KENT L. REV. 653, 661 (1988) (contending that if an entity takes on roles of a municipality, that entity should be regulated by municipal law); Brian L. Weakland, *Condominium Associations: Living Under the Due Process Shadow*, 13 PEPP. L. REV. 297, 310-20 (1986) (comparing municipal voting rights to condominium association voting rights).

20. *See generally*, Katharine Rosenberry, *The Application of Federal and State Constitutions to Condominiums, Cooperatives and Planned Developments*, 19 REAL PROP. PROB. & TR. J. 1, 20 (1984) (discussing applying constitutional law to community associations); James W. Torke, *What Price Belonging: An Essay on Groups, Community and the Constitution*, 24 IND. L. REV. 1 (1990) (relating community association and constitutional issues).

21. Public policy concerns are discussed in several settings throughout this article. The term “concern” should not be misconstrued. There are negative arguments regarding community association membership. One argument is the loss of citizenship rights and activities. *See* Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: “The State Will Make The Call,”* 30 VAL. U. L. REV. 509, 521 (1996) (stating, “Today’s private communities and the rules they operate under may challenge this traditional commitment to individual rights and open space embedded in our legal tradition. . . . An equally important impact of these private communities is the reduction and gradual elimination of traditional public areas of uninhibited exchange.”) Another negative argument is the argument against gates and exclusion. David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 763 (1995). *But see* Jill Stewart, *The Next Eden*, CAL. LAW., Nov. 1996, at 39 (stating the contrary argument that the majority of gated communities have the benign

As the community association evolves, it confronts the challenges of “privatopia”²² and privatization.²³ The first concept is a pejorative term and is applied to community associations in support of the argument that they have become private utopias of privilege and exclusive restrictiveness.²⁴ In other words, commu-

purpose of building community).

There are also positive arguments in support of community association membership. One argument is that community living provides affordable housing. See *Lauriedale Associates, Ltd. v. Wilson*, 7 Cal. App. 4th 1439, 1442 (Cal. Ct. App. 1992) (discussing community housing); *Markey v. Wolf*, 607 A.2d 82, 101 (Ct. Spec. App. 1992) (allowing a developer to build low cost housing in an exclusive subdivision); *New Jersey State League of Municipalities v. State*, 608 A.2d 965, 972 (N.J. Super. Ct. App. Div. 1992) (upholding an act that reduced the expense of condominium ownership). Another argument favoring community developments is their ability to deliver services local governments cannot or will not deliver.

One of the more important factors responsible for this growth is that many local government officials now view PUD and condominium developments as the only viable housing alternative available because they recognize that they do not have the financial resources available to provide the infrastructure necessary to make the project feasible.

ROBERT JAY DILGER, *NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE* 62 (1992). Another view is as follows:

Developers, homeowners, and governments have worked together to increase the number of RCAs [residential community association]. They each get something out of it.

The developers are able to produce more attractive and marketable homes, which include a livable environment, not just a house. The RCA also gives the developer options to cut costs, work within a more flexible regulatory framework, and exit the project without a continuing responsibility for maintenance and management.

The purchasers and homeowners receive a range of choices in communities and service packages. They also benefit from any cost savings that the developer is able to capture through regulatory flexibility. Thus, goals for meeting the needs of special market niches and keeping housing affordable are facilitated by RCA development.

Local government gets developments that are significantly self-financing, often have additional amenities, and add to the local tax base. At the same time, RCA development relieves local government and, thereby, existing taxpayers of much of the responsibility for financing infrastructure and services.

RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 4, 5 (1989).

22. See generally, MCKENZIE, *supra* note 8 (discussing privatopia).

23. Rishikof & Wohl, *supra* note 21, at 510. See also Robert H. Nelson, *The Privatization of Local Government: From Zoning to RCAs*, in *RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM?*, *supra* note 21, at 47 (discussing privatization by residential community associations); DILGER, *supra* note 21, at 9 (stating that “in all probability, RCAs account for the most significant privatization of public services in recent times”).

24. Privatopia means different things in different contexts and to different people. See *infra* notes 282-89 for a detailed discussion of privatopia.

nity associations are alleged to be anti-community.²⁵ There are and have been justifications for that argument. Privatization reflects a growing trend: local government imposing responsibility for public services and facilities upon the private sector.²⁶ Taken together, privatopia and privatization help frame the need for evolution and reinvention.

A. *The Need for Reinvention*

Facing community associations are two challenges calling for change. The first challenge is to reconcile or to resolve the community associations' negative aspects. This requires a candid admission that negative aspects exist.²⁷ The second challenge is to anticipate the future needs of community associations and to develop responses to those needs. Inherent in such an analysis is a fair amount of intellectual risk-taking because the future is uncertain and the primary players in the game are risk-averse attorneys and community managers. Also required is acknowledgment that community association law as it predominately is practiced may buckle under its own success because that law has been almost exclusively regulatory and controlling. There is a limit to the acceptable extent of control and to its productive results.²⁸

As unprecedented numbers of Americans look to common interest communities for services traditionally supplied by private government, many will be irritated by restrictions on property

25. The definition of anti-community and how to create and sustain it varies with one's own biases, expectations, and belief systems. Some may expect too much, others too little. This article discusses community and seeks to develop a working definition. In so doing, the author is more influenced by what is in existence than by critical theorists, though they are certainly neither ignored nor dismissed.

26. See *infra* notes 282-89 and accompanying text for a detailed discussion of privatization. Professor McKenzie in his remarks following the author's presentation at the Kratovil Lecture made an interesting observation that community associations originally were a vehicle for privatization and that they now are again leading the way in the second phase. Remarks in response, Wayne S. Hyatt, Remarks at The Robert Kratovil Memorial Seminar in Real Estate Law, J. Marshall L. School, Oct. 15, 1997.

27. Too many leaders in the industry have for too long resisted this admission and have refused to engage in constructive dialogue with those who assert otherwise. It is time, however to admit the negative aspects of community associations do exist so that meaningful conversation and change can occur.

28. See generally James L. Winokur, *Choice, Consent, and Citizenship in Common Interest Communities*, in COMMON INTEREST COMMUNITIES 87 (Carol J. Barton & Stephen E. Silverman eds. 1994) (discussing generally community association law); Stephen E. Silverman & Carol J. Barton, *Shared Premises: Community and Conflict in the Common Interest Development*, in COMMON INTEREST COMMUNITIES, *supra* at 129. It is appropriate to note that today Professor Winokur may not hold as tightly to some of the positions set forth in this much earlier article.

rights that the government traditionally protects. Residents will expect rights and processes as experienced in the public realm. As community associations seek to create and to maintain community, there will be a need to balance (a word not frequently used in today's political or social debates) the interests of the individual and the group. "Intergenerational insensitivity"²⁹ exhibited by association boards in decision making must give way. Means must be found to reconcile the effects of the "compression factor" in neighborhood or community development. In earlier years, neighborhoods developed over a period of many years; traditions reflected decades of community life. Now the effort is to do it all in a selling season, thus compressing the time available to create community.

Historically there has been a "total disconnect between the people who design and build [common interest] communities and those who manage and sustain communities over the long term."³⁰ As noted below, this separation is changing. The developer's perspective is also changing. Until recently, most developers had seen the community association as a necessary evil, fraught with potential liability and expense. More developers now view the community association opportunistically as the "engine" and platform for social, recreational, and civic activities.³¹

In many instances, community associations are enclaves of wealth and privilege, but they may also be enclaves of diversity and middle class life and values. They are becoming partners in alliances with other associations, tax exempt organizations, schools, churches, and other public and private entities for building and sustaining community.³²

It would be wrong and intellectually dishonest to assert, however, that all is paradise in privatopia. It is not. Perhaps Professor McKenzie, in some instances, paints with an overly broad, generalizing brush, but he is correct when he asserts that "[t]he CID [common interest development] resident must choose between conformity and conflict."³³ The conflict is heightened as a result of the preoccupation with "rights" and the failure to understand and appreciate the benefits that can come from the group setting and

29. This term was coined by Charles Fraser and used in a conversation with the author. Interview with Charles Fraser, President of Charles Fraser Co., Winston, Ga. (July 26, 1997) (notes on file with the author).

30. Letter from Brent Herrington, Celebration's community manager and President of the CAI Research Foundation, to Charles Fraser and to the author (July 17, 1997) (on file with the author).

31. *Id.*

32. *Id.* The author, his firm, and other leading community association practitioners are involved with numerous similar projects throughout the United States.

33. MCKENZIE, *supra* note 8, at 19.

from sharing.³⁴

There are problems and there are opportunities. There is a genuine need for honest questioning and realistic responses. The academic and the practitioner must both participate in the discussion and in creating a range of options to meet the challenge of evolution and reinvention, ever mindful that just as communities and people in them will vary, so will the challenges, ills, and solutions. Just as all criticisms do not fit all communities, all innovations will not work in all communities.

The criticisms of common interest communities reflect certain basic arguments or perceptions. It is helpful to identify them. First, there is the argument that current concepts do not further community. The compression issue discussed above is part of that argument, but more serious issues exist as well. The common interest community as an elite enclave behind gates excluding the public at large is a persistent depiction.³⁵ There are concerns about diversity³⁶ and disparity in services.³⁷ Most significantly, perhaps, is that there is no consensus on what is meant by “community” with most literature addressing the community association as an “illiberal” undemocratic regime.³⁸ Such rhetoric may warm but does not illuminate the debate.

Second, there is the argument that common interest communities are coercive, and not voluntary. This argument contends that because the range of housing choices is limited, individuals

34. Todd Brower, *Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory, in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 221 (1992). “Like other private organizations, common interest developments explicitly create an environment separate from society at large. Unlike limited purpose organizations such as labor unions, corporations, and social clubs, however, residential associations serve a wide range of purposes and goals.” *Id.* Clayton Gillette stated:

Residential associations that are occupied by homogeneous populations (typically by those best off within the society) and whose members eschew the company of outsiders may be considered the archetypal representatives of self-interested liberalism. But if residents of associations enjoy interactions with others at work, in social contexts, or in politics (to name some alternatives), then the fact that they seek a more private preserve for interactions with a more homogeneous population does not necessarily translate into a narrowly self-interested lifestyle.

Clayton P. Gillette, *Mediating Institutions: Beyond the Public/Private Distinction: Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1378-79 (1994).

35. Kennedy, *supra* note 21 at 767.

36. See generally Rishikof & Wohl, *supra* note 21, at 510-20 (stating the case with the authorities it cites in Sections I and II). The Brower article also argues the case but is much more polemic in its use of authority and “fact” to support its position. Brower, *supra* note 34, at 216-23.

37. Rishikof & Wohl, *supra* note 21, at 515-16.

38. Note, *The Rule of Law in Residential Associations*, 99 HARV. L. REV. 472, 473 (1985).

become subject to community association governance by necessity rather than by fully informed choice.³⁹ This argument has been significant for many years and is closely tied to the next theme, that of the individual. In approaching the issue of coercion or free choice, one is confronted first by the difficulty of adequately confirming or denying the premise. There are many markets dominated by some form of common interest community development.⁴⁰ However, do people buy in these developments because they must, or do developers build them because that is what people want? In the final analysis, does not the housing product, its price, and value drive the decision to purchase?

It seems a bootstrap argument to assert that because common interest community housing has more in facilities, services, value enhancement and protection, it is coercive. The second question in this theme is “so what?” Assuming that there is an element of coercion, the challenge is to determine the effect. A more serious issue is the question of the degree of the buyer’s comprehension of the effects of the governance structure and the nature of that structure.⁴¹ Coercion becomes more of a polemic than a defining consideration.⁴²

The third theme is that of the individual and the group. As noted, this theme is very much related to the preceding theme. At the root of this theme is society’s preoccupation with the individual’s “rights” and society’s disregard for the rights of the group.⁴³ While most of the writings on this issue focus on the larger community,⁴⁴ many of the writings have relevance to the current dis-

39. *Id.* at 481-82. Though this Note at Harvard first made the coercion argument, it has had disciples. See JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 936-37 (3d. ed. 1993) (endorsing the coercion argument).

40. Markets dominated by some form of common interest community development tend to be in the sunbelt states and California.

41. DILGER, *supra* note 21, at 35. Logic and human experience support the contention that the understanding level is low. At the same time, it is important to keep in mind that when people buy, they are making a housing choice not a governance choice.

42. Other scholars simply reject this coercion idea: “[M]ore precisely, a decision to join an association is as voluntary as a human decision can be.” Ellickson, *supra* note 11, at 1523 n.20.

43. One observer stated overly broadly: “Nonconformists cannot join and dissenting members face various legal penalties when they give up their homes and leave the association.” *The Rule of Law in Residential Associations*, *supra* note 38, at 474. See generally Armand Arabian, *Condos, Cats, and CC&Rs: Invasion of the Castle Common*, 23 PEPP. L. REV. 1 (1995).

44. AMITAI ETZIONI, THE SPIRIT OF COMMUNITY - THE REINVENTION OF AMERICAN SOCIETY 3 (1994). “This paradox highlights a major aspect of contemporary American civic culture: a strong sense of entitlement - that is, a demand that the community provide more services and strongly uphold rights-coupled with a rather weak sense of obligation to the local and national community.” *Id.*

cussion. The challenge is to make the “little platoons”⁴⁵ all work for a mutual benefit. Another aspect of this theme is that of expectations. One of the core sources of the individual/group divergence is the lack of understanding of the community association and resulting expectations that are inconsistent with its governance reality. Much of the blame for this goes to the developer-builder-seller and her attorney. Some of the blame, however, must be shared by the management and brokerage communities, some rests with societal norms,⁴⁶ and some rests with the individual.

Fourth, it should require no citation in support of the proposition that community association law practitioners are change-averse and precedent-bound. There are, however, citations and experiences in support of this proposition.⁴⁷ Much enforcement litigation is the result of the unwillingness of the association manager and attorney to refrain from enforcing association rules for fear of setting “a precedent.”⁴⁸ The result often is an overly restrictive environment that the basic governance structure does not require.

Fifth, there is a perception of a limited “business” purpose for

45. The term “little platoons” comes from Edmund Burke: “To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections.” EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 59 (Anchor ed. 1973). It serves as the title for an interesting comparative look at the subject. GEORGE W. LIEBMANN, THE LITTLE PLATOONS: SUB-LOCAL GOVERNMENTS IN MODERN HISTORY (Praeger 1995).

46. See generally CHERYL RUSSELL, THE MASTER TREND: HOW THE BABY BOOM GENERATION IS REMAKING AMERICA (1993) (discussing changes in societal norms).

47. See MCKENZIE, *supra* note 8, at 131 (discussing the view held by many community association legal practitioners that “[r]ules must be enforced uniformly, promptly and firmly”); E. Richard Kennedy & Mark D. Imbriani, *The Rights of Tenants in Condominium and Homeowner Association Communities*, 174 N.J. LAW. 18, 22 (1996) (observing that practitioners representing a community association must abide by the restrictions imposed by the applicable law of that particular state regarding condominium associations); Nodiff, *supra* note 17, at 151 (noting that Missouri courts are cautious in inspecting factual questions under the existing reasonableness standard); J. Davis Ramsey, *Why New Jersey Needs the Uniform Common Interest Ownership Act*, 174 N.J. LAW. 31, 32 (1996) (relating the stunned reaction by community association law practitioners to a New Jersey case holding that a condominium association lacked the power to impose fines); James L. Winokur, *Ancient Strands Rewoven, or Fashioned Out of Whole Cloth?: First Impressions of the Emerging Restatement of Servitudes*, 27 CONN. L. REV. 131, 150 (1994) (noting that practitioners consider hard and fast community association rules to be “problematic”).

48. MCKENZIE, *supra* note 8, at 131. McKenzie uses the *ad hominem* argument that enforcement structures illustrate the “legalistic managerialism” prevalent in the industry. *Id.* It is a neat, apt phrase and regrettably is applicable too often to the legal profession; however, it is unfortunate and unfair as applied in this instance.

community associations. That purpose is seen as property management solely or property management and value protection. This perception is in part the result of early government-produced and required document⁴⁹ forms and in part the result of the nature of community development in its first 20 or so years.⁵⁰ The issue today is to address how these purposes are changing and the effect of that change.

The sixth theme deals with the association's structure and the potential for rigidity resulting from a corporate structure as opposed to a participatory democratic structure.⁵¹ There have long been discussions about the characterization of the community association⁵² and whether that characterization had an impact on the legal rules applicable to the association's or its board's decisions.⁵³ A question for the future is how to formulate a governance structure to minimize the negatives and to optimize the potential for community activities. One starting point might be to empower, not to impose.

Finances comprise a seventh theme. In the past, the association has paid its way by general or special assessments, most paid monthly, from the members.⁵⁴ In some cases, there are user fees

49. In February 1965, both the Federal Housing Administration (FHA) and Veterans Administration (VA) published Suggested Legal Documents for Planned Unit Developments (FHA Form 1400; VA Form 26-8200).

50. Brent Herrington classifies the progression in community design and marketing as:

Pre-1960s: "The House" (e.g., the floorplan, facade, etc.)

1960s and 1970s: "The Neighborhood Amenity" (e.g., community pool, golf course, etc.)

1980s and 1990s: "The Lifestyle" (e.g. gates, amenities packages, security, a respite from the outside world)

1990s to 2000s: "Community and Values" (e.g., our community, place, technology, health, education)

Herrington, *supra* note 30. See generally BOOKOUT, *supra* note 1, at 290-93 (providing an overview of community associations); J. ERIC SMART, RECREATIONAL DEVELOPMENT HANDBOOK (Urb. Land Inst. ed., 1981) (giving an informative and educational look at the evolution in the structure of community developments).

51. MCKENZIE, *supra* note 8, at 143. See also Curtis C. Sproul, *Is California's Mutual Benefit Corporation Law the Appropriate Domicile for Community Associations?*, 18 U.S.F. L. REV. 695 (1984) (ignoring the corporate rigidity issue in his defense of a corporate model, which is certainly worthy of consideration). See *infra* notes 204-37 and accompanying text for a discussion of the reasonableness standard as applied to community associations.

52. Hyatt & Stubblefield, *supra* note 14, at 623.

53. See generally HYATT, *supra* note 5, § 6.03(a) (discussing the general fiscal responsibilities of the board); ROBERT G. NATELSON, LAW OF PROPERTY OWNERS ASSOCIATIONS § 6.0 (1989); RESTATEMENT, *supra* note 2, § 6.5 (stating that a community association has the power to levy assessments in order to execute its functions).

54. See generally DAVID B. WOLFE ET AL., FINANCIAL MANAGEMENT OF CONDOMINIUM AND HOMEOWNERS' ASSOCIATIONS (Urb. Land Inst. & Com-

for particular services.⁵⁵ The question becomes whether these monetary sources are adequate for the future roles and activities of the evolving common interest community. There are new approaches,⁵⁶ and each approach raises its own set of legal issues.

Finally, the eighth theme is a complex theme involving the relationship between the community association and local government. There is a sub-theme implicit in the discussion concerning the potential for the community association in some larger common interest communities to become the surrogate or substitute for local government itself. That is the subject for another article. However, the very real issue of privatization affects the current discussion and is addressed below.⁵⁷ Both substitution of the community association for the government and privatization can have profound effects if the community association becomes the functional equivalent of the government with the attendant constitutional implications.⁵⁸

Municipal failure is, however, a most interesting sub-theme. This failure illustrates the result that when the "real government" cannot meet the needs of its citizens, those citizens undertake to

munity Ass'ns Inst. eds., 2d rev. ed. 1985) (discussing association assessments).

55. A typical provision might state:

(a) *Neighborhoods*. Any Neighborhood, acting either through a Neighborhood Committee elected as provided in Section 5.3 of the Bylaws or through a Neighborhood Association, if any, may request that the Association provide a higher level of service than that which the Association generally provides to all Neighborhoods or may request that the Association provide special services for the benefit of Units in such Neighborhood. Upon the affirmative vote, written consent, or a combination thereof, of Owners of a majority of the Units within the Neighborhood, the Association shall provide the requested services; provided, however, the Board, in its sole discretion, may veto any such request by a Neighborhood.

The cost of such services requested by a Neighborhood and provided by the Association, which may include a reasonable administrative charge in such amount as the Board deems appropriate (provided any such administrative charge shall apply at a uniform rate per Unit to all Neighborhoods receiving the same service), shall be assessed against the benefited Units within such Neighborhood as a Neighborhood Assessment.

56. See *infra* notes 326-34 and accompanying text for a discussion of new approaches to funding.

57. See *infra* notes 282-89 and accompanying text for a discussion of the privatization of services.

58. See DILGER, *supra* note 21, at 63 (discussing privatization); Rishikof & Wohl, *supra* note 21, at 510 (discussing efforts to transform governmental functions to private concerns). A third article is far afield in its constitutional analysis: In asserting that community associations represent an instance in which "all attributes" of government are "performed by private actors," the author is clearly wrong. Mays, *supra* note 15, at 58. See also Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449, 456 (1988) (discussing privatization generally).

establish another level of government, either on their own or through the community developer. In the community association, the government is private and much more responsive to the needs and decisions of its members.⁵⁹

B. Purpose and Plan of the Article

The purpose of this article is to identify and to explore the potential for change and growth in community association law and practice in response to the forces and demands underlying the arguments and perceptions of common interest communities. The article seeks to articulate what may be, not just what is. At the same time, its arguments and contentions are rooted in experience and the appreciation that predictions must be given an opportunity to work. Addressing many criticisms and concerns, this article demonstrates that viable responses exist.

Certain basic guiding principles help frame this discussion. One principle is that the discussion and any resulting proposed courses of action should be theoretically sound and complete, yet non-legalistic. These courses of action must be well-premised in case and statutory law with regard to both problems and solutions. It is meaningless to hypothesize about ideas that clearly have no legal foundation. This maxim leaves room, however, for suggestions concerning the law's evolution.

Another principle is that the discussion must have a foundation in reality. The discussion must reflect the fact that evolution in community association formation and operation must not be so daring as to make developments unmarketable, nor should it be so complex as to make projects unmanageable. Moreover, the end product after evolution must be understandable by "ordinary people." Finally, evolution must produce a synergy between governance needs and governance capacity. An understanding of these issues and the applicable principles requires an appreciation for any new association roles and responsibilities, their nature, and how they arise. The basis of and authority for any new responsibilities can make a significant difference in the way the association responds, the way legal principles apply, and the way covenants are drafted.

First, this article examines briefly the historical context of the evolution in common interest governance structures. Common interest communities have evolved and there is much to be learned from the nature and the "why" of that evolution. Many of

59. Elizabeth Plater-Zyberk, notes that today's "metropolis needs a reformed hierarchy of government; state and municipal is not enough. Regional, municipal, local (community scale) [governments] may be more responsive to issues of environment, infrastructure, zoning, schools, etc." Interview with Elizabeth Plater-Zyberk, noted architect and a creator of Seaside, in Fla.

today's concerns are, perhaps, the result of the experience or lack of experience of those involved in the early creation and operation of community associations.⁶⁰ A historical perspective shows, first, that the common interest community movement has been part of American real estate far longer than most imagine; second, that it has been evolving through stages of design-development and governance changes; and third, that the law can and has evolved with the movement.⁶¹

Next, the article looks more closely at forces encouraging evolution, challenges impeding evolution, and some of the major legal issues awaiting resolution as part of that evolution. The article also examines the new responsibilities requiring the need for a re-engineering of the community association, the law of community associations, and the way that law is practiced and applied.

Finally, the article sets forth some suggestions as a blueprint for change. The objective is not only to make suggestions but to engage scholars and practitioners alike in constructive, creative dialogue seeking an array of theories and techniques that meet the needs of the common interest community of the future and that truly represent "community." Numerous footnotes contain discussion examples of drafting approaches that the author and his firm colleagues use⁶² to address subjects discussed in the text. Some of the suggestions in this article are intentionally provocative. All of these suggestions may not work and certainly will not work in all circumstances, but the discussion must begin.

60. See *infra* Part V.C for a discussion on restrictiveness.

61. See generally Paul S. Jacobsen, *Standing of Condominium Associations to Sue: One for All or All for One*, 13 *HAMLIN L. REV.* 15, 15-16 (1990) (relaying the evolution of the condominium association's ability to assert claims against various parties); Nodiff, *supra* note 17, at 141-42 (describing the evolution of law regarding the decision-making entity in a community association); James L. Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms under the Uniform Common Interest Ownership Act*, 27 *WAKE FOREST L. REV.* 353, 362 (1992) (depicting the evolution of community associations in regard to the association's ability to perfect liens for assessments).

62. Readers are cautioned that some sample document provisions are concepts-in-process and that others, having stood the test of time, are subject to revision, improvement, and tailoring. The author and his partners believe that the drafting process should be as dynamic as the documents and the communities themselves.

II. HISTORICAL CONTEXT OF COMMON INTEREST COMMUNITIES⁶³

A. *Evolution of Community Governance*

In their paper, *Community Builders and Community Associations: The Role of Real Estate Developers in Private Residential Governance*, Marc Weiss and John Watts divided the history of residential community associations into five historical periods: Origins (1830-1910), Emergence (1910-1935), Popularization (1935-1963), Expansion (1963-1973), and Restructuring (1973-1989).⁶⁴

Weiss and Watts note that during the Origins period, community associations did not exist as we know them today.⁶⁵ The Emergence period saw an increased demand for amenities in large-scale suburban subdivisions.⁶⁶ This led developers to establish homeowners' associations, although there was no standardization in formation or documentation.⁶⁷

During the Popularization period, homeowner associations moved toward standardization through efforts of the Community Builders Council of the Urban Land Institute (ULI) and the National Association of Home Builders (NAHB).⁶⁸ Concurrently, the Federal Housing Administration (FHA) promoted the use of deed restrictions in residential development which paved the way for homeowner associations to enforce the restrictions.⁶⁹

The FHA and ULI collaborated in promoting widespread use of community associations in Planned Unit Developments (PUDs) and condominiums (approved by the FHA in 1961) during the Expansion period.⁷⁰ Unfortunately, many small associations of this period were poorly organized.⁷¹

During the Restructuring period, developers recognized many

63. The author expresses his sincere appreciation to Christine Barsody, paralegal and research assistant, for her contribution to this historical overview.

64. Marc A. Weiss & John W. Watts, *Community Builders and Community Associations: The Role of Real Estate Developers in Private Residential Governance*, in *RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM?*, *supra* note 21, at 95, 97-98.

65. *Id.* at 98-99.

66. *Id.*

67. *Id.*

68. *Id.* at 99-100.

69. *Id.*

70. *Id.* at 101.

71. *Id.* Weiss and Watts note that developers during the Expansion period often stacked the transition board with supporters, thus prolonging the declarant's influence until well after the transfer point. *Id.* Even if owners achieved control of the board, most developers did not train or involve unit owners in governance. *Id.*

problems facing community associations and organized to resolve them. In 1973, NAHB, ULI and the United States League of Cities formed the Community Associations Institute (CAI), a trade organization which offers education, support, and resources to associations, managers, developers, and others in the community association field.⁷² Additionally, the FHA and the Veterans Administration (VA) also played a vital role in standardizing associations by insuring and guaranteeing mortgages.

There are two basic types of residential community associations: the homeowners' association and the condominium association.⁷³ Homeowners' associations are typically used in projects comprised of single-family detached or attached houses, in townhouse projects, or in cluster home projects. In a homeowners' association, the owner owns the lot and any improvements on it. The association owns and maintains the common area.

Condominium associations are enabled by state statutes. During the 1960s, the states and territories adopted condominium property acts primarily based on the FHA model statute and the initial Horizontal Act of Puerto Rico. These early, rudimentary statutes are known as "first generation" statutes and are still the statutory foundation in approximately half of the states.⁷⁴ In 1972, a commission met in Virginia to develop a condominium statute that sought a balance between developer needs and consumer protection. This began the era of the "second generation" condominium statutes.⁷⁵ Virginia, followed by Georgia and one or two other states, adopted second generation legislation, but the

72. See, e.g., COMMUNITY ASSOCIATION FACT BOOK (1993) (comprising a publication that is one of the many resources offered by CAI which includes basic facts and statistics about community associations in the United States).

73. The term "condominium" is, in reality, a descriptive "form of packaging" providing a form of ownership where the owner acquires title to a unit of a condominium, not title to the condominium. HYATT, *supra* note 5, § 105(b)(1), at 14. Specifically, the condominium form of ownership is based upon an underlying principle of shared ownership and responsibility, with each owner having a fee simple interest in a defined space and an assigned interest in common with all owners in the "common elements" of the condominium association. *Id.* Conversely, with regard to homeowner associations, the "common elements" in the association are owned by the association itself and not in common by the owners as in condominiums. *Id.* § 105(c)(1), at 20. Also, in a homeowners' association, the individual owner has title to a parcel of property, not a "space" or "unit" as in condominium associations. *Id.* § 105(c)(1), at 21.

74. See Robert G. Natelson, *Condominiums, Reform, and the Unit Ownership Act*, 58 MONT. L. REV. 495, 500-01 (1997) (noting that these "first generation statutes" are enabling acts and guaranteed validity of the drafters' product if they were followed; consequently, all 50 states have enacted condominium statutes).

75. James H. Jefferies, IV, *North Carolina Adopts the Uniform Condominium Act*, 66 N.C. L. REV. 199, 199 n.4 (1987) (showing that the "first generation" condominium statute "did not reflect the actual day-to-day experience of those who have contact with the condominium form of ownership").

real boom occurred with the adoption of the Uniform Condominium Act in 1977 by the National Conference of Commissioners on Uniform State Laws.⁷⁶

Governance of associations for large-scale residential projects evolved somewhat differently. Typically, these associations are structured in one of three ways: independent associations, umbrella associations, and single associations.⁷⁷ With an independent association, the project is divided into a series of housing groups, and a separate association is created for each group.

In the past, large-scale, multi-phased associations were often structured with a community-wide association which had responsibility for architectural control, open space management, and operation of amenities used by all owners. Individual associations were incorporated for each parcel and were responsible for financial management and maintenance for a particular parcel.

Recently, large residential communities have been structured under a single association. The association provides management and maintenance with a greater efficiency than can be provided under the umbrella structure.⁷⁸ In a single association structure, individual parcels are established as special assessment districts, and assessments are based on the cost of providing particular services to each parcel.⁷⁹ This change also reflects an evolution in governance. Community association structures have become more efficient and inclusive, much like consolidated local governments.⁸⁰ The new approach has alleviated a number of developmental and operational problems for developer and owner alike.

The primary reasons for the change in structure are economy of operation and avoiding the Balkanizing effect of separate small

76. UNIF. CONDOMINIUM ACT § 1-101 (1982) [hereinafter UCA]. The Act is now law, either in its original form or with substantial amendments, in 21 states.

77. See WAYNE S. HYATT, CONDOMINIUM AND HOME OWNER ASSOCIATIONS: A GUIDE TO THE DEVELOPMENT PROCESS §§ 5.07-.21 (1985) [hereinafter HYATT, GUIDE] (discussing the advantages and disadvantages of alternative governance structures). See also BOOKOUT, *supra* note 1, at 294-96 (discussing the advantages and disadvantages of alternative governance structures); DEAN SCHWANKE ET AL., RESORT DEVELOPMENT HANDBOOK 242 (Urb. Land Inst. ed. 1997) (comparing community association structures).

78. BOOKOUT, *supra* note 1, at 294.

79. *Id.* at 296.

80. Robert M. Diamond, *Sample Executive Summary of Legal Documents*, in DRAFTING FOR PLANNED UNIT DEVELOPMENTS, GOLF COURSE COMMUNITIES, AND CONDOMINIUMS 45, 49 (ALI-ABA Course of Study May 10-12, 1990) (demonstrating that association documents that contemplate "one association provide flexibility in dealing with the differing interests of the owners," developers and the association itself). See BOOKOUT, *supra* note 1, at 294-96 (explaining the types of governance structures and the benefits of the "consolidated" governance structure).

associations.⁸¹ The result is an early step in the evolution of more community-friendly community associations, yet at the cost of larger more municipal like governance structures.

Governance structures for mixed use developments (MXDs) which contain both residential and nonresidential products have evolved over the years. Reston in Virginia is an example of a project which contains residential and nonresidential centers. Reston illustrates a typical approach to governance and the blending of economic and property interests in a common interest community. Reston Town Center is comprised of three distinct areas: Reston Business Center, Reston Industrial Center, and Reston Residential Center. The Business and Industrial Centers are each governed by separate nonprofit corporations. The Residential Center is divided into individual cluster associations.⁸²

The Town Center Joint Committee is a nonprofit corporation which was established to operate and manage Reston Town Center. The Committee oversees the transportation system management, and it also levies and collects assessments from unit owners in all three Centers for roadway expenses, support of the arts, and, in the case of the Business and Industrial Centers, for common expenses of those associations. This approach is a precursor of some of the innovative techniques now being developed for the more community-focused projects of the late 1990s.⁸³

Celebration,⁸⁴ DC Ranch,⁸⁵ Valencia's Main Street,⁸⁶

81. See BOOKOUT, *supra* note 1, at 294-96 (discussing association structures in detail).

82. The Reston Residential Center in Reston, Virginia reflects the association structure established 30 years ago and which remains today.

83. See *infra* notes 290-350 and accompanying text for a discussion of some areas of change in community association governance.

84. Celebration is being developed on 4,900 acres near Orlando, Florida. The community will include various housing types, a town center, K-12 public school, office park, 18-hole public golf course, healthcare campus, and parks and open space which includes a 4,600-acre protected greenbelt. The 18-acre downtown is the first phase of the community and includes a preview center, Town Hall, Post Office, bank, cinema, retail space, office space, and 123 rental apartments. Residential neighborhoods surround the downtown district and include sites for 360 single family homes.

85. DC Ranch is an 8,300-acre common interest community in Scottsdale, Arizona. When it is completed, DC Ranch will have a maximum of 8,000 homes including condominiums and apartments, a town center, office and retail space, and two 18-hole golf courses. The project is divided into neighborhoods, with each including no more than 40-50 houses, most of which will include a front porch, adding an element of sociability. The community is designed to minimize vehicular traffic and maximize the use of pedestrian and bike paths. With one-half of the property preserved as open space, the paths not only lead to shopping and schools but to the McDowell Mountains as well. A 64-acre parcel has been set aside as a school campus for grades K-12. Fiber optic cabling will be run to the curb of each home site, and students should be able to access their school's library from home computers. Teachers will be

Ladera,⁸⁷ and other communities following and building upon the Disney-DC Ranch examples are very different from the more traditional development. Differences certainly exist in facilities and services, but more significant are the differences in the commitment, the involvement, and the alliances that serve to execute the developers' vision for quality living environments. These communities serve as a significant change agent, marking a sixth historical period; more precisely, they introduce the future.

B. *The Way Things Are*

If there is anything the nonconformist hates worse than a conformist it's another nonconformist who doesn't conform to the prevailing standards of nonconformity. Bill Vaughn

The real estate development industry has taken the lead in reinventing the common interest community. The next step is for the legal and academic communities to assume responsibility for change in governance structures to accommodate new developments. In other words, the process must keep pace with the product.

When discussing governance systems, it is important to recognize the impact governance has on various facets of community association activity. First, there is the obvious concern of balancing the rights of the community with the rights of individuals residing in that community. Although simplicity and flexibility are highly desirable qualities from the association's perspective, the individual expects a degree of certainty that provides both a sense of what the rules are and a reasonable assurance that the rules will not change so drastically as to make ownership undesirable. Community association governance also presents broader societal concerns. Should the public become convinced that community association living is a lifestyle of conformity, control, and constraint,

able to assign homework electronically. Personal computers also factor into healthcare for DC Ranch residents. The healthcare provider system is also linked with the community's computer network in addition to having a physical presence in the community.

86. Valencia, a master planned new town is located 30 miles from downtown Los Angeles. Developed by The Newhall Land and Farming Company, Valencia is committed to high standards of architecture and protection of open spaces and recreational amenities. The 10,000-acre community currently includes three business parks, a shopping center, and a variety of other retail complexes. Divided into communities, Valencia's residential housing includes recreation centers for each community. Over 14 miles of lighted, landscaped pathways known as paseos link neighborhoods with schools, recreation centers, parks, and shopping areas. The community includes several elementary, junior high, and high schools and also includes higher education opportunities.

87. This 5,000-acre project with approximately 2,500 acres zoned for development in Southern California will carry forward and build upon the unique features of DC Ranch.

buyers will avoid it.⁸⁸ This concern, in turn, will reduce the available housing stock significantly to the detriment of developers, consumers, and local governments.⁸⁹

The concern, then, for community developers and for those drafting governing documents, deciding the cases, and most importantly, teaching the law of community associations should be to develop systems that work. Within the context of this discussion, “what works” is a governance mechanism that balances multiple interests, preserves the community association’s functions, protects flexibility, provides the powers necessary to permit an association to remain dynamic during periods of change, and yet reasonably protects the property owners’ reliance interests and their expectations for an appropriate degree of certainty. It is not a simple task; it is not susceptible to simplistic solutions.

Change is not easy, nor does it come in a smooth and linear way. Practical and structural obstacles must be overcome. Some of these obstacles can be dealt with quickly through determination and imagination. Others require changes in the law. Still others require a cultural change in long-held ideas of how things are done.⁹⁰ Those who seek to make changes in association governance must deal with all of these factors.

What is wrong with the way things are and why is there a need for organic, structural change in the way community associations are organized? What issues require resolution in order for this evolution to occur? In answering these questions, the legal issues awaiting resolution and their effect upon the evolution should be identified. However, both the forces encouraging that evolution and the challenges impeding it must first be appreciated. Then some steps to facilitate the evolution may be suggested.

88. Wayne S. Hyatt, *Master Planned Communities: An Evolution and Reinvention*, 3 LUSK REV. 105, 106 (1997). See *supra* note 21 and accompanying text for a discussion of the positive effects of affordable housing.

89. *Id.*

90. See *Gerber v. Longboat Harbour N. Condominium, Inc.*, 724 F. Supp. 884, 885 (M.D. Fla. 1989) (describing owner who wanted to fly flag alleged that board violated his right to free speech); *Park Redlands Covenant Control Comm. v. Simon*, 226 Cal. Rptr. 199, 200-01 (Cal. Ct. App. 1986) (explaining owner challenged covenant that based occupancy on number of bedrooms and objected to board having key to unit, asserting invasion of privacy); *Franklin v. Spadafora*, 447 N.E.2d 1244, 1245 (Mass. 1983) (depicting an owner who claimed that a rule prohibiting ownership of more than two condominium units violated his equal protection rights); *Midlake on Big Boulder Lake Condominium Ass’n v. Cappuccio*, 673 A.2d 340, 340-41 (Pa. Super. 1996) (depicting an owner who wanted to erect signs and alleged that board violated his right to free speech).

III. FORCES ENCOURAGING EVOLUTION

A. *Restatement of the Law, Third Property (Servitudes)*

A major determinant in the evolution of governance structures has been the evolution of community association law itself. Both the *Restatement of the Law, Third Property (Servitudes) (Restatement)*⁹¹ and Uniform Acts from the National Conference of Commissioners on Uniform State Laws⁹² are significant in this evolution. The Uniform Common Interest Ownership Act (UCIOA) as an enabling act has and will continue to play a role. As with any piece of legislation, however, it has rigidities that reduce efficacy in the dynamic process of creating and operating common interest communities in the future.⁹³ The *Restatement* conversely is well-structured and positioned to be a positive force in the process of change.

The effort to draft and adopt a third Restatement of Property did not begin as an effort to address community association law

91. RESTATEMENT, *supra* note 2, at ch. 6. The *Restatement* takes the position that servitudes are valid unless illegal or against public policy. *Id.* The former “touch and concern” doctrine has been superseded by a more explicit focus on public policy. *Id.* Servitudes that impose unreasonable restraints on alienation or competition, or that are unconscionable are expressly declared to be invalid because they are against public policy. *Id.* Instead of asking whether a servitude relates to use of the land in some way (touches or concerns), courts are invited to ask whether there is a reason to prohibit land owners from creating the kind of arrangement embodied in the servitude, and if there is, whether the reason is sufficiently compelling that the court should refuse to give effect to the agreement reached by the original parties. *Id.* The *Restatement* allows a focus on questions that are relevant to community association law: interpretation of documents that create the servitudes, how those documents can be enforced, how the documents can be modified, and whether the servitudes and the community they created can be terminated. *Id.*

92. The purpose of the national Conference of Commissioners on Uniform laws is to promote uniformity in the law on all subjects where uniformity is desirable and practicable. To accomplish this, the Commissioners participate in drafting acts on various subjects and endeavor to secure enactment of the approved acts in various states.

93. UCIOA is not perfect; however, it is an excellent effort. UCIOA was drafted as a response to the greatly increased level of community association development in the 1970s and 1980s. UNIF. COMMON INTEREST OWNERSHIP ACT 5 (1982). UCIOA’s basic goal is uniformity and balance among the various forms of ownership. *Id.* at 8. It achieves the goal through five basic articles: Article One sets forth general provisions including definitions and applicability sections. *Id.* art. 1. Article Two deals with the creation, alteration, and termination of common interest communities, while Article Three deals with management of the common interest community. *Id.* art. 2-3 Article Four discusses purchaser protections and includes public offering statements, warranties, causes of action, and statutes of limitation. *Id.* art. 4. The optional Fifth Article deals with the creation of an administrative agency to enforce UCIOA’s provisions. *Id.* art. 5.

issues.⁹⁴ Time and the volume of community association law cases, however, produced a comprehensive chapter.⁹⁵ Chapter six of the Council Draft is divided into five separate parts: introduction, powers of the community association, duties of the community association, governance of the community association, and relationship between the developer and the community association.⁹⁶ The *Restatement* reflects but does not mirror the UCIOA and, in several instances, positively⁹⁷ addresses the defects in that Act.

The *Restatement* has considered and thoroughly addressed the common interest community experience. Provisions in Chapter six and in other relevant chapters empower the association while at the same time provide limits upon that power and substantive and procedural protections for individual property owners.⁹⁸ Adoption of the *Restatement* will significantly contribute to resolution of many debates and uncertainties.

First, the *Restatement* serves as a flexible yet protective guide for the creation and operation of common interest communities. It anticipates and provides for change both in the black letter and in the notes and commentary. Second, the *Restatement* should reduce judicial uncertainty and interstate conflict. Although it is not binding on any court, it will fill a vacuum and will serve as a very persuasive guide for courts and practitioners alike. Third, the *Restatement* addresses the power of the community association in a positive way. It does so by empowering the association to become involved in activities both within and without its borders and to do so with the same range of powers, expressed and implied, as any other corporation under the situs state's laws. At the same time, however, the *Restatement* imposes limits both on the association and its board of directors. It sets a standard for both

94. See Boken, *supra* note 18, at 198 (describing that states often look to corporate law to determine, among other issues, the exact fiduciary relationship between a developer and a condominium association); French, *supra* note 18, at 128-29 (noting that community associations have no traditional body of law governing them; thus, corporate, municipal, and trust law must be applied by analogy).

95. Upon performing a WESTLAW query, one finds just under 4000 cases with one form of community association as a party to the suit nationwide. Moreover, community association law dates back at least to 1945. *Halls' Point Property Owner Ass'n v. Zinda*, 19 N.W.2d 251 (Wis. 1945).

96. RESTATEMENT, *supra* note 2, §§ 6.20-22.

97. See *Id.* § 6.3 cmt. (noting that the UCIOA requires the association be in place before the first unit is sold, while the *Restatement* does not require association incorporation but allows easy creation of an association, if desired); *Id.* § 6.7 cmt. (adopting the 1994 amendments to the UCIOA which grant broad powers to the association to make rules and restrictions for the common property but restrict association's power to regulate the use of individually-owned property); *Id.* § 6.20 cmt. (adopting UCIOA § 3-105 regarding the general power to terminate long-term and unconscionable contracts).

98. *Id.* §§ 6.7, 6.8, 6.13.

the business judgment rule and the business judgment doctrine⁹⁹ in the affairs of the community association. Finally, the *Restatement* addresses the financial affairs of the association in a way consistent with the needs of the group, yet with due regard for the rights of the individual.

When the common interest community “industry” began in the late 1960s and early 1970s in the United States, there were very rudimentary condominium acts,¹⁰⁰ the law of real covenants and equitable servitudes,¹⁰¹ and little else.¹⁰² The industry developed through the common law. This development made the process much more difficult as old principles of covenant and servitude law tended to require more restrictive documents¹⁰³ and resulted in more narrowly drawn court decisions construed against the developer and the association.¹⁰⁴ This in turn reduced the needed flexibility and created a fixation on strict construction.¹⁰⁵

99. *Id.* § 6.14.

100. See *supra* notes 74-76 and accompanying text for a discussion of the first generation condominium statutes.

101. See generally ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* §§ 8.13-.33 (2d ed. 1993).

102. See generally Wayne S. Hyatt & James B. Rhoads, *Concepts of Liability in the Development and Administration of Condominiums and Home Owners Associations*, 12 WAKE FOREST L. REV. 915 (1976).

103. See CUNNINGHAM ET AL., *supra* note 101, § 8.22 (providing an introduction on equitable servitudes).

104. *Id.* §§ 8.24-.25. See, e.g., *Daytona Dev. Corp. v. Bergquist*, 308 So. 2d 548, 549-50 (Fla. Dist. Ct. App. 1975) (holding that the failure to assign the common elements in the declaration of condominium was a fatal defect in title); *Raines v. Palm Beach Leisureville Community Ass'n*, 317 So. 2d 814, 820 (Fla. Dist. Ct. App. 1975) (holding that although in one portion of the bylaws the unit owner is responsible for a pro rata share of the lawn maintenance cost and in another part defined pro rata as equal shares per owner, the more specific provision would prevail); *Wittington Condominium Apartments, Inc. v. Braemar Corp.*, 313 So. 2d 463, 468 (Fla. Dist. Ct. App. 1975) (holding that although the bylaws do not specifically allow the condominium association to sue, the association nevertheless has standing to sue).

105. See French, *supra* note 18, at 120, 129 (discussing the flexibility of the new *Restatement*) French stated,

By permitting private recording of the incidents of ownership, servitudes add an important element of flexibility to land ownership regimes based on exclusive private ownership of property. . . . It [the new *Restatement*] provides additional flexibility for parties wishing to use servitude by eliminating old constraints on benefits in gross and other economic arrangements that tie rights or obligations to land without necessarily touching or concerning it.

Id. See also Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of Gross Real Covenants and Easements*, 63 TEX. L. REV. 433 (1984) (analyzing real covenants and easement policies). See also Gerald Korngold, *Resolving the Flaws of Residential Servitudes and Owners Associations: For Reformation Not Termination*, 1990 WIS. L. REV. 513, 515 (refuting Professor James L. Winokur's article, *Mixed Blessing of Promissory Servitude: Toward Optimizing Economic Unity, Individual Liberty and Per-*

Some have attributed an ulterior motive to the early drafters and “creators”¹⁰⁶ and from this motive-by-inference have found numerous negative inferences¹⁰⁷ supporting their anti-community association arguments. In reality, the early drafters and “creators” were searching for answers with very little guidance.¹⁰⁸ They had no utopian or anti-utopian agenda. The early drafters were driven neither by a liberal nor communitarian doctrine.¹⁰⁹ They

sonal Identity, 1989 WIS. L. REV. 1). Professor Korngold’s contention is to “balance the freedom of contract notions against other policies.” *Id.* at 515. Professor Korngold also states,

Flexibility, compromise and community autonomy may be increased in several ways. First, when covenants are reciprocal, owners may be willing to compromise to resolve questions relating to covenant violations and enforcement because of the social norm of cooperation between neighbors. Furthermore, because all owners have the same benefits and burdens, an owner seeking to violate the covenant may be dissuaded from doing so upon realizing that her property would be devalued if her neighbors also breached the covenant; similarly, an owner enforcing a restriction may be willing to be flexible since she may seek a similar accommodation in the future.

Id. at 520. See also Winokur, *supra* note 47, at 150 (discussing rigidity in association contracts). Professor Winokur stated:

Residents in these communities have been severely troubled, as community conflict has been spurred by rigid rules. Many current community associations practitioners consider such hard and fast rules to be problematic, and the healthier trend is dramatically toward general, empowering provisions authorizing associations to make change rules, or imposing rules which associations are to apply with discretion, and which may be more readily amended.

Id. See generally Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1368 (1982) (arguing against flexibility in contracting). Throughout the article, Professor Epstein dispels the need for flexibility because he assumes that the parties allowed for modification within the document. *Id.* at 1353-68. Such an argument presumes, incorrectly, that Covenants, Conditions and Restrictions (CCRs) are negotiated as business agreements and that ever-needed modification may be impossible to implement.

106. MCKENZIE, *supra* note 8, at 139.

107. One can only question scholarship that seeks to draw an inference from a previously assumed but unsupported inference.

108. Early texts were practice guides, continuing legal education programs, and program materials. Some were quite helpful and of high quality for their purposes. However, there is no evidence of bias, and a review of these materials supports the conclusion that their authors were grappling with real estate, not socio-political, theories.

109. Significantly, no exponent of one school or the other has pointed to any factual support for contradicting this point. These terms and “movements” are of relatively recent origin as far as the common interest community movement is concerned and have not figured in any of the literature relating to development or operation. Revisionist interpretation may have its place but not in lieu of empirical honesty. Glen Robinson was on point when he stated:

Perhaps because each side is intent upon advancing broad philosophical claims about competing ideals - the priority of right versus good, of the individual versus the group - it is often hard to pin down what the spe-

were trying to create a new form of real estate development and make it work in order to meet a housing need and demand. These early drafters were doing so with no legal guides and even less academic support.¹¹⁰

In many cases, the early drafters succeeded in drafting documents and creating community governance schemes which succeeded in meeting their expectations.¹¹¹ In some cases they did not.¹¹² Those successes and failures are a basis for the reinvention and evolution. But now the law has changed to reflect the effort, and the *Restatement* will provide well-considered and targeted legal principles as a guide. Drafters, scholars, and practitioners will not be forced to make the mistakes of the past, even as they seek to replicate the successes.

B. New Urbanism or the Traditional Neighborhood Development

cific reference points are. Communitarians insist that we be more attentive to group needs and group norms. Which group? In truth we are members of many groups, many communities. We cannot be equally committed to all of them, for they often make radically inconsistent claims on our loyalty. Liberals on the other hand insist on individual autonomy and diversity. Diversity of what - individuals or groups? The promotion of individual choice is not always consistent with political or cultural diversity.

Glen O. Robinson, *Communities*, 83 VA. L. REV. 269, 270 (1997).

110. MCKENZIE, *supra* note 8, at 140. See also Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 256-58 (1976) (providing an interesting commentary on this lack of academic interest and possible reasons for it).

111. Harbor Bay Isle in Alameda, California is an example of a community whose governance scheme was successful and whose documents were ahead of their time. See generally *Telluride Lodge Ass'n v. Zoline*, 707 P.2d 998, 999-1000 (Colo. Ct. App. 1985) (upholding document maintenance provisions); *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 181-82 (Fla. Dist. Ct. App. 1975) (finding declaration provided for adoption of "reasonable rules," with court upholding ban on alcoholic beverages in common areas); *Candlelight Hills Civic Ass'n, Inc. v. Goodwin*, 763 S.W.2d 474, 477-78 (Tex. Ct. App. 1988) (requiring covenants' manifest intent to permit association to acquire real property); *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 810 P.2d 27, 29-30 (Wash. Ct. App. 1991) (finding declaration prohibition against fences flexible enough to exclude a "wall of trees").

112. See *Spitser v. Kentwood Home Guardians*, 100 Cal. Rptr. 798, 800-02 (Cal. Ct. App. 1972) (finding declaration did not contemplate assessments for association lawsuits against outside parties; therefore, association could not assess for costs of nuisance action against airport); *Lovering v. Seabrook Island Property Owners Ass'n*, 352 S.E.2d 707, 708 (S.C. 1987) (explaining declaration failed to provide association with the authority to levy special assessments for extraordinary maintenance activities); *Seabrook Island Property Owners Ass'n v. Pelzer*, 356 S.E.2d 411, 413-14 (S.C. Ct. App. 1987) (discussing declaration provision for cumbersome assessment method based upon property valuation of county tax assessor); *Montgomery v. Columbia Knoll Condominium Council of Co-owners*, 344 S.E.2d 912, 912-13 (Va. 1986) (holding documents failed to provide association with authority to make energy-saving improvements).

Movement

“New Urbanism is a movement that . . . addresses many of the ills of our current sprawl development pattern while returning to a cherished American icon: that of a compact, close-knit community.”¹¹³ So begins a major pronouncement of the movement. It sets the tone. New Urbanism is a term that applies to a planning philosophy that has far more significance than just planning.¹¹⁴ Part planning and part political theory, part social structuralist and part environmentalist, this movement has had and will have a profound impact on the way developers and local governments look at the creation of communities. New Urbanism looks at the ways communities are created. More significantly, however, it has become a major leader in that trend, first by its positive results and, second, by its aggressive challenging of the status quo.¹¹⁵

The movement is not without its detractors.¹¹⁶ While many

113. PETER KATZ, *THE NEW URBANISM*, at ix (1994).

114. When new urbanists allocate space for a city, they advocate the importance of the needs of pedestrians, reliance on public transportation, centrally located public space, and focal points and boundaries for urban space. Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1091 (1996). Specifically, the new urbanists design cities with an eye for the following:

1. Multi-use environments: Instead of zoning areas with only one function, the new urbanists mandate incorporating “schools, parks, public squares, and public buildings into multi-use neighborhoods.”
2. Grid systems: The new urbanists do away with the pervasive suburban cul-de-sacs, and focus upon inter-connected public streets to facilitate intra-neighborhood connections.
3. Needs of Pedestrians: pedestrians have all priority over automobiles, to the extent that car streets and pedestrian streets have different designs and perhaps may not even be the same street.
4. Public Transportation: Public transportation, in conjunction with the above needs of pedestrians, is designed to re-balance the use of the three forms of transportation: by foot, by car, and by public transportation.
5. Public Space: All streets and buildings need public space as the focal point of the neighborhood where interaction can occur.
6. Centers and Edges: New urbanists want definable boundaries and centers of neighborhoods to demonstrate to the inhabitants the multiplicity and the inter-connection of neighborhoods, including specialized neighborhoods.

Id. at 1091-92.

115. Herbert Muschamp, *New Urbanism Group Takes on Saving of Central Cities*, J. REC., June 14, 1996, available in 1996 WL 11091739, at *1 (showing that new urbanists contest the conventional, self-centered, post-Cold War generation). See also PETER CALTHORPE, *THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY AND THE AMERICAN DREAM* 30 (1993) (noting that the new urbanist economists choose to subsidize public transportation, rather than the usual public highway subsidization).

116. David R. Jensen, *Neotraditional - Nothing New: Quality Communities - The Other Side*, 9 LAND DEV. 14 (Spring-Summer 1996). Some argue that the new urbanist plan will only attract a single type of buyer, inasmuch as new urbanists force people to be more frugal by giving up their cars, or that the

reject the new urbanist theories on the ground that the product does not sell or will not work in non-urban settings,¹¹⁷ there are examples in which both arguments fall in the face of successful development.¹¹⁸ But the detractors' arguments, valid or invalid, are not the point of this article. The point is that the proponents have changed the way the industry thinks, or at least they have made the industry think about some new approaches.¹¹⁹ And those approaches include community: "If the New Urbanism can indeed be shown to deliver a higher, more sustainable quality of life to a majority of this nation's citizens, we can only hope that it will be embraced as the next paradigm for the shaping of America's communities."¹²⁰

Not only has the market been affected by the New Urbanism movement but local governments have as well.¹²¹ In many instances, planning departments are requiring many of the characteristics of the neo-traditional plan. This is true in both suburban and urban settings.¹²² Moreover, many of the most successful

new urbanist contention of building more streets in a neighborhood will actually increase automobile traffic: "If you build more streets, people are bound to drive on them." Heidi Landecker, *Is New Urbanism Good for America*, ARCHITECTURE, April 1996, at 69-70. Some argue that new urbanists communities will become "middle-and upper-income ghettos." *Id.*

117. Jensen, *supra* note 116, at 14-15. Further critics of new urbanism question the marketplace success by noting that most Neotraditional developments have not attained the desired sense of community because of a lack of housing, neighborhood retail space and public space. Martin, *supra* note 3, at 30. Developers do not appear to be in touch with the surrounding market conditions and targeted buyers when implementing Neotraditional/new urbanism planning that consumers in a particular area do not desire. John Schleimer, *Market Research: Buyers of Homes in Neotraditional Communities Voice Their Opinions*, 6 LAND DEV. 1, 4-6 (Spring-Summer 1993). Nevertheless, buyers who did live in Neotraditional communities do say that they have a stronger sense of "neighborliness," did not think that their community was overrated and believe that their home will appreciate faster than a similar home in a typical subdivision. *Id.*

118. David B. Wolfe & Susan Bradford, *Best of Show*, 1996 BUILDER 213, 214-28 (exhibiting successful communities that won awards).

119. See Jerry Adler, *Bye-Bye Suburban Dream*, NEWSWEEK, May 15, 1995, at 41 (defining new urbanism as a plan for building posh towns for the upper-middle class, where middle-class Americans will not be able to live); Muschamp, *supra* note 115, at *3 (arguing that "new urbanists rely too much on esthetic solutions to social problems created by the urban sprawl").

120. KATZ, *supra* note 113, at x.

121. *Neighborhoods Reborn*, CONSUMER REP., May 1996, at 24-30 (noting that municipal governments in cities such as San Diego, Cal.; Orlando, Fla.; Gaithersburg, Md.; Mashpec, Mass.; Fearington, N.C.; and Mud Island, Tenn. have applied new urbanism and neo traditional planning in their recent neighborhood developments).

122. Andres Duany and Elizabeth Plater-Zyberk succinctly summarized the economic success of new urbanism when they noticed that in today's market "community sells." Andres Duany & Elizabeth Plater-Zyberk, *The Second Coming of The American Small Town*, WILSON Q., Winter 1992, at 47.

master planned communities of the late 1990's have significant neo-traditional aspects¹²³ further reinforcing the market's attention and replication.

The new architect-planners do not believe that the architectural and land plans alone will create community or a renewed sense of community. What they do believe, with substantial justification, is that these plans produce a place and structured opportunities for community and interpersonal interaction.¹²⁴ A by-product of this planning, therefore, is that non-planners on the development team are focusing more upon ways and means to create and to sustain community. That is where the common interest community and its community association enter the process.

Although not all developments will utilize new urbanist theory, its impact will still be felt. In these developments, the market attraction of "community" and the demands of local government will result in features new to the common interest community and will require the community association to adapt in order to fulfill new responsibilities.

C. The Real Estate Market and the Urban Land Institute

The market is changing, and the ULI¹²⁵ has both been affected by and affected that change. Many of the assumptions about common interest communities and the things they do are part of what is changing. As the real estate market produces new products and structures to reflect changes in consumer demand, community associations' purposes alter as do past practices and accepted legal principles for creating and operating the associations.

Not all new developments are being established under these new principles nor are all existing common interest communities changing to reflect these new principles. Many common interest communities cannot easily change their governing documents.¹²⁶

123. Celebration, DC Ranch, Northwest Landing, and Kentlands are four examples. Not all New Urbanism communities have had a full measure of economic success or some may be early in their market cycle. That has not reduced their impact as paradigms for future development. More importantly, they have contributed to the focus on community that is the primary concern of this article.

124. Interview with Philip Erickson, Senior Associate at Calthorpe Associates, speaker at the ULI seminar, "Designing Master-Planned Communities: In Search of New Visions," in Reston, Va. (June 24-25, 1996).

125. Formed in 1936, the Urban Land Institute (ULI) is an independent, nonprofit educational and research organization dedicated to improving the quality of standards for land use planning and development.

126. Documents frequently require supermajorities for amendment. When there is a significant percentage of absentee owners or apathy infects the community, this requirement can become a ban. The courts have addressed several amendment issues as well. *See, e.g., Twin Lakes Property Ass'n v.*

Many new and old developments, however, are adopting new urbanism principles, and the evolutionary effects will continue to be felt as the market pushes and pulls developers to change.

A forthcoming book on master planned communities that ULI is publishing illustrates the impetus for these market changes.¹²⁷ This book also helps to illustrate what is meant by the "evolution." In this book, Pete Halter, one of the county's foremost marketing consultants for developers of common interest communities and certainly one of the leading thinkers among marketers in the field, observes that "the nineties have quietly become the decade of subtle, but substantive changes in consumer demographics and, more importantly, psycho-graphics."¹²⁸ He identifies some of these changes and their effects. First, "the 'typical' homeowner is very difficult to describe. Simply put, a mass market no longer exists."¹²⁹ Second, consumers range from singles, retirees, married couples, with and without children in the home, with aging parents, with college graduates back into the parents' homes, and immigrants. All the needs and diversities represented require new attributes in the housing experience.¹³⁰

Halter identifies several factors that produced these market changes. He attributes part of the cause to new responsibilities developers have assumed willingly or otherwise.¹³¹ These respon-

Crowley, 857 P.2d 611, 614 (Idaho 1993) (holding that amendments may not deprive members of certain existing rights); Zito v. Gerken, 587 N.E.2d 1048, 1050 (Ill. App. Ct. 1992) (holding that reasonable amendments to restrictive covenants are enforceable); Worthinglen Condominium Unit Owners' Ass'n v. Brown, 566 N.E.2d, 1275, 1277-78 (Ohio 1989) (holding that enforceability of prospective and retroactive application of amendments depends on reasonableness); Montoya v. Barreras, 473 P.2d 363, 366 (N.M. 1970) (arguing that if individual lot owners amend restrictive covenants it would destroy the ability to rely on uniformity); Board of Dir. v. Sondock, 644 S.W.2d 774, 781 (Tex. Ct. App. 1982) (ruling that governing documents grant board of directors authority to amend governing documents). There have also been cases dealing with the method of amending governing documents. See, e.g., Carroll v. El Dorado Estates, 680 P.2d 1158, 1162 (Alaska 1984) (ruling on notice requirements); Penney v. Ass'n of Apt. Owners of Hale Kaanapali, 776 P.2d 393, 470-71 (Haw. 1989) (ruling that a unanimous vote is required to change common interests); Sky View Fin., Inc. v. Bellinger, 554 N.W.2d 694, 697-98 (Iowa 1996) (ruling on the validity of amended restrictive covenants); Harrison v. Air Park Estates, 533 S.W.2d 108, 110-11 (Tex. Ct. App. 1976) (ruling on voting requirements).

127. BOOKOUT, *supra* note 4.

128. *Id.*

129. *Id.*

130. *Id.*

131. Although many commentators allege that the developer has not accepted these new responsibilities altruistically but has done so either by duress or because they can profit from them, the response is: so what? For present purposes, motive has no relevance except to those who find something wrong in profit. Responding to that attitude is for another time and article. The point is that developers have new roles and are discharging them causing

sibilities include the assumption of financial responsibility for the physical infrastructure and “social value systems” that local governments cannot afford to provide.¹³² A second factor is the changing work habits of the consumer. A third factor is health concerns as a driving force behind many housing and lifestyle choices.¹³³ Another factor is “time as the amenity of the future.”¹³⁴ A fifth factor is a “desire to belong,” a desire that is not filled “by the country club, the health club, or the rarely used neighborhood clubhouse; instead this is a broader desire to feel good about a place and, more importantly, to feel a part of it.”¹³⁵

Halter then admonishes developers and builders that success will come from creative design for common interest communities. He states,

Developers will begin looking at ways to create a stronger community through simple land planning changes, such as: small pocket parks that allow individual streets to have gathering places and sidewalk systems that offer gathering points with small amenities such as swings, benches, landscape garden areas, and site lighting for safety. They are also reinventing the development process so that there are programs in place early to help establish civic and social organizations within the community.¹³⁶

These changes result in the actual use of facilities especially as gathering places for social and community activities rather than merely staying on the “drawing board.”

Finally, Halter sees education for both parent and child; affordable, integrated housing; environmental activities; and technology as keys to the future housing product.¹³⁷ Based upon what is selling in the real estate market, he predicts that the community association “will become providers and managers for the community’s technology services, cultural activities, and cross alliance management between businesses, schools, and retailers.”¹³⁸

Halter’s comments are supported by another pair of ULI authors, Brooke Warrick of American LIVES, Inc., and Toni Alexander of InterCommunications, Inc., two of the industry’s leading survey and forecasting companies with extensive experience in California and throughout the nation.¹³⁹ Pointing to the impor-

certain changes in the nature of the community.

132. BOOKOUT, *supra* note 4.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. BOOKOUT, *supra* note 4.

139. Toni Alexander is president of InterCommunications, Inc., a highly regarded lifestyle and leisure marketing communications firm in Newport Beach, California. Brook H. Warwick is president of America LIVES, a San Francisco firm which specializes in primary data collection and analyses in

tance of market segmentation, they advise that “each master-planned community should appeal to a collection of market niches.”¹⁴⁰ American LIVES conducted a national survey on desires of common interest community consumers and found that many of the “truths” that had driven sales messages and community planning were no longer accurate. The survey also showed that the consumer was willing to pay a 35% premium for the same house in a common interest community over one not so located.¹⁴¹

Significantly, the report stated that “disillusionment with the loss of community has set in” and that “[s]tatus needs seem to be declining, and other concerns [have] come to the fore.”¹⁴² These other needs include a “desire, even a yearning, for community.”¹⁴³ The paper concludes by observing that developers, and by implication those who work for them, must understand that “changes in society that make us want to live differently, such as crime, aging and women’s issues, will result in the development of communities that meet the needs of a greater variety of home buyers.”¹⁴⁴ Societal changes will also result in less restrictive, more diverse, more inclusive and more interactive developments. These changes will result in the creation of communities.

D. Scholars Taking Notice

As is illustrated throughout this article, there has been a growing volume of academic interest and writing on common interest communities in the recent past. Much of this interest has focused on the restrictiveness issue and the question of the appropriate standards to be applied in evaluating association rule making.¹⁴⁵

Much of the scholarly literature is discussed throughout this article and is particularly analyzed in discussing the rule of reasonableness. For present purposes, however, the significant issue is not what the scholars state but the fact that their work focused attention upon common interest communities. In the past, most literature has been practice oriented. While much was of high

proprietary studies. The two firms collaborated on a series of independent studies on the consumer, including the recently published, *Changing Consumer Preferences in Community Features and Amenities*.

140. BOOKOUT, *supra* note 4.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. See *infra* notes 238-89 and accompanying text for a discussion of restrictiveness. An article in this issue provides a thorough look at several key issues and current court treatment of restrictiveness and rule making. See generally Katharine Rosenberry, *Home Businesses, Llamas and Aluminum Siding: Trends in Covenant Enforcement*, 31 J. MARSHALL L. REV. 441 (1998) (discussing restrictiveness standards).

quality, there was too little concern for theoretical issues and for an exploration of the resulting consequences.

Although practitioners and scholars have biases, as the early and more recent works reflect, recent work has produced positive results. Consideration of various community association issues has helped to focus a necessary, wider ranging analysis of governance structures and the consequences that, fortuitously, coincide with a change in the product the industry is producing.

IV. FORCES IMPEDING EVOLUTION

A. Institutional Inertia

Subtle but significant factors impede evolution. This impediment is caused by the people most involved: attorneys, property managers, owners and board members, and their reluctance or unwillingness to change because of concerns over the effects of change. Perhaps fear of the unknown is a very human characteristic, but there is more involved. There is a regrettable degree of self preservation and preservation of the "old ways" because both are easy and well-known. There is also the sense that if one always follows the same route, there is no need to exercise judgment in selecting an alternative.¹⁴⁶ This is institutional inertia.

B. Reliance upon Precedent

Another impediment to evolution is legal inertia, partially resulting from sound legal training and partially from baser motives.¹⁴⁷ This is the reliance upon precedent and the fear of waiver.¹⁴⁸ In many instances, community associations enforce rules, make decisions, or take other actions because there is a fear that if they do not, they will "set a bad precedent." In part, this is the result of cases dealing with estoppel¹⁴⁹ and waiver.¹⁵⁰ There is an obvious need to be concerned about these legal issues.

At the same time, such formalism produces bad cases and bad

146. Lawyer and layperson become victims to the habit of following the familiar route. To some extent, perhaps a great extent, this familiar route represents security and a respite from having to make decisions.

147. MCKENZIE, *supra* note 8, at 131, 134.

148. Precedent also represents a frequent refrain from community association board members: "Since you have already done that, the fee should be less this time, right?"

149. See *Woodmoor Improvement Ass'n, Inc. v. Brenner*, 919 P.2d 928, 932 (Colo. Ct. App. 1996) (ruling that because the previous association board had allowed installation of a satellite dish and surrounding fence, the new board was estopped from requiring their removal). See also RESTATEMENT, *supra* note 2, § 2.3 (dealing with the estoppel issue).

150. *Sharpstown Civic Ass'n, Inc. v. Pickett*, 679 S.W.2d 956, 958 (Tex. 1984); RESTATEMENT, *supra* note 2, § 8.3.

law.¹⁵¹ This formalism exacerbates the negatives of covenant enforcement by impeding creative thought and solutions. It encourages conformity and control and a perception of an overly restricted, regulated living environment. The exercise of judgment and an analysis of factual situations can cure many of the problems that might otherwise fall into this “precedent trap.”

C. *Reliance upon Forms*

Reliance upon forms is another impediment to evolution. Simply stated, as long as attorneys and clients are content to use and reuse the same forms and to expect maximum return for minimum intellectual investment in the process and the project, there will not be positive evolution on a wide scale basis. The problems originate because the client wishes to have the job done at the lowest fee and sees no real need for anything different from the last time.¹⁵² The client and attorney, however, are at a competitive disadvantage from the more innovative developments competitors are achieving. This results in a desire for new approaches but does not necessarily reduce the reliance on forms; it merely results in the use of someone else’s forms.

D. *Societal “Norms”*

Society has a role in impeding evolution: the emphasis on rights often overwhelms the need for collective solutions, especially in enforcement cases. This apparent conflict between individual rights and common, community rights is made more difficult by a significant trend in American society toward a “language of rights” in which an individual’s desire or predilection is transformed into a justiciable right.

In *Rights Talk*,¹⁵³ Professor Mary Ann Glendon points out that in American society there is a “tendency to frame nearly every social controversy in terms of a clash of rights [which] impedes compromise, mutual understanding, and the discovery of common ground.”¹⁵⁴ Quoting the United States Supreme Court in the *Charles River Bridge* case, she further points out that “we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful

151. See *Portola Hills Community Ass’n v. James*, 5 Cal. Rptr. 2d 580, (Cal. Ct. App. 1992). (holding that a ban against satellite dishes was unreasonable as applied to the owner).

152. Every attorney who has represented a community association has had this experience. This experience is not repeated with all clients, but it happens frequently enough to influence the approach the attorney takes.

153. MARY ANN GLENDON, *RIGHTS TALK, THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

154. *Id.* at xi.

preservation.”¹⁵⁵ Finally, Professor Glendon points out that “American political discourse generally seems poorly equipped to take into account social ‘environments’ - the criss crossing networks of associations and relationships that constitute the fine grain of society.”¹⁵⁶ She later points out that “[o]ur legal and political vocabulary deal handily with rights-bearing individuals, market actors, and the state, but they do not afford us a ready way of bringing into focus smaller groups and systems where the values and practices that sustain our republic are shaped, practiced, transformed, and transmitted from one generation to the next.”¹⁵⁷

The discussion of the rights of the group versus those of the individual frames several issues in the evolution of community associations, including the entire discussion of enforcement and governance.¹⁵⁸

V. LEGAL ISSUES AWAITING RESOLUTION

The goal of this section is to identify issues requiring resolution critical to successful new applications of common interest communities and the community associations that are part of those communities.¹⁵⁹ The process of evolution itself makes certain considerations more complex or significant. This section does not try to resolve all aspects of the present debates, academic or practitioner, on each issue.¹⁶⁰ This section points out that while much of the present debate focuses on what has happened, the actual subject of the debate looks forward toward new approaches and new applications. Some of the changes that will occur as part of the evolution will render moot *some* of the debate as associations self correct on *some* issues, such as restrictiveness. Other issues, such as state and federal Constitutional applications, relationships with local government, the provision of services to association members and to the public at large, may reframe some and create new debates far more relevant than those of today.

This section identifies these major issues for the future and

155. *Id.* at 26 (quoting *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 548 (1837)).

156. *Id.* at 115.

157. *Id.* at 120.

158. See *infra* notes 177-237 and accompanying text for a discussion of enforcement and governance.

159. Others may find additional issues or place a higher priority on one or more, which is normal and acceptable. The goal here is to identify key issues and to re-focus the discussion in order to encourage scholarly participation in the evolution. The issue of constitutional concerns is a fine example of a significant issue: the change in what community associations do and how they are structured will make constitutional challenges more likely.

160. Resolution of all of the debates is beyond the scope of this paper and, indeed, beyond the scope of any single paper. It would also be unnecessary even if possible.

establishes the relevance and degree of significance of each. It provides an analysis focused on the nature of the issue, its impact on evolution and the impact of evolution on the particular issue. Finally, this section suggests some approaches to resolve or to minimize any negative impact or to enhance the efficacy of the issue on the process of common interest community evolution.

A. *The Constitution and the Community Association*

1. *The issue*

There is a popular tendency to see a violation of “constitutional rights” whenever a community association restriction limits owners’ rights to use their property in the manner they desire. This is particularly true when the conduct prohibited would be constitutionally protected if the regulation were imposed by a government.¹⁶¹ The basis for these arguments generally is that the actions of the community association constitute “state action” on one or more of several theories. These theories are generally referred to as “judicial enforcement,” “sufficiently close nexus,” “symbiotic relationship,” or the “public function” theory.¹⁶²

The misapplication of these theories in practice, the realities

161. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 18 (1948) (holding that state action existed when a court enforced racial restrictions). The “judicial enforcement” theory derives from *Shelley*. *Id.* In *Shelley*, the United States Supreme Court found state action in the judicial enforcement of a racial restriction and held that this enforcement violated the Fourteenth Amendment. *Id.* at 21-23. There continues to be debate and discussion over *Shelley*. See generally Francis A. Allen, *Remembering Shelley v. Kraemer: Of Public and Private Worlds*, 67 WASH. U. L.Q. 709, 710-12 (1989) (discussing the social impact of *Shelley v. Kraemer*); Linda Graglia, *State Action: Constitutional Phoenix*, 67 WASH. U. L.Q. 777, 787 (1989) (discussing the constitutionality of state actions concerning restrictive covenants); Clyde Summers, *Commentary*, 67 WASH. U. L.Q. 799 (1989) (discussing judicial review and how it applies to government and non-government actions); Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383 (1988) (discussing theories of equality in state actions concerning restriction). Some lower courts have used *Shelley* in community association cases. See, e.g., *Midlake on Big Boulder Lake Condominium Ass’n v. Cappuccio*, No. 02139 (Pa. Super. Ct. Jan. 1, 1995). However, the prevailing view is that *Shelley* is limited to discrimination cases and, perhaps, cases dealing with zoning. Katharine Rosenberry, *An Introduction to Constitutional Challenges to Covenant Enforcement*, 1 J. COMM. ASS’N 23 (1998). See, e.g., *Latera v. Isle at Mission Bay Homeowners Ass’n, Inc.*, 655 So. 2d 144, 146 (Fla. Dist. Ct. App. 1995) (holding that the right to install a satellite dish was not protected speech, was not a fundamental freedom and that the regulation could be justified as rational on any conceivable state of facts).

162. See Rosenberry, *supra* note 20, at 6-23 (discussing each theory and its applicability in the community association context). There is, of course, a significant body of literature on these theories, and this article will not repeat that discussion.

of community association operation, and the hyperbole that can result from this misunderstanding are illustrated by the statement “[i]f the holdings of *Marsh* through *Hudgens* were carried to their logical conclusions, a homeowner association would be the equivalent of a ‘company town’ After all, this is an instance when all the attributes of a public government are being performed by private actors.”¹⁶³ Other commentators are equally misleading when they generalize broadly from a narrow, often erroneous fact base.¹⁶⁴ More to the point, “the weaknesses in the analogy between municipalities and most ICSs are many and fundamental.”¹⁶⁵

2. A proposed approach

The conclusion is that in the absence of unusual circumstances or perhaps an emotionally driven decision,¹⁶⁶ the United States Constitution does not apply in common interest community situations today. However, state constitutions can and do apply in numerous situations. In fact, the state courts and constitutions may be the appropriate arena for resolution of issues often characterized as constitutional.¹⁶⁷ In a recent case, the New Jersey Superior Court found a violation of free speech rights under the state

163. Mays, *supra* note 15, at 58. Clearly, the community association does not perform “all” of the attributes of a government. In many instances, associations perform few, if any, services that would be classified as municipal. This fuels misperceptions among non-lawyers and lawyers alike.

164. *See generally* Kennedy, *supra* note 21 (discussing problems caused by residential associations). Kennedy draws conclusions on the assumption that common interest communities and neighborhoods that close public streets are the same or that all common interest communities are “gated communities.” *Id.* at 769-771. They are not. Moreover, he ignores the fact that developers pay substantial fees and that owners pay taxes when stating that members of common interest communities “unfairly” use public resources. *Id.* at 774-75. The problem is that there is a valid point in the article that is hidden by rhetoric. The valid point is that as community associations do affect non-members, the analysis should be more focused, and there needs to be recognition that the “may” and “perhaps” have constitutional implications. *Id.* at 778. The key is correctly and fairly identifying when and how this takes place.

165. NATELSON, *supra* note 53, at 149. An ICS is an “independent covenanted subdivision,” Natelson’s term for a common interest community with an association. *Id.* *See also*, Katharine Rosenberry, *Condominium and Homeowner Associations: Should They Be Treated Like “Mini-Governments?”*, in *RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM?*, *supra* note 21, at 69 (comparing homeowner association functions with governmental functions).

166. *See* Gerber v. Longboat Condominium, 724 F. Supp. 884 (M.D. Fla. 1989), *aff’d in part on reh’g*, Gerber v. Longboat Condominium, 757 F. Supp. 1330, 1341 (M.D. Fla. 1991) (finding that enforcement of private agreements in a declaration of condominium is a state action).

167. *See generally* Rishikof & Wohl, *supra* note 21 (discussing federalism in the common interest community area).

constitution and overturned a condominium's regulation regarding distribution of literature.¹⁶⁸ The United States Supreme Court in *Pruneyard Shopping Center v. Robins*¹⁶⁹ made clear that a state's constitution might provide protection for an individual's activities even when the federal constitution would not, and this protection does not constitute a taking.¹⁷⁰

There are situations both in existing association operation and in evolving activities that could give rise to application of the United States Constitution but for the absence of state action. These might include community building and outreach, privatization, closer relationships with local government, the assumption of responsibilities because local government mandates that assumption,¹⁷¹ and a wide variety of other activities that make the community association more governmental. The breadth of these association activities may support a finding of state action. The constitutional challenge may arise from the state or federal constitution.

The absence of state action does not necessarily resolve the issue. There may be association actions that infringe on rights that would be constitutionally protected if the actions were governmental.¹⁷² In such situations, there are arguments that other remedies should be available even in the absence of state action. Public policy remains a determinant in the validity of a servitude and certainly of a rule adopted in accordance with that servitude.¹⁷³ Courts can and should carefully examine the issue and determine whether there is a genuine constitutional issue. If so, the court would be justified in striking down the restriction or ac-

168. *Guttenberg Taxpayers and Rentpayers Ass'n v. Galaxy Towers Condominium Ass'n*, 688 A.2d 156, 158-59 (N.J. Super. Ct. Ch. Div. 1996).

169. 447 U.S. 74 (1980).

170. *Id.* at 82-83.

171. *Park Redlands Covenant Control Comm. v. Simon*, 226 Cal Rptr. 199 (Cal. Ct. App. 1986) (ruling at the state constitutional level).

172. Gillette, *supra* note 34, at 1432. "The polar case for judicial intervention exists where the association seeks to engage in conduct that could not constitutionally be enforced with the participation of state actors." *Id.*

173. See RESTATEMENT, *supra* note 2, § 3.8. In his article, Brower stated the following:

[C]ourts have generally ignored public policy in favor of "reasonableness" review or a misguided search for federal Constitutional, or other limitations, on private ordering. . . . The failure of courts to use the most appropriate legal theory to impose substantive limits on residential association authority has led to strained interpretations of state civil rights legislation, misapplication of Fourteenth Amendment state action jurisprudence, and a consequent confusion as to the relevant legal doctrine and precedent.

Brower, *supra* note 34, at 267-68. It is important to focus upon the relevance of these standards. Public policy is not a warrant for courts to run associations. To argue otherwise is to defy public policy in favor of workable, livable associations.

tion on the basis that to enforce it would violate public policy. This does not foreclose the regulation of “fundamental rights.” Proper drafting may impose reasonable time, place, and manner regulations upon even constitutionally protected rights.¹⁷⁴ Doing so also represents a shift from prohibition to reasonable regulation as discussed below.¹⁷⁵

Constitutional issues must be considered and addressed in drafting common interest community documentation and in advising the community association on its operations. There are obvious issues affecting the association’s members such as voting, occupancy restrictions, use of the property, leasing and transfer restrictions, sign restrictions, and access among others. However, constitutional issues are more likely to arise as the community association interacts with non-members, either as it affords or denies them rights of participation or access and as it assumes responsibilities previously held by the local government.¹⁷⁶

B. Association Governance

1. The issues

Most community associations created today are incorporated under the not-for-profit corporation law of the state in which they operate.¹⁷⁷ This may be due in part to statutory requirements,¹⁷⁸ a desire to limit liability,¹⁷⁹ a desire to make the established body of

174. *Brown v. State of Louisiana*, 383 U.S. 131, 143 (1966) (holding that a “[s]tate or its instrumentality may . . . regulate the use of its . . . facilities[,] [b]ut it must do so in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all”).

175. See *infra* notes 204-37 and accompanying text for a discussion of the reasonableness standard.

176. See *supra* notes 161-75 and accompanying text for a discussion of constitutional issues.

177. Hyatt & Stubblefield, *supra* note 14, at 624. Although not typically prohibited by statute or otherwise, few community associations are incorporated as for-profit corporations. *Id.* See, e.g., ARIZ. REV. STAT. ANN. § 33-1241 (1985); D.C. CODE ANN. § 45-1841 (Supp. 1992); FLA. STAT. ANN. ch. 718.111(1)(a) (Harrison 1984); GA. CODE ANN. § 44-3-100(a) (1992); MD. REAL PROP. CODE ANN. § 11-109(d) (1987); MINN. STAT. ANN. § 515A.3-101 (West 1980); WIS. STAT. ANN. § 703.15 (West 1977). For-profit associations are generally mixed-use or commercial ventures. Hyatt & Stubblefield, *supra* note 14, at 624.

178. Some states require that certain forms of community associations be incorporated, such as associations controlling a condominium. See, e.g., D.C. CODE ANN. § 45-1841 (Supp. 1992); FLA. STAT. ANN. ch. 718.111(1)(a) (Harrison 1984); GA. CODE ANN. § 44-3-100(a) (1992); MINN. STAT. ANN. § 515A.3-101 (West 1980). Other states allow community associations to be incorporated or unincorporated. See, e.g., ARIZ. REV. STAT. ANN. § 33-1241 (1985); MD. REAL PROP. CODE ANN. § 11-109(d) (1987); WIS. STAT. ANN. § 703.15 (West 1977). Still other state statutes are silent on the issue.

179. Whether incorporated or not, the community association has various

corporate law applicable to the administrative operations of the community association,¹⁸⁰ or a combination of these factors.

Commentators have argued that, although community associations resemble towns or municipalities, they are neither and should not be analyzed from the governmental perspective but rather from the corporate perspective.¹⁸¹ At the same time, there are those that find the use of the corporate form of governance destructive of community fabric and detrimental to protecting rights and political discourse within the community association. For example, Evan McKenzie speculates on the “long term social and psychological effect on the American family of having the corporate model imposed on the home and its surroundings.”¹⁸² Although some of McKenzie’s underlying premise is puzzling,¹⁸³ he makes a troubling and all too accurate point when he states that “people problems” are too often seen as “a complication of property management” and the applied “rationale is neither completely authoritarian nor one that rests entirely on cooperation with and respect for the rights of the neighbors. It is a corporate, business

responsibilities which, if not properly performed, may lead to liability. The corporate form is a universal shield against liability for the individuals involved, while the unincorporated association may expose individual members to joint and several liability for the association’s actions. *See* Raven Cove Townhomes, Inc. v. Knuppe Dev. Co., 171 Cal. Rptr. 334, 343 (Cal. Ct. App. 1981) (holding the incorporated association liable, not its individual directors); *Osborne v. Dickey*, 71 S.E. 763, 763 (Ga. Ct. App. 1911) (holding that members of a committee in an unincorporated association are liable, while members for corporations will only be liable if the other party did not know at the time of the contract). Hiroshi Sakai, a member of the American College of Real Estate Lawyers, suggests that in the absence of express statutory authority to incorporate, a condominium association cannot rely upon the nonprofit statute to reduce the liability of its officers and directors or otherwise negate statutory provisions regarding governance. Hyatt & Stubblefield, *supra* note 14, at 624 n.124.

180. Hiroshi Sakai notes that some associations have been forced to incorporate to borrow money. Hyatt & Stubblefield, *supra* note 14, at 624 n.125. Incorporation also adds certainty regarding the date that the community association comes into existence. *See* HYATT, *supra* note 5, § 3.04, at 53-56. Incorporation provides the association with a legal form of existence so that it can clearly hold title to property. *Id.* *See* NATELSON, *supra* note 53, at 73 (discussing incorporated and unincorporated associations).

181. *See* Sproul, *supra* note 51, at 699-707 (discussing the implications of applying municipal jurisprudence to community associations).

182. MCKENZIE, *supra* note 8, at 143.

183. *See, e.g., id.* at 134 (stating, “In [common interest communities,] power is unitary. The board cites violators and holds the hearings that constitute the trial.”). McKenzie contends that the movement away from the private government theory is to avoid regulation. *Id.* at 134-35. He further notes, “It seems that [common interest community] advocates, during critical growth years for this form of housing, tried to create a particular kind of private government without politics.” *Id.* at 139. Once again, this statement is an inference arising from an assumption predicated upon a theory. It may be accurate, but it implies more sophisticated motives than most possess.

and property-oriented rationale.”¹⁸⁴

The corporate issue is significant to the evolution on two bases. The first is how to make the corporate model work best within the context of the peculiarities of the common interest community. The second is how to tailor the corporate model to respond positively to the political and social needs that are not accommodated by that the traditional corporate structure.

2. *The business judgment rule*

A point of beginning for the discussion is the business judgment rule. In *Levandusky v. One Fifth Avenue Apartment Corp.*,¹⁸⁵ the New York Court of Appeals suggested that the well-established corporate principle known as the “business judgment rule” had efficacy in the context of common interest community cases. The court saw the need for a rule to provide some “check” on the community association’s powers and the application of those powers yet “not undermine the purposes” of the common interest community and its governance structure.¹⁸⁶ A “standard of review that is analogous to the business judgment rule”¹⁸⁷ best met these goals.

The Pennsylvania Supreme Court, relying in part on the American Law Institute’s Principles of Corporate Governance, recently stated the business judgment rule and what it means:

The business judgment rule insulates an officer or director of a corporation from liability for a business decision made in good faith if he is not interested in the subject of the business judgment, is informed with respect to the subject of the business judgment to the extent he reasonably believes to be appropriate under the circumstances, and rationally believes that the business judgment is in the best interests of the corporation.¹⁸⁸

184. *Id.* at 143.

185. 553 N.E.2d 1317 (N.Y. 1990).

186. *Id.* at 1321. *See generally The Rule of Law in Residential Associations*, *supra* note 38, at 475-78 (discussing the standard of review courts have used when ruling on an association’s rule-making authority).

187. *Levandusky*, 553 N.E.2d at 1321. Courts and practitioners alike have subsequently struggled with this articulation and with the ultimate questions of how the “analogy” should be fashioned. The United States Court of Appeals for the Second Circuit directly addressed the issue in *Croton River Club* when it raised the question of how to adapt the business judgment rule “in light of the somewhat different contexts” of the common interest community versus the business corporation. *In re Croton River Club, Inc. v. Half-Moon Bay Homeowner’s Ass’n*, 52 F.3d 41, 44 (2d Cir. 1994). *See Hyatt*, *supra* note 18, at 8-9 (discussing the challenges of the business judgment rule in common interest communities).

188. *Cuker v. Mikalauskas*, 692 A.2d 1042, 1045 (Pa. 1997). *See Joy v. North*, 692 F.2d 880, 886 (2d Cir. 1982) (holding that the business judgment rule only applies when the decision has a business purpose); *Smith v. Van Gorkom*, 488 A.2d 858, 871-73 (Del. 1985) (finding that business judgment re-

The business judgment rule is used to defend a board¹⁸⁹ when it and its members are subject to suit. The business judgment rule is used as the business judgment doctrine to defend the board's decisions.¹⁹⁰ Most cases present the latter situation in which some association member contests the board's decision, and the board relies upon business judgment as a defense.

Technically, the business judgment doctrine or principle¹⁹¹ is invoked to defend the board's decisions, but in most community association cases, there is no distinction in nomenclature.¹⁹² There may, however, be a difference in the underlying rationale. A review of the cases shows that the business judgment rule rather than the doctrine may be used to support the business or entrepreneurial decisions of the board. Both the rule and the doctrine rest upon notions of judicial restraint and the relative competence of directors and judges in making decisions.¹⁹³ The doc-

quires a board to make informed decisions); David N. Barrett, Note, *A Call for More Lenient Director Liability Standards for Small, Charitable Nonprofit Corporations*, 71 IND. L.J. 967, 978-84 (1996) (discussing the duties owed by directors).

189. The business judgment rule has been used as a type of "shield" by some boards when faced with a lawsuit. In *Seafirst Corp. v. Jenkins*, corporate officers and directors used it as a means of showing they exercised due care in fulfillment of their responsibilities when charged with negligent mismanagement. 644 F. Supp. 1152, 1159 (W.D. Wash. 1986).

190. "As the name implies, a necessary predicate for the application of the business judgment rule is that the directors' decision be that of a business judgment and not a decision . . . which construes and applies a statute and a corporate bylaw." *Lake Monticello Owners' Ass'n v. Lake*, 463 S.E.2d 652, 656 (Va. 1995). In *Dockside Ass'n v. Detyens*, the association attempted to enforce and collect emergency assessments. 362 S.E.2d 874, 874 (S.C. 1987). The court proposed that the decision to make the assessments should not be disturbed or even reviewed if the board made the decision to assess in good faith. *Id.* The business judgment rule has also been used to defend board decisions in granting or denying sublease applications. *Ludwig v. 25 Plaza Tenants Corp.*, 184 A.D.2d 623, 624 (N.Y. App. Div. 1992).

191. See generally Joseph Hinsley, IV, *Business Judgment and the American Law Institute's Corporate Governance Project: The Rule, the Doctrine, and the Reality*, 52 GEO. WASH. L. REV. 609 (1984) (discussing the applicability of the business judgment rule to the directors' duties).

192. See, e.g., *Schwarzmann v. Ass'n of Apartment Owners of Bridgehaven*, 655 P.2d 1177, 1180 (Wash. Ct. App. 1982) (holding that tort actions could not be maintained when board actions fall within the business judgment rule); *Levandusky*, 553 N.E.2d at 1321 (finding the standard of review for board decisions is best served by a rule analogous to the business judgment rule); *Croton River Club*, 52 F.3d at 44 (questioning how to adapt the business judgment rule in common interest communities).

193. See Hinsley, *supra* note 191, at 610 (discussing the standards the court will utilize in determining whether to interfere with board decisions); DENIS J. BLOCK, *THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS* ch. 2 § A2 (4th ed. 1993 & Supp. 1995). The court's inquiry is limited to whether the board acted within the scope of its authority under the by-laws and whether the action was taken in good faith to further a legitimate interest of the community association. *Id.* Absent a showing of fraud, self-

trine is weighted in favor of third parties who deal with the corporation and require certainty. The rule, however, serves as an incentive to induce individuals to become directors.¹⁹⁴

These cases, actually, are asserting a rule that defends the *procedure* under which the board has acted and the right of the board to be the sole arbiter of the issue involved. The result is that if the procedure is valid, the court will not second guess the substance of the board's action. Consequently, the court upholds the decision without subjecting the wisdom of the board's action to judicial scrutiny. As the Delaware Supreme Court explained, the business judgment rule is "a *presumption* that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."¹⁹⁵ (emphasis added) A complaining party, of course, may challenge the presumption and require a court to examine each component.

In the community association context, a serious question arises as to whether *all* board decisions should be protected by the business judgment doctrine. Some courts have held that the business judgment rule does not apply because of the "governmental" nature of the board's action.¹⁹⁶ The gravamen of such decisions is the fundamental nature of the action and its effect upon some right of the property owner. Such decisions articulate the premise that this corporate standard is irrelevant in a case testing the validity of a non business action.

The practitioner and the board are more concerned about the enforceability of the decision itself than they are about the damage award in most cases.¹⁹⁷ Resolution of litigation through settlement or court order that leaves the board's decision altered or set aside has a potentially far greater impact than might result in

dealing or unconscionability, a court will not call into question the wisdom of the business decision. *See also* *Schoninger v. Yardarm Beach Homeowners Ass'n*, 134 A.D.2d 1, 10 (N.Y. App. Div. 1987) (holding the business judgment rule requires a court to interfere with a board's decision only upon a showing of fraud or other misconduct); *Rywalt v. Writer Corp.*, 526 P.2d 316, 317 (1974) (finding that courts will not interfere with a board's conduct in the honest exercise of its duties).

194. Common sense supports this assertion, but there is more official authority as well. *See generally* DANIEL KURTZ, BOARD LIABILITY: GUIDE FOR NONPROFIT DIRECTORS 49-59 (1988) (explaining how the business judgment rule protects board members, thus, encouraging members to run).

195. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

196. *Cohen v. Kite Hill Community Ass'n*, 191 Cal. Rptr. 209, 213-15 (Cal. Ct. App. 1983).

197. This concern stems from the board's desire to keep its form intact. Money does a board little good if the framework from which it operates is weakened. For example, by settling a suit to "make it go away," the board may lose a rule or a policy on which it wished to act (*e.g.*, prohibiting pets for the good of the property).

some other commercial setting and certainly more so than in typical civil litigation. The issue in common interest community litigation is not only the immediate issue at trial but the larger issue of board governance and the very structure of the common interest community.

Conversely there is the need to separate the presumption of validity that works well in the business setting from political-social-regulator decisions. A presumption of validity may not be as appropriate in those circumstances. These circumstances give rise to a need for a more structured process that affords protection to the association and the members, giving due regard to the rights of the other members of the association as well.¹⁹⁸

Courts do not apply the business judgment doctrine in some corporate areas. One area is analogous to the present discussion: internal corporate matters and shareholder voice.¹⁹⁹ This departure illustrates the appropriateness for departures in other “internal governance” areas, such as voting, voice, rule making, and enforcement. In applying this heightened scrutiny, however, courts do not substitute their own judgment for that of the board but do afford closer scrutiny.²⁰⁰

There are additional justifications for a departure from or a modification of the business judgment doctrine in some internal matters. These justifications include the nature of the business, the significance of the investment, the liquidity factor, and, most

198. See *infra* notes 290-304 and accompanying text for a discussion of the role and structure of association governing boards and suggested measures that would balance the board's authority and protection for the association members.

199. *Hall v. Tennessee Dressed Beef Co.*, 1996 WL 355074 at *6 (Tenn. Ct. App. June 28, 1996) (observing that Tennessee courts consistently follow a noninterventionist policy with regard to internal corporate matters, and the courts do not apply the business judgment rule to such matters).

200. See *Blasius Indus. v. Atlas Corp.*, 564 A.2d 651, 660-663 (Del. Ch. 1988) (explaining how the Delaware courts concern themselves with these issues, including cites to similar cases). See also *Brazen v. Bell Atlantic, Corp.*, 695 A.2d 43, 49 (Del. 1997) (noting that when courts do not apply the business judgment rule, the court applies a reasonableness test that is analogous to a heightened level of scrutiny, but, nevertheless, denies the court the ability to substitute its judgment for that of the directors); *Unitrin, Inc. v. American Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995) (quoting *Unocal v. Mesa Petroleum*, 493 A.2d 946, 954 (Del. 1985), “If the business judgment rule is not rebutted, a court will not substitute its judgment for that of the board if the [board's] decision can be attributed to any rational business purpose”); *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1994) (describing the heightened scrutiny test as: “(a) a judicial determination regarding the adequacy of the decision making process employed by the directors; and (b) a judicial examination of the reasonableness of the director's action in light of the circumstances then existing”). See generally *Unocal Corp.*, 493 A.2d at 954 (holding that a court will only interfere with a board's decision if it lacks a rational business purpose).

importantly, the power the association has over its members.

A troublesome issue in applying the business judgment rule is self interest. Directors are members and, thus, are affected by each decision. But directors frequently act in their own interest without breaching the duty of loyalty.²⁰¹ The key issue is whether the directors are taking advantage of their position to improve their situation at the expense of non-director members.²⁰²

Finally, one might argue that the court, the board member, and the practitioner all have an interest in a rule that provides certainty, predictability, and autonomy. Certainty allows the common interest community governance system some measure of stability and guidance. Predictability allows all concerned to know that the outcome will not vary from judge to judge and from one emotional issue to another. This outcome is determined by the governing body charged with this responsibility not the political and emotional factors inherent in the particular case. Autonomy is a consideration because it is important to permit each community to reflect the realities of that community and to give effect to the objectives and motivations that attracted people to it.²⁰³

Common interest community evolution will place greater

201. In *Johnson v. Trueblood*, Judge (formerly Delaware Chancellor) Seitz makes the point that everything directors do is indirectly influenced by their own self-interest in retaining their positions. 629 F.2d 287, 296 (3d Cir. 1980), cert. denied 450 U.S. 999 (1981). Similarly, *Sinclair Oil Corp. v. Levien*, made the point that there is nothing disloyal about directors making a dividend decision desired by the controlling shareholder because all shareholders will be treated alike. 280 A.2d 717, 721 (Del. 1971). See also *Thorpe v. Cerbco, Inc.*, 676 A.2d 436, 444 (Del. 1996) (noting that board members may vote their shares in their own interests without breaching their duty of loyalty); *Miller v. Miller*, 222 N.W.2d 71, 81 (Minn. 1974) (holding that if a director diverts a corporate opportunity for himself, the court must determine the following to see if a duty of loyalty was breached: (1) whether the opportunity was in the corporation's line of business, (2) whether the opportunity was presented to the director in a personal or fiduciary capacity, (3) whether the corporation or the individual benefited, and (4) whether there was full disclosure in good faith).

202. In *In re Unitrin*, the Delaware court expressed the view that it wasn't worried about whether directors would vote their shares to preserve their jobs where they had a very substantial economic interest in the corporation. Civil Action No. 13699 (Del. Ch. Sept. 8, 1994). In other words, being invested in the corporation in the same manner as all other investors seems to establish a presumption of good faith.

203. See *Valenti v. Hopkins*, 926 P.2d 813 (Or. 1996) (dealing with the case administratively). This case is particularly interesting because the court deferred to the association's architectural review committee much as an administrative procedure in which the agency's decision is seen as final, conclusive, and binding. *Id.* at 818. Relying upon the words "shall judge," the court held that the committee was "intended to be the final arbiter both as to applicable law and the facts . . ." *Id.* The court relied upon policy arguments as to cost efficiency and finality of decisions among other bases. *Id.* at 817-18.

business responsibilities upon directors and dealings with third parties. This justifies the continued protective application of the business judgment rule. As the association addresses internal issues, especially those regulating its members, it is appropriate to recast the applicable standards and to depart from the business judgment doctrine except in the association's commercial transactions.

3. *The reasonableness rule*

Reasonableness as a test is the second standard courts use when reviewing association decisions. This test is not without a degree of controversy. Scholarly commentary on reasonableness is extensive. Although some commentary reflects an inherent predilection that common interest communities are seriously flawed, and some shows an inadequate understanding of the common interest community itself, much commentary has raised legitimate questions and proposed theoretical solutions.²⁰⁴ Regrettably, many of those suggested solutions call for a blanket response to highly particularized situations or are impractical to implement. These solutions, however, served to help frame responses from both the courts²⁰⁵ and practitioners.²⁰⁶ Without becoming too detailed and, thus, losing sight of the scope and purpose of this article, it is appropriate to examine some of the commentary, the problems identified, and the proposed solutions.²⁰⁷

204. See *supra* notes 9-11 for examples of legitimate questions and proposed solutions.

205. See, e.g., *Nahrstedt v. Lakeside Village Condominium Ass'n, Inc.*, 878 P.2d 1275 (Cal. 1994) (reviewing the "reasonableness" of pet restrictions); *River Terrace Condominium Ass'n v. Lewis*, 514 N.E.2d 732 (Ohio App. 1986) (reviewing the "reasonableness" of board decision to spray insecticide inside units); *Hidden Harbor Estates, Inc. v. Basso*, 393 So. 2d 637 (Fla. Dist. Ct. App. 1981) (reviewing the "reasonableness" of a well water provision).

206. See Nodiff, *supra* note 17, at 151 (discussing the different approaches the courts have applied, including the reasonableness test); Weakland, *supra* note 19, at 310-16 (discussing how courts have applied the reasonableness test); HYATT, *supra* note 5, at 218-25 (discussing the reasonableness test and how it has been applied); Hyatt & Rhoads, *supra* note 102, at 923-47 (discussing the reasonableness test and solutions for avoiding liability).

207. Much of the discussion is a debate between two views of social structure. Communitarianism and liberalism appear to be the two most pervasive theories of the notion of community. Communitarians advocate the attentiveness to group needs and group norms. Robinson, *supra* note 109, at 270. Conversely, liberals promote individual autonomy and diversity within the community. *Id.* However, Robinson notes that the two movements must resolve similar internal contradictions of ideology. *Id.* at 272. Specifically, both movements must resolve the social reality that both beliefs condone community by isolationism; that neither are readily assimilated into the larger society. *Id.* at 272-73. Robinson concluded by observing that the two seemingly opposing theories are at times difficult to distinguish. *Id.* at 346.

Professor Alexander also sees little opposition between communitarian-

The discussion among scholars essentially concerns the nature and extent of the regulation appropriate for community associations. There is a general consensus that the association has a restrictive aspect and an ability to control its members to some extent.²⁰⁸ There is less agreement upon the consequence or the approach courts should take in testing association action. This disagreement, however, is less sharply drawn when the association's actions affect third parties.²⁰⁹

When a court tests a municipality's actions, in the absence of the strict scrutiny required to protect a "fundamental" right, courts apply the rationality standard, which requires that in order for a governmental action to be valid it must only be rationally related to a legitimate governmental interest.²¹⁰ Some commentators reject application of this same standard to the "private government." They argue for a higher standard and define "reasonableness" to include both procedural and substantive components. Such a reasonable standard is, therefore, higher than that applicable to local government. Is this appropriate?

ism and liberalism when he notes that the communitarian theory "understands group activity and individuality as simultaneously present aspects of the human personality, or self." Alexander, *supra* note 9, at 2. Alexander attempts to converge the divergent gaps between communitarianism and liberalism by including liberal ideals within communitarian dogma. *Id.* He then applies his "communitarian" theory to residential associations by noting that residential associations are communitarian in character because of their desire as a group to isolate themselves. *Id.* at 50. His argument is theory, not fact, based. Alexander then contends that communities, by their very nature, exclude. *Id.* at 52. This limits the ability of the community to develop sympathy for others and contradicting the communitarian teachings. *Id.* One questions the applicability of his theory to common interest community reality.

Conversely, Robinson, in attempting to define the concept of "community" and how this concept fits within the larger framework of society, sees very little overlap in the philosophies of two opposed concepts, communitarianism and liberalism. He states that communitarians emphasize group needs and group norms. Robinson, *supra* note 109, at 270. Likewise, liberals insist on individual autonomy and diversity. *Id.* Moreover, Robinson addresses the notion of exclusion by gated communities by asking the following questions: 1) what is the difference between "privatized" and "traditional" communities? 2) who sets the terms and conditions of "community living"? and 3) given a conflict between communal and social norms, how do we decide which comes first? *Id.* at 306.

208. "The typical controversy is not one that arises from terms in the original covenants; it arises from the subsequent exercise of regulatory power delegated to a representative of the homeowners (initially to the developer of the common interest property and thence to the homeowners' association) by the original covenants." *Id.* at 289.

209. See, e.g., Evan McKenzie, 31 J. MARSHALL L. REV. 395 (1998).

210. The Due Process clause protects those liberties that are so rooted in the traditions and conscience of our people as to be ranked fundamental. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Most of these fundamental rights concern non-economic issues related to familial relationships, such as birth control, adoption and zoning.

Several commentators²¹¹ argue that this higher standard is appropriate. They base their contentions upon the argument that common interest communities are not voluntary, at least under their definition of voluntary. These commentators²¹² find “coercion” in the market place from the popularity of the common interest community and the lack of alternative housing.²¹³ These scholars are also concerned because they find further coercion once the buyer becomes a member and is subject to the governance process of the community association itself. They expect to find and, thus, assume a universal finding of exclusiveness,²¹⁴ regimentation,²¹⁵ and loss of personal freedom to act as an individual,²¹⁶ among other concerns about the individual member’s relationship to the group.²¹⁷

211. See Alexander, *supra* note 9, at 7 (arguing that experience with associations indicates why strong autonomy for associations perverts the ideal community). See also Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 900-02 (1988) (discussing the coercive nature of homeowner associations and the need for a higher standard of review).

212. Alexander stated the following:

Several commentators have criticized reasonableness review on the basis of familiar notions of private ordering. In effect, they seek to secure a strong form of autonomy for these residential groups, requiring only that groups govern themselves consistently with their own internal scheme of values and preferences. Their arguments for strong autonomy reflect the pluralist/public choice approach to the nature and status of groups. With respect to the specific debate over residential associations, I argue that communitarian theory justifies substantive judicial review under the reasonableness standard as a dialogic form of legal intervention. The experience with residential associations indicates why we should reject strong group autonomy for social groups in general as a social condition that would pervert, rather than advance, the ideal of a community.

Alexander, *supra* note 9, at 7.

213. *Id.*

214. Brower, *supra* note 34, at 205, 207; *The Rule of Law in Residential Associations*, *supra* note 38, at 475; Kennedy *supra* note 21, at 767-78.

215. Arabian, *supra* note 43, at 17; Brower, *supra* note 34, at 205.

216. *The Rule of Law in Residential Associations*, *supra* note 38, at 474; MCKENZIE, *supra* note 8, at 26.

217. Alexander argues for judicial activism in communities, where courts “serve as a bridge between communities and society” to keep the majoritarian forces within the community from denying a community’s ability to formulate the conception of the “good.” Alexander, *supra* note 9, at 55-56. He apparently sees the judiciary as a cure-all for the struggle between the individual and the group. *Id.*

A recognized communitarian leader disagrees with this argument:

Any form of social encouragement or pressure is quickly branded “coercion.” [A]s I see it, suasion is not coercion, because coercion entails the use of force. Moral suasion carries no threat of imprisonment, deportation, physical harm to one’s loved ones, or even destruction of property. As a result, the ultimate decision of how to conduct oneself when one is

Other scholars disagree and assert that the reasonableness standard is too severe,²¹⁸ especially in light of the voluntary nature of the purchase²¹⁹ and the doctrines applicable to consensual undertakings and private ordering.²²⁰ These commentators would have the courts refrain from involvement in most cases. However, perhaps the leading scholar on this side of the argument has appropriately defined reasonableness²²¹ and would look to a private

subject to suasion, as distinct from coercion, rests with the individual. ETZIONI, *supra* note 44, at 38.

218. In fact, the view has been met with considerable skepticism. Professor Stewart Sterk, in refuting Alexander's notion of judicial activism in community association affairs, argues that the self-interest of association members provides an "institutional protection" against enactment of harsh restrictions, hence the association's rules should be enforceable, without court intervention. Sterk, *supra* note 17, at 333. Sterk also notes that due to the interdependence of association members, community associations should enjoy a greater latitude and freedom to choose its associates than the courts afford individual sellers or landlords. *Id.* at 336-37. Sterk generally argues that as long as the rules have a similar impact on all units, the legal system should let the association decision stand. *Id.* at 337.

Professor Gillette also refutes Alexander's view on judicial activism by contending that community association residents should implement *their* vision of *their* community. Gillette, *supra* note 34, at 1378-79. Gillette argues that the more privatized this vision, the more the law should defer to the association because the political processes in municipal decision making helps to accommodate the diverse and competing interests that exist in a municipality. *Id.* at 1379-80, 1410. Moreover, Gillette shows that judicial intervention is not always adept at distinguishing process failures from situations in which the majority was simply outvoted. *Id.* at 1411.

Robinson is also hesitant to allow the judiciary to solve community problems. Robinson notes that Alexander "conflates communitarian norms with the social policy of the state." Robinson, *supra* note 109, at 295. This is a dangerous confusion when one "assume[s] that the state is the embodiment of community norms." *Id.* Professor Robinson comments on the debate in community by viewing judicial activism not as a question of community versus individual but a question of choosing one concept of community over another. *Id.*

219. Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 919-20 (1988); Reichman, *supra* note 110, at 276-77; *The Rule of Law in Residential Associations*, *supra* note 38, at 478-81.

220. Epstein, *supra* note 219, at 916-26.

221. With regard to the reasonableness standard, Ellickson stated:

"Reasonable," the most ubiquitous legal adjective, is not self-defining. In reviewing an association's legislative or administrative decisions, many judges have viewed the "reasonableness" standard as entitling them to undertake an independent cost-benefit analysis of the decision under review and to invalidate association decisions that are not cost-justified by general societal standards. This variant of reasonableness review ignores the contractarian underpinnings of the private association. As some courts have recognized, respect for private ordering requires a court applying the reasonableness standard to comb the association's original documents to find the association's collective purposes, and then to determine whether the association's actions have been consonant with those purposes. To illustrate, the reasonableness of a board

“takings clause” in order to compensate member owners who are aggrieved by regulations that economically disadvantage their property rights.²²²

Still other scholars have sought a middle ground or variations on these central themes.²²³ More recently, others have advanced what may be more pragmatic yet theoretically sound arguments that reflect realities of the common interest community experience.²²⁴

rule banning alcoholic beverages from the swimming pool area cannot be determined in the abstract for all associations. So long as the rule at issue does not violate fundamental external norms that constrain the contracting process, the rule’s validity should not be tested according to external values, for example, the precise package of values that would constrain a comparable action by a public organization. Rather, the validity of the rule should be judged according to the enacting association’s own original purposes.

Ellickson, *supra* note 11, at 1530.

222. The practicality of this proposal is questionable.

223. Gillette stated with regard to judicial intervention:

Judicial intervention, however, is not always beneficial. Courts are not necessarily adept at distinguishing process failures from situations in which the minority was simply outvoted by a sympathetic but unpersuaded majority. . . . As in those cases, however judicial intervention is not an unqualified benefit. Courts that err when construing ambiguities, or that restrict associations from enforcing covenants, impose on associations the very activities that a majority of the association had agreed to avoid. Indeed, the desire to avoid the externalities from such activity may have been the primary motivating factor for joining the association to begin with. Judicial misconstruction thus distorts the signals sent by covenants about the nature of the association. Judicial scrutiny of the meaning or reasonableness of covenants, therefore, is desirable only if the risk of judicial error is outweighed by the possibility that the association will enforce covenants in a manner inconsistent with the common vision of association members.

Gillette, *supra* note 34, at 1411-12.

224. The need for flexibility in servitudes brings forth an argument that a community association must be governed by “standards” instead of “rules.” Winokur, *supra* note 47, at 149. Implicit in the concept of “standards,” according to Winokur, is the ability of the board to use discretion in applying standards. *Id.* at 150. Winokur does see advantages to steady rule governance, namely the elimination of arbitrary or bias decision making and increased predictability. *Id.* at 149. To Professor Winokur, the difficulty in governance by standards is that if Ms. Nahrstedt were allowed her cats, the association would have risked (1) the waiver of the “no pet” rule, and (2) liability for nonenforcement to a stricter neighbor. *Id.* at 149 n.94. Both concerns can be resolved and have been discussed as part of the “precedent problem.” Winokur argues that if true discretionary standard governance is to take place, boards must be protected from these legal risks. *Id.* As discussed above and provided in the *Restatement*, boards are protected if they act properly.

Alexander also advocates the need for governance by standards instead of rules. Alexander, *supra* note 9, at 56. He would leave standards to the courts. *Id.* However, Alexander incorrectly notes that the courts can take into consideration the rights of the individual within the group in applying these “standards.” *Id.* at 57. Gillette best describes Alexander’s error in reliance on

During this scholarly debate on the reasonableness standard, courts and practitioners have been applying and developing a substantial body of community association law.²²⁵ Reasonableness has been a major component in that body of law. In many cases courts have simply required that the action be reasonable without defining what reasonable means.²²⁶ The courts have then applied the facts and found for²²⁷ or against²²⁸ the association without articulating a jurisprudential definition.²²⁹

The case law is advancing with community association evolution and is more reflective of the practical realities than scholarly disputation. Two leading cases illustrate the point: *Nahrstedt v. Lakeside Village Condo. Association, Inc.*²³⁰ and *Hidden Harbor*

court imposed “standards” when he states: “Courts that err when construing ambiguities, or that restrict associations from enforcing covenants, impose on associations the very activities that a majority of the association had agreed to avoid. Judicial misconstruction thus distorts the signals sent by covenants about the nature of the association.” Gillette, *supra* note 34, at 1412.

Korngold realizes that private residential governments and reciprocal servitudes are the answer to flexibility compromise and community autonomy. Korngold, *Resolving the Flaws of Residential Servitudes and Owners Associations: For Reformation not Termination*, *supra* note 105, at 520. He notes that because the covenants are reciprocal, there may be more of a motivation to compromise on the covenants meaning, cooperation in enforcing the covenants, and an owner may be flexible because that owner may seek a similar accommodation in the future. *Id.* See also *Citizens for Covenant Compliance v. Anderson*, 906 P.2d 1314, 1326 (Cal. 1995) (stating, “One of the prime policy components of the law of equitable servitude and real covenants is that of meeting the reasonable expectations of the parties and of the community.”).

225. See generally *Perry v. Bridgetown Community Ass’n*, 486 So. 2d 1230, 1233 (Miss. 1986) (noting that, as society has become more complex, real estate developments have given rise to a “new body of law” regarding servitudes).

226. See, e.g., *Hidden Harbor Estates, Inc. v. Norman*, 309 So. 2d 180, 182 (Fla. 1975) (using the reasonableness test without defining the term). This case is perhaps the prime example of this approach, and courts often cite it.

227. *Id.* (holding that the rule prohibiting alcoholic beverages in common areas was reasonable); *Gillman v. Pebble Cove Home Owners Ass’n, Inc.*, 546 N.Y.S. 2d 134 (A.D. 2 Dept. 1989).

228. See *Hidden Harbor Estates, Inc. v. Basso*, 393 So. 2d 637 (Fla. Dist. Ct. App. 1981) (holding that the rule prohibiting an owner from drilling a water well was reasonable); *Bear Creek Village Condominium Ass’n v. Clark*, No. 10401 (Mich. App. March 23, 1989) (finding that the rule prohibiting dogs that exceed a certain height or weight requirement was unreasonable).

229. One interesting application is *Papalexioiu v. Tower W. Condominium*, 401 A.2d 280, 285-86 (N.J. Super. Ct. Ch. Div. 1979) (stating that reasonableness was the rule but applied the business judgment rule).

230. 878 P.2d 1275 (1994). This California case is much misrepresented as to the severity of its facts. See, e.g., Carl B. Kress, Comment, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in Property Owner Associations*, 42 UCLA L. Rev. 837, 857-58 (1995) (clarifying and reducing the emotional aspect of the pet restriction at issue in the case). Even though the court was applying a statute, its articulation of reasonableness is relevant and is appropriate as the standard. The court stated that a “servitude will be en-

Estates, Inc. v. Basso.²³¹ The cases basically apply the approach of the business judgment doctrine, by exhibiting a respect for the elected decision maker and displaying a reluctance to substitute the court's judgment just because the judge might see the preferred outcome differently.²³² The courts generally look at procedure and not outcome.

The appropriate standard is one that fairly responds to owner expectations and to association purposes. It is one that acknowledges that courts have no greater, and perhaps less, capacity to govern associations than those elected to do so;²³³ that admits to the fallacies of the arguments favoring a substantive reasonableness review;²³⁴ that elevates private actors to the standard applicable to public actors,²³⁵ but no higher; that gives an appropriate degree of autonomy,²³⁶ certainty, and predictability to community

forced unless it violates public policy; bears no rational relationship to the protection, preservation, operation or purpose of the affected land; or it otherwise imposes burdens on the affected land that are so disproportionate to the . . . beneficial effects the restriction should not be enforced." *Nahrstedt*, 878 P.2d at 1287. The court specifically rejected a case by case analysis of a restriction looking instead to the community effect. *Id.* Even though the court's test of reasonableness was applied against a covenant provision, it is a valid definition of "reasonableness" for any community association purpose. See *infra* note 232 and accompanying text for a comparison of the courts' review of association regulations with municipal regulations.

231. 393 So. 2d 637 (Fla. 1981). This case drew a sharp distinction between board created restrictions and those contained in the covenant. *Id.* at 639-40. The latter did not require reasonableness because they were agreed to upon purchase. *Id.* at 640. The former, however, were subject to a test of reasonableness as a "fetter" on the board's discretion. *Id.* at 639-40. See *Korandovich v. Vista Plantation Condominium Ass'n*, 634 So. 2d 273, 275 (Fla. Dist. Ct. App. 1994) (holding that association's decision to prohibit supplemental address numbers adjacent to storm doors is subject to rule of reasonableness where declaration is silent on the issue); *Worthington Condominium Unit Owners' Ass'n v. Brown*, 566 N.E.2d 1275, 1279 (Ohio Ct. App. 1989) (using a reasonableness test to determine that amendments to a condominium declaration were enforceable against owners who acquired units prior to adoption of the amendment).

232. See, e.g., *Valenti v. Hopkins*, 926 P.2d 813, 817-18 (Or. 1996) (holding that an association's decision is entitled to the court's deference, regardless of whether the members were "skilled" or "neutral").

233. See *Gillette*, *supra* note 34, at 1405-31 (discussing the extent to which court intervention in association decision making is necessary).

234. See *id.* at 1379 (stating, "It is through resolution of these disputes that the legal system reveals the value we ultimately place on autonomous associations.").

235. See *Ellickson*, *supra* note 11, at 1520 (stating, "The first puzzle is that courts are more vigorous in reviewing the substantive validity of regulations adopted by established homeowners' associations than regulations adopted by established cities. Considering the "private" nature of the association, one might have expected exactly the opposite judicial treatment.").

236. Robinson stated:

Power and discretion may provide opportunity for arbitrariness, but they may also indicate a desire for communal autonomy and to that ex-

governance; and that accords with community association law and the emerging *Restatement*.²³⁷ The appropriate standard is reasonableness, premised upon an examination of the association's purposes and the rational relationship of the action to those purposes.

C. Restrictiveness

Common interest communities are restrictive; the very name of the instrument that creates a common interest community, a declaration of covenants, conditions, and *restrictions*, makes clear that there is a restrictive character to the development. That element has sparked extensive debate over the years.²³⁸ That common interest communities are restrictive and that this restrictiveness has had an impact on the sale and operation of such communities and upon the rights and quality of life of those who live in them is an issue, however.

Rather than seeking to resolve policy debates, this article seeks to focus the analysis on the future and to suggest some substantive and procedural approaches for practical solutions to theoretical problems. Rejecting both the courts and legislatures as the appropriate players to develop these solutions,²³⁹ this article takes an approach of "theoretical pragmatism." In utilizing this approach, this article asserts that the solutions should be fitted to the new developmental realities and should come from drafters who are strongly influenced both by scholarly commentary and the nature and needs of the evolving common interest community.

In so doing, the author is mindful that positive suggestions that are designed to work "on the ground," do not always satisfy the popular demand for tighter control upon associations. As has been said in a different context:

It has always seemed to me that if you want to be taken seriously, you can't be too optimistic. People who see how bad things are get respect. When they make a triangle with their fingertips and

tent may be an argument against outside interference. . . . But one can also see the case in a somewhat broader light as a recognition that individual autonomy and community self-governance are two sides of the same coin.

Robinson, *supra* note 109, at 290-91.

237. RESTATEMENT, *supra* note 2, at ch. 6.

238. See *infra* notes 246-52 and accompanying text for a discussion of the restrictiveness debate. The purpose of this article is not to attempt to rationalize or to resolve that debate.

239. Brent Herrington notes:

In their zest to meticulously enforce the rules, too many associations lose touch with the social and civic aspects of the community. When the board's quest for total and unwavering compliance with the rules becomes the defining characteristic of the association, the culture of the community tends to stagnate and the sense of community suffers.

Memorandum from Brent Herrington, on-site manager of Celebration (Jan. 19, 1998) (on file with author).

thumbs and say, "What I find deeply troubling . . ." or "I fear I take a less sanguine view . . ." everybody listens, brows furrowed. Go around acting as if everything's wonderful, though, and you'll be dismissed as an ignorant lightweight, shallow and simpleminded.²⁴⁰

Nevertheless, it seems appropriate to take a more optimistic and pragmatic approach. The evolution in use and structure of common interest communities provides an excellent opportunity and impetus to minimize, if not to resolve, many of the often discussed problems.

1. *What does restrictive mean?*

Certainly restrictive means different things to different people within different contexts. For present purposes, however, it means an attitude as well as a set of recorded rules and regulations. In many cases, the attitude is the more severely limiting of the two. "Restrictive" is a reflection of the management and development industries' emphasis on "people and property management"²⁴¹ as the hallmark of the "community management" business. This attitude sees conformity as simplicity, while using judgment is risky and taxing. It also reflects no sense of purpose other than preventing "disorder," and it results in excessive detail and non-discretionary responses to deviations from the predetermined norms.²⁴²

"Restrictive" also means document provisions that restrict an individual's ability to act. The objective of the restriction is the protection of some perceived common good that necessitates this limitation on individual "rights."²⁴³ Two concerns are immediately

240. James Collins, *The Agony of Ecstasy*, TIME, May 19, 1997, at 33.

241. Brent Herrington notes:

Most associations regard the "hard issues" of rule enforcement, physical maintenance and financial management as the central mission of the association. "Soft issues," such as fostering communication, building civic pride, developing social and recreational opportunities, and engendering volunteerism and shared responsibility, are viewed as frivolous extras not worthy of meaningful attention from the board. The culture in such a community invariably suffers from such a narrow focus by the association's leadership. The concept of "good citizenship" soon boils down to the most sterile definitions, i.e. pristine maintenance of the home, strict compliance with rules and prompt payment of assessments. The vitality of the community suffers as the residents come to view the association mostly as enforcement body.

Memorandum from Brent Herrington, on-site manager of Celebration, (Feb. 17, 1998) (on file with the author).

242. This criticism has been advanced in many contexts. Reasserting it here is not to be taken as a blanket condemnation. Not all documents are so restrictive. Moreover, commentators often see overly restrictiveness because their perspective, limited experience, or bias prevents understanding of the why and the how of a provision and its effects.

243. See *generally* MANAGING A SUCCESSFUL COMMUNITY ASSOCIATION

apparent: first, too many Covenants, Conditions and Restrictions (CCRs) are forms containing too many unnecessary or overly broad restraints and “protections;” and second, too often characterization of these documents and their implementation is exaggerated for effect in order to make an argument having more to do with one’s bias, academic discipline, or school of thought than with resolving the real issues.²⁴⁴ In addressing the problem of overly restrictive communities, both concerns must be confronted, but need not be debated.

2. *Why is restrictiveness an issue?*

Restrictiveness is an issue for the following reasons. These reasons are in no order of importance and are not considered an exhaustive list.

a. Social-political science concerns

The first concerns are the social-political science concerns. These concerns include individualism and group needs and prerogatives, and the balance between the two. That balance requires an acknowledgment that there are tangible and intangible benefits from residing in a common interest community,²⁴⁵ and that many of these benefits are obtainable only through the vehicle of group ownership and structure. At the same time, there is a social cost to overly protecting the group and too severely limiting the individual.

Just as it is appropriate to examine the limits on the individual, it is imperative to avoid rhetoric that disregards the fact of mutual obligations *and* benefits and that prevents constructive change. Ignoring the advantages the individual realizes from group structure and economic bargaining power and focusing solely on “rights” is self defeating and conclusive. It is also all too common:

A tendency to frame nearly every social controversy in terms of a clash of rights (a woman’s right to her own body vs. a fetus’s right to life) impedes compromise, mutual understanding, and the discovery of common ground. A penchant for absolute formulations (“I have the right to do whatever I want with my property”) promotes unrealistic expectations and ignores both social costs and the rights of others.²⁴⁶

This focus applies equally to the common interest community dis-

(Juliana V. Goldberg ed., 1974).

244. One is reminded of the statement, “Numbers can be manipulated to make bias look like logic.” BERNIE SIEGEL, M.D., *LOVE, MEDICINE & MIRACLES* 32 (1986). It is as true in law as in medicine.

245. BYRON R. HANKE, ET AL., *THE HOMES ASSOCIATION HANDBOOK* 39 (rev. ed. 1970).

246. GLENDON, *supra* note 152, at xi (1991).

cussion as to other social contexts.²⁴⁷

There are legitimate concerns as to the relationship of the individual within the group and the responsibilities of each to the other. This relationship requires legal treatment that includes resolution of the fact that the community association is much like a government and, thus, must balance the individual and the group. Finding ways to articulate that balance and to insure its maintenance in practice is what is really needed. Balance is difficult if not impossible if there is an inalterable bias in favor of the more idiosyncratic.

An important component of these social-political concerns is buyers' expectations. That which the buyers expect is what they have a right to receive. Identifying what that expectation is and how to give it effect becomes the essential component for analysis. If the community is to be less restrictive in fact and in attitude, there must be a lowering or a re-channeling of those expectations. Until a re-channeling is done, however, the argument in favor of the more idiosyncratic behavior ignores that the other owners have a "right" to be free of the complained of behavior.

b. The market

The second reason restrictiveness is an issue is the market. Some will never respond to the scholarly call for reform, well intentioned and articulated as it may be. Fortunately, the market has an impact on those who would otherwise miss the need. Highly regimented, non-community focused developments do not sell as well as those that are less restrictive. Restrictions must have a perceived rationale and benefit.²⁴⁸ Moreover, the paradigm communities of the next cycle, such as Celebration and DC Ranch, have practices and procedures to increase the participation and involvement in governance and community activities. The "copy cat" factor takes hold. These provisions dramatically affect the *attitude* discussed above as the real negative in the restrictive equation.²⁴⁹

247. *Id.* at 45. "In the common enterprise of ordering our lives together, much depends on communication, reason-giving, and mutual understanding. . . . Excessively strong formulations express our most infantile instincts rather than our potential to be reasonable men and women." *Id.*

248. BOOKOUT, *supra* note 4.

249. According to Brent Herrington:

The new generation of "community-centered" master planned developments - Celebration among them - is proving that high levels of rule compliance can be achieved in new ways. Through nurturing a shared vision, building genuine grass-roots support for certain rules, and communicating constantly about evolving issues, residents are able to see rules in their proper context and share a commitment to sustaining the quality of the community. In these new communities, proposed architectural changes are evaluated pragmatically, rather than based solely

c. Opportunity costs

The third reason that restrictiveness is an issue is the opportunity costs that may also result in loss of market value. Developers, community managers, and association members are realizing that there is more to life than enforcement and regimentation. This realization is the hallmark of the new communities that are becoming involved in programs and activities that enliven and revitalize not only the common interest community itself but the greater public community. An excessive focus on “pets, parking, children, and trash” is inappropriate in places where people have something more important and valuable to do. This excessive focus takes time and resources from these more productive activities.

d. Real costs

The fourth reason restrictiveness is an issue is the real costs in excessive enforcement. Management and legal costs can be overwhelming. Those who suggest that the supervision of community associations should rest with the courts fail to realize not only how ill equipped the courts are for that role but how costly and inconsistent the results would be. Associations are increasingly cost conscious,²⁵⁰ and this, coupled with the increasing awareness that there is no obligation to sue in all cases, gives rise to an appreciation for the problems inherent in an overly restrictive community.

on their adherence to an arcane, inflexible code. Does the proposed improvement flatter the home? Does it sustain the quality of the residence? Does it agree aesthetically with the architectural style? Residents are much more likely to understand and support an association that bases its decisions on such practical considerations.

Memorandum from Brent Herrington, on-site manager of Celebration, (Jan. 19, 1998) (on file with the author).

250. According to Ken Chadwick:

Enforcement of restrictive covenants through the legal process is, like other litigation, subject to the whims of the judicial system and rules of discovery. Too often, getting to the facts through discovery methods costs, or in the hands of able defense attorneys, can be made to cost the Association more than gaining compliance may be worth. The benefit of the enforcement may be significantly outweighed by the cost of the process, thus, jading Associations and their Boards on litigation as a means to an end. Practically, the investment of time in litigation by the Association, its Board and its managing agent may in some cases outweigh the investment of cash and be another “cost” factor lost to vagaries of litigation. In light of these factors, more and more community associations are seeking more neighborly means to “coerce cooperation.”

Letter from Kenneth E. Chadwick, Partner, Chadwick, Washington, Olters, Moriarty & Lynn, P.C., to Wayne S. Hyatt, Hyatt & Stubblefield (Jan. 30, 1998) (on file with the author).

e. Effect upon participation

A fifth reason that restrictiveness is an issue is its effect upon apathy and participation.²⁵¹ In communities in which conformity and control are the watchwords, there is little reason for membership participation unless a member is “into” control. The creative developer and the wise manager both see that opportunities for successful communities rest in other avenues for involvement and offer participation that is more constructive.

3. *Why is restrictiveness so pervasive?*

Much of the debate regarding the pervasiveness of restrictiveness has assumed that there is an intent to create an illiberal subsociety²⁵² and that early drafters desired to avoid democratic participation and flexible governance regimes. As noted above,²⁵³ such arguments have no basis in reality. While there certainly has been conscious structuring of documents and governance that has resulted in overly restricted communities and heavy-handed enforcement, the causes in most cases are less sinister.

a. Principles of servitude law

Principles of servitude law have had the greatest impact upon the creation of overly restrictive documents and inflexible governance structures.²⁵⁴ The law of servitudes has been little under-

251. Melinda Masson, who has been involved with association management for over 20 years, notes:

Aligning owner expectations with the perceived purpose of the community association has resulted in a climate of command/control rather than a balance between restrictions and social lifestyle. As a result of the push/pull that a command/control governance represents, the personal desires of one's lifestyle (manifested by such traits as fairness, reasonableness, harmony and basic non-confrontational living), doesn't co-exist well with restrictions. In most cases, the personal desires of one's lifestyle diminish or disappear as a result of purchasing a home in a community with an association. Compounded by either personal experience or related association “horror tales,” the social interaction that most of us display (that warm, fuzzy side of one's nature) is abandoned - even so far as to prohibit one's attendance or activity in the association. In recent years the media has also hyped the negativity of human dynamics within community associations which has resulted in avoidance being the most acceptable and preferred “participation” in an association. The end result is apathy and non-participation by the masses residing in a common interest community.

Memorandum from Melinda Masson, C.E.O., Merit Property Management, Inc., in Mission Viejo, Cal. (Feb. 18, 1998).

252. *The Rule of Law in Residential Associations*, *supra* note 38, at 474-75.

253. See *supra* notes 106-12 and accompanying text for a discussion of the early drafters of governance documents.

254. See Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982) (discussing the “servitudes swamp”).

stood, and even less well applied by the ordinary practitioner because of its complexity.²⁵⁵ The consequences, however, have been defensive drafting. Such drafting is rigid, overly inclusive, and not supportive of periodic changes in the “common plan.” It is, in a word, restrictive.

b. Government forms and regulatory rigidity

Government forms and regulatory rigidity have been major contributors to the restrictive nature of common interest communities. Some commentators attribute ill motive to the regulators,²⁵⁶ but those who have dealt with the regulations know that the rigidity continued long after racial bias passed from any official position. The real problem was the regulatory bias itself. Once again the experience of Professor Krasnowiecki, a co-author of the widely used *The Homes Association Handbook*,²⁵⁷ is instructive: “HUD personnel treat the model documents as law, ignoring the introductory statement that [t]heir use is not mandatory but recommended.”²⁵⁸ Professor Krasnowiecki points out that area and central offices failed to differentiate between large and small, phased and non-phased projects and generally required uniform use of the “form.”²⁵⁹

Attorneys responded to these pressures by drafting form documents or at least documents that were “complete” with little room for doubt as to what the “common plan of development”

255. See, e.g., Jan Z. Krasnowiecki, *Townhouses with Homes Association: A New Perspective*, 123 U. PA. L. REV. 711, 717 (1975) (stating, “Unfortunately, the law that relates to affirmative covenants presents the ordinary mortal one of the most confounding intellectual experiences he can suffer.”). Others have not been so gentle. It is unnecessary for present purposes to detail these complexities and difficulties, as it has been well done elsewhere. Alexander, *supra* note 211, at 883; Lawrence Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167 (1970); Olin L. Browder, *Running Covenants and Public Policy*, 77 MICH. L. REV. 12 (1978); Epstein, *supra* note 219, at 906; Epstein, *supra* note 105, at 1353; French, *supra* note 254, at 1261; Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1179 (1982); Uriel Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139 (1978); Carol M. Rose, *Servitudes, Security, and Assent; Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403 (1982); Stewart E. Sterk, *Foresight and the Law of Servitudes*, 73 CORNELL L. REV. 956 (1988); Stewart E. Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615 (1985); James L. Winokur, *Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty and Personal Identity*, 1989 WIS. L. REV. 1.

256. MCKENZIE, *supra* note 8, at 27, 58, 60, 64-67.

257. HANKE, *supra* note 245.

258. Krasnowiecki, *supra* note 255, at 744.

259. *Id.* at 743-45. These comments are from one who worked closely with HUD officials.

was.²⁶⁰ The regulatory emphasis on enforcement also played a significant role in setting in motion a bias in favor of no discretionary judgment.²⁶¹ While over-reliance on forms is a mistake and one that persists, it was an expected reaction to the combined effects of the law of servitudes and the availability of a required form in a new growth field of practice.²⁶²

c. Early texts

Early, influential texts reinforced the trend toward restrictiveness. For example, widely relied upon texts placed great emphasis on the restrictions and the need for their resistance to change. One stated that:

Such covenants do not pose serious or novel questions but they do involve unfrequented, and, therefore, sometimes archaic, areas of law. . . . By comparison with related public controls, they have, on occasion, been criticized for their intransigence to changing conditions. But it is precisely their resistance to change that has given them an important advantage over public land use controls.²⁶³

Another text was equally supportive of the trend:

The basic fabric of the HOA community is maintained by imposing restrictions on the owners' subsequent use of the land to permit the sharing of common elements and the enhancement of the property values. . . . Through use restrictions the developer and his attorney attempt to mandate certain patterns of use that presumably will preserve and protect the basic design, character, and appearance of the community or development over time. For the most part this area of legal documentation involves subjective value judgments on the part of the developer rather than any hard business principles or procedures; an obnoxious use to one person may well be a desirable use to another.²⁶⁴

d. Misperception of value and elitism

Unmistakably, there was the perception that restrictions added value to the property. Regrettably, in some cases it is just as clear that some of these restrictions fostered a sense of exclusion and elitism.²⁶⁵ Conversely, what is characterized as harsh

260. A review of Course Materials for ALI-ABA Courses of Study on Drafting for Condominium and PUDs from the 1970s, '80s, and even the early 1990s would be illustrative.

261. Weiss & Watts, *supra* note 64, at 100. (noting that the "FHA also strongly promoted the use of comprehensive deed restrictions and insisted that they be vigorously enforced").

262. Wayne S. Hyatt, *Condominium and Home Owner Associations: Formation and Development*, 24 EMORY L.J. 977, 978 (1975).

263. HANKE, *supra* note 245, at 197, 309.

264. DOWDEN, *supra* note 5, at 29, 31.

265. *Id.* at 61; Weiss & Watts, *supra* note 64, at 100; *The Rule of Law in*

and exclusive may foster community.²⁶⁶ However, many of the reasons that common interest communities became restrictive have changed or are changing. The question is what will these changes produce.

4. *How old approaches clash with new realities*

Changes in the law and in industry practice contribute to the evolution both of the products available and to the ways the community association process is structured and operated. These “new realities” serve to override factors that have given rise to the negative aspects of the common interest community. In addition, the new realities justify if not compel constructive change.

a. Evolution in servitudes law

First it is appropriate to look at the evolution in the law of servitudes and to suggest several new approaches in community association law. The new council draft of the *Restatement of the Law Third, Property (Servitudes)* takes the position that most traditional doctrinal requirements are obsolete and should be discarded. Instead of the old formulations, modern law requires only intent and compliance with the Statute of Frauds for creation of a servitude. Horizontal privity is irrelevant. There is no limit on the persons or entities that can be made beneficiaries of servitudes, regardless of whether they own land to be benefited by enforcement of the servitude.²⁶⁷

Substantively, the new *Restatement* takes the position that servitudes are valid unless they are illegal or against public policy. The touch or concern doctrine has been superseded by a more explicit focus on public policy. Instead of asking whether a servitude relates to use of the land in some way (touches or concerns), the *Restatement* invites courts to ask whether there is a reason to prohibit land owners from creating the kind of arrangement embodied in the servitude. If there is a reason, the next question is whether the reason is sufficiently compelling that the court should refuse to give effect to the agreement reached by the original parties. This shift in emphasis and burden will be quite significant in community association cases.

Residential Associations, *supra* note 38, at 4.

266. Regarding restriction, Robinson stated:

If one of the justifications for allowing covenant restrictions is to allow people to create their own communities, it is odd to disallow those restrictions that tend to be at the heart of real community. Restrictions on pets are tolerated even though the relationship between pet owning and communal bonds seems a bit thin. Restrictions on personal characteristics are not tolerated even though these are, for better or worse, the core elements of true communities.

Robinson, *supra* note 109, at 302.

267. RESTATEMENT, *supra* note 2, at ch. 6.

The new *Restatement* resolves most of the conundrums that confused students and practitioners, making way for focus on servitude questions that have more relevance to the study of community association law: interpretation, enforcement, modification, and termination of servitudes.²⁶⁸ Thus, the rationales for overly restrictive drafting, non-discretionary enforcement, and judicial rigidity are all alleviated as general matters of servitude law. The *Restatement*, however, also specifically addresses common interest community issues.

The *Restatement* has a complete chapter addressing homeowners' associations²⁶⁹ and specifically deals with operational and enforcement issues that have given rise to the concerns about restrictiveness. The *Restatement* addresses several key considerations. First, the validity of the servitude is established unless it violates public policy. This principle can resolve many of the cases where the issue rests upon the validity of the CCR provision, and it is consistent with leading cases.²⁷⁰

The second area of dispute is board-made rules, the greatest source of both litigation and scholarly controversy. The *Restatement* addresses this issue by rationalizing the misapplications among three rules: the business judgment rule, the business judgment doctrine or principle, and the rule of reasonableness. The *Restatement* points out that both members and the public have interests in the effectiveness with which associations function.²⁷¹ This is very important because the effectiveness depends on there being an appropriate degree of certainty and predictability in the manner of the discharge of the associations' functions.

The maintenance of the structure and, thus, the public's and the members' interests are at greatest risk when courts subject association action to case-by-case or individual-by-individual tests of substantive reasonableness. Such analyses place the idiosyncratic interests over those of the public and private community, and too often, this placement results in the court substituting its judgment for the elected governing body of the common interest community. The court's judgment is frequently affected by facts, emotions and human biases. Sympathy or empathy on a human level, as the determinant, should not equate to a finding of unreasonableness. Thus, a rationale for testing board decisions that protects the association's rights while affording a realistic measure of protection for the individual is necessary.

The *Restatement* provides that rationale by imposing a duty

268. See SUSAN F. FRENCH & WAYNE S. HYATT, COMMUNITY ASSOCIATION LAW: CASES AND MATERIALS ON COMMON INTEREST COMMUNITIES, 24-25 (1998) (examining community association law in light of the new *Restatement*).

269. RESTATEMENT, *supra* note 2, at ch. 6.

270. *Id.* § 6.13.

271. *Id.* at ch. 6 cmt. a.

to act reasonably in rule making and enforcement, to act fairly and impartially, and to exercise ordinary care and prudence in exercising management and financial responsibilities.²⁷² Rejecting the application of the business judgment principle as too permissive under the circumstances, the *Restatement* does take an essential element from the corporate rule. It places the burden of proof on the complaining owner, thus clothing the board's actions with a presumption of validity.²⁷³

In the introductory note to the chapter on homeowners' associations, the *Restatement* observes that community association law is "in a state of flux" and that "these sections may contribute more to the rational development of this field of law by their analysis of the relevant considerations and existing doctrinal choices than by their choice of the reasonableness rule or the business judgment rule or doctrine."²⁷⁴ This is a very important consideration for all involved in common interest community activities and in its evolution. The debate over formalistic rules needs to give way to the application of principles and to an understanding of concepts and interests. Creative community association structure and operation in accordance with "analysis and doctrinal choices" and in recognition of the policy implications of the community association itself should frame the next level of legal development.

b. Practical new realities

One of the strongest needs of the soul is for community. Souls yearn for attachment, for variety in personality, for intimacy and particularity. So it is these qualities in community that the soul seeks out, and not like-mindedness and conformity. Thomas Moore

There are some new realities in the practical aspects of common interest communities as well. These also require examination. Redefinition of the term "community" as applied to the creation of new common interest communities seriously calls into question the old applications and justifications for restrictive governance.²⁷⁵ The following brief discussion of community and how

272. *Id.* § 6.13.

273. *Id.* § 6.14.

274. *Id.* at ch. 6 introductory note.

275. One clear statement of the need for reformulations is in the Atlanta District Federal Reserve Bank's *Economic Review*:

Just as there are many homeowners who place a high value on the security and stability of their community, there are also many who value the idea that the organization of their community should be consistent with ideas of democracy, individual liberty, and fairness. The apparent challenge to both advocates and critics of common interest developments will be to devise forms of community organization that incorporate the efficiency advantages of the common interest development and at the same time ensure a greater degree of democracy and fair play. If future housing markets are to be dominated by common interest developments, then it seems that the design and organization of some segments of the

it might be defined anew is based upon actual common interest communities in place and being created. This discussion is not a reflection of current communitarian movements or discussions, although there is much that one can draw from the other. It is an affirmation that the forces discussed above concerning markets, design, and consumer preferences have produced an opportunity to create a different type of real estate development, one that has a different emphasis.

Courts,²⁷⁶ regulators,²⁷⁷ and philosophers²⁷⁸ have sought to

CID industry will have to accommodate more diverse forms of community government.

William Roberds, *Privatopia and the Public Good*, Atlanta Dist. Fed. Reserve Bank, 80 ECON. REV. 3, 36 (1995).

276. See *Lukens Steel Co. v. Perkins*, 107 F.2d 627, 631 (D.C. Cir. 1939) (defining "community").

The word "community" connotes a congeries of common interests arising from associations - social, business, religious, governmental, scholastic, recreational- involving considerations of public health, fire protection, water, sewage, transportation, and other services, which bind together the people of such a community or set them quarreling with each other. The only community of interest revealed by the determination in the present case is steel and iron manufacture. It could almost as well be said that because Esperanto groups throughout the world have a community of interest, the whole world is a locality.

Id. Another court defined "community" as "a unified body of individuals with common interests living in a particular area; an interacting population of various kinds of individuals in a common location . . ." *Berry v. Arapahoe and Shoshone Tribes*, 420 F. Supp. 934, 940 (D. Wyo. 1976) (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY (1975)). Still another court defined community as "an interacting population of different kinds of individuals constituting a society or association . . ." *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1544 n.14 (10th Cir. 1995) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 102 (3d ed. 1981)). In *Watchman*, the court also defined community as "an aggregation of mutually related individuals in a given location." *Id.* Basic to the understanding of a community is the idea of a cohesiveness that unifies the community. *United States and Standing Rock Sioux Tribe of North Dakota v. Morgan*, 614 F.2d 166, 170 (8th Cir. 1980). This cohesiveness could be along religious, political, geographic, or cultural lines, but it is the cohesion of a group of people, rather than their physical presence in any certain geographic location, that is the mark of a community.

277. California Department of Real Estate regulations do not offer an opinion on what the purpose of a community association is, but one can divine what California considers to be their purpose from the definition of "Association" found in § 1351(a) of the Davis-Stirling Act:

(a) "Association" means a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development.

.....

(c) "Common interest development" means any of the following: (1) a community apartment project, (2) a condominium project, (3) a planned development, or (4) a stock cooperative.

.....

(k) "Planned development" means a development . . . having either or

define community. For present purposes, a common interest community is a “community” if its activities and interests are both within its geographic boundaries and beyond. A “community” has a connection to the public at large as well as providing services and facilities to its own members. It is active on its own, and it forms alliances with other organizations and the public sector.

Some basic characteristics of these new communities include diversity in uses, population, demographics, architectural character and architectural style. The new communities include entry level and affordable housing (though affordable means different things in different regions) as well as more upscale and expensive housing. Frequently, housing styles are scattered through the community furthering the sense and the reality of integration. Community does not mean bland, with all members thinking alike.²⁷⁹

both of the following features:

(1) the common area is owned either by an association or in common by the owners of the separate interests who possess appurtenant rights to the beneficial use and enjoyment of the common area.

(2) a power exists in the association to enforce an obligation of an owner of a separate interests with respect to the beneficial use and enjoyment of the common area by means of an assessment which may become a lien upon the separate interests in accordance with [the Davis-Stirling Act].

CAL. [PROPERTY, ACQUISITION OF PROPERTY, COMMON INTEREST DEVELOPMENTS] CODE § 1351 (Deerling 1982 & Supp. 1998).

278. BERTRAND RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 16-17 (1945). “On one hand the purposes of the community are enforced upon the individual, and, on the other hand the individual, having acquired the habit of viewing his life as a whole, increasingly sacrifices his present to his future.” *Id.*

For when any number of men have, by the consent of every individual, made a community, they have thereby made that community one body, with a power to act as one body, which is only by the will and determination of the majority: for that which act any community, being only the consent of the individuals of it

JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, § 96, at 55 (1952). “Aristotle thought that the [community] existed for the sake of the citizen and not the citizen for the sake of the [community]; accordingly, he rejects the scheme of communal ownership of wives, children, and property. . . .” J. L. Creed & A. E. Wardman, trans., *Introduction* to *THE PHILOSOPHY OF ARISTOTLE: POLITICS*, Book I (1963). “Is there any greater evil we can mention for a city than whatever tears it apart into many communities instead of one? - There is not.” PLATO, *THE REPUBLIC*, Book V, § 462(b). Plato also states, “[I]t is not the law’s concern to make some one group in the city outstandingly happy but to contrive to spread happiness throughout the city, by bringing the citizens into harmony with each other the benefits which each group can confer upon the community.” *Id.* at Book VII, § 520.

279. Wendy Kaminer, *A Civic Duty to Annoy*, *ATLANTIC MONTHLY*, Sept. 1997, at 18. Kaminer states:

In fact communities are built on compromise, and compromise presupposes disagreement. Tolerance presupposes the existence of people and ideas you don’t like. It prevails upon you to forswear censoring others

Often there is an internal interdependence and independence as neighborhoods or villages within the larger community have both their own services and funding mechanisms and share others with the entire community. This permits targeted delivery of services and self selection at an appropriate level. There is a sense of inclusiveness and connectedness. Both the association and developer see achieving these qualities as major policy objectives, and there are funding mechanisms in place to support them. Technology plays a major role in overcoming some of the isolation of the past and makes easier participation and knowledge exchange.

The absolute prohibition of business activities within the community has given way to reasonable regulation and the creation of zones in the development that permit or even encourage different degrees of business usages. This trend reinforces community. At least one wise consultant has pointed out that the commercial activity within or adjacent to the development should mirror “the Yellow Pages” in order for there to be a genuine richness of commercial opportunity.²⁸⁰ He also noted the number of significant inventions and businesses that began in someone’s garage. Prohibitions on activities that might cost the world the next Apple or Ben & Jerry’s are clearly suspect. These prohibitions serve no purpose when there is an easier way to address any potential harm. The new common interest community is much more likely to have a meaningful town center or Main Street as well.²⁸¹

but not yourself. One test of tolerance is provocation. When you sit down to dinner with your disagreeable relations, or comrades who bask in their rectitude and compassion, you have a civic duty to annoy them.

Id.

280. Interview with Charles Fraser, President of Charles Fraser Co.

281. A *Wall Street Journal* article discussed the topic and focused on another innovative new community, Valencia. The article stated:

The key to this emerging trend is the recognition that a Main Street is much more than a place to shop. A true Main Street unites retail with restaurants, entertainment, jobs, housing and civic functions like a post office or town hall to create a multidimensional public realm.

.....

Equally difficult, many logical sites for new Main Streets straddle several different suburban jurisdictions. Will these municipalities be able to put aside their differences and work together to create a new Main Street that will meet their communities’ deeper needs?

.....

The postwar suburbs that were the driving force behind the decline of America’s traditional urban and small-town Main Streets are now seeing the error of their ways. Suburbia has realized that Main Streets are essential to a community’s economy, vitality, identity and sense of place; and it is building accordingly. In the new millennium, we may look back on the postwar decades as an aberration - as the only period when America’s communities lacked true Main Streets.

Charles Lockwood, *Rebuilding a Sense of Community*, WALL ST. J., August 29, 1997, at A10.

c. Broader community purposes and power

When we see land as a community to which we belong, we may begin to use it with love and respect. Aldo Leopold

Finally, these new communities are being created with broader statements of purpose. These communities have a purpose other than property management, and their activities are specifically authorized to reach beyond their borders.

One aspect of empowering the association is the trend toward "privatization."²⁸² While this term means many things to different constituencies and in different situations, it may mean simply *cooperation* with local government or the local school system in new and more meaningful ways.²⁸³ Privatization in the present context is not intended to be an all-or-nothing concept. In some cases, privatization is a complete transfer of responsibility of some formerly public services.²⁸⁴

There are various causes of privatization. Privatization may

282. There is a considerable volume of material on the subject. A representative sample touching relevant issues of concern include: Scott Lehmann, *Privatizing Public Lands: A Bad Idea*, 3 HASTINGS W.-N.W. J. ENVTL. L & POLY 231 (1996); Cass, *supra* note 58, at 449; Klaus M. Schmidt, *The Costs and Benefits of Privatization: An Incomplete Contracts Approach*, 12 J.L. ECON. & ORG. 1 (1996); Jack Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities for Exemplary Damages?*, 58 OHIO ST. L.J. 175 (1997); Ronald Cass, *The Optimal Place of Privatization*, 13 B.U. INT'L L.J. 413 (1995); Clayton P. Gillette, *Opting Out of Public Provisions*, 73 DENV. U. L. REV. 1185 (1996); Mays, *supra* note 15, at 43; DILGER, *supra* note 21, at 63. Professor McKenzie makes a most interesting point that community associations were originally vehicles of privatization. Remarks in response, Wayne S. Hyatt, Remarks at The Robert Kratovil Memorial Seminar in Real Estate Law, J. Marshall L. School, October 15, 1997. With "reinvention," they move to a new level of activity. *Id.*

283. East Lake in South San Diego County, developed by East Lake Company, successfully melds public schools with education-enhancing programs. One unique approach to cooperation among local government, public schools, and the community includes sharing facilities. The high school athletic programs use the adjacent the City park. The high school's performing arts center is used extensively by the City, and its library becomes a community library after school hours. An educational foundation was established under I.R.C. § 501(c)(3) which serves as a fund-raiser for the schools. Staffed by volunteers, the foundation gives 96% of its receipts to school programs developed by the foundation. It was instrumental in getting the high school wired with fiber optics and is currently raising money to buy computers. The foundation established a program for fifth graders that divided the students into project teams, focusing on the Revolutionary War. The end result was a Web Page researched and designed by the students. An astronomy program offered to high school students included Internet links with NASA. The East Lake Network connects shopping centers, schools and homes.

284. "RCAs account for the most significant privatization of local government responsibilities in recent times . . ." DILGER, *supra* note 21, at 63 (citing a 1989 report by the U.S. Advisory Commission on Intergovernmental Relations).

be the result of an affirmative requirement for local government as a condition of permit issuance.²⁸⁵ It may be the consequence of a local government's default at meeting a community need.²⁸⁶ It might also be the result of positive, affirmative action of the developer or the community association that sees an opportunity and seeks to fill it.²⁸⁷

The community association's governance structure supports privatization. There is the capacity to raise revenue. There are decision-making and communication systems in place. Decision makers are in office, empowered, and in most cases more accessible than local government leaders. It has been argued that community association leaders have no requirements for assuming leadership and, thus, the quality of their leadership is suspect.²⁸⁸

285. Dilger stated:

One of the more important factors responsible for this growth is that many local government officials now view PUD and condominium developments as the only viable housing alternative available because they recognize that [the local government does] not have the financial resources available to provide the infrastructure necessary to make the project feasible.

Id. at 62.

286. "The growing dissatisfaction with the public sector's performance as a service provider during the 1970s and 1980s may have generated a political environment conducive to the formation of institutions, such as RCAs, that decentralize decision making authority in American society." *Id.* at 87.

287. There are several rationales for the community association's involvement in privatization activities. These may include greater cost effectiveness in private delivery of services than that seen from the public sector. Self-determination, the ability to allocate resources, and greater, direct accountability of those responsible are issues. The argument that the community association will use its funds and not vote for taxes for the greater community is, of course, a concern. "[I]t would seem reasonable to assume that RCAs regularly attempt to influence the outcome of local government decisions" *Id.* at 25. However, there is no factual support for that argument especially of a widespread nature. Moreover, in the new community model, there is a greater sharing of the services being privatized beyond the development's boundaries. "If neighbors formed into residential community associations, and a company claims it can supply specific types of goods and services more efficiently and effectively than their local government, should the company be allowed or encouraged to provide them? If not, why not?" *Id.* at 63-64. *See also* Gillette, *supra* note 34, at 1392 (stating "Residents who provide their own services might still wish to maintain property values throughout the locality in order to support their own values, and hence support a high level of services throughout the locality.").

288. "CCRs generally require no particular level or degree of education or experience to serve. . . . This hit or miss, uncredentialed caliber of board membership tends to reduce its efficiency and create uncertainty and arbitrariness regarding enforcement action." Arabian, *supra* note 43, at 21. This statement has no basis in logic or experience. It is mere polemic.

There are counter arguments:

Thus, by encouraging ordinary people to become more aware of the political world and how its decisions affect their lives and by offering them

These arguments are incongruous. What are the requirements to sit in city hall, the legislature, and on the bench? Why should there be a more substantive requirement to be president of a community association than to be President of the United States? What substantive requirements apply to the leaders who would impose requirements on community associations?

Externally imposed standards for holding office do not prevent abuses. Standards for conduct and, more importantly, systems in which true leadership emerges and is sustained do:

In other words, leaders generally provide leadership in a well developed context of supportive arrangements. So when we ask, in any given situation, "Where are the leaders?" we must ask the related question, "Are there leadership structures, established roles, and support for any leaders who do arise?"

It is a critical question in the cities today. Leaders are going to have to emerge from quite diverse segments of the community and work together to forge new kinds of partnerships among officials of local, state, and federal government; neighborhood leaders; business leaders; and leaders from the many agencies and institutions of the non-profit world. But in most cities we lack any of the appropriate supports for such citizen leaders - no designated jobs or titles; no clear, credible sponsorship or authority; no tradition; no rules or guidelines; and no staff support.²⁸⁹

The drafter's role is to set this environment in motion and the developer and association members roles are to nurture it. Then there will be community.

VI. A BLUEPRINT FOR CHANGE

The perpetual obstacle to human advancement is custom. John Stuart Mill

a mechanism to participate in their local government's political processes, RCAs foster a more just and legitimate society. They do this by encouraging members to use their heightened knowledge of local political processes and outcomes to hold local policy makers more accountable to their interests as opposed to the interests of organized interest groups.

DILGER, *supra* note 21, at 94. See Gillette, *supra* note 34, at 1428 (providing the comment of one who has served: "Service as a member of an association board of directors does not return the kinds of benefits that might lead those who occupy management positions in other contexts to maximize objectives other than their constituents' welfare.").

289. John W. Gardner, *Leadership in the Cities*, LEADER TO LEADER (Premier Issue 1996) at 38. The increasingly dysfunctional nature of many local governments fosters both the possibility and necessity for privatization. The impact of that and of the possibility of some common interest communities becoming alternatives to local government is for another day and another article.

A. Introduction

The following discussion of some areas of change in community association governance is not revolutionary; many of the ideas are already under discussion or being carried out. Regulation of community associations in California and adoption of the UCIOA in other states are often advanced as impediments to innovation. This criticism is misplaced and is often an unfair justification for the failure to try to address change. The suggestions in this article work in regulated and lesser regulated environments.

The following suggestions are offered in no particular order of priority. They cover a broad spectrum, but the list is not exhaustive. It is hoped that the list will be added to, borrowed from and modified. That is how it should be.

B. Suggestions for change

1. Role and structure of association governing boards

The future holds several opportunities for evolution in the structure, powers, and basic responsibilities of community association governing boards. Changes in this area become the predicate for changes in other areas. At the same time, evolution in those areas may drive these governance changes.

The basic principles underlying board governance are reasonableness,²⁹⁰ the standards under the business judgment rule,²⁹¹

290. There are many examples of reasonableness. *See* *Makeever v. Lyle*, 609 P.2d 1084, 1088 (Ariz. 1980) (recognizing that condominium associations may exercise broad powers “if they are not arbitrary and capricious, bearing no reasonable relationship to the fundamental condominium concept”); *Rhue v. Cheyenne Homes, Inc.*, 449 P.2d 361, 363 (Colo. 1969) (finding that the refusal of the committee to approve house plans must be reasonable and not arbitrary and capricious); *Ryan v. Baptiste*, 565 S.W.2d 196, 198 (Mo. Ct. App. 1978) (reviewing the actions of a condominium board with a reasonableness standard). *See also* *Unit Owners Ass’n of Buildamerica-1 v. Gillman*, 292 S.E.2d 378, 386 (Va. 1982) (concluding that “amendments to condominium restrictions, rules and regulations should be measured by a standard of reasonableness, and . . . courts should refuse to enforce regulations that are found to be unreasonable.”); *Worthinglen Condominium Owners’ Ass’n v. Brown*, 566 N.E.2d 1275, 1277 (Ohio Ct. App. 1989) (holding that if the amendment is unreasonable, arbitrary or capricious in the context of surrounding circumstances, it is invalid); *Chateau Village N. Condominium Ass’n v. Jordan*, 643 P.2d 791, 792 (Colo. Ct. App. 1982) (applying the “reasonable and good faith standard” to the condominium association). For all cases “the reasonableness standard . . . must be measured in the context of the uniqueness of condominium living.” *Pooser v. Lovett Square Townhomes Owners’ Ass’n*, 702 S.W.2d 226, 231 (Tex. Ct. App. 1985).

291. The *Restatement* provides an interesting comparison of the two:

The principal differences between these two standards as they have been applied in cases involving common interest community associations are in the location of the burden of proof and the strength of the al-

and the scope of the board's expressed and implied powers.²⁹² Properly applied, these principles provide a solid foundation for evolution in governance that can meet not only new functions and purposes but also reduce the level of legitimate concern over the relationship of the community association and its members and third parties.

Governing boards need to have a more flexible approach to governance, and the initial governing documents need to create and to institutionalize rule-making as a dynamic rather than a static process. A legal framework is needed that permits the board and the association to implement the development's covenants so that the governance process can evolve with the needs, desires, and changes within the community. At the same time, there should be procedures for owner involvement and owner appeals.

An alternative governance approach involves creation of a more legitimate governance structure and recognizes the difference between regulation and prohibition. This type of a structure contemplates that the initial governing documents will contain only a limited number of prohibitions and restrictions, including

legations and evidence needed to get beyond a motion for summary judgment. Although it has been argued that the tests are substantively different, in reality, there seems to be little difference between actions, policies, and rules that fail the reasonableness test and those that fail the business judgment test. Actions that are arbitrary - that are not reasonably related to accomplishing a legitimate purpose of the association are invalid under either standard. Actions that unfairly single out a minority of members for unfavorable treatment without substantial justification are invalid under either standard. And actions that are not within the power of the association are equally invalid. Whether the business judgment principle or the reasonableness standard is used, courts should not apply them to insulate associations from liability for negligence that results in bodily injury or property damage. Under either rule, courts should refrain from second-guessing association decisions which were properly made and which do not threaten important interests of members.

RESTATEMENT, *supra* note 2, § 6.13 cmt. b.

292. *See, e.g.*, *Salvatore v. Gelburd*, 565 N.E.2d 204, 205-06 (Ill. App. Ct. 1990) (finding that the condominium association was authorized by the condominium declaration to ratify additions, alterations, or improvements to common areas without prior consent of association members); *Ochs v. L'Enfant Trust and West End Condominium Ass'n*, 504 A.2d 1110, 1116 (D.C. App. 1986) (holding that the condominium association board of directors had the authority to grant a site easement); *Lovering v. Seabrook Island Property Owners Ass'n*, 352 S.E.2d 707, 708 (S.C. Ct. App. 1986) (declaring that the property owner association lacked implied or incidental power to levy a special assessment); *Beachwood Villas Condominium v. Poor*, 448 So. 2d 1143, 1144 (Fla. Ct. App. 1984) (holding that condominium rules enacted by the board of directors regulating unit rentals and occupancy of units was within the board's authority); *Ryan*, 565 S.W.2d at 197-98 (holding that installation of locks and exterior doors was reasonable exercise of the board's authority).

only those restrictions that the developer believes to be vital to the overall community development plan. Coupled with these initial provisions would be a method for permitting changes and for the adoption, modification, or abrogation of regulations through the community's "legislative process" as time passes and circumstances change. Members' rights to initiate and to participate in this process are vital.

In addition to the initial restrictions or prohibitions, there would be several general but clearly stated standards of conduct, maintenance, and design. These standards operate to establish ranges of expectation and permitted activity without being overly restrictive or disruptive of individual choice within articulated, accepted norms.

In a system that provides simplicity, flexibility, and balance, it would be unnecessary to promulgate initial restrictions and prohibitions that might, in the final analysis, be inconsistent with the development plan and the reality of the community as it takes form, grows, and changes. Rather, the governing body, first the board of directors and secondarily the membership, would have the power to make or to change these provisions, according to a defined procedure.²⁹³ In other words, the goal would be to create a

293. The following provision from a declaration of covenants, conditions, and restrictions accomplishes this goal:

Rule Making Authority.

(a) Subject to the terms of this Article and the Board's duty to exercise business judgment and reasonableness on behalf of the Association and its Members, the Board may modify, cancel, limit, create exceptions to, or expand the Use Restrictions and Rules. The Board shall send notice by mail to all Owners concerning any such proposed action at least five business days prior to the Board meeting at which such action is to be considered. Voting Members shall have a reasonable opportunity to be heard at a Board meeting prior to such action being taken.

Such action shall become effective, after compliance with subsection (c) below, unless disapproved at a meeting by Voting Members representing more than 50% of the total Class "A" votes in the Association and by the Class "B" Member, if any. The Board shall have no obligation to call a meeting of the Voting Members to consider disapproval except upon receipt of a petition of the Voting Members as required for special meetings in the By-Laws. Upon such petition of the Voting Members prior to the effective date of any Board action under this Section 3.2(a), the proposed action shall not become effective until after such meeting is held, and then subject to the outcome of such meeting.

(b) Alternatively, Voting Members, representing more than 50% of the total Class "A" votes in the Association at an Association meeting duly called for such purpose, may vote to adopt rules which modify, cancel, limit, create exceptions to, or expand the Use Restrictions and Rules then in effect. Such action shall require approval of the Class "B" Member, if any.

(c) Prior to any action taken under this Section becoming effective,

truly responsive governance system, one that is realistically empowered to govern. For this to work, the practitioner must not be change-averse and precedent-bound.²⁹⁴

At the same time, the governance system must provide checks and balances, disclosures of potential consequences from operation of the system to purchasers, and specific protections for vested rights that might have arisen as a part of a purchaser's initial acquisition. For this reason, governing documents should contain not only empowering sections but also sections providing a "bill of rights" for owners and developers²⁹⁵ together with a hearing

the Board shall send a copy of the new rule or explanation of any changes to the Use Restrictions and Rules to each Owner. The effective date shall be not less than 30 days following distribution to Owners. The Association shall provide, without cost, a copy of the Use Restrictions and Rules then in effect to any requesting Member or Mortgagee.

(d) No action taken under this Article shall have the effect of modifying, repealing or expanding the Design Guidelines or any provision of this Declaration other than the Initial Use Restrictions and Rules set forth in Exhibit "C." In the event of a conflict between the Design Guidelines and the Use Restrictions and Rules, the Design Guidelines shall control.

(e) The procedures required under this Section 3.2 shall not apply to the enactment and enforcement of administrative rules and regulations governing use of the Common Area unless the Board chooses in its discretion to submit to such procedures. Examples of such administrative rules and regulations shall include, but not be limited to, hours of operation of a recreational facility, speed limits on private roads, and the method of allocating or reserving use of a facility (if permitted) by particular individuals at particular times. The Board shall exercise business judgment in the enactment, amendment, and enforcement of such administrative rules and regulations.

294. See *supra* notes 147-51 and accompanying text concerning the debilitating effect of precedent wrongly applied.

295. See generally Susan F. French, *The Constitution of a Private Residential Government Should Include a Bill of Rights*, 27 WAKE FOREST L. REV. 345 (1992) (proposing a Homeowner's Bill of Rights). The following CCR language sets out a "bill of rights" for the association members:

Protection of Owners and Others.

Except as may be set forth in this Declaration (either initially or by amendment) all Rules shall comply with the following provisions:

(i) Similar Treatment. Similarly situated Owners shall be treated similarly.

(ii) Displays. The rights of Owners to display religious and holiday signs, symbols, and decorations inside structures on their Lots of the kinds normally displayed in dwellings located in single-family residential neighborhoods shall not be abridged, except that the Association may adopt time, place, and manner restrictions with respect to displays visible from outside the dwelling.

No rules shall regulate the content of political signs; however, rules may regulate the time, place and manner of posting such signs (including design criteria).

(iii) Household Composition. No Rule shall interfere with the freedom of Owners to determine the composition of their house-

mechanism.²⁹⁶ The drafter, the practitioner, and the court must

holds, except that the Association shall have the power to require that all occupants be members of a single housekeeping unit and to limit the total number of occupants permitted in each Lot on the basis of the size and facilities of the Lot and its fair use of the Common Area.

(iv) Activities Within Dwellings. No rule shall interfere with the activities carried on within the confines of dwellings, except that the Association may prohibit activities not normally associated with property restricted to residential use, and it may restrict or prohibit any activities that create monetary costs for the Association or other Owners, that create a danger to the health or safety of occupants of other Units, that generate excessive noise or traffic, that create unsightly conditions visible outside the dwelling, or that create an unreasonable source of annoyance.

(v) Allocation of Burdens and Benefits. No Rule shall alter the allocation of financial burdens among the various Lots or rights to use the Common Area to the detriment of any Owner over that Owner's objection expressed in writing to the Association. Nothing in this provision shall prevent the Association from changing the Common Area available or from denying use privileges to those who abuse the Common Area or violate the Restrictions. This provision does not affect the right to increase the amount of assessments as provided in Article ___ (assessments).

(vi) Alienation. No rule shall prohibit leasing or transfer of any Lot, or require consent of the Association or Board for leasing or transfer of any Lot; provided, the Association or the Board may require a minimum lease term of up to 12 months. The Association may require that Owners use lease forms approved by the Association.

Id. at 351-52. The following additional rights should be added:

(vii) Abridging Existing Rights. No rule shall require an Owner to dispose of personal property that was in or on a Lot prior to the adoption of such Rule if such personal property was in compliance with all rules previously in force. This exemption shall apply only during the period of such Owner's ownership of the Lot, and shall not apply to subsequent Owners who take title to the Lot after adoption of the Rule.

(viii) Reasonable Rights to Develop. No rule or action by the Association or Board shall unreasonably impede Declarant's right to develop the Property.

The limitations in subsections (i) through (viii) of this Section shall only limit rulemaking authority exercised under subsection (b); they shall not apply to the use restrictions set forth in Article ___ or to amendments to this Declaration adopted in accordance with Section ___.

Used in conjunction with the rule making procedure discussed *supra* note 293, this Bill of Rights gives both flexibility and protection.

296. Associations frequently have structured hearing procedures before the finding of a violation and, if warranted, the imposition of a sanction. The hearing should not be overly formal. The following is a workable approach:

Hearing. If a hearing is requested within the allotted 10-day period, the hearing shall be held before the Covenants Committee, or if none has been appointed, then before the Board in executive session. The alleged violator shall be afforded a reasonable opportunity to be heard. Prior to

acknowledge that there are limits both to the acceptable degree of control and to the powers that support the control.

The business and governmental roles of the board will continue to grow with the evolution, even if these labels fade away. There will be changes in the board's functions which justify changes in its form. For example, future associations may have two governing boards, one for each role. Alternatively, one board might carry out these functions through two committees: one for business and one for governance with appellate rights to the full board. The applicable rules for each board or committee would be spelled out in the governing documents.²⁹⁷ This format would address concerns regarding the applicability of the corporate model to the political and social needs of the community as well as establish an appellate mechanism.

Conversely, there can be a more fully developed covenants committee²⁹⁸ that would be the appellate body for the board's governance decisions. That committee might be the first level decision maker on alleged violations of the rules or covenants with a meaningful appeal to the full board. The objective under this system is to separate the legislative and the judicial bodies and functions. The boards' policy-making, law-giving and judicial roles should be more clearly delineated.

the effectiveness of any sanction hereunder, proof of proper notice shall be placed in the minutes of the meeting. Such proof shall be deemed adequate if a copy of the notice, together with a statement of the date and manner of delivery, is entered by the officer, director, or agent who delivered such notice. The notice requirement shall be deemed satisfied if the alleged violator or his or her representative 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.

297. One drafting approach is to include in the CCRs what the rules guiding the board mean. Such a provision defines the rule of reasonableness and the business judgment rule as they apply in that common interest community. This becomes the "law of the project." This approach is state-specific and requires awareness of what the law is in the jurisdiction. It provides great comfort and assistance to board members and to judges who see that what the parties have undertaken is in compliance with the applicable standards in their community.

298. Some associations establish a separate body to hear covenant violation matters. Appeals may then be taken to the board. The following is an example of a CCR regulation which establishes a Covenants Committee:

Covenants Committee. In addition to any other committees which the Board may establish pursuant to Section 5.1, the Board may appoint a Covenants Committee consisting of at least three and no more than seven Members. Acting in accordance with the provisions of the Declaration, these Bylaws, and resolutions the Board may adopt, the Covenants Committee, if established, shall be the hearing tribunal of the Association and shall conduct all hearings held pursuant to Section 3.24 of these Bylaws.

Another approach is to utilize a board committee with an appeal to the board *en banc*.

The board's business role will increase as new and greater powers are required to meet new needs, especially as some forms of privatization take place. Examples include the provision of services of a municipal nature, social and educational activities, technological services, and a wide variety of other activities as discussed in the section on changes in market demands. Issues of capacity, delegation, provision of individualized services, and use of technology will all be important. The nature and purpose of the association will become more significant, and courts should look to those considerations in determining the appropriate degree of autonomy to afford to the board.

The powers and methods of operation of the board should be clarified, providing guidance as to what activities fit into each role, how the board should operate and standards or training requirements for qualifying for office.²⁹⁹ Associations may be inclined to adopt a "strong city manager" form of government as they adapt to new needs and time constraints.³⁰⁰ Board composition will become more problematic as owners' time and demands conflict, yet member involvement in policy decisions will be even more important than it is today. A key question is which types of developments need such balance and which do not. Most significant, however, is the question of how to structure the board and management functions to achieve this balance.

Associations may also need procedures to create boards that are balanced in terms of the members' understanding of and experience in corporate governance. The possibility of having professional board members is real and should not be rejected out of hand.³⁰¹ The owners' desire and need to participate, however,

299. Better trained boards result in fewer problems and better association governance. The following is a model CCR regulation mandating board training:

Board Training Seminar. The Board shall make available to each director, at a time reasonably convenient for the subject directors, a board training seminar within each director's first six months of directorship. Such seminar shall educate the directors about their responsibilities and duties. The seminar may be in live, video tape, audio tape, or other format. Each director shall attend a board training seminar within the first six months he or she serves as a director. All expenses associated with any Board training seminar shall be a Common Expense of the Association.

300. Several large associations have found that personnel trained and experienced in municipal management make excellent community managers. There is a need and an opportunity for academic institutions to broaden the public administration curriculum to include the large scale common interest community.

301. According to Robert M. Diamond, his clients have successfully used professional board members in several developer-controlled developments. Interview with Robert M. Diamond, attorney, U.L.I. Conference, in Orlando, Fla. (Jan. 12, 1998).

should not be overlooked. An association might hire professional officers while owners continue to serve in policy-making roles. The important point is that professionalism and compensation are possible components of the future of board operations. Current management professionals must be willing to accept and to lead change.³⁰²

Finally, courts, boards and association counsel must recognize a public policy interest in the successful operation of common interest communities,³⁰³ especially the “reinvented” common interest community. This public interest supports and limits the operation of the private government but calls for judicial restraint in any substantive review. As previously noted, “the capacity of the association to satisfy the functions for which it is created depends substantially on the latitude granted by the courts reviewing its construction of covenants.”³⁰⁴ As the functions evolve, so must the nature and extent of the review.

2. *Association as service provider*

The unfortunate thing about this world is that good habits are so much easier to give up than bad ones. Somerset Maugham

As community associations’ purposes broaden to reflect market demands and transfers of responsibility by local governments, the association will require enhanced capacity to provide association-wide, group, and individual services. The governing documents will empower the association to provide services beyond the community boundaries and determine the funding for these services. Services will range from supplying firewood and mowing lawns to “one-stop shopping” for social services to meet the needs of children, working families, the elderly and other constituencies within a particular development. An obvious legal issue is the

302. The Community Associations Institute and especially its Research Foundation are becoming active in this effort. According to Brent Herrington:

There are strong arguments to be made for associations compensating officers and/or directors. Operating a successful association can be technically challenging, highly specialized and extremely time consuming. From a “systems thinking” perspective, it could be argued that attempting to operate such an organization using only short-term, untrained, purely volunteer leaders tends to set the organization up for failure. Compensating officers and directors could raise the level of leadership expertise and enhance the performance of the association. For a professional manager, working for a “professional” board of directors would be very different than working for unpaid, untrained volunteers. I suspect in many cases it would be a refreshing improvement.

Memorandum from Brent Herrington, on-site manager of Celebration, (Feb. 17, 1998) (on file with the author).

303. See *supra* note 21 and accompanying text for a discussion of public policy concerns related to common interest communities.

304. Gillette, *supra* note 34, at 1417.

question of at what point the association becomes a business. Under any set of circumstances, the documentation will need to be more carefully and more thoroughly drafted than it is today.

Many of these services will be implemented by the development team and the association; other services will be offered by public/association partnerships. All of these services can raise levels of interaction, participation, and citizenship. Associations are now providing these services, and more associations each year will add to the list of services and programs. There is much to be gained.³⁰⁵

Major questions, however, will arise from these changes: Can the association afford these services? Will the members bear the financial responsibility? What will be the effect of the owners' perceptions of double taxation as they pay assessments and the local government's taxes?³⁰⁶ New assessment mechanisms will permit financing different levels of services with levels of assessments.

305. With regard to privatization of services, Gillette states the following:

The result of all these phenomena is that residential associations hold out the promise that services can be more directly linked to the tastes of particular residents. By matching more precisely the supply and demand of public goods, associations play much the same role that municipalities seek to accomplish by privatizing local services or by shifting to user fee schemes to pay for publicly provided services.

Id. at 1391.

306. *Long Cove Homeowners' Ass'n, Inc. v. Beaufort County Tax Equalization Bd.*, 488 S.E.2d 857, 859 (S.C. 1997). The community association appealed the increased assessments on the common areas. *Id.* The court held that the assessor lacked authority to reassess during a nonassessment year; that deed restrictions on the common areas must be taken into account when valuing common areas; and the value of common areas were not included in the value of residential lots. *Id.* at 861. *See Sun City Summerlin Community Ass'n v. State of Nevada*, 944 P.2d 234, 237 (Nev. 1997) (holding a Nevada tax statute, Nev. Rev. Stat. § 116.1105(2)(b) (1993), unconstitutional because it precluded taxation of common elements in planned communities). The Nevada Supreme Court found that §116.1105(2)(b) stating that "no separate tax or assessment may be rendered against any common elements for which a declarant has reserved no developmental rights" was unconstitutional. *Id.* The court also held that the restrictions in common areas must be taken into consideration when valuing the common elements. *Id.* at 240. *See also Hagley Homeowners Ass'n v. Hagley Water, Sewer and Fire Auth.*, 485 S.E.2d 92, 97 (S.C. 1997) (upholding city imposed assessments). The community association wanted to tie into the city's sewer system but build their own system within the community association. *Id.* at 94. The community association challenged the monthly charges and front-foot assessments imposed by the city for the construction of the septic system, arguing that it is "taxation without representation." *Id.* at 95-96. The court upheld the assessments, stating that although the appellants may not receive as great a benefit from the sewer system because they have their own private system, there has never been a requirement for complete equality of assessments. *Id.* at 97. *See also Recreation Centers of Sun City v. Maricopa County*, 782 P.2d 1174, 1183-84 (Ariz. 1989) (holding that the assessor may not consider deed restrictions when valuing property but should take land use restrictions in the valuation formula).

“Common expense” definitions will be broadened as property management gives way to community building and management. Learning centers; computer centers that supplement home offices with facilities, services, and hardware; and strategic services for working families will all become part of the authorized activities of associations. In these instances, the practitioner and scholar alike must examine the effect of these activities upon association governance.³⁰⁷

3. *Interaction with other organizations*

Amenity preference surveys show that community members’ interest in golf is waning, although the concept of the club is still a vital part of many development plans.³⁰⁸ More importantly, organizations that are tax exempt under Internal Revenue Code Sections 501(c)(3) and 501(c)(4) will increasingly be used to provide social, educational, environmental, wellness, transportation, and other services.

As developments reflect the evolutionary trends discussed throughout this article, association governing documents can and will authorize and empower the association to be involved in such

307. As common interest communities seek to expand their service delivery areas beyond the boundaries of the real estate development itself, CCRs will frequently contain language such as the following authorizing the association to do so in order to avoid power and *ultra vires* issues:

The following language, which may be included in the declaration, authorizes the association to provide services to the members and obtain reimbursement for expenses associated with such services.

Provision of Services, Facilities, and Programs.

The Association may provide services to, and programs and facilities for, Members and their guests, lessees, and invitees, as well as the community surrounding the Property. The Association may enter into and terminate contracts or agreements with other entities, including Declarant, to provide such services, facilities, or programs. The Board may charge use and consumption fees for its activities this Section authorizes.

Specific Assessments.

The Association shall have the power to levy Specific Assessments against a particular Lot to cover the costs, including overhead and administrative costs, of providing services to Lots upon request of an Owner pursuant to any menu of special services which may be offered by the Association. Specific Assessments for special services may be levied in advance of the provision of the requested service.

308. See *supra* note 125 and accompanying text for a discussion of the changing needs of communities. Clubs are not going to disappear, but they will change, in many instances, in basic structure. Social membership in the club can be used to shift some operating costs from the association’s assessment to the club’s golf and related revenues that involve non-association members. New ways to use clubs will be developed, and club membership will be destigmatized, in some circles, by broadening the reach of the club without losing desirable club qualities.

activities,³⁰⁹ while tax-exempt organizations³¹⁰ undertake some of these activities with tax-deductible financing. These tax exempt activities will range from direct involvement in management, such as a transportation management association, to education. These tax exempt organizations are especially well equipped to reach out to the local or regional community and to become involved beyond the community association boundaries.

Numerous innovative common interest communities are utilizing trusts and foundations in today's market. These tools are used for many purposes, including preservation of open space,³¹¹ environmental concerns of many types,³¹² provision and maintenance of open space and parks,³¹³ health and wellness programs,³¹⁴ and promotion of the arts.³¹⁵ Trusts and foundations also meet significant societal needs.³¹⁶ Perhaps the greatest current and po-

309. An example of an empowerment CCR regulation is provided:

Provision of Services.

The Board may enter into and terminate contracts or agreements with other entities, including Declarant, to provide services to and facilities for the Members and their guests, lessees and invitees; the Board may charge use and consumption fees for such services and facilities. By way of example, some services and facilities which might be offered include landscape maintenance, pest control service, cable television service, security, caretaker, transportation, fire protection, utilities, and similar services and facilities.

310. Tax exempt organizations are those organizations that meet the requirements of I.R.C. §§ 501(c)(3) - (4) (1996).

311. Spring Island in South Carolina has an active trust established for wetlands maintenance and nature study.

312. Governance documents for High Desert, in Albuquerque, permit the association's board to establish gardens in the common area to promote public awareness of and participation in conservation, management, and enhancement of native vegetation, soils, and geology. The purpose of The Covenant at DC Ranch is to preserve, continue, and maintain the community's character. Sun City Georgetown in Texas, includes preservation areas, which include karsts and are monitored to insure the quality of endangered species' habitats.

313. The Sonoran Institute of Tucson is engaged in numerous locales in active and passive programs.

314. See BOOKOUT, *supra* note 4.

315. Reston, a master planned community in Virginia, has a Town Center Arts Fund which promotes the arts throughout the community. The Arts Fund is supported by assessments levied against owners within Reston's Urban Core.

316. Etzioni, commenting on the social aspect of common interest communities, stated:

Third are the social webs that communities provide, in neighborhoods, at work, and in ethnic clubs and associations, the webs that bind individuals, who would otherwise be on their own, into groups of people who care for one another and who help maintain a civic, social, and moral order. However, for these communities to be able to make their contributions, they themselves need to be shored up. This requires a new respect for the role that institutions, such as local schools, have in sustaining communities. Government needs to refrain from usurping their

tential use is in the support of public education through community foundations, often called public education trusts.³¹⁷ In some cases, these trusts are created and funded in conjunction with the common interest community.³¹⁸

Developers will, in appropriate cases, shift some activities away from the community association to a Section 501(c)(3) or (c)(4) organization.³¹⁹ As developmental innovation calls for the community association to assume more public and community building activities, the civic league structure³²⁰ in Section 501(c)(4) becomes a viable alternative or addition to the association. Not only does the civic league have positive financing considerations,³²¹ but it also, by definition, is structured to serve a broad, community-wide constituency. The civic leagues' permitted activi-

functions; planners need to make spaces more community-friendly; and all of us need to invest more of ourselves in one another.

ETZIONI, *supra* note 44, at 248.

317. Community foundations are being created throughout the country to provide financial and other resources to support what many believe to be inadequate and even failing public schools. The foundations are frequently formed by concerned citizens or parents in support of their local school or schools. However, some such foundations have actually been created by the school districts themselves, and other foundations focus their efforts on state-wide educational improvement. The increasing prevalence of the public education foundations is evidenced by a 1996 study which found that 38 of Washington's 296 school districts had foundations operating as 501(c)(3) entities to raise money for school improvements which the districts could not otherwise afford. Richard Clayton, *Foundation Seeks Second Chance for B.G. Schools*, COLUMBIAN, June 24, 1997, at B1.

Newspaper advertising, Internet web sites, and fundraising activities, such as golf tournaments and recognition dinners, are among the methods by which the foundations solicit donations, which can range from money, to computer equipment, to the refurbishment of a school building. Most of the foundations accept both restricted and unrestricted gifts, and the money raised has been used for a variety of educational purposes including facilities repairs and improvements, enrichment programs, scholarships and student fee assistance, special equipment purchases, and the promotion of innovative educational programs.

318. See *supra* note 283 and accompanying text for a discussion of privatization with respect to school systems.

319. Such organizations must meet requirements of corresponding Internal Revenue Code sections. A qualifying 501(c)(3) organization must serve a public rather than a private interest, and must be organized and operated for one or more of the following purposes: religious, charitable, scientific, testing for public safety, literary, educational, or prevention of cruelty to children or animals. I.R.C. § 501(c)(3) (1996). If an organization is to qualify as a 501(c)(4) entity, it may not be organized or operated for profit and must operate exclusively for the promotion of social welfare. *Id.* § 501(c)(4).

320. "A civic league or organization may be exempt as an organization described in section 501(c)(4) if - (i) It is not organized or operated for profit; and (ii) It is operated exclusively for the promotion of social welfare." 26 C.F.R. § 1.501(c)(4)-1(a)(1).

321. Its income is tax exempt though not tax deductible.

ties³²² coincide with developmental objectives. While the tax-exempt organization serves many desired functions, it cannot perform private property maintenance, regulation, and other needed management functions.³²³ The association and the tax-exempt organization, however, can work together to achieve the maximum community return.³²⁴ The results can be greater public trust and

322. An exempt organization is described as follows:

An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community. An organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements.

26 C.F.R. § 1.501(c)(4)-1(a)(2)(i). A “social welfare” organization qualifies for exemption as a charitable organization if it is “charitable” as set forth in the Federal Tax Regulations and not an “action” organization as set forth in §1.501(c)(3)-1 (i.e. an organization that has the substantial purpose of attempting to influence legislation). *Id.* Under the Regulations, “charitable” includes:

[R]elief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.

Id. § 1.501(c)(3)-1(d)(2).

323. *Id.* § 1.501(c)(3)-1(d)(1)(ii).

324. The association may create the tax exempt organization, have simply a working relationship with it, or have no direct relationship with it at all.

The following language, which may be included in the declaration, promotes the association’s ability to enter into cooperative agreements with other entities. Not only does this facilitate efficient management of hard infrastructure, it also promotes the establishment of soft infrastructure.

*Relations with Other Properties.*The Association may enter into contractual agreements or covenants to share costs with any neighboring property to contribute funds for, among other things, shared or mutually beneficial property or services or a higher level of Association Property maintenance.

*Relations with Other Entities.*The Association may enter into agreements with other entities for the benefit of the Property and its residents, as well as the larger community surrounding the Property. The purposes for such agreements may include, without limitation:

- (a) preservation and maintenance of natural areas, wildlife preserves, or similar conservation areas and sponsorship of educational programs and activities which contribute to the overall understanding, appreciation, and preservation of the natural environment within the Property or the surrounding community;
- (b) programs and activities which serve to promote a sense of community, such as recreational leagues, cultural programs, educational programs, festivals, holiday celebrations and activities, a community computer network, and recycling programs; and

acceptability of the common interest community itself.³²⁵

4. *Finance mechanisms and systems*

As communities age and, thus, need rebuilding and restoring and as associations undertake new responsibilities, new funding systems will be needed. The power to borrow without artificial constraints will be enhanced,³²⁶ as will the capacity to pledge property or income streams as collateral.

Different assessment levels and types of fees will meet newly created needs. Caps on appreciation, recaptures of a portion of appreciation, percentage charges on resales, and transfer fees based on the resale price will, in appropriate cases, keep units affordable, fund Section 501(c)(3) activities, lower ongoing operating costs, and meet other needs. Transfer fees are increasingly seen today³²⁷ and are used for a variety of purposes. These may range,

(c) social services, community outreach programs, and other charitable causes.

In some instances the transfer fee income accrues to the tax exempt organization. In others the association may partially fund it through a contract for services or by direct, budgeted payments. In early years of operation, the developer often funds all or part of the operation.

Because the 501(c) organization is tax exempt, tax deductible property acting in accordance with the strict guidelines of the I.R.C., the CFR, and the IRS, individual and institutional donors may make tax deductible contributions. Deductibility obviously requires donative intent and compliance with applicable law and regulation.

325. The author is aware that the discussion of tax exempt organizations is not exhaustive and may not satisfy the reader's appetite. The topic needs to be raised, nonetheless, because it is *beginning* to be considered, debated, and utilized. Practical and policy issues remain unresolved; however, projects utilizing these concepts are the laboratory for addressing and resolving the issues. The 501(c) tax exempt organization, properly employed, is very much a part of the evolution.

326. See UCIOA § 3-112 (1994) (amending borrowing powers). The following is an example of a CCR provision which allows borrowing without artificial constraints:

Borrowing. To the fullest extent allowed by Georgia laws, the Board shall have the power to borrow money, contract debts, and issue evidences of indebtedness for any purpose. The Board shall have the power to secure such debts, which shall include, without limitation, the power to pledge collateral, including property and future assessment income.

327. Celebration, Bonita Bay, Spring Island, The Landings at Skidaway Island, and Mariner Sands are examples of communities which use transfer fees. Transfer fees are computed in a couple of ways; some communities use a fixed fee while others use a percentage of the sales price. An example of CCR language providing for transfer fees follows:

Transfer Fees.

(a) *Authority.* The Board shall have the authority, on behalf of the Association, to establish and collect a transfer fee from the transferring Owner upon each transfer of title to a Unit in Seven Oaks which fee shall be payable to the Association by at the closing of the trans-

for example, from funding the capital reserve to funding social programs. Transfer fees capture a modest portion of an owner's appreciation upon resale. The justification for these fees is that the programs they fund add to the house's value, thus heightening the appreciation. The transfer fee is less economically painful

fer and shall be secured by the Association's lien for assessments under Section 8.8.

(b) *Fee Limit.* The Board shall have the sole discretion to determine the amount and method of determining any such transfer fee, which may, but is not required to, be determined based upon a sliding scale which varies in accordance with the "Gross Selling Price" of the property or another factor as determined by the Board; provided, however, any such transfer fee shall be equal to an amount not greater than ____ % of the Gross Selling Price of the property. For the purpose of determining the amount of the transfer fee, the Gross Selling Price shall be the total cost to the purchaser of the property, excluding taxes and title transfer fees as shown by the amount of tax imposed by _____.

(c) *Purpose.* All transfer fees which the Association collects shall be deposited into a segregated account to used for such purposes as the Board deems beneficial to the general good and welfare of Seven Oaks which the Governing Documents do not otherwise require to be addressed by the Association's general operating budget. By way of example and not limitation, such transfer fees might be used to assist the Association or one or more tax-exempt entities in funding:

- (i) preservation and maintenance of natural areas, wildlife preserves, or similar conservation areas, and sponsorship of educational programs and activities which contribute to the overall understanding, appreciation and preservation of the natural environment at Seven Oaks;
- (ii) programs and activities which serve to promote a sense of community within Seven Oaks, such as recreational leagues, cultural programs, educational programs, festivals and holiday celebrations and activities, a community computer network, and recycling programs; and
- (iii) social services, community outreach programs, and other charitable causes.

(d) *Exempt Transfers.* Notwithstanding the above, no transfer fee shall be levied upon transfer of title to a Unit:

- (i) by or to Declarant or an Initial Owner;
- (ii) by a Builder who held title solely for purposes of development and resale;
- (iii) by a co-owner to any Person who was a co-owner immediately prior to such transfer;
- (iv) to the Owner's estate, surviving spouse or child upon the death of the Owner;
- (v) to an entity wholly owned by the grantor; provided, upon any subsequent transfer of an ownership interest in such entity, the transfer fee shall become due; or
- (vi) to an institutional lender pursuant to a Mortgage or upon foreclosure of a Mortgage; except that no Unit shall be eligible for exemption from payment of the transfer fee if the immediately preceding transfer of title to the Unit was exempted pursuant to this Section.

than monthly assessments and normally results in a lower charge against the owner than would monthly assessments.³²⁸

5. *Neighborhoods*

The market discussion³²⁹ illustrates that owners desire to be a part of the larger community. At the same time, homeowners want to maintain a neighborhood feeling. These desires can be “accommodated by a growth in neighborhood structures without the sub-associations which often balkanize communities, increase costs, and polarize attitudes.”³³⁰ Alternative structures, more like unified county-city governments, will meet consumer desires and permit cost effective community government.³³¹ Many of these will be Section 501(c)(4) entities.

These neighborhoods within communities will meet different needs and reflect different attitudes and desires. Associations can restore a neighborhood feeling and still retain the advantage of be-

328. One contrary view, or at least searching inquiry, poses the concern that transfer fees inefficiently restrain alienation of units and unfairly exploit relatively mobile households for the benefit of the relatively immobile households. The point is an interesting one, but experience to date does not support it. In the typical community, turnover over a 5-7 year period is common. In a mixed age community, older residents may be less mobile; however, in every community, the accretions to value are cumulative over the years so that the short- or long-term economic impact should be relatively equal.

329. See *supra* notes 125-44 and accompanying text for a discussion regarding homeowners desires for community.

330. Hyatt, *supra* note 88, at 111.

331. A provision to create a neighborhood might be as follows:

Neighborhoods. Any Neighborhood, acting either through a Neighborhood Committee elected as provided in Section (—) of the By-Laws or through a Neighborhood Association, if any, may request that the Association provide a higher level of service than which the Association generally provides to all Neighborhoods, or may request that the Association provide special services for the benefit of Units in such Neighborhood. Upon the affirmative vote, written consent, or a combination thereof, of Owners of a majority of the Units within the Neighborhood, the Association shall provide the requested services. The cost of such services, which may include a reasonable administrative charge in such amount as the Board deems appropriate (provided, any such administrative charge shall apply at a uniform rate per Unit to all Neighborhoods receiving the same service), shall be assessed against the Units within such Neighborhood as a Neighborhood Assessment.

Exhibit “A” to this Declaration, and each Supplemental Declaration submitting additional property to this Declaration shall initially assign the property submitted thereby to a specific Neighborhood (by name or other identifying designation), which Neighborhood may be then existing or newly created. So long as it has the right to subject additional property to this Declaration pursuant to Section 9.1, Declarant may unilaterally amend this Declaration or any Supplemental Declaration to redesignate Neighborhood boundaries; provided, two or more existing Neighborhoods shall not be combined without the consent of Owners of a majority of the Units in the affected Neighborhoods.

ing part of an integrated, comprehensive community structure. Affordability issues can be accommodated by shifting costs within the community. In part, this is accomplished by the use of a cost center on neighborhood assessments. This cost center permits neighborhoods to choose services desired and to be paid for above the level of the general assessment for the entire community. The goal of making communities inclusive and of providing meaningful diversity within those communities is a part of the reestablishment of neighborhoods. Neighborhood structures can aid in achieving this goal.³³²

6. *Individuals and groups*

The same orientation that leads to neighborhood structures and lowered restrictiveness will enable associations to achieve a greater capacity to address individual needs. Associations must have greater ability to deal with parts of the community separately: services, rules, costs, and facilities can all be tailored without losing the overall community theme. Proper tailoring reduces the potential that rules will have no genuine, relevant policy purpose. It increases the probability that governance will be aligned with expectations *and* understanding.

As part of this trend, associations will emphasize and allocate resources to volunteerism³³³ and to multiple use of facilities for clubs, interest groups, and those outside of the community.³³⁴ Systems, programs, and funds that balance inclusiveness and exclusiveness will address community building tasks.³³⁵

332. See *supra* note 54-55 and accompanying text discussing the funding of services through user fees.

333. Celebration and the Sun City communities are very active in volunteerism.

334. This is common both with adjacent facilities, such as churches, as well as with the public at large.

335. Volunteerism is very important, and many associations have formal procedures to encourage it. For example:

Volunteer Clearinghouse. One of the important functions of the Association is to encourage and facilitate the organization of volunteer organizations within the community which will serve the interests of community residents as they may be identified from time to time. The Association may maintain a data bank of residents interested in volunteer organizations and may make such data available to volunteer organizations within the community. The Association, by Board resolution, may also establish or support the establishment of charter clubs within the community or other organizations as it deems appropriate to encourage or facilitate the gathering of Owners and residents of Celebration to pursue common interests or hobbies. Any resolution establishing a charter club shall designate the requirements, if any, for membership therein. The Board may provide for such organizations to be funded by the Association as a Common Expense subject to such rules regarding participation, area of interest or other matters as the Board, in its discretion, may establish. Any charter club shall operate in accor-

Communities can and should be both creators and preservers

dance with the resolution establishing it.

The Association, through its bulletin boards and publications, may assist community groups, religious groups, civic groups, youth organizations, support groups, and similar organizations in publicizing their meetings, events, and need for volunteer assistance.

The nature and extent of any such assistance shall be in the Board's sole discretion. It is not intended that the Association spend its funds for specific advertising or promotion of events of such volunteer groups unless the Board determines that they merit such support as benefiting the entire community. The Association's contribution will be supplemental to funds raised by the volunteer organization.

Chartered Clubs and Other Organizations. One of the important functions of the Association is to encourage and facilitate the organization of organizations which will serve the interests of residents and those in the community surrounding the Property. The Board, acting by resolution, may establish or support the establishment of organizations as it deems appropriate to encourage or facilitate the gathering of owners, residents, occupants, or those from the surrounding community to pursue common interests or hobbies. Such organizations may, but need not, include "chartered clubs."

The Association may, from time to time, grant charters to groups of individuals who share a particular field of interest. Any such charter may confer privileges and impose responsibilities on the group. Privileges may include, without limitation, financial support; material support; facility use privileges, either with or without charge; priority for facility use; administrative and technical support; and liability insurance coverage.

Members who are interested in establishing a chartered club may petition for a charter from the Association. The Association may, in its sole discretion, grant or deny charter status to any such petitioners.

Any chartered club shall be established by Board resolution. The resolution establishing such club shall designate the requirements, if any, for membership therein and shall set forth (a) the purposes for which such chartered club is established; (b) the privileges granted by the Board to the chartered club; (c) the rules and regulations of such chartered club; and (d) the requirement that the chartered club establish written safety rules and establish a safety committee, both subject to the approval of the Board, if such chartered club is to engage in the use of power equipment or other equipment of a specialized nature. Each chartered club shall operate in accordance with the terms of the resolution establishing such chartered club.

The Board may provide for any organization described in this Section to be funded by the Association as a Common Expense subject to such rules regarding participation, area of interest or otherwise which the Association, in its discretion, may establish. It is not intended that the Association spend Association funds for specific advertising or promotion of events of organizations authorized under this Section unless the Board determines that they merit such support as benefiting the entire community. In the event the Association does contribute to the operation of such organizations, the Association's contribution will be supplemental to funds raised by the organization.

The Association may assist such organizations in publicizing their meetings, events, and activities. The nature and extent of any such assistance shall be in the Board's sole discretion.

of value systems. To accomplish these tasks, however, requires a new approach to participation and inclusiveness. It requires that there be links beyond the real estate development as a “community.” For example, community building activities will be reflected in a new approach to providing amenities: what will they be, where will they be located, for whom will they be established, and what funding will be used to provide them. Much can be accomplished in this area with little or no marginal cost, but traditional governing documents will need to be changed to permit and to encourage third party use of facilities. Not all facilities necessarily will be open to the public, but those that are will assist in establishing linkages beyond the development’s boundaries.

An increase in telecommuting, resulting in less interpersonal connection on the job, will increase the need for community associations to provide facilities and systems that promote interpersonal activity. This will include both organized activities at designated facilities and, perhaps more importantly, spontaneous gatherings at passive areas that are conducive to a coming together.

7. *Affordable housing*

*There will always be a tension between the needs of the individual and the needs of the group.
Both must be honored. John W. Gardner*

Community inclusiveness requires a demographic and economic mix. For this reason and as developers respond to governmental and private pressures for low-and moderate-income housing in their developments, more and more projects will have an affordable housing component.

Governing documents will rely on neighborhood structures, service delivery levels and systems, and alternative assessment systems to integrate affordable and market-rate housing into planned communities. This will also involve approaches to cap or to recapture appreciation to preserve affordability as addressed in the discussion of finances.

Providing affordable housing will involve the association and Section 501(c)(3) partnerships to maximize service capacities. Design review will need to be made flexible so that product costs will meet acceptable, affordable limits. Most of all, the governance structure and operation must avoid division and classification. Common interest communities will also need to be more open to a rental component in order to meet non-owner occupant housing needs.

8. *Aging population*

Demographic realities compel master planned communities to address the aging population, whether the communities are age-

restricted or simply have diverse populations. Striking balances, insuring proper representation, and protecting divergent interests are part of the challenge. Other challenges include setting service levels, dealing with assessments and reserves, and providing facilities and services to meet diverse needs and desires.

9. Technology

Restrictions on the use of technology, business use of homes, and other such old fashioned provisions in governing documents will need to be eliminated as "flex execs" work at home, technology improves, and other advances continue. More significant changes include notification and meeting by phone, fax, or computer; neighborhood home pages; annual meetings with computer voting by members watching on community cable; online assessment collection and service requests; online newsletters, and service bulletin boards.³³⁶ The industry expects major innovations.³³⁷

Just as the technological potential is seemingly endless, the potential for legal issues is also significant.³³⁸ These legal issues will require creative document provisions and more informed decision making. Examples of the potential legal issues include such concerns as how the association controls and monitors its own intranet or what rights exist for member access to post anything desired.³³⁹

336. See Zelica Marie Grieve, *Latera v. Isle at Mission Bay Homeowners Ass'n: The Homeowner's First Amendment Right to Receive Information*, 20 NOVA L. REV. 531 (1995) (regarding the homeowners constitutional rights to receive information); John C. Wilcox, *Electronic Communication and Proxy Voting: The Governance Implications of Shareholders in Cyberspace*, 11 No. 3 INSIGHTS 8 (March, 1997) (noting that electronic communication with shareholders with regard to proxy voting and corporate annual reports increases shareholder activism and the incorporation of shareholder opinion in corporate decisions); Noel D. Humphreys, *When Next We Meet Online . . .*, 19 PA. LAW. 50 (1997) (advocating electronic corporate meetings, electronic bulletin boards, and electronic communication to reduce costs and increase communication efficiency); *Inside the SEC*, 11 No. 5 INSIGHTS 29 (May, 1997) (discussing the corporate governance committee and the committee's prediction that technology will enable large amounts of people access to large amounts of information, making Internet board meetings and shareholder contributions to corporate policy commonplace in the corporate world).

337. BOOKOUT, *supra* note 4. See ESTHER DYSON, *RELEASE 2.0: A DESIGN FOR LIVING IN THE DIGITAL AGE* (1997) (discussing the technologically created community).

338. An innovative use of technology is the right to vote through the association's intranet. This technique is valid under most, if not all state corporate codes.

339. Grieve, *supra* note 336, at 537-42; Wilcox, *supra* note 336, at 9. The Securities and Exchange Commission (SEC) notes some of the measures to embrace technology in the corporate world, including those permitting investors affirmatively to consent to receive disclosures electronically. *Id.* However, as of now, the SEC is advising the use of electronic communication as a supple-

10. Litigation

A machine you go into as a pig and come out as a sausage. Ambrose Bierce on litigation

No one can deny the effects of litigation on the housing industry, from the perspective of the builder-developer, those who operate and manage common interest communities, and the housing consumer.³⁴⁰ The effects of litigation include greatly increased risks, costs, time delays, defensive engineering. These factors lead to a reduced willingness to build and an increased cost to purchase.³⁴¹ These reactions ultimately result in lower housing stocks, increased prices, and lower returns. There must be a change in the causes, reactions, and effects.

To affect the pace and direction of change, the development industry must become more active in prevention of litigation than in preparation for it.³⁴² It will be critical to establish the concept of preventive law and practice. Awaiting changes in the nature of lawyers or in the laws of liability and procedures as the panacea to excessive litigation will be a long, possibly futile wait.³⁴³ Certainly there will be changes in these arenas; however, they will come gradually and will be incomplete. For there to be meaningful change, there must be an alteration in attitudes and practices both for the consumer and producer of products in master planned communities.³⁴⁴

In addition to basic business practices that can alter the climate and the developer/builder-association relationship, there are

ment to traditional paper-based distribution methods. *Id.*

340. See generally WAYNE S. HYATT, PROTECTING YOUR ASSETS: STRATEGIES FOR SUCCESSFUL BUSINESS OPERATION IN A LITIGIOUS SOCIETY (1997) (discussing our litigious society and its effects on businesses).

341. In 1997, for example, most Southern California developers would not build attached products due to the litigation risk. Sherman D. Harmer, Jr., California's Building Industry Association Task Force, Remarks at San Diego County's Construction Quality Workshop (Sept. 29, 1993); Sherman D. Harmer, Jr., California's Building Industry Association Task Force, Reducing Legal Risks in a Litigious Society, Lusk Center for Real Estate Spring Retreat (Mar. 2, 1995). Nora N. Jaeschke of N.N. Jaeschke, Inc., a San Diego manager; and Scott Jackson, an Irvine attorney, can attest to this avoidance due to litigation.

342. Regrettably, too many community developers place significant sums from each home sale into a litigation reserve. They do not invest in community association relations, programs, training, warranty education, or other proven activities that reduce the risk of and need for litigation. Such defensive measures become a self-fulfilling prophecy. HYATT, *supra* note 340, at 6.

343. "Contemporary lawyers, to the contrary, are apt to see negotiation and settlement, not as peacemaking activity, but as war by other means, an effort to gain victory by intimidating, outspending, or otherwise grinding down one's opponent." MARY A. GLENDON, A NATION UNDER LAWYERS 55 (1994).

344. Glendon continues by pointing out that the roles of "consensus builders, problems solvers, troubleshooters, dispute avoiders, and dispute settlers [have been] devalued while litigation has been exalted." *Id.* at 101.

practices and procedures directly focused on litigation prevention. Documentation can do much to reduce the risk without depriving the consumer of legitimate protections.

Sales documents are not usually thought of as an opportunity to manage risk, but they can function in that capacity. These documents can also help condition expectations through properly drafted disclosures and disclaimers. In addition, the documents should contain balanced yet defensive provisions. Judgment is a precious commodity but is required if there truly is to be a balance. As stated in the best seller, *The Death of Common Sense*,³⁴⁵ "Seeking balance has become difficult because we have misplaced the vocabulary of accommodation."³⁴⁶

Board members must not be pressured into litigation.³⁴⁷ There are those who inculcate fear that if a lawsuit is not filed, the directors will be in breach of their fiduciary duty.³⁴⁸ Such situations result in litigation in which the plaintiffs do not even know what the claims are but "will find out on discovery."³⁴⁹ Case law

345. PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1995).

346. *Id.* at 120.

347. A well-drafted alternative dispute resolution provision can aid the effort to reduce litigation. Such a provision would include language addressing at least the following topics: Alternative Method for Resolving Disputes; Claims; Mandatory Procedures (including notice, response, and negotiation and mediation); Alternative Dispute Resolution Required under the Act; and Prerequisites to Actions Against Declarant or Builders.

348. Boards often sue to enforce a provision because they are afraid not to do so. This may result in unnecessary, unwarranted litigation. The following provision limits the association's enforcement obligation:

The Association shall not be obligated to take any action if the Board reasonably determines that the Association's position is not strong enough to justify taking such action; that the covenant, restriction, or rule being enforced is, or is likely to be construed as, inconsistent with applicable law; or that it is not in the Association's interests, based upon hardship, expense, or other reasonable criteria to pursue enforcement action. Such a decision shall not be construed as a waiver of the right of the Association to enforce such provision at a later time under other circumstances or estop the Association from enforcing any other covenant, restriction, or rule.

349. Accommodation has been made all the more difficult by the presence of what some have called the "predator bar," a group of attorneys who encourage association boards to initiate litigation, despite the fact that the board has no known cause of action. They encourage litigation with the expectation that they will always be able to find a colorable claim against the developer, given the complexity of community development. The strategy of these attorneys is almost never to go to trial, but rather to force a settlement, and developers often do settle because it is less expensive than litigation, even if they are not at fault.

A story exists of some residents of an apartment complex that was going through a condominium conversion receiving a letter from a plaintiff's attorney, stating that when the conversion was complete, there would be construction defects and that the attorney would represent them when he

makes clear, however, that the decision to sue is one resting in the judgment of the board and that the business judgment rule provides protection for those who make the decision.³⁵⁰ It appears that it is the lawyer, not the client, that benefits from the fear factor which results in litigation rather than resolution. It is not a “community” if the courtroom is the place of resolution of each dispute, whether with the builder-developer or among or between fellow owners.

VII. NOT A CONCLUSION

In the past 25 years, community associations have moved from a little-known concept to one of the most significant concepts in real estate development. This legal evolution has been most extensive and rapid in the last decade. This trend will continue.

As governing documents move from “the language of rights” to a reinstatement of empowerment and judgment, their capacity for future application and evolution is limited only by the dreams of developers and the skill, creative capacity, and commitment of drafters. There are no limits to the potential to make the legal structures fit, work within, and bring to fruition developmental forms and objectives of the future.

If it is true that “the perpetual obstacle to human advancement is custom,” then the challenge and the opportunity is to redefine custom, to build on it, and to create new approaches and new applications.

discovered them. This is clearly unethical, yet some people believe that this type of activity has become so prevalent that it has turned into a cottage industry.

350. *Beehan v. Lido Isle Community Ass’n*, 137 Cal. Rptr. 528, 532 (Cal. Ct. App. 1977) (agreeing with the board’s belief that the utility of incurring substantial attorney fees in prosecuting a lawsuit of questionable merit at the request of just one complainant was outweighed by the possible curtailment of services because of such expense). *See also* *Lewis v. Anderson*, 615 F.2d 778, 784 (9th Cir. 1979) (holding that a recovery was the likely result of potential litigation is not enough to remove the protection of the business judgment rule); *Cuker v. Miklauskas*, 692 A.2d 1042, 1048 (Pa. 1997) (holding that factors bearing on whether the court will respect a board’s decision not to litigate are: (a) board’s disinterestedness, (b) whether board was assisted by counsel, (c) whether board prepared a written report, (d) whether board conducted an adequate investigation, and (e) whether it rationally believed its decision was in the best interests of the corporation); *Duffey v. Superior Court*, 4 Cal. Rptr. 334, 336 (Cal. Ct. App. 1992) (holding that where the facts invoke the association’s corporate function, the court will apply corporate principles, including the business judgment rule, in determining the case); *Olympian W. Condominium Ass’n v. Kramer*, 427 So. 2d 1039, 1039 (Fla. Dist. Ct. App. 1983) (holding that directors appointed by the developer are not personally liable for the existence of, or failure to correct, construction defects caused by the developer).